

CIVIL RIGHTS AS HUMAN RIGHTS

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ABSTRACT

During the early 1960s, government officials in the U.S. Department of State grappled with the following quandary: How could the United States shape and lead a racially diverse world while still denying rights to Black Americans domestically? One way the State Department set out to resolve this disconnect was through diplomacy and negotiations at the United Nations Sub-Commission on the Prevention of Discrimination and Protection of Minorities, which crafted the International Convention on the Elimination of all Forms of Racial Discrimination. Although extensive documentation exists on the exchanges between the Sub-Commission, the State Department, and the U.S. civil rights community, existing literature fails to examine these rich exchanges in sufficient detail. This Article explores how the United States shaped international human rights regimes through the Sub-Commission, and, in turn, how international affairs shaped the U.S. civil rights movement.

One underexplored aspect of the interplay between the U.S. civil rights movement and the international human rights regime is how the State Department interfaced with the Sub-Commission. By exploring the exchanges between the two high-profile civil rights lawyers the State Department sent to negotiate with the Sub-Commission and other actors at the United Nations, this Article highlights the tension between these lawyers' values and the U.S. diplomatic agenda. This tension in turn magnifies how the U.S. civil rights movement and the international human rights regime shaped one another.

The history of how the U.S. delegation sought to imbue the International Convention on the Elimination of all Forms of Racial Discrimination with U.S. values remains central to this Article's discussion. And, at the heart of this contribution was the importation of the state action doctrine. Thus, the doctrine that had vexed civil rights activists' domestic litigation for decades became enshrined in the international human rights regime. This Article explores the role that

the state action doctrine played in the reciprocal relationship between the U.S. civil rights movement and the international human rights regime.

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INTRODUCTION

In late 1963, the U.S. Department of State was preparing for renewed international criticism of the Jim Crow South.¹ In November of that year, the U.N. General Assembly gave "absolute priority" to preparing an international treaty to end racism.² The General Assembly tasked the U.N. Sub-Commission on the Prevention of Discrimination and Protection of Minorities ("Sub-Commission") with preparing the first draft of this binding legal document, entitled the "International Convention on the Elimination of All Forms of Racial

1. See Letter from Morris Abram, U.N. Sub-Comm'n on Prevention of Discrimination and Prot. of Minorities, to Ivan Allen, Jr., Mayor, City of Atlanta, Ga. (Oct. 23, 1963) (on file with author) (describing the Sub-Commission on Prevention of Discrimination and Protection of Minorities visiting Atlanta: "As you know, the purpose of the visit is not to demonstrate that the South is without problems but to show that places like Atlanta are doing something constructive in spite of the encrusted past . . .").

2. G.A. Res. 1906 (XVIII), at 38 (Nov. 20, 1963).

Discrimination” (“ICERD” or “Convention”), which would become the world’s most comprehensive treaty on race.³

The Sub-Commission was well-positioned to produce the primary draft of the Convention for several reasons. First, the Sub-Commission, pursuant to its mandate, was a body exclusively dedicated to studying issues of inequality throughout the world and offering recommendations for remedying those denials of human rights.⁴ Second, U.N. rules stated that the Sub-Commission’s members were to be “experts” on issues of inequality operating in their individual capacities, not simply representatives of their home states.⁵ Finally, the Sub-Commission’s members, as experts, were only authorized to examine general patterns of discrimination around the world rather than offer country-specific criticisms or remedies.⁶ The Sub-Commission, in other words, was designed to advance the idea that human rights were to be above politics, neutral, and universal in application.⁷ The United Nations hoped the arrangement would minimize power politics and, in turn, provide broad, global solutions to problems facing diverse societies.⁸ Nonetheless, the Sub-Commission’s foundation of expert autonomy was often a legal fiction; the experts were appointed by their respective national governments and many operated as state agents.⁹ Using these experts, states could pursue their

3. See International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969); G.A. Res. 1906 (XVIII), at 37–38 (Nov. 20, 1963) (requesting the Sub-Commission’s assistance in drafting the Convention and showing the hierarchy within the U.N. system which led to the Sub-Commission producing the first draft of the Convention); see also NATAN LERNER, *THE U.N. CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION* 4–6 (1980) (explaining that the Sub-Commission produced the first draft of the Convention).

4. Asbjørn Eide, *The Sub-Commission on Prevention of Discrimination and Protection of Minorities*, in *THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL* 211, 211 (Philip Alston ed., 1992).

5. See John P. Humphrey, *The United Nations Sub-Commission on the Prevention of Discrimination and the Protection of Minorities*, 62 *AM. J. INT’L L.* 869, 869 (1968).

6. Eide, *supra* note 4, at 226–27.

7. *Id.* The idea was to mitigate political dynamics in hopes of achieving broader remedies against racial discrimination than would otherwise be possible through the traditional means of country-based negotiations. See Humphrey, *supra* note 5 (explaining that the Sub-Commission was to be composed of independent experts which would allow it to be free from the pressures of their respective governments).

8. See Humphrey, *supra* note 5 (describing how being composed of independent experts rather than government representatives would allow the Sub-Commission to develop solutions not available to political representatives).

9. *Id.* at 871.

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 those facing racial discrimination.¹⁰ Yet, at other times, 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.¹¹ And in many instances, these diverse motivations for human rights work dovetailed in the Convention debates.¹²

Thus, contrary to the body's internal rules,¹³ the Sub-Commission often transformed into a forum where foreign officials shamed the body's U.S. members for proclaiming the United States' commitment to democracy abroad while denying Black Americans democracy at home.¹⁴ Such outward criticism harmed U.S. foreign policy interests because U.S. policymakers understood the United States' position in the Cold War increasingly depended upon its ability to influence decolonizing and newly independent countries.¹⁵ The persistence of U.S. racism thus proved to be a liability in the international arena.¹⁶ Many at the United Nations questioned the United States' fitness to lead a racially diverse world given its failure to ensure racial equality within its borders.¹⁷

However, when the U.N. General Assembly requested that the Sub-Commission draft the Convention, State Department officials saw an opportunity and seized the moment. Those officials charged two of the United States' foremost civil rights lawyers, Morris Abram and Clyde Ferguson, to help develop a U.S. draft of the Convention for the

10. *Id.*

11. See CAROL ANDERSON, *EYES OFF THE PRIZE: THE UNITED NATIONS AND THE AFRICAN AMERICAN STRUGGLE FOR HUMAN RIGHTS, 1944-1955*, at 76-77 (2003).

12. See, e.g., MORRIS B. ABRAM, *THE DAY IS SHORT* 151-54 (1982) (providing a firsthand account of politicking and disagreements among countries and delegates at the Convention).

13. Eide, *supra* note 4.

14. See, e.g., ANDERSON, *supra* note 11, at 106-07; ABRAM, *supra* note 12, at 152-53; MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* 43-44 (2000) [hereinafter DUDZIAK, *COLD WAR CIVIL RIGHTS*].

15. DUDZIAK, *COLD WAR CIVIL RIGHTS*, *supra* note 14, at 6.

16. See *id.* at 6-7.

17. See, e.g., ANDERSON, *supra* note 11, at 106-07; see also DUDZIAK, *COLD WAR CIVIL RIGHTS*, *supra* note 14, at 6-7 (illustrating that this criticism of U.S. democracy was part of a broader geopolitical phenomenon).

Sub-Commission's debates.¹⁸ For Abram and Ferguson, the U.N. project offered them a matchless opportunity as well, and the effort would create a powerful platform for both men to advance ideas of equality, freedom, and justice under law.¹⁹

And when the State Department developed drafting instructions for Abram and Ferguson, the instructions were resoundingly 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."²⁰ For the State Department, incorporating U.S. constitutional principles into the U.N. Convention presented many benefits. First, if the Convention mirrored the principles in constitutional law, the United States could credibly argue that it was at the vanguard of racial progress.²¹ Second, State Department officials hoped to persuade newly independent countries and the Sub-Commission to embrace U.S. constitutional values more broadly. Moreover, the closer the Convention's language was to the Constitution, the fewer conflicting obligations the United States would encounter if it were to adopt the Convention. In an ideal world, the United States would need no reservations, understandings, or declarations to adopt the Convention.²²

18. See Letter from Rachel C. Nason, Hum. Rts. Officer, Off. of Int'l Econ. & Soc. Affs., U.S. Dep't of State, to Morris Abram, Paul, Weiss, Rifkind & Garrison (Dec. 20, 1963) (on file with MARBL, Abram Papers, Box 94, Folder 9) [hereinafter 1963 Nason-Abram Letter]; Letter from Morris B. Abram to Dr. Clyde Ferguson, Dean, How. Univ. L. Sch. (Dec. 30, 1963) (on file with MARBL, Abram Papers, Box 94, Folder 9) [hereinafter Abram-Ferguson Letter] (showing communication between Abram and Ferguson on the draft); Letter from Rachel Nason to Morris Abram, Paul, Weiss, Rifkind, Wharton & Garrison (Jan. 10, 1964) (on file with MARBL, Abram Papers, Box 94, Folder 9) [hereinafter 1964 Nason-Abram letter] (providing an example of collaboration between Abram and Ferguson).

19. See ABRAM, *supra* note 12, at 150–51; Clyde Ferguson, *International Convention on the Elimination of All Forms of Racial Discrimination, in U.S. RATIFICATION OF THE HUMAN RIGHTS TREATIES: WITH OR WITHOUT RESERVATIONS?* 41, 41–43 (Richard B. Lillich ed., 1981) [hereinafter Ferguson, *CERD*].

20. Guidance Paper, Draft Convention on the Elimination of All Forms of Racial Discrimination 4 (on file with MARBL, Abram Papers, Box 94, Folder 3) [hereinafter Guidance Paper].

21. See, e.g., ABRAM, *supra* note 12, at 150–51 (explaining how he conceived of his role as one that represents U.S. interests on the Sub-Commission and relies on U.S. legal principles to draft international treaties); Guidance Paper, *supra* note 20, at 4–5 ("Provisions in line with the US Constitution and law should be supported on their merits.").

22. See Ferguson, *CERD, supra* note 19, at 41–42 (explaining that, given the active U.S. participation in drafting the Convention and that the Convention expressed U.S. values, the United States did not need to enter the reservations, understandings, and declarations proposed by the Executive branch).

However, for Abram and Ferguson, the goal of transplanting U.S. law into the Convention created a paradox. Abram and Ferguson were cold warriors and firmly believed in America's democratic potential.²³ Yet, exporting U.S. democracy abroad would also mean exporting American problems. Despite the Fourteenth Amendment's great promise, if Abram and Ferguson were successful in grafting the Equal Protection Clause onto the Convention, they would also saddle the Convention with the state action doctrine. That doctrine limited the application of the clause only to government entities and, in turn, put private discrimination beyond constitutional reach.²⁴ The doctrine had long stymied racial progress in the United States.²⁵ Thus, while other experts' Convention proposals could likely achieve greater protection against racial discrimination,²⁶ Abram and Ferguson's acceptance of those proposals would fail to promote the United States' ideals and democracy abroad.

Even today, the vestiges of this paradox remain.²⁷ More than fifty years after the Civil Rights Act of 1964 ended most formal racial discrimination, the distinction between private and public discrimination is a cornerstone of the U.S. government's approach to domestic and international law.²⁸ Where no redress exists for parties

23. See ABRAM, *supra* note 12, at 150–51 (describing how, in the 1960s, he perceived his diplomatic work as an “opportunity to flaunt the glorious difference between [U.S.] society and that of . . . the Soviet Union”). For expressions of Ferguson's patriotism and belief in the promise of U.S. democracy, see Clarence Clyde Ferguson, Jr., *The Nature and Dimensions of Human Rights in the United States*, 11 HOW. L.J. 452, 453, 460–61 (1965) [hereinafter Ferguson, *Nature and Dimensions*] (describing the civil rights movement as “the third American revolution” and hoping that all in the United States could “share in the American dream”).

24. See, e.g., *The Civil Rights Cases*, 109 U.S. 3, 4, 17–18, 25 (1883) (declaring that the Fourteenth Amendment did not empower Congress to pass the Civil Rights Act of 1875).

25. See *id.*; John Silard, *A Constitutional Forecast: Demise of the “State Action” Limit on the Equal Protection Guarantee*, 66 COLUM. L. REV. 855, 855 (1966) (describing how this public-private distinction facilitated racial discrimination in the private sphere and arguing that the Court should replace the state action doctrine in order to fulfill the promise of Reconstruction and secure racial equality in public life).

26. See *infra* note 180 and accompanying text.

27. See U.S. DEP'T OF STATE, PERIODIC REPORT OF THE UNITED STATES OF AMERICA TO THE UNITED NATIONS COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION CONCERNING THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION 9 (2013), <https://2009-2017.state.gov/documents/organization/210817.pdf> [https://perma.cc/8BK6-GSMY].

28. See *id.* See generally CHARLES & BARBARA WHALEN, *THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE CIVIL RIGHTS ACT OF 1964* (1985) (recounting the history of the Civil Rights Act of 1964).

with private discrimination claims, the U.S. government continues to insist that neither the Fourteenth Amendment nor international instruments impose an obligation to prohibit and punish purely private conduct.²⁹ Thus, the debates at the Convention's drafting continue to shape the debates over both domestic and international norms regarding racial discrimination today.

But despite the ties between the Sub-Commission, State Department, and the civil rights community, the relationship between the U.S. civil rights movement and the Convention's legislative history remains underexplored.³⁰ This Article contributes to a growing historiography and corrects a common misperception that the United States has not contributed considerably to international human rights regimes.³¹ 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

29. U.S. DEP'T OF STATE, *supra* note 27. The United States' position contrasts with the shadow report the National Association for the Advancement of Colored People ("NAACP") submitted to the CERD Committee. NAACP, SHADOW REPORT OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE TO THE UNITED NATIONS COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION CONCERNING THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION 43 (2014), https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/USA/INT_CERD_NGO_USA_17809_E.pdf [<https://perma.cc/S8VZ-VQD7>] (arguing that the United States should remedy residential segregation and housing discrimination caused by public and private actors pursuant to U.S. civil rights law and its CERD obligations).

30. In fact, one prominent human rights scholar, David P. Forsythe, has gone as far as to claim that "the United States, despite its dominant power, has not been the major shaper of community standards or international regimes on human rights." David P. Forsythe, *Human Rights in U.S. Foreign Policy: Retrospect and Prospect*, 105 POL. SCI. Q. 435, 435 (1990). It is also 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." Ferguson, *Nature and Dimensions*, *supra* note 23, at 452. These definitional problems were present even at the founding of the United Nations. See *infra* note 225 and accompanying text. 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.

31. For examples of this historiographic shift recognizing the United States' role in international law, see generally CAROL ANDERSON, *BOURGEOIS RADICALS: THE NAACP AND THE STRUGGLE FOR COLONIAL LIBERATION, 1941-1960* (2014); ELIZABETH BORGWARDT, *A NEW DEAL FOR THE WORLD: AMERICA'S VISION FOR HUMAN RIGHTS* (2005); MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* (2001).

international human rights law. 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, exposing great tensions within the global freedom struggle and revealing the diversity of strategies used to end Jim Crow.

This Article expands the scholarship on civil rights lawyers and activists' efforts to forge transnational connections and extend the movement's geopolitical reach.³² The Convention has a vast geopolitical expanse: There are now 182 parties to the Convention.³³ Scores of countries have domesticated the Convention.³⁴ Intergovernmental organizations have developed new human rights mechanisms to assist with the implementation of the Convention.³⁵ And individuals throughout the world use the Convention to seek legal

32. Some foreign leaders were deeply impressed by the hard-earned victories of U.S. civil rights lawyers, and these officials drew extensively from movement lawyers' experiences and insights to remake world constitutions. The Kenyan government, for example, commissioned Thurgood Marshall to help draft the country's independence constitution. For a rich account of Marshall's diplomacy in Kenya, see generally MARY L. DUDZIAK, *EXPORTING AMERICAN DREAMS: THURGOOD MARSHALL'S AFRICAN JOURNEY* (Princeton Univ. Press 2011) (2008). Despite the proliferation of civil rights scholarship, the movement's larger-than-life personalities—men like Thurgood Marshall—dominate the literature on civil rights lawyering. See generally, e.g., WIL HAYGOOD, *SHOWDOWN: THURGOOD MARSHALL AND THE SUPREME COURT NOMINATION THAT CHANGED AMERICA* (2015) (detailing Marshall's Supreme Court confirmation hearings); CHARLES L. ZELDEN, *THURGOOD MARSHALL: RACE, RIGHTS, AND THE STRUGGLE FOR A MORE PERFECT UNION* (2013) (providing a concise biography of Thurgood Marshall); LARRY S. GIBSON, *YOUNG THURGOOD: THE MAKING OF A SUPREME COURT JUSTICE* (2012) (examining Marshall's childhood and rise to civil rights stardom); GILBERT KING, *DEVIL IN THE GROVE: THURGOOD MARSHALL, THE GROVELAND BOYS, AND THE DAWN OF A NEW AMERICA* (2012) (chronicling Marshall's fight against Jim Crow in a case involving four Black men wrongly accused of raping a white woman); THURGOOD MARSHALL: HIS SPEECHES, WRITINGS, ARGUMENTS, OPINIONS, AND REMINISCENCES (Mark V. Tushnet ed., 2001) (offering examples of Thurgood Marshall's speeches, arguments, and opinions); JUAN WILLIAMS, *THURGOOD MARSHALL: AMERICAN REVOLUTIONARY* (1998) (providing a biography of Thurgood Marshall); MARK V. TUSHNET, *MAKING CONSTITUTIONAL LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1961–1991* (1997) (examining Marshall's judicial career); MARK V. TUSHNET, *MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936–1961* (1994) (examining Marshall's legal career at the NAACP).

33. Status of the ICERD, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-2&chapter=4&clang=_en [<https://perma.cc/C46Y-A2SW>].

34. See *id.*

35. PATRICK THORNBERRY, *THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION: A COMMENTARY* 35 (2016).

redress in national and international courts.³⁶ But just as the U.S. experts used U.S. constitutional law to spread a vision for democracy, they also spread the limitations of U.S. constitutional law.³⁷ This Article seeks to provide a more in-depth understanding of the geopolitical context within which the experts drafted the Convention and, in turn, highlight how that context continues to shape domestic and international debates on racism today.

Part I of this Article provides background on the Convention and explores the underlying political currents going into the Convention debates. Part II details the United States' strategy to explain U.S. racism to the human rights community while establishing the federal government as the world's authority on ensuring racial progress. The Part also details the relationship between the U.S. experts and the State Department and outlines how both parties collaborated to achieve their unique goals. Part III chronicles the Convention debates themselves, illuminating how the United States actively worked to export the state action doctrine to ensure that the Convention accorded with U.S. constitutional principles. Part IV documents how the U.S. experts justified their stance on the Convention to the State Department and how their perspectives fit neatly within liberal thought. Finally, this Article concludes with three lessons from the history of the Convention that remain relevant today.

I. A BRIEF HISTORY OF THE CONVENTION AND THE UNITED STATES' INTEREST IN THE CONVENTION DEBATES

The push to create a comprehensive treaty on discrimination began with the rise of decolonization and a new wave of anti-Semitism in Europe in 1959.³⁸ Originally, the United Nations planned to author a treaty that addressed “all manifestations and practices of racial, religious and national hatred,”³⁹ but members of the burgeoning Afro-Asian bloc moved to separate the treaty into two: one treaty on

36. *See id.* at 472–83.

37. *See supra* notes 20–28 and accompanying text.

38. *See* Ofra Friesel, *Race Versus Religion in the Making of the International Convention Against Racial Discrimination, 1965*, 32 *LAW & HIST. REV.* 351, 361–62 (2014).

39. G.A. Res. 1510 (XV), at 22 (Dec. 12, 1960). Jointly addressing religious and racial discrimination would be consistent with the other major documents, like the Universal Declaration of Human Rights, that the United Nations had produced at that point. Friesel, *supra* note 38, at 352–53.

racial discrimination and a second treaty on religious intolerance.⁴⁰ Given the ideological fissures at the United Nations, the Afro-Asian bloc argued that incorporating a ban on religious intolerance in the treaty would delay the treaty's adoption.⁴¹ The Soviet Union, most notably, aimed to avoid all U.N. examinations of its long and continuing anti-Semitic practices.⁴² The country's U.N. delegates routinely refused to even acknowledge Soviet anti-Semitism.⁴³ Many Third World representatives feared bundling religious and racial discrimination would complicate and delay the passage of any treaty.⁴⁴ Indeed, those African and Asian countries were still reeling from the legacies of European colonialism.⁴⁵ Representatives in the Afro-Asian bloc, in particular, tended to prioritize ending racial discrimination and recognized how the United Nations' efforts to end racial discrimination would become collateral damage to the geopolitical tensions surrounding religious discrimination.⁴⁶ The U.N. General Assembly eventually ceded to the Afro-Asian bloc's prioritization of racial discrimination and placed race and religion into separate human rights instruments.⁴⁷

The U.N. General Assembly then tasked the Sub-Commission with drafting the primary language for the instruments.⁴⁸ The Sub-Commission began its process by authoring declarations on each topic.⁴⁹ These declarations, as the term indicates, did not establish legal obligations on state signatories. They were instead nonbinding

40. Friesel, *supra* note 38, at 375.

41. *Id.* at 354.

42. *Id.* at 364–65.

43. *Id.*

44. *Id.* at 375–76.

45. *Id.* at 362.

46. *Id.* at 353–54.

47. *Id.* at 376; *see* G.A. Res. 1780 (XVII), at 32–33 (Dec. 7, 1962) (calling for “a draft declaration” and “a draft convention” on “the elimination of all forms of racial discrimination”); G.A. Res. 1781 (XVII), at 33 (Dec. 7, 1962) (calling for “a draft declaration” and “a draft convention” on “the elimination of . . . religious intolerance”).

48. *See* G.A. Res. 1780, *supra* note 47, at 32–33; G.A. Res. 1781, *supra* note 47, at 33; *see also* THORNBERRY, *supra* note 35, at 30–31 (discussing how “[t]he Sub-Commission took up the task . . . of preparing the Convention”).

49. *See* G.A. Res. 1780, *supra* note 47, at 32–33 (calling for “a draft declaration” and a “draft convention” on “the elimination of all forms of racial discrimination”); G.A. Res. 1781, *supra* note 47, at 33 (calling for “a draft declaration and a draft convention on the elimination of all forms of religious [discrimination]”); David Keane, *Addressing the Aggravated Meeting Points of Race and Religion*, 6 U. MD. L.J. RACE RELIGION GENDER & CLASS 367, 373–81 (2006).

expressions declaring the ideal standards for all countries to follow.⁵⁰ 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 by relying on the ratified declaration as a guide.⁵¹ Each convention, as a treaty and pursuant to international law, would then create binding legal obligations on its state parties.⁵²

The United States was 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. Article 2 of 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 the ground of race, colour[,] or ethnic origin.”⁵³ The provision cast a much wider net than the Fourteenth Amendment because the state action doctrine prevented the Equal Protection Clause from reaching wholly private discrimination.⁵⁴ Despite the United States’ rhetoric, its Constitution could not reach all forms of racial discrimination under the Declaration.⁵⁵

State Department officials recognized that the Convention debates offered new opportunities for the United States to counter the Eastern bloc’s advances on the Sub-Commission.⁵⁶ The Convention,

50. See Keane, *supra* note 49, at 368–74 (explaining the different historical trajectories and statuses of these racial and religious instruments); ANNE-MARIE MOONEY COTTER, RACE MATTERS: AN INTERNATIONAL LEGAL ANALYSIS OF RACE DISCRIMINATION 41 (2006) (“[T]here are several international declarations which express the international community’s aspirations to eliminate racial discrimination.”).

51. See Keane, *supra* note 49, at 374. This process was the traditional practice. It was used for the preparation of the treaty on racial discrimination. *Id.* This process was proposed for the treaty on religious intolerance, but that process ultimately turned out different. See *id.* at 377–80.

52. *Id.* at 368, 382. 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. See LERNER, *supra* note 3, at 4–6.

53. G.A. Res. 1904 (XVIII), art. 2, at 36 (Nov. 20, 1963).

54. See *The Civil Rights Cases*, 109 U.S. 3, 11 (1883).

55. Memorandum from Clarence Clyde Ferguson, Jr., Gen. Couns., to Mrs. Rachel Nason, Off. of Econ. & Soc. Affs., Dep’t of State (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).

56. See Keane, *supra* note 50, at 371–77 (explaining the processes leading to drafting the Convention and the differences between the Declaration and Convention). Morris Abram also

unlike the Declaration, would be legally binding upon state parties.⁵⁷ Now, with an opening to redefine racial discrimination, the State Department embarked upon a strategy to translate its vision of equal protection into a binding treaty.⁵⁸

II. A U.S. PLAN FOR THE WORLD

The United States' 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.⁵⁹ It first required that the United States 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.⁶⁰ State Department officials contended that it was not U.S. values that had been the source of the nation's race problems; rather, it was lapses in the commitment to those values, particularly in the U.S. South, that had caused race problems.⁶¹ The State Department also needed

highlighted this substantial distinction between the Declaration and the Convention early in the Convention debates. Although the Declaration inspired portions of the U.S. draft, Abram reminded his colleagues "that a convention was not the same thing as a declaration. A declaration stated principles, put hopes and aspirations into words, and set the objectives to be reached." U.N. ESCOR, Sub-Comm'n on the Prevention of Discrimination and Prot. of Minorities, 16th Sess., 408th mtg. at 6, U.N. Doc. E/CN.4/Sub.2/SR.408 (Jan. 14, 1964) [hereinafter Sub-Comm'n 408 mtg.]. However, for Abram, there was a legal difference that was key to understanding the significance of the newest round of Sub-Commission negotiations. Abram maintained, "Moral principles . . . no matter how noble, could not all be incorporated in international law. The object of a Convention should be to formulate rules of conduct common to all civilized societies." *Id.*

57. See Keane, *supra* note 50 at 368, 374-77 (noting that the Convention "is both specific and binding on states parties," in contrast to the nonbinding Declaration).

58. See Sub-Comm'n 408 mtg., *supra* note 56, at 6.

59. Not only did the State Department select two civil rights lawyers to also work as human rights lawyers, but the State Department was also attempting to incorporate U.S. civil rights law and policy into the Convention. See *supra* note 18 and accompanying text; see, e.g., Guidance Paper, *supra* note 20, at 4 ("On the development of text, . . . the approach should be along [the] lines of the 'equal protection' concept in our 14th Amendment.").

60. Guidance Paper, *supra* note 20, at 5.

61. See, e.g., Press Release, Ambassador Adlai E. Stevenson, U.S. Representative to the United Nations, Statement on the Draft Declaration on the Elimination of All Forms of Racial Discrimination 3 (Oct. 1, 1963) (on file with MARBL, Abram Papers, Box 94, Folder 1) (describing the United States' treatment of Black people as often deviating from the principles in

members on the Sub-Commission to represent U.S. interests during the Convention debates. Morris Abram and Clyde Ferguson were the perfect fit. The esteemed lawyers gave legitimacy to the U.S. narrative and helped promote domestic values globally. For Abram and Ferguson, representing U.S. interests presented a rare opportunity to leverage the global stage for progress both at home and abroad.⁶² The plan created new opportunities to counter foreign criticism of U.S. race relations, enlarge the United States' sphere of influence at the United Nations, and reposition the nation in discussions of global racial progress—all without offending the U.S. Constitution.⁶³

This part introduces the State Department's strategy and discusses why U.S. officials believed that selecting a diverse pair of Sub-Commission members would help the United States execute its strategy. The part then turns to the U.S. racial experts' backgrounds and aspirations. It outlines how Abram and Ferguson hoped to use their experiences and positions within the state to advance U.S. foreign interests and promote their own visions for domestic and international race reform.

A. *South of Freedom: How Southern "Exceptionalism" Shaped U.S. Diplomacy on Race*

In many ways, 1963 appeared to be the wrong year for the State Department to act so brazenly. Birmingham, Alabama's high-pressure fire hoses, snarling police dogs, and dead children haunted the country's conscience.⁶⁴ More than two hundred thousand citizens marched on Washington to remind the world that one hundred years after the Emancipation Proclamation, "the Negro live[d] on a lonely island of poverty in the midst of a vast ocean of material prosperity."⁶⁵

the Declaration of Independence and Bill of Rights and declaring that despite some setbacks the United States now was attempting to live up to its heritage).

62. See ABRAM, *supra* note 12, at 154; Ferguson, *CERD*, *supra* note 19, at 41–42.

63. See ABRAM, *supra* note 12, at 150–51; Guidance Paper, *supra* note 20, at 4–5.

64. DUDZIAK, *COLD WAR CIVIL RIGHTS*, *supra* note 14, at 170; see also Stevenson, *supra* note 61, at 5 ("The recent murder of four innocent Negro children in a church has shocked and sickened us all.")

65. *March on Washington for Jobs and Freedom*, NAT'L PARK SERV., <https://www.nps.gov/articles/march-on-washington.htm#:~:text=It%20was%20the%20largest%20gathering,from%20all%20over%20the%20country> [<https://perma.cc/C6US-XWAK>]; Martin Luther King, Jr., *I Have a Dream, Speech at the Lincoln Memorial* (Aug. 28, 1963), in *A CALL TO CONSCIENCE: THE LANDMARK SPEECHES OF DR. MARTIN LUTHER KING, JR.* 81, 81 (Clayborne Carson & Kris Shepard eds., 2001).

African diplomats repeatedly complained to the State Department and their home governments after they were Jim Crowed out of housing in Washington, D.C.⁶⁶ These diplomats faced additional humiliation on the drive from the nation's capital to U.N. headquarters. On Route 40, the highway that connected Washington and New York, diplomats of color were routinely denied service in Maryland's public accommodations.⁶⁷ America's race problems appeared not to be temporary lapses in democratic governance. Racial domination seemed to be a defining feature of U.S. democracy. 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? Outright denial, scapegoating, or dismissing the significance of the United States' dilemma would undermine the nation's credibility during the Convention debates, State Department officials reasoned.⁶⁸ A United States perceived as lukewarm or even hostile to civil rights progress would struggle to endear the human rights community to its interests and values. Federal officials insisted that their country, flaws and all, had the world's best and most effective legal framework for ending racial discrimination.⁶⁹ If the United States' conception of civil rights was indeed the highest expression of human rights, as federal officials maintained, the United States had to powerfully convey the great prospects for racial progress under 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

66. See Michael Krenn, *The Unwelcome Mat: African Diplomats in Washington, D.C., During the Kennedy Years*, in WINDOW ON FREEDOM: RACE, CIVIL RIGHTS, AND FOREIGN AFFAIRS, 1945–1988, at 163, 165–69 (Brenda Gayle Plummer ed., 2003); Renee Romano, *No Diplomatic Immunity: African Diplomats, the State Department, and Civil Rights, 1961–1964*, 87 J. AM. HIST. 546, 551–53 (2000).

67. See CHARLES E. COBB JR., ON THE ROAD TO FREEDOM: A GUIDED TOUR OF THE CIVIL RIGHTS TRAIL 40 (2008); Krenn, *supra* note 66, at 170; Romano, *supra* note 66, at 551–52; Harold R. Isaacs, *American Race Relations and the United States Image in World Affairs*, in RACE AND U.S. FOREIGN POLICY DURING THE COLD WAR 260, 265–66 (Michael L. Krenn ed., 1998).

68. See Romano, *supra* note 66, at 546–48 (noting that the Kennedy administration took more forceful actions to fight segregation after the administration recognized the nation's passive approach to outlawing segregation harmed its foreign policy interests).

69. See, e.g., ABRAM, *supra* note 12, at 150–53.

1963.⁷⁰ The U.S. delegate assigned to the committee was scheduled to address the group of representatives from all 111 U.N. delegations, but Stevenson, the senior U.S. representative to the United Nations, usurped the scheduled delegate's slot.⁷¹ In his address, Stevenson emphasized the United States' commitment to racial justice while acknowledging the nation's shortcomings.⁷² Stevenson discussed how, only weeks earlier, a time-delayed dynamite blast rocked Birmingham's Sixteenth Street Baptist Church and killed four young Black children: Addie Mae Collins, Denise McNair, Carole Robertson, and Cynthia Wesley.⁷³ In a region where many citizens prized religiosity, the Ku Klux Klan's callous attack on a civil rights sanctuary after the morning's Sunday school lesson epitomized the United States' deep hypocrisies.⁷⁴ "Such a crime impairs human freedom not only here," Stevenson lamented, "but throughout the world."⁷⁵

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,

70. *Adlai Backs U.N.'s Race Statement*, WASH. POST, Oct. 2, 1963, at A23; Stevenson, *supra* note 61. Stevenson made this unusual and significant move due to the growing criticisms of U.S. race relations and the broader, powerful calls at the United Nations to address global racism. Kathleen Teltsch, *Stevenson Gives Pledge on Rights*, N.Y. TIMES, Oct. 2, 1963, at 24; see *Adlai Backs U.N.'s Race Statement*, *supra*.

71. Teltsch, *supra* note 70; see also *Adlai Backs U.N.'s Race Statement*, *supra* note 70 ("[Stevenson] said he was making the speech personally instead of the regular U.S. delegate to the committee because racial justice ha[d] been a major interest of his for many years."). Stevenson served as U.S. Ambassador to the United Nations from 1961 until 1965. Harlan Cleveland, *On a World-Scale Roller Coaster: Adlai Stevenson at the UN, 1961–65*, in ADLAI STEVENSON'S LASTING LEGACY 97, 97 (Alvin Leibling ed., 2007).

72. See Stevenson, *supra* note 61, at 5. Stevenson acknowledged racism in U.S. cities like Jackson, Mississippi; Little Rock, Arkansas; and Birmingham, Alabama, but he then reframed the United States' response as one that demonstrated the nation was attempting to uproot racism. *Id.* He declared, "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." *Id.*

73. *Id.* ("The recent murder of four innocent Negro children in a church has shocked and sickened us all."); CAROLYN MAULL MCKINSTRY & DENISE GEORGE, *WHILE THE WORLD WATCHED: A BIRMINGHAM BOMBING SURVIVOR COMES OF AGE DURING THE CIVIL RIGHTS MOVEMENT*, at xiii–ix (2011); THERLEE GIPSON, *ALABAMA BLACKS LAST STRAW* 44 (2019).

74. See MCKINSTRY & GEORGE, *supra* note 73, at ix.

75. Stevenson, *supra* note 61, at 5.

and even more rarely do they do so with such open self-criticism.”⁷⁶ But Stevenson’s candor was strategic. Newswires crisscrossed the globe, circulating sensational portraits of racial strife in the United States, and the ambassador used this moment to reconceptualize the nation’s well-known racial struggles.⁷⁷ Rather than assume a purely defensive posture, Stevenson asserted that the United States’ racial struggles were evidence of true progress.⁷⁸ His reframing of the United States’ dilemma attempted to capture the emotionalism of the moment, demands for increased U.S. transparency, and his firm belief in the redemptive power of U.S. values.⁷⁹

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 United States had been a trailblazer in the world’s struggle for liberty for nearly two hundred years.⁸⁰ The civil rights movement was the last phase in its march toward human rights for all.⁸¹ Thus, the U.S. delegation framed the nation’s racial history in a narrative paradigm familiar to the human rights community, holding the civil rights movement as the final of three U.S. revolutions.⁸² In this grand narrative, the first revolution was the battle for independence; the second, the Civil War; the third, the nonviolent civil rights movement.⁸³ With this framing, the United States hoped to leave experts on the Sub-Commission with the impression that it placed “the highest priority on the fight against discrimination everywhere.”⁸⁴ This evolutionary logic

76. Teltsch, *supra* note 70.

77. *Id.*; Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61, 62 (1988) [hereinafter, Dudziak, *Cold War Imperative*].

78. Stevenson, *supra* note 61, at 5.

79. *See id.* at 3, 5.

80. *See id.* at 1.

81. *Id.*

82. *Id.*; see Makau Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 HARV. INT’L L.J. 201, 202–04 (2001) (describing the flawed “three-dimensional” conception often adopted by human rights advocates). Professor Makau Mutua’s deeply influential article, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, discusses how human rights advocates often rely on troubling progress narratives to justify their projects. *See id.* (discussing the “troubling rhetoric” of the human rights movement and the three dimensions of the “fundamentally Eurocentric” human rights narrative).

83. Stevenson, *supra* note 61, at 1.

84. *Id.*

was standard fare for U.S. cold warriors interested in race reform and fit neatly within the Convention debates.

The State Department's strategy also borrowed from the trope of "Southern exceptionalism." This myth regionalized U.S. racism, making the nation's race problem, at its core, a Southern problem.⁸⁵ The United States highlighted cities notorious for their racial clashes like Little Rock, Arkansas; Birmingham, Alabama; Albany, Georgia; Cambridge, Maryland; and Jackson, Mississippi, that were all below the Mason-Dixon line.⁸⁶ This presentation 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, Michigan; Chicago, Illinois; and Los Angeles, California.⁸⁷

The trope of "Southern exceptionalism" also purported to explain federalism's relationship to racial justice.⁸⁸ Racial subordination occurred in the United States, so the argument went, 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. Ambassador Stevenson invoked this familiar binary during his speech to the Social, Cultural, and Humanitarian Committee:

[I]f 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 [James Meredith] to sit in the classrooms of the University of Mississippi.⁸⁹

This binary tale left no room for federal ineptitude, complicity, or cowardice in the campus desegregation story.⁹⁰ The federal

85. *Id.* at 5. For more on "Southern exceptionalism," see Matthew D. Lassiter & Joseph Crespino, *Introduction: The End of Southern History* to THE MYTH OF SOUTHERN EXCEPTIONALISM 5–6 (Matthew D. Lassiter & Joseph Crespino eds., 2009).

86. *See, e.g.,* Stevenson, *supra* note 61, at 5.

87. JEANNE F. THEOHARIS, A MORE BEAUTIFUL AND TERRIBLE HISTORY: THE USES AND MISUSES OF CIVIL RIGHTS HISTORY 63–65 (2018); THOMAS J. SUGRUE, SWEET LAND OF LIBERTY: THE FORGOTTEN STRUGGLE FOR CIVIL RIGHTS IN THE NORTH, at xiii–xiv (2008); Jeanne Theoharis, *Introduction* to FREEDOM NORTH: BLACK FREEDOM STRUGGLES OUTSIDE THE SOUTH, 1940–1980, at 1, 1–3 (Jeanne Theoharis & Komozi Woodard eds., 2003).

88. For other insights on the political implications of invoking "Southern exceptionalism," see generally THE MYTH OF SOUTHERN EXCEPTIONALISM, *supra* note 85.

89. Stevenson, *supra* note 61, at 5.

90. *See* RICHARD D. MAHONEY, SONS & BROTHERS: THE DAYS OF JACK AND BOBBY KENNEDY 182–89 (1999).

government was James Meredith's and, by extension, the Black race's savior. Its machinery would only be mobilized to support the country's commitment to destroying racial discrimination. Southern state governments were the problem, and the federal government had the solution.

B. A New Symbiosis: Morris Abram and Clyde Ferguson Change the Face of Racial Diplomacy

Legal concepts do not travel by themselves. Humans circulated ideas about human rights law, and in the case of racial diplomacy, it was particularly critical to note *who* circulated the ideas.⁹¹ Jim Crow undercut the United States' ability to establish itself as the world's true race leader, and so its State Department sought to appoint experts who could credibly further U.S. interests during the Convention debates. Morris Abram and Clyde Ferguson provided exactly that, both descriptively and substantively.⁹² Yet the relationship was symbiotic. Abram and Ferguson saw an opportunity in their appointments to leverage the global stage to promote progress both abroad and at home.⁹³ Thus, an extraordinary, mutually beneficial relationship formed that would play a crucial role in shaping the landscape of both civil and human rights.

Morris Abram was born in Fitzgerald, Georgia, to a Jewish immigrant from Romania.⁹⁴ Fitzgerald was a Protestant hamlet tucked in Georgia's Black Belt, and there, Abram began to understand the tension between the U.S. Constitution and the practices of segregation.⁹⁵ Abram later graduated summa cum laude from the University of Georgia "and received his law degree from the University of Chicago."⁹⁶ Abram also received a Rhodes Scholarship,

91. For more on how ideas flow across national borders, see Daniel T. Rodgers, *Paths in the Social History of Ideas*, in *THE WORLDS OF AMERICAN INTELLECTUAL HISTORY* 307, 307–08 (Joel Isaac et al. eds., 2017).

92. See *supra* note 18 and accompanying text.

93. See, e.g., ABRAM, *supra* note 12, at 150–52 (discussing how Abram conceptualized his platform on the Sub-Commission); ALBERT P. BLAUSTEIN & CLARENCE CLYDE FERGUSON, JR., *DESEGREGATION AND THE LAW: THE MEANING AND EFFECT OF THE SCHOOL SEGREGATION CASES 11–12* (1957) (explaining how Cold War politics could spur domestic civil rights reform).

94. ABRAM, *supra* note 12, at 9–10.

95. See *id.* at 10, 47–48.

96. Lawyer, Educator, Civil Rights Activist, Jewish Community Leader, Educator & Diplomat, Morris B. Abram 4 (on file with MARBL, Abram Papers, Box 22, Folder 12) [hereinafter Abram, Extended Biography].

but he could not immediately attend Oxford University as World War II intervened.⁹⁷ Abram joined the Army Air Forces during the war, quickly “rising to the rank of major” and earning the Legion of Merit for his outstanding service in war.⁹⁸ “At the close of hostilities,” Abram moved to Germany and joined U.S. Supreme Court Justice Robert Jackson’s legal staff in Nuremburg at the International Military Tribunal.⁹⁹ When Abram returned home, he collaborated with lawyers from the Anti-Defamation League to draft legislation aimed at breaking the Klan’s stranglehold on the South.¹⁰⁰

By the mid-1960s, Abram had developed a national reputation for civil rights leadership.¹⁰¹ Perhaps most notably, Abram was an attorney for the movement’s most recognizable figure, Dr. Martin Luther King, Jr.¹⁰² Abram, like King, was then an Atlanta resident; served as a trustee at King’s alma mater, Morehouse College; and had been involved in civil rights activism with a wide range of movement organizations, including the National Association for the Advancement of Colored People (“NAACP”), the Southern Regional Council, and the Congress of Racial Equality.¹⁰³ Abram was also a distinguished U.S. Supreme Court advocate. One of his touchstone

97. ABRAM, *supra* note 12, at 55–56, 58.

98. *Id.* at 66; Abram, *Extended Biography*, *supra* note 96.

99. Abram, *Extended Biography*, *supra* note 96, at 1, 4.

100. ABRAM, *supra* note 12, at 86–87. The statute, which criminalized public mask-wearing, was enacted in five states and fifty-five Southern cities. Abram, *Extended Biography*, *supra* note 99, at 2–3.

101. *See, e.g., Jewish Unit Picks National Leader: Morris Abram Is Chosen by Committee on Rights*, N.Y. TIMES, Feb. 16, 1964, at 73 (referencing Abram’s national reputation as “as an attorney in crucial cases dealing with major civil rights and civil liberties issues”).

102. Abram, *Extended Biography*, *supra* note 96, at 3; *see also Real Drama Followed the Kennedy Call in King Case*, NORFOLK J. & GUIDE, Dec. 31, 1960, at 8 (explaining how Abram became involved in the King case).

103. *See, e.g.,* Biographical Sketch of Morris B. Abram (Jan. 1964) (on file with National Archives, College Park, Md., Central Foreign Policy Files, Record Group 59, Box 3204, Folder SOC 14 Human Rights, Race Relations); *Attorney Morris Abram Slated To Address NAACP ‘Crusade’ Meet*, ATLANTA DAILY WORLD, Mar. 7, 1954, at 1 (discussing Abram’s delivery of a keynote address at an NAACP program in anticipation of the U.S. Supreme Court’s decision in *Brown v. Board of Education*); *Dixie Leadership on Bias Assailed: Regional Council Asks South To Repudiate ‘Fraudulent’ Voices on School Issue*, N.Y. TIMES, Mar. 7, 1955, at 28 (noting that Abram served on the SRC’s executive committee and was active in the fight against massive resistance to *Brown*); *Rights Suit Assails Americus Jailings*, ATLANTA CONST., Oct. 11, 1963, at 24 (serving as a lawyer for a Congress of Racial Equity member facing the death penalty for his civil rights activism in Southwest Georgia); *Major King Events Chronology: 1929-1968*, STANFORD: MARTIN LUTHER KING JR. RSCH. & EDUC. INST., <https://kinginstitute.stanford.edu/king-resources/major-king-events-chronology-1929-1968> [<https://perma.cc/B9F4-7PRG>].

civil rights victories was the landmark U.S. Supreme Court decision recognizing the “one person, one vote” principle.¹⁰⁴ And Abram’s interests in extending equality were not cabined to the domestic realm; he continued to engage with issues of equality internationally. Abram served as the first general counsel to the Peace Corps and occupied the liberal edge of the New Frontier as a key human rights voice in the Kennedy White House.¹⁰⁵

In 1963, as the global fight against discrimination escalated, State Department officials were seeking new human rights staffers to ensure that the U.S. delegation was “equipped to give leadership as well as handle emergencies” at the United Nations.¹⁰⁶ One person immediately stood out in their personnel search. “As you know, our first choice,” a State Department staffing memo disclosed, “is Morris Abram.”¹⁰⁷ The State Department memo described Abram as someone who could serve as a “special-adviser-trouble shooter.”¹⁰⁸ The State Department also recognized that the upcoming U.N. session would be anything but ordinary. They needed staffers who could help the United States manage what one official called the “crisis character of human rights issues” before the United Nations.¹⁰⁹ Abram squarely fit the bill. In Abram, the State Department had selected someone whose background and experience made him very well equipped to speak directly to two of the most pressing legal issues then on the United Nation’s agenda: the creation of human rights instruments on race and religion.

104. See *Gray v. Sanders*, 372 U.S. 368, 369, 381 (1963) (declaring that “[t]he conception of political equality from the Declaration of Independence, to Lincoln’s Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote”).

105. *Abram Back from U. S. Peace Corps in Tanganyika*, ATLANTA DAILY WORLD, Dec. 15, 1961, at 1; Biographical Sketch of Morris B. Abram, *supra* note 103. See generally Irving Bernstein, PROMISES KEPT: JOHN F. KENNEDY’S NEW FRONTIER (1993) (describing how President John F. Kennedy used the idea of a “New Frontier” to offer a bold vision for solving national and international problems and how this political slogan transformed into a description of Kennedy administration programs like the Peace Corps).

106. See, e.g., Memorandum from Nathaniel McKitterick, Dep’t of State Bureau of Internal Org. Affs., to Mr. Cleveland, Dep’t of State Bureau of Oceans & Env’t & Sci. Affs. 1 (July 23, 1963) (on file with John F. Kennedy Presidential Library and Museum, Box 114, Folder U.N. Human Rights).

107. *Id.*

108. *Id.*

109. *Id.*

State Department officials shortly thereafter named Clyde Ferguson, a Black attorney considered “one of the best civil rights legal brains in the country,” as Morris Abram’s alternate to the Sub-Commission.¹¹⁰ Ferguson was born in Wilmington, North Carolina, to a prominent Methodist preacher, who took his family north as part of the Great Migration.¹¹¹ Ferguson excelled academically, graduating Phi Beta Kappa from Ohio State University, but unlike Abram, Ferguson declined a Rhodes nomination.¹¹² In the 1940s, Ferguson joined the war effort and shone in battle, winning a Bronze Star for his heroism “in the European and . . . Southwest Pacific [t]heatres.”¹¹³ In the 1950s, the Harvard Law School honors graduate gained a wealth of experience in international human rights law and politics.¹¹⁴ He represented the United States at the Western Hemisphere United Nations Economic, Social, and Cultural Organization’s (“UNESCO”) conference.¹¹⁵ 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.¹¹⁶ 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.¹¹⁷

110. *Ferguson New Howard Law Dean*, N.Y. AMSTERDAM NEWS, Aug. 10, 1963, at 4; see also *Clarence Clyde Ferguson Jr. (1924-1983): Highlights of an Impressive Career*, 1 BLACK LETTER J. 17, 18 (1984) [hereinafter *Highlights of an Impressive Career*] (stating that Ferguson “served as United States Alternate to the United States Sub-Commission on Prevention of Discrimination”). Ferguson’s accolades also included serving as a teaching fellow-in-law at Harvard Law School, a teaching assistant in the department of general education at Harvard College, an assistant professor at Rutgers Law School, general counsel of the U.S. Commission on Civil Rights, and dean of the Howard University School of Law. *Id.* at 17–18.

111. B.M. Phillips, ‘*I Had High Hopes*’, BALT. AFRO-AM., Aug. 17, 1963, at 5.

112. *Highlights of an Impressive Career*, *supra* note 110, at 17; ABRAM, *supra* note 12, at 55–56, 58.

113. *Highlights of an Impressive Career*, *supra* note 110, at 17; see also *C. C. Ferguson Jr. on Harvard Staff*, BALT. AFRO-AM., May 19, 1951, at 7 (describing Ferguson as “[a] war veteran who saw service in both Europe and the Philippines”).

114. See *Highlights of an Impressive Career*, *supra* note 110, at 17.

115. *Id.* at 18.

116. *Clarence Ferguson Appointed Howard University Law Dean*, BALT. AFRO-AM., Aug. 10, 1963, at 3; *LDF Director-Counsels: Thurgood Marshall 1940-1961*, LDF, <https://www.naacpldf.org/about-us/history/thurgood-marshall> [<https://perma.cc/UT5N-PUTG>].

117. See Rupert G. John, U.N. Division of Human Rights to Morris B. Abram (Dec. 6, 1963) (on file with MARBL, Abram Papers, Box 94, Folder Sub-Commission on Prevention of Discrimination, Etc., 1964); see also Abram-Ferguson Letter, *supra* note 18 (discussing dates when Abram would be absent from a Sub-Commission meeting and requesting feedback on draft comments for that meeting).

The State Department had selected one of Black America's leading representatives.¹¹⁸

State Department officials were also clear that, in naming Ferguson to the post, they could demonstrate their commitment to ending racial discrimination in the United States to the world.¹¹⁹ Only weeks after Martin Luther King, Jr. penned his "Letter from Birmingham Jail,"¹²⁰ he published a hard-hitting editorial in which he described Birmingham as "the last stop before Johannesburg, South Africa."¹²¹ The analogies between "petty apartheid" and "grand apartheid" were gaining traction, Ambassador Stevenson's staffers stressed, so they sought additional special advisers to help keep Stevenson informed of "race developments in the [United States] and . . . apartheid in South Africa" during the General Assembly's debates of the Declaration.¹²² Ferguson's experience with civil and human rights law as well as his race proved to be significant in his appointment as a special adviser to Stevenson during the Declaration debates;¹²³ they were very likely significant when the State Department appointed him to be Abram's alternate during the Convention debates. "Our preference is Clyde Ferguson," a State Department memorandum revealed in Ferguson's selection as a special adviser.¹²⁴ The memorandum emphasized Ferguson's experience as general counsel to the U.S. Commission on Civil Rights, but the State Department also turned to two other substantial considerations in Ferguson's

118. See KENNETH W. MACK, REPRESENTING THE RACE: THE CREATION OF THE CIVIL RIGHTS LAWYER 37 (2012) (describing the phenomenon of a race representative as a "black person who crossed racial lines, and often shook up the expectations of a segregated society"). Mack writes, "[t]o focus on 'progress' and 'representative Negroes' as a civil rights claim was to make the mere existence of the black lawyer into a potent argument of equality." *Id.* at 32.

119. See Memorandum from Mr. McKitterick, Dep't of State Bureau of Internal Org. Affs., to Mr. Cleveland, Dep't of State Bureau of Oceans & Env't & Sci. Affs. 1 (July 16, 1963) (on file with John F. Kennedy Presidential Library and Museum, Box 114, Folder U.N. Human Rights) [hereinafter Memorandum from Mr. McKitterick to Mr. Cleveland].

120. MARTIN LUTHER KING, JR., *Letter from Birmingham Jail*, in WHY WE CAN'T WAIT 64, 64 (2000).

121. Dr. Martin Luther King, Jr., *Birmingham, U.S.A.: How It All Began*, N.Y. AMSTERDAM NEWS, June 8, 1963, at 10.

122. See WINSTON A. GRADY-WILLIS, CHALLENGING U.S. APARTHEID: ATLANTA AND BLACK STRUGGLES FOR HUMAN RIGHTS, 1960-1977, at xviii (2006) (offering a historical comparison of the apartheid structures in the U.S. South and South Africa); Memorandum from Mr. McKitterick to Mr. Cleveland, *supra* note 119.

123. See Memorandum from Mr. McKitterick to Mr. Cleveland, *supra* note 119.

124. *Id.*

selection.¹²⁵ “He is a Negro,” the memorandum underscored, and “someone already familiar with the U.N.”¹²⁶

The State Department’s personnel decisions were groundbreaking. Both Abram and Ferguson were immensely talented, but they offered much more than their considerable intellectual abilities to the U.S. delegation to the Sub-Commission. State Department officials recognized that civil and human rights were not simply moral issues; they were also foreign policy issues.¹²⁷ The State Department had tapped two high-profile civil rights lawyers to champion U.S. constitutional values. Both men were natives of the South, the region of the country so fiercely criticized at the United Nations, and their personal and professional backgrounds lent immediate credibility to the United States’ position.¹²⁸ The U.S. delegation embodied the nation’s commitment to racial progress. Together, these men told a remarkable story of how the United States’ ongoing social transformation could serve as a model for the world. The State Department’s selection was audacious.

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 United States did not need to violate the Sub-Commission’s rules by publicly discussing the nation’s commitment to social progress.¹²⁹ 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 State Department had been known, in many circles, as an “Old Boys’ Club” with a thin record of appointing minorities to key

125. *Id.*

126. *Id.*

127. See Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 524 (1980) (“[T]he decision in *Brown* . . . cannot be understood without some consideration of the decision’s value to . . . whites in policymaking positions able to see the economic and political advances at home and abroad that would follow abandonment of segregation.”); DUDZIAK, *COLD WAR CIVIL RIGHTS*, *supra* note 14, at 6 (“[C]ivil rights reform came to be seen as crucial to U.S. foreign relations.”).

128. See *supra* Part II.A and notes 95, 111.

129. See Eide, *supra* note 4, at 216–17 (noting that the Sub-Commission members were prohibited from discussing country-specific developments).

positions.¹³⁰ 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.

Substantively, the race leaders possessed cosmopolitan worldviews, but they, particularly Abram, ultimately believed that the U.S. federal government could and should be the world's engine for racial progress.¹³¹ Abram and Ferguson regularly demonstrated the ability to close the gaps between the United States' ideals and practices, and they had built their reputations on excelling in these crisis situations.¹³² The State Department widely distributed Abram and Ferguson's biographies to other delegations as part of U.N. protocol, but their compelling personal narratives also offered the United States a much greater public relations tool.¹³³

Additionally, Abram and Ferguson were strong institutional fits for the State Department's plan because they personified the marriage

130. See MICHAEL L. KRENN, *BLACK DIPLOMACY: AFRICAN AMERICANS AND THE STATE DEPARTMENT, 1945-1969*, at 9, 100, 131 (1999) (noting the growing demand for Black representation in the State Department, and describing the appointment of two Black delegates).

131. See ABRAM, *supra* note 12, at 150–51.

132. See *supra* notes 101–05, 110, *infra* note 135, and accompanying text.

133. Cf. Eide, *supra* note 4, at 252–54 (“The election has thus become a regular process of nominations and competition among candidates. . . . [C]onsiderable lobbying has been undertaken by some governments both for and against certain candidates”). National governments nominated their citizens to the Sub-Commission, but the Sub-Commission had to elect the nominee before they could become a Sub-Commission member. See *id.* at 253. As part of the elections process, national governments widely distributed the biographies of their nominees to the Sub-Commission to illustrate their nominee's qualifications. See, e.g., Foreign Service Dispatch from Zachary P. Geaneas, Chief Admin. Officer, USUN New York (on file with author); see also Biography of Morris Berthold Abram (on file with MARBL, Abram Papers, Box 94, Folder 8) (providing Abram's biography); Biographical Summary of Clarence Clyde Ferguson, Jr., General Counsel, Commission on Civil Rights, Professor of Law, Rutgers University (on leave 1962–63) 1 (on file with MARBL, Abram Papers, Box 94, Folder 8) (providing Ferguson's biography). Abram, in particular, shared his personal experiences with the Sub-Commission to attempt to shape the Sub-Commission's debates. See, e.g., H. Timothy Lovelace Jr., *Making the World in Atlanta's Image: The Student Nonviolent Coordinating Committee, Morris Abram, and the Legislative History of the United Nations Race Convention*, 32 *LAW & HIST. REV.* 385, 401 (2014) [hereinafter Lovelace, *Making the World in Atlanta's Image*]; see also U.N. ESCOR, Sub-Comm'n on the Prevention of Discrimination and Prot. of Minorities, 16th Sess., 420th mtg. at 4–5, U.N. Doc. E/CN.4/Sub.2/SR.420 (Jan. 22, 1964) (leveraging his experiences fighting the Ku Klux Klan to advance his position on how the Convention should regulate hateful expressions).

between the Cold War and the era's "responsible" race leadership.¹³⁴ The U.S. experts, like leading State Department officials, contended that the United States could lead the world's pursuit of freedom given the trajectory of U.S. history and the moral superiority of U.S. constitutional values.¹³⁵ They believed that 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.¹³⁶ The United States' 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.¹³⁷ "In short, I think a revolution may be used affirmatively. . . . [T]his revolution presents the grand opportunity to seize the flux of change for the purpose of finally resolving our problem."¹³⁸ 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. Indeed, they had risked their lives for these ideals at home and abroad.

Thus, Abram and Ferguson 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, Abram reveled in it, believing that regardless of how lax the United States was in enforcing human rights domestically, the nation "[was] without fault compared to the rest of the world" and that other countries should embrace U.S. values given the nation's "moral

134. See Bell, *supra* note 127, at 524 (characterizing foreign relations and Cold War politics as driving factors in the *Brown v. Board of Education* decision); Dudziak, *Cold War Imperative*, *supra* note 77, at 63 ("[E]fforts to promote civil rights within the United States were consistent with, and important to, the more central U.S. mission of fighting world communism.").

135. See, e.g., Ferguson, *Nature and Dimensions*, *supra* note 23, at 462; ABRAM, *supra* note 12, at 150–51.

136. See Ferguson, *Nature and Dimensions*, *supra* note 23, at 452, 461–62; ABRAM, *supra* note 12, at 151. Ferguson asserted that the conception of human rights was the broadest it had been "within any period within the last 100 years" in the United States and that the nation had progressed rapidly during the last five years, but he also maintained that more work was still needed to narrow the gap between its racial ideals and racial practices. Ferguson, *Nature and Dimensions*, *supra* note 23, at 452, 461–62.

137. Ferguson, *Nature and Dimensions*, *supra* note 23, at 460; see Stevenson, *supra* note 61, at 1 ("In my own country, we are even now living through our third revolution in the name of freedom.").

138. Ferguson, *Nature and Dimensions*, *supra* note 23, at 460.

authority.”¹³⁹ There were also real reputational costs for the United States if the nation did not lead the Convention’s drafting and eventually ratify the treaty. Americans’ distaste for U.N. affairs, which exploded at midcentury,¹⁴⁰ was now self-defeating and outmoded. The rapid growth in the number of newly independent countries at the United Nations had radically shifted the direction of U.N. affairs. Nonwhite nations were now in the majority in the General Assembly, and they brought colonialism and racial discrimination to the forefront of discussions.¹⁴¹ For most of the world, the Convention was the era’s most anticipated human rights instrument.¹⁴² Abram and Ferguson knew that if the United States truly desired to limit the Soviet sphere of influence at the United Nations, the U.S. delegation needed to take aggressive stances on human rights issues.

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.¹⁴³ Abram, for example, had strong ties to President John F. Kennedy from the earliest days of his presidential run.¹⁴⁴ During the 1960 race, the Democratic stalwart stumped for Kennedy in Georgia and masterfully converted registered Black Atlantans into Kennedy voters.¹⁴⁵ The thoroughly vetted U.S. experts cringed at the thought of embarrassing their president or their nation

139. Interview by Michael L. Gillette with Morris Abram, in N.Y.C., N.Y. (May 3, 1984), in LYNDON B. JOHNSON LIBRARY ORAL HISTORIES, LYNDON B. JOHNSON PRESIDENTIAL LIBRARY 8, <https://www.discoverljb.org/item/oh-abramm-19840503-2-94-6> [<https://perma.cc/9GXY-CJXQ>].

140. See Carol Anderson, *A “Hollow Mockery”: African Americans, White Supremacy, and the Development of Human Rights in the United States*, in 1 BRINGING HUMAN RIGHTS HOME: A HISTORY OF HUMAN RIGHTS IN THE UNITED STATES 75, 90–93 (Cynthia Soohoo, Catherine Albisa & Martha F. Davis eds., 2008) [hereinafter BRINGING HUMAN RIGHTS HOME].

141. Clarence Clyde Ferguson, Jr., *The United Nations Convention on Racial Discrimination: Civil Rights by Treaty*, 1 LAW TRANSITION Q. 61, 61 (1964) [hereinafter Ferguson, *United Nations*].

142. See G.A. Res. 1906 (XVIII), at 38 (Nov. 20, 1963) (proclaiming that drafting the Convention was the United Nations’ “absolute priority”).

143. See ABRAM, *supra* note 12, at 150 (stating that President Kennedy sent Abram as the “representative to the Subcommittee for the Prevention of Discrimination and the Protection of Minorities and later as [the] representative to the Human Rights Commission”); see also Eide, *supra* note 4, at 253 (“Candidates [to the Sub-Commission] must be nominated by their governments.”); Humphrey, *supra* note 7, at 871 (explaining that the Sub-Commission consisted of experts chosen with the “consent of the governments of which they were nationals”).

144. See ABRAM, *supra* note 12, at 124–26.

145. See, e.g., *id.* at 132 (explaining how Abram was able to convince Martin Luther King, Sr., to publicly announce that he was going to vote for Kennedy).

while at the United Nations.¹⁴⁶ They worked closely with the Kennedy and Johnson administrations during the treaty negotiations and embraced their status as de facto agents of the State Department.¹⁴⁷ Although Abram and Ferguson were technically operating in their “individual capacities” as Sub-Committee experts and could theoretically go rogue, there were no questions about the experts’ fidelity to their country. They had the guidance papers and security clearances to prove it.¹⁴⁸

Abram and Ferguson themselves recognized a grand opportunity to implement real change both globally and domestically, and this incredible collaboration engendered trust. Indeed, Abram and Ferguson’s brand of racial diplomacy was a sharp rebuke of their predecessors’ approach to international human rights law. Black Americans working outside the auspices of the State Department had petitioned the Sub-Commission and the Commission on Human Rights with human rights complaints since its inception.¹⁴⁹ Their pleas, however, were met with devastating results. Shortly after the creation

146. Abram literally wrote that he was a “representative” of the United States sent to the Sub-Commission by President John F. Kennedy, although each Sub-Commission member was supposed to be an independent expert, operating in his own personal capacity and not serving as a state “representative.” *Id.* at 150–51; *see also* Ferguson, *CERD*, *supra* note 19, at 41–42 (“[T]here was very active participation on the expert level by two U.S. citizens in the Subcommittee on Discrimination.”). Similarly, although Ferguson and Abram were operating on the Sub-Commission technically in their individual capacities, Ferguson characterized the contributions he and Abram made during the drafting debates as the “full participation by the U.S.”—not merely the efforts of two experts with no national backing. *Id.* Moreover, Ferguson described the work that he and Abram did in geopolitical terms, arguing that he and Abram very likely outperformed the formal U.S. representatives charged with negotiating the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights. *Id.* Ferguson said that he suspected “that in the convention we have an instrument that, when compared to the covenants, is a better document in terms of U.S. interest, the expression of U.S. values, and the expression of the U.S. view about what should be done to eliminate racial discrimination.” *Id.* at 42. Both men viewed their service on the Sub-Commission as extensions of U.S. foreign policy. *See id.*; ABRAM, *supra* note 12, at 150.

147. Abram and Ferguson soon 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* Abram, *Extended Biography*, *supra* note 96, at 2–3 (describing Abram’s role in the Commission on Human Rights and the White House Conference on Civil Rights); *Biographic Sketch of Clarence Clyde Ferguson* (on file with the Harvard Law School Library, Clarence Clyde Ferguson Papers, Box 12, Folder 9).

148. *See, e.g.*, Guidance Paper, *supra* note 20, at 1.

149. *See* ANDERSON, *supra* note 11, at 109–11.

of the United Nations, W.E.B. Du Bois, the towering intellectual, NAACP founder, and Pan-Africanist, appealed to the United Nations, charging the United States with violating Black Americans' human rights.¹⁵⁰ But Eleanor Roosevelt, then Commission on Human Rights Chair, U.S. delegate to the United Nations, and an NAACP board member, fumed that Du Bois's attempts to tarnish the nation's image had given credence to the communists' claims about the inadequacies of U.S. democracy.¹⁵¹ Roosevelt worked with U.S. officials to bury Du Bois's petition, and the civil rights group demoted and then removed Du Bois from his leadership position in the NAACP—the very organization he helped found four decades earlier—for his willingness to shame the United States at the United Nations.¹⁵² Similarly, William Patterson, attorney and national secretary of the Civil Rights Congress, charged the United States with genocide in a 1951 U.N. petition.¹⁵³ He was soon stripped of his passport and publicly scorned for allegedly aiding the Soviet cause.¹⁵⁴ When Paul Robeson became a prominent critic of U.S. racism on the international stage, he too found himself on the political margins. The civil rights leader, award-winning entertainer, and darling of Black America was blacklisted, stripped of his passport, and blasted by the press and the liberal establishment for his reported communist ties.¹⁵⁵

Abram and Ferguson took a different tack, instead opting to leverage their relationship with the State Department. Shaming the United States at the United Nations or looking to “foreign” legal standards to improve the lived experiences of Black Americans could

150. MANNING MARABLE, W.E.B. DU BOIS: BLACK RADICAL DEMOCRAT 169 (Routledge 2016) (1986); W.E.B. Du Bois, NAACP, <https://naacp.org/find-resources/history-explained/civil-rights-leaders/web-du-bois> [<https://perma.cc/9BJJ-NEWA>].

151. See MARABLE, *supra* note 150; see also DAVID LEVERING LEWIS, W.E.B. DU BOIS: A BIOGRAPHY 676 (2009) (illustrating that Mrs. Roosevelt believed that “no good could come from” putting the petition on the agenda); BRINGING HUMAN RIGHTS HOME, *supra* note 140, at 90 (identifying Mrs. Roosevelt as Commission on Human Rights Chair).

152. LEWIS, *supra* note 151, at 676–77.

153. See GERALD HORNE, BLACK REVOLUTIONARY: WILLIAM PATTERSON AND THE GLOBALIZATION OF THE AFRICAN AMERICAN FREEDOM STRUGGLE 1–2 (2013). See generally CIVIL RIGHTS CONGRESS, WE CHARGE GENOCIDE: THE HISTORIC PETITION TO THE UNITED NATIONS FOR RELIEF FROM A CRIME OF THE UNITED STATES GOVERNMENT AGAINST THE NEGRO PEOPLE (William L. Patterson ed., 1951) (displaying Patterson's charge).

154. See Mary L. Dudziak, *Josephine Baker, Racial Protest, and the Cold War*, 81 J. AM. HIST. 543, 566 (1994).

155. *Id.* at 546, 554, 565–66.

easily cause racial backlash, Ferguson explained.¹⁵⁶ Ferguson recognized how an older generation of civil rights lawyers and activists had sparked a firestorm when they used international human rights law to illustrate the shortcomings of U.S. constitutionalism.¹⁵⁷ Their human rights strategies suggested that subversive forces controlled the civil rights movement. As one example, fear that presidents might agree to human rights treaties that could impose limitations on federal and state law (including limits on segregation statutes) led xenophobic Ohio Senator John W. Bricker to propose a constitutional amendment to limit the president's ability to agree to treaties.¹⁵⁸ Though it narrowly lost in the Senate, the so-called "Bricker episode" showed the perceived dangers of using international human rights to promote domestic civil rights goals.¹⁵⁹ 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 v. Board of Education*¹⁶⁰ and that was proving valuable in the push toward the Civil Rights Act of 1964.¹⁶¹ Collaborating with the State Department had the potential to advance the domestic 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 Black Americans 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.

Fostering a greater appreciation of global politics to aid the movement in the United States was especially important for Ferguson.

156. Ferguson, *CERD*, *supra* note 19, at 45 (explaining how a more radical internationalist approach to domestic racial reform spurred the Bricker amendment).

157. *Id.*

158. See BRINGING HUMAN RIGHTS HOME, *supra* note 140, at 90–91.

159. See *id.* at 90–93 (arguing that Brickerism contributed to silencing progressive civil rights voices, narrowing acceptable civil rights discourse, and limiting the United States' involvement and embrace of international human rights law).

160. *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483 (1954).

161. See BLAUSTEIN & FERGUSON, *supra* note 93, at 11–12 ("And in the brief submitted . . . 'It is in the context of the present world struggle between freedom and tyranny that the problem of racial discrimination must be viewed . . . [for] discrimination against minority groups in the United States has an adverse effect upon our relations with other countries.'" (alteration in original) (footnote omitted)). The Justice Department worked with the State Department to help produce the government's brief in *Brown*. The brief quoted a letter from the Secretary of State to the Attorney General dated December 2, 1952. See Brief for the United States as Amici Curiae at 6–8, *Brown*, 347 U.S. 483 (Nos. 8, 101, 191, 413, 448).

He hypothesized that racial progress would not occur in the United States without judges and policymakers recognizing the impact of domestic race relations on U.S. foreign policy.¹⁶² When these key stakeholders acknowledged Jim Crow's reputational costs, they would be more likely to support domestic civil rights reforms. Scholars of U.S. constitutional law and many everyday citizens in the 1950s often used the Supreme Court's ruling in *Brown* to explain how the Cold War could benefit the U.S. civil rights movement.¹⁶³ Ferguson's first book, *Desegregation and the Law*, affirmed this perspective, postulating that Cold War tensions likely informed the Justices' decision in *Brown*.¹⁶⁴ Ferguson found that foreign policy was integral to the parties' briefs in the case, as was evident in both the NAACP's and the Justice Department's court papers.¹⁶⁵ The Justice Department in particular emphasized that racial discrimination and segregation in the United States could become fodder for communist propaganda mills and could make countries doubt the United States' commitment to freedom, justice, and democracy.¹⁶⁶

162. See BLAUSTEIN & FERGUSON, *supra* note 93, at 11 (explaining that the NAACP recognized how racial segregation shaped the United States' perception internationally). Interestingly, in 1980, Professor Derrick Bell made essentially the same argument that Ferguson made some twenty years earlier in a foundational critical race theory text, *Brown v. Board of Education and the Interest-Convergence Dilemma*. Bell, *supra* note 127, at 524. Bell and Ferguson were colleagues at Harvard at that time. *Id.*

163. See, e.g., BLAUSTEIN & FERGUSON, *supra* note 93, at 11–13.

164. *Id.* at 12 (“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.”).

165. *Id.* at 11 (“The lawyers for the NAACP wrote: ‘Survival of our country in the present international situation is inevitably tied to resolution of this domestic issue.’” (footnote omitted)); *id.* at 12 (noting that the Justice Department stated that 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” (alteration in original) (footnote omitted)).

166. See Brief for the United States as Amici Curiae, *supra* note 161. Many people in the United States also appreciated the global significance of the Court's decision. In *Desegregation and the Law*, Blaustein and 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 equal.’” *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 of the last decade strengthened the cause of freedom everywhere.”

But the U.S. experts were not only focused on domestic progress. The U.S. strategy might also allow the civil rights lawyers a way to plant their law and policy ideas into constitutions abroad.¹⁶⁷ Countries experiencing social upheavals, wrestling with constitutional chaos, or emerging as newly independent frequently borrowed from international instruments like the Universal Declaration of Human Rights to establish domestic rule of law.¹⁶⁸ Abram and Ferguson recognized that if the United States did not adequately participate in the Convention debates, when these politically fragile societies domesticated the treaty, as many countries would later do, their laws might resemble the Soviet Constitution.¹⁶⁹ The United States would be rendered an outlier in global race relations, U.S. law and democracy would be on the outskirts, and other “engine[s] of repression” would take hold.¹⁷⁰

Instead, the pair believed that the newly independent countries at the United Nations could find a clear path to modernity by adopting the constitutional values in the United States’ draft of the Convention. The U.S. Constitution, they argued, provided the human rights protections necessary to ensure an inclusive multiracial and multiethnic democracy.¹⁷¹ Ensuring equality before law for diverse populations was indeed challenging, but the U.S. experts preached

BLAUSTEIN & FERGUSON, *supra* note 93, at 12–13 (footnotes omitted).

167. For example, Ferguson himself explained that it was “likely that [the United Nations Convention against Racial Discrimination] . . . [would] demonstrate more so than ever, the truism that foreign policy is simply the logical extension of domestic policy.” Clarence Clyde Ferguson, Jr., *The United Nations Human Rights Covenants: Problems of Ratification and Implementation*, 62 AM. SOC’Y INT’L L. PROC. 83, 90 (1968) [hereinafter *Problems of Ratification and Implementation*].

168. See, e.g., *id.* at 89 (providing several examples of countries adopting principles or language from the Universal Declaration of Human Rights).

169. See ABRAM, *supra* note 12, at 150–51 (describing how he used his time on the Sub-Commission to counter the Soviet Union’s ideas).

170. See Lovelace, *Making the World in Atlanta’s Image*, *supra* note 133, at 400 (“I was keenly aware that I [Abram] was representing the only great power that stands for human rights” (quoting ABRAM, *supra* note 12, at 150–51)).

171. See ABRAM, *supra* note 12, at 150–51. The experts’ entire project revolved around the idea that U.S. democracy was morally superior to other forms of government and that this treaty designed to serve the world should mirror U.S. civil rights law and policy. E.g., Lovelace, *Making the World in Atlanta’s Image*, *supra* note 133, at 403–04 (“State Department officials instructed Abram to emphasize that the American constitutional protections were consistent with human rights norms and that Article 9 of the Declaration and the provision that would become Article 4 of the Convention were deviations from longstanding human rights traditions.” (footnote omitted)).

democracy's unqualified application to all people.¹⁷² As evidence of this fact, the U.S. delegation pointed to "former totalitarian states such as Germany, Italy, and Japan bec[oming] functioning democracies" after U.S. occupation and "Soviet occupation never birth[ing] a democratic regime."¹⁷³

Equally important, Abram and Ferguson were themselves engaging in the kind of desegregationist project at the United Nations that they had engaged in domestically. They lived their politics on U.S. soil and aspired to 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 ideas for global equality.¹⁷⁴ Although the Russian member of the Sub-Commission praised the Soviet Union's civil rights protections, the Soviets still engaged in anti-Semitic programs on a vast scale.¹⁷⁵ In this light, Abram could decry the Soviet Constitution for being a sham and use his new platform to develop international instruments targeting religious and racial persecution.¹⁷⁶ Partnering with the State Department afforded the U.S. experts the ability to harness the power of the state in ways that gave the U.S. lawyers and their causes greater global prominence.

This experiment in diplomacy was rooted in an abiding faith in the United States' 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

172. See, e.g., ABRAM, *supra* note 12, at 150–51 (describing the United States as "the only great power that [stood] for human rights"). 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. Lovelace, *Making the World in Atlanta's Image*, *supra* note 133, at 385–86, 401. Abram hoped that Sub-Commission's visit to the Southern capital would educate foreigners on the United States and its model city of Atlanta, and thus would limit Soviet influence during the Convention's debates. *Id.* at 400–01, 401 n.52.

173. ABRAM, *supra* note 12, at 151.

174. See *id.* at 152 ("As I got to know my Russian colleagues, I began to confront them not only with their anti-Semitism but with the wide-scale violation of human rights in the Gulag Archipelago and throughout their vast dominions.").

175. *Id.* at 151–52. See generally Moshe Decter, *The Status of the Jews in the Soviet Union*, 41 FOREIGN AFFS. 420 (1963) (discussing how anti-Semitic policies in the Soviet Union violated principles of self-determination and cultural freedom).

176. See ABRAM, *supra* note 12, at 151–52, 154 (explaining how Abram was gaining political traction to eliminate racial discrimination and promote religious freedom).

movement lawyering. The partnership was, for some, a testament of hope.

III. RACIAL DISCRIMINATION AS A PUBLIC PROBLEM

The United States' members produced the Sub-Commission's first draft of the Convention.¹⁷⁷ Thereafter, however, the Soviet-Polish Eastern bloc quickly circulated a competing draft.¹⁷⁸ Although several similarities existed between the U.S. and Eastern bloc drafts—such as a mandate to end state-sponsored discrimination¹⁷⁹ and protection of affirmative action programs¹⁸⁰—the Eastern bloc's draft provided far more expansive protections against racial discrimination.¹⁸¹ The competing drafts reignited familiar debates about the U.S. government's ability and willingness to redress racism. Abram and Ferguson, seeking to produce a Convention that accorded with the U.S. Constitution, pushed the Sub-Commission to adopt a draft Convention

177. See generally Suggested Draft for U.N. Convention on the Elimination of All Forms of Racial Discrimination (Jan. 7, 1964) (on file with MARBL, Abram Papers, Box 94, Folder 3) [hereinafter Suggested Draft for CERD].

178. See Ivanov and Ketrzynski, Draft International Convention on the Elimination of All Forms of Racial Discrimination 1, U.N. Doc. E/CN.4/Sub.2/L.314 (Jan. 15, 1964).

179. Compare *id.* at 2 (prohibiting contracting parties from “acts or manifestations of racial discrimination” in “political, economic, social, cultural, or any other field or public life”), with Suggested Draft for CERD, *supra* note 177, at 2 (“No State Party shall make any discrimination whatsoever against persons, groups of persons or institutions on the grounds of race, color, or ethnic origin, or where applicable, on the basis of ‘nationality’ or national origin.”).

180. Compare Ivanov and Ketrzynski, *supra* note 178, at 3 (requiring that state parties to the Convention “provide the training of skilled manpower and expert personnel [to] groups . . . formerly deprived of the right to education” due to racial discrimination), with Suggested Draft for CERD, *supra* note 177, at 2–3 (“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 the object of ensuring the full enjoyment of such individuals of human rights and fundamental freedoms.”). For more on Soviet visions of affirmative action, see generally TERRY MARTIN, *THE AFFIRMATIVE ACTION EMPIRE: NATIONS AND NATIONALISM IN THE SOVIET UNION, 1923–1939* (2001) (describing the Soviet Union's longstanding system of managing a multiethnic population through ethnic conscious policies as “affirmative action”); Constantin Katsakioris, *The Soviet-South Encounter: Tensions in the Friendship with Afro-Asian Partners, 1945–1965*, in *COLD WAR CROSSINGS: INTERNATIONAL TRAVEL AND EXCHANGE ACROSS THE SOVIET BLOC, 1940s–1960s*, at 134, 145 (Patrick Babiracki & Kenyon Zimmer eds., 2014) (describing how, in 1960, Soviet Premier Nikita Khrushchev established a university in Moscow for training “Asian, African, and Latin American” students).

181. See Ivanov and Ketrzynski, *supra* note 178, at 2–3 (requiring state parties to the Convention “to prohibit and disband racist [and] fascist . . . organizations,” end racial discrimination in economic rights, and abolish housing discrimination including “reservations perpetuating and aggravating racial discrimination”).

that permitted state enforcement only against public actors.¹⁸² Ultimately, after debate with other countries' experts and through compromises with the U.K. expert, the U.S. experts succeeded in creating an interpretation of the Convention to counter the Eastern bloc's draft.¹⁸³

A. *The Americans' Draft of ICERD*

Abram and Ferguson collaborated with officials from the State Department, the Justice Department, and the U.S. Commission on Civil Rights to compose language for the U.S. draft of the Convention.¹⁸⁴ The interagency group's main function was to help the secretary of state develop the United States' position on all human rights issues facing international bodies.¹⁸⁵ At times, Abram and Ferguson faced considerable opposition in the State Department and Justice Department over the "issue of a UN Convention dealing with race," but the Interdepartmental Committee was able to help develop eight substantive articles in time for the Sub-Commission's January 1964 session.¹⁸⁶ Abram and Ferguson recognized that the General

182. Suggested Draft for CERD, *supra* note 177, at 2 ("No State Party shall make any discrimination whatsoever against persons, groups of persons[,], or institutions on the grounds of race, color, or ethnic origin, or where applicable, on the basis of 'nationality' or national origin."); see Guidance Paper, *supra* note 20, at 4 ("On the development of text . . . the approach should be along lines of the 'equal protection' concept in our 14th Amendment.").

183. See Comments by Dean Clyde Ferguson, Jr. (Morris Abram concurring) on Sub-Commission Draft Convention on the Elimination of All Forms of Racial Discrimination - Preamble and Substantive Articles 2-3 (Jan. 30, 1964) (on file with MARBL, Abram Papers, Folder 94, Box 1) (showing the U.S. experts' endorsement of the reading of the controversial Convention provision); see also Personal Report by Peter Calvocoressi (Feb. 4, 1964) (on file with National Archives, Kew, United Kingdom, Population and Discrimination: Sub-Commission on Discrimination, FO 371/178331) [hereinafter Calvocoressi Report] (showing the U.K. expert's endorsement of the reading of the controversial Convention provision).

184. See *International Protection of Human Rights: The Work of International Organizations and the Role of U.S. Foreign Policy: Hearings Before the Subcomm. on Int'l Orgs. and Movements of the Comm. on Foreign Affs.*, 93d Cong. 321 (1973) (statement of Rev. Theodore M. Hesburgh, President, University of Notre Dame, Former Chairman, U.S. Commission on Civil Rights) (explaining that he was part of this committee, "which was responsible for developing the United States' position on all human rights subjects coming before international bodies").

185. *Id.*

186. C. Clyde Ferguson, Jr., 70 AM. J. INT'L L. 610, 610 (1976) (reviewing NATHANIEL L. NATHANSON & EGON SCHWELB, *THE UNITED STATES AND THE UNITED NATIONS TREATY ON RACIAL DISCRIMINATION: A REPORT FOR THE PANEL ON INTERNATIONAL HUMAN RIGHTS LAW AND ITS IMPLEMENTATION* (1975)); see also Abram-Ferguson Letter, *supra* note 18 (requesting Ferguson's comments on his drafts); 1964 Nason-Abram Letter, *supra* note 18 (providing Abram with notes on the substantive changes made to the draft). Abram and Ferguson

Assembly expected the United States to use the Declaration as the basis for the Convention. So, the U.S. experts, in consultation with the Interdepartmental Committee, adapted the Declaration's language to accord with "the 'equal protection' concept in [the] 14th Amendment."¹⁸⁷

Article I of the U.S. draft Convention defined racial discrimination. It read, "For the purpose of this convention, the term racial discrimination includes any distinction, exclusion or preference made on the basis of race, color, or ethnic origin[, or] . . . national origin."¹⁸⁸ 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.¹⁸⁹ 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.¹⁹⁰

Article II of the U.S. draft reiterated Article I's prohibition against racial preferences but made one notable exception: affirmative action.¹⁹¹ Ferguson, in particular, had been an early proponent of affirmative action. In 1957, Ferguson delivered an address during a National Bar Association conference urging the federal government to expand the constitutional concept of nondiscrimination by providing Black Americans with racial preferences in hiring.¹⁹² In the early 1960s, as general counsel of the U.S. Commission on Civil Rights, Ferguson and Commission members supported Executive Orders 10925 and 11114, Kennedy administration initiatives aimed at diversifying federal

later added a ninth article addressing hate speech and hate organizations. U.N. ESCOR, Sub-Comm'n on Prevention of Discrimination and Prot. of Minorities, Mr. Abram: Suggested Draft for United Nations Convention on the Elimination of All Forms of Racial Discrimination, U.N. Doc. E/CN.4/Sub.2/L.308/Add.1 (Jan. 13, 1964) [hereinafter Mr. Abram: Suggested Draft].

187. Compare Guidance Paper, *supra* note 20, at 4 ("On the development of text, coverage should be limited to basic rights and the approach should be along lines of the 'equal protection' concept in our 14th Amendment."), with G.A. Res. 1906 (XVIII), at 37 (Nov. 20, 1963) (noting the importance of "adoption of an international convention on the elimination of all forms of racial discrimination").

188. Suggested Draft for CERD, *supra* note 177, at 2.

189. *Id.* at 2–5; see *infra* notes 191–204 and accompanying text (explaining the remainder of the U.S. draft).

190. Suggested Draft for CERD, *supra* note 177, at 2–5; see also *infra* Part IV (discussing the sit-in cases and the expanding constitutional notion of "state action").

191. Suggested Draft for CERD, *supra* note 177, at 2–3.

192. Ferguson, *Nature and Dimensions*, *supra* note 23, at 459.

employment and contracting.¹⁹³ And as dean of Howard Law School, Ferguson penned several articles praising the shifting emphasis in civil rights from simple nondiscrimination mandates to more positive and robust efforts like affirmative action.¹⁹⁴ To this end, Article II also authorized states to take steps to assure adequate protection and development of positive measures for racial groups that had endured past discrimination.¹⁹⁵

Article III of the draft was similarly bold, mandating that states “end without delay . . . governmental and other public policies of racial segregation and especially policies of apartheid.”¹⁹⁶ U.N. delegations, regardless of political alliances, often held apartheid out as the world’s monument to racial inequality, and Abram and Ferguson’s article reflected the human rights consensus around South African race relations.¹⁹⁷

Article IV emanated directly from the U.S. sit-in movement and the spirited congressional debates that eventually led to the enactment of the Civil Rights Act of 1964.¹⁹⁸ The provision required states to “take

193. See, e.g., CIVIL RIGHTS ‘63: 1963 REPORT OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS 89, 256 (1963); see also Memorandum from Mr. McKitterick to Mr. Cleveland, *supra* note 119 (noting Ferguson’s work as general counsel to the U.S. Commission on Civil Rights).

194. Clarence Clyde Ferguson, Jr., *Civil Rights Legislation 1964: A Study of Constitutional Resources*, 24 FED. BAR J. 102, 102, 104–05 (1964) [hereinafter Ferguson, Jr., *Civil Rights Legislation 1964*]; see also Clarence Clyde Ferguson, Jr., *The Federal Interest in Employment Discrimination: Herein the Constitutional Scope of Executive Power To Withhold Appropriated Funds*, 14 BUFF. L. REV. 1, 6–7 (1964) (using two case studies to argue that affirmative action was not “discrimination in reverse” and arguing that the federal government had the authority to withhold federal funds from those that used those funds to discriminate).

195. Suggested Draft for CERD, *supra* note 177, at 2–3.

196. *Id.* at 3 (emphasis omitted).

197. Shortly after its founding, the United Nations began passing a wide array of resolutions regarding racism in South Africa. For resolutions on the “race conflict in South Africa resulting from . . . apartheid,” see generally G.A. Res. 616 (VII) (Dec. 5, 1952) (emphasis omitted); G.A. Res. 1016 (XI) (Jan. 30, 1957); G.A. Res. 1248 (XIII) (Oct. 30, 1958); G.A. Res. 1375 (XIV) (Nov. 17, 1959); G.A. Res. 1598 (XV) (Apr. 13, 1961); G.A. Res. 1663 (XVI) (Nov. 28, 1961); G.A. Res. 1761 (XVII) (Nov. 6, 1962). For resolutions also condemning the mistreatment of peoples of Indian and Indo-Pakistan origin in South Africa, see generally G.A. Res. 44 (I) (Dec. 8, 1946); G.A. Res. 395 (V) (Dec. 2, 1950); G.A. Res. 615 (VII) (Dec. 5, 1952); G.A. Res. 1179 (XII) (Nov. 26, 1957); G.A. Res. 1302 (XIII) (Dec. 10, 1958); G.A. Res. 1460 (XIV) (Dec. 10, 1959); G.A. Res. 1597 (XV) (Apr. 13, 1961); G.A. Res. 1662 (XVI) (Nov. 28, 1961).

198. Ferguson, *CERD*, *supra* note 19, at 42–43; see also TOMIKO BROWN-NAGIN, COURAGE TO DISSENT: ATLANTA AND THE LONG HISTORY OF THE CIVIL RIGHTS MOVEMENT 133, 135 (2011) (describing how the sit-ins played a critical role in the passage of the 1964 Civil Rights Act).

effective measures, including the adoption of such legislation . . . to assure equal access to any place or facility intended for use by the general public.”¹⁹⁹

Article V reiterated that states must prevent discrimination “in the enjoyment of political and citizenship rights.”²⁰⁰

Articles VI and VII ensured equality in the administration of justice. Article VI guaranteed all persons “equal justice under the law” and the security of the person from bodily harm.²⁰¹ Article VII ordered states to provide “effective remed[ies] against . . . racial discrimination” and “competent” tribunals to recognize those rights.²⁰²

Article VIII required states to “take immediate steps through educational and other means . . . to promote understanding, tolerance, and friendship among all nations and all peoples.”²⁰³ This article reflected the longstanding position at the United Nations and in the United States that education was essential to healing the world’s racial divisions.²⁰⁴

The U.S. draft won international acclaim. The *Atlanta Daily World*, the largest Black daily newspaper in the South, called the U.S. proposal a “sweeping eight-point international treaty,” highlighted Abram’s hometown roots, and congratulated the “distinguished attorney” for spearheading the United Nations’ push to end racial discrimination.²⁰⁵ *The New York Times* characterized the U.S. draft as an innovative effort “to test sentiment at home and abroad on a treaty attempting to ban racial bias,” and emphasized its wide-ranging ideas on mechanisms to bar discrimination.²⁰⁶ In cities like Lagos, Nigeria; Santiago, Chile; and Addis Ababa, Ethiopia, as well as in Sub-Saharan Africa more generally, global media outlets covered the leading role

199. Suggested Draft for CERD, *supra* note 177, at 3.

200. *Id.* at 4.

201. *Id.*

202. *Id.*

203. *Id.* at 4–5.

204. *See id.* For a detailed treatment of how the United States and the United Nations conceptualized the role of education in advancing antiracist, human rights norms, see generally ANTHONY Q. HAZARD JR., POSTWAR ANTI-RACISM: THE UNITED STATES, UNESCO, AND “RACE,” 1945-1968 (2012).

205. *United Nations Rights Panel To Visit Atlanta*, ATLANTA DAILY WORLD, Jan. 19, 1964, at 1; see ANDREW WIESE, PLACES OF THEIR OWN: AFRICAN AMERICAN SUBURBANIZATION IN THE TWENTIETH CENTURY 174 (2009).

206. Kathleen Teltsch, *Pact To Ban Bias Proposed in U.N.: Draft Offered by American—National Policies Asked*, N.Y. TIMES, Jan. 14, 1964, at 7.

that the Sub-Commission's U.S. members played in the Convention debates²⁰⁷—all to the delight of State Department officials. Shortly after Mohammed Mudawi, the Sub-Commission's expert from 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.²⁰⁸ “If a general provision akin to . . . the fourteenth amendment of the United States Constitution were included in the [c]onstitution of a country,” Mudawi explained, “it would be difficult to amend or delete it.”²⁰⁹ One of Mr. Mudawi's colleagues soon reminded the group of the organ's protocol restraining references to state parties.²¹⁰

The U.S. drafters wanted to be on the right side of human rights history. Morris Abram characterized the Sub-Commission's work as one of the most important agenda items the secretary-general had ever tasked it with and deemed the treaty drafting as “literally epochal.”²¹¹ He was right. The Sub-Commission had never been charged with such an awesome responsibility. For some in the international community, the Sub-Commission merely studied global race relations, did little to protect minorities, and was more of a geopolitical battleground than a true human rights body.²¹² The Sub-Commission's sixteenth session, however, promised to produce an altogether different result. Drafting the Convention was the United Nation's “absolute priority” for the

207. For a sample of this international coverage, see, for example, *Discrimination*, W. AFR. PILOT (Nigeria), Jan. 15, 1964, at 1; *Comisión de la NU Observa Situación Racial en EE. UU.*, EL MERCURIO (Chile), Jan. 27, 1964, at 33; *UN Members Visit Atlanta, Georgia*, ETHIOPIAN HERALD, Jan. 24, 1964, at 4.

208. U.N. ESCOR, Sub-Comm'n on the Prevention of Discrimination and Prot. of Minorities, 16th Sess., 407th mtg. at 2, 11, U.N. Doc. E/CN.4/Sub.2/SR.407 (Jan. 14, 1964).

209. *Id.* at 11.

210. See Sub-Comm'n 408 mtg., *supra* note 56, at 5 (emphasizing that the Sub-Commission members were “essentially experts and not diplomats” and should develop a universalist approach to drafting).

211. Morris B. Abram, Statement at Sixteenth Session of U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities (Jan. 1964) (on file with MARBL, Abram Papers, Box 94, Folder 9) [hereinafter Abram Statement at U.N.] (providing the full text of Abram's statement); see also U.N. ESCOR, Sub-Comm'n on the Prevention of Discrimination and Prot. of Minorities, 16th Sess., 405th mtg. at 3–4, U.N. Doc. E/CN.4/Sub.2/SR.405 (Jan. 13, 1964) (providing the date and minutes from Abram's full statement).

212. See, e.g., Humphrey, *supra* note 5, at 872 (arguing that the United Nations had no “serious intention of doing anything about minorities”).

entire year,²¹³ and Georgia's native son was at the helm of this unprecedented effort. The U.S. lawyer 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."²¹⁴ The Southern statesman was convinced that he would forever change the world.²¹⁵

Clyde Ferguson, too, was caught up in the racial zeitgeist of the 1960s. He recognized that the drive to end colonialism and racial discrimination was sweeping the globe.²¹⁶ As such, he was part of a Black internationalist tradition that placed Black American activism in global terms.²¹⁷ Ferguson realized that the struggle in the United States was related to freedom movements in Africa and Asia. The international forces opposing white colonialism had converged to create the Convention.²¹⁸

B. *The Soviet's Counter*

Abram and Ferguson's push to make the Convention in the likeness of U.S. civil rights law and policy faced real obstacles from other competing state interests at the Convention debates. Although the U.S. experts had produced the Sub-Commission's first Convention draft, the Eastern bloc quickly countered. Perhaps more significantly, the Eastern bloc's draft seemed to overshadow the American proposal through powerful mandates to end racial discrimination in broad, substantive areas.²¹⁹ At stake was the very conception of human rights. For more than fifteen years, the Eastern and Western blocs had fought

213. See G.A. Res. 1906 (XVIII), at 38 (Nov. 20, 1963).

214. Abram Statement at U.N., *supra* note 211, at 4.

215. *Id.*

216. Ferguson, *United Nations*, *supra* note 141, at 61.

217. For more on this internationalist tradition, see generally, for example, HENRY J. RICHARDSON III, *THE ORIGINS OF AFRICAN-AMERICAN INTERESTS IN INTERNATIONAL LAW* (2008); KEVIN K. GAINES, *AMERICAN AFRICANS IN GHANA: BLACK EXPATRIATES AND THE CIVIL RIGHTS ERA* (2006); Hope Lewis, *Reflections on "Blackcrit Theory": Human Rights*, 45 VILL. L. REV. 1075 (2000); Gay J. McDougall, *Toward a Meaningful International Regime: The Domestic Relevance of International Efforts To Eliminate All Forms of Racial Discrimination*, 40 HOW. L.J. 571 (1997); Henry J. Richardson III, *African Americans and International Law: For Professor Goler Teal Butcher, with Appreciation*, 37 HOW. L.J. 217 (1994).

218. Ferguson, *United Nations*, *supra* note 141, at 61.

219. See Ivanov & Ketrzynski, *supra* note 178, at 1-3 (defining racial discrimination and obliging states to adopt measures prohibiting racial discrimination in various areas).

bitter drafting wars at the United Nations over this issue.²²⁰ The wrangling was predictable, falling into a familiar split of positive versus negative rights. The United States and many of its Western allies argued that civil and political rights were the only justiciable human rights.²²¹ The Western bloc feared that placing economic, social, and cultural rights on the same plane as civil and political rights might undermine individual freedoms.²²² The Soviet Union's totalitarian state was sufficient evidence. Moreover, many in the West argued that most states were actually unable to deliver "economic, social, and cultural rights."²²³ These rights were nonjusticiable and difficult to measure and implement, sowing the constitutional seeds for a sprawling welfare state.²²⁴

Conversely, the Soviet Union and its closely aligned countries decried the Western bloc for what they viewed as a laissez-faire approach to social justice. They maintained that economic, social, and cultural rights were at least as important as civil and political rights and that civil and political rights were illusory when citizens did not have economic, social, and cultural protections.²²⁵ What made this moment in the Convention debates so fascinating was that the Sub-Commission's Eastern bloc was arguing for the indivisibility of human rights in the race context. Nondiscrimination in civil rights was not enough, and neither was nondiscrimination in economic, social, and cultural rights. The U.N. General Assembly had tasked the Sub-Commission with drafting a treaty that eliminated all forms of racial

220. See Stephen P. Marks, *The Past and Future of the Separation of Human Rights into Categories*, 24 MD. J. INT'L L. 209, 212–13 (2009); ROGER NORMAND & SARAH ZAIDI, *HUMAN RIGHTS AT THE U.N.: THE POLITICAL HISTORY OF UNIVERSAL JUSTICE* 198–200 (2008).

221. See Marks, *supra* note 220, at 213, 215, 218, 240 ("Eleanor Roosevelt maintained that economic, social, and cultural rights could not be regarded as justiciable in the same way as civil and political rights . . ."); NORMAND & ZAIDI, *supra* note 220, at 200–01.

222. See Marks, *supra* note 220, at 240–42.

223. See *id.* at 234–35.

224. See *id.* at 228–29, 237; see also *Problems of Ratification and Implementation*, *supra* note 167, at 90 (discussing the "dichotomy" of government obligations versus "limitations imposed upon government").

225. See Philip Alston, *Economic and Social Rights*, in *HUMAN RIGHTS: AN AGENDA FOR THE NEXT CENTURY* 137, 147–51 (Louis Henkin & John Lawrence Hargrove eds., 1994); KITTY ARAMBULO, *STRENGTHENING THE SUPERVISION OF THE INTERNATIONAL COVENANT ON ECONOMIC, CULTURAL, AND SOCIAL RIGHTS: THEORETICAL AND PROCEDURAL ASPECTS* 17 (1999).

discrimination.²²⁶ This was an uncompromising fight; there could be no equivocation or division of rights.

The Sub-Commission's Soviet and Polish experts, Boris Ivanov and Wojciech Ketrzynski, circulated their version of the Convention to the body's other experts.²²⁷ The jointly authored text lacked the craftsmanship of the U.S. draft and deviated structurally from the Declaration, but the rich ideas in the text were not only morally defensible but also politically viable. Article I of the Soviet-Polish draft defined racial discrimination as "any differentiation, ban on access, exclusion, preference[,] or limitation," on minorities' abilities to enjoy "freedoms in political, economic, social, cultural, or any other field or public life."²²⁸ This provision reproduced the constellation of rights recognized in the 1936 U.S.S.R. Constitution and its offspring, the 1952 Constitution of Poland.²²⁹ Pursuant to Article 123 of the Stalin Constitution and Article 69 of the Polish Constitution, citizens had the right to "enjoy equal rights in all spheres of public, political, economic, social[,] and cultural life."²³⁰ Ketrzynski, who doubled as an official in the Polish Foreign Service, submitted the text on behalf of the Sub-Commission's Eastern bloc.²³¹

Article II of the Soviet-Polish draft enumerated the obligations of each state party to the Convention.²³² The proposed treaty's list of substantive rights was extensive. The Soviet-Polish draft, like its U.S.

226. See G.A. Res. 1906 (XVIII), at 38 (Nov. 20, 1963).

227. See generally Ivanov and Ketrzynski, *supra* note 178 (providing their version's text as circulated).

228. *Id.* at 2.

229. KONSTITUTSIJA SSSR (1936) [KONST. SSSR] [USSR CONSTITUTION] art. 123; KONSTITUCJA RZECZYPOSPOLITEJ POLSKIEJ [CONSTITUTION] 1952, art. 69 (Pol.).

230. KONSTITUCJA RZECZYPOSPOLITEJ POLSKIEJ [CONSTITUTION] 1952, art. 69 (Pol.); *cf.* KONSTITUTSIJA SSSR (1936) [KONST. SSSR] [USSR CONSTITUTION] art. 123 (mandating nondiscrimination "in all spheres of economic, [public], cultural, social[,] and political life"); see also Rep. of the Sixteenth Session of the Sub-Comm'n on Prevention of Discrimination and Prot. of Minorities to the Comm'n on Hum. Rts., at 21, U.N. Doc. E/CN.4/Sub.2/241 (Feb. 11, 1964) [hereinafter Rep. of Sixteenth Session] (discussing the definition of "racial discrimination" as proposed by Ivanov and Ketrzynski). The word "public" is used in some translations of both the Polish and Soviet Constitutions. For example, see this version of the Polish Constitution: KONSTITUCJA RZECZYPOSPOLITEJ POLSKIEJ [CONSTITUTION] 1952, art. 69 (Pol.), <http://libr.sejm.gov.pl/tek01/txt/kpol/e1952a-r7.html> [<https://perma.cc/6A9E-BGQ3>].

231. See Letter from Morris B. Abram to George Goodwin (Dec. 23, 1963) (on file with MARBL, Abram Papers, Box 94, Folder 9) [hereinafter Abram-Goodwin Letter]; U.N. ESCOR, Sub-Comm'n on Prevention of Discrimination and Prot. of Minorities, 16th Sess., 410th mtg. at 7, U.N. Doc. E/CN.4/Sub.2/SR.410 (Feb. 7, 1964).

232. Ivanov and Ketrzynski, *supra* note 178, at 2–3.

counterpart, mandated that states “ensure equality for all before the law,” eliminate racial discrimination in protecting political and civil rights, provide effective remedies regardless of race, and guarantee equal access to recreational and public facilities—“including restaurants, hotels, cinemas, [and] parks.”²³³ The Soviet-Polish draft also included a provision that mirrored the U.S. members’ call for affirmative action.²³⁴ Under the proviso, which drew inspiration from Soviet experience managing a multiethnic state and educating Third World college students, state parties to the Convention were “to provide the training of skilled manpower and expert personnel from among the groups of population formerly deprived of the right to education.”²³⁵ Those similarities between the competing drafts were irrefutable, but they also ended here.

The Soviet-Polish draft dwarfed the United States’ proposal. Article II of the Eastern bloc’s draft additionally called on states to end racial discrimination in a wide range of economic, social, and cultural rights—including “the right to form and join trade unions,” “to employment and equal pay,” to education, to housing, and to “public health, medical care[,] and social security.”²³⁶ If the Eastern bloc’s long catalog of prohibitions was not enough, Article II of their draft also declared that state parties to the Convention must prohibit all “acts or manifestations of racial discrimination of any kind.”²³⁷ There was no question about the Eastern bloc’s commitment to racial justice, at least on paper. Its proposed Convention made the United States look weak before the human rights community.

The Soviet and Polish experts’ views prohibiting all “acts or manifestations of racial discrimination of any kind” were explosive.²³⁸

233. *Id.*

234. *Id.* at 3; Suggested Draft for CERD, *supra* note 177, at 2–3.

235. Ivanov and Ketrzynski, *supra* note 178, at 3; MARTIN, *supra* note 180, at 1 (asserting that the Soviet Union “was the first of the old European multiethnic states to confront the rising tide of nationalism and respond by systematically promoting the national consciousness of its ethnic minorities and establishing for them many of the characteristic institutional forms of the nation-state”); Katsakioris, *supra* note 180, at 145 (noting that in 1960 Khrushchev opened the People’s Friendship University shortly thereafter renamed Patrice Lumumba University dedicated to educating “students from Asian, African, and Latin American countries”).

236. Ivanov and Ketrzynski, *supra* note 178, at 3.

237. *Id.* at 2.

238. *Id.* For one explosive moment, see U.N. ESCOR, Sub-Comm’n on the Prevention of Discrimination and Prot. of Minorities, 16th Sess., 409th mtg. at 6–8, U.N. Doc. E/CN.4/Sub.2/SR.409 (Jan. 15, 1964). The Eastern experts asserted that a Convention truly

Early in the Convention debates, the Sub-Commission's experts had agreed to delay the discussions of one manifestation of racial discrimination—group defamation, the most controversial issue during the Declaration and Convention debates.²³⁹ Even with that difficulty temporarily sidelined, Article II of the Soviet-Polish proposal went well beyond Abram and Ferguson's proposed treaty, which was developed in line with the Fourteenth Amendment's equal protection concept.²⁴⁰ Under the state action doctrine, the equal protection clause only applied to government entities.²⁴¹ Yet Abram and Ferguson privately confessed that there remained unambiguous areas of law where state actors still denied U.S. citizens equal protection of the law, such as state miscegenation statutes.²⁴²

worthy of its name should prohibit any racist manifestation and that racist manifestations often became much larger human rights problems. *Id.* at 7–8. However, the U.S. draft did not seek to end all racist manifestations, particularly in the private sphere. *Id.* at 7. The Eastern experts used this ostensible contradiction as a way to attack the United States for being weak in the fight against racism. Ketrzynski blasted Abram for producing an “inadequate” draft that protected racist advocacy. *Id.* Ketrzynski argued, “Hitler had advocated racist doctrines long before he had passed to action” and “the *apartheid* faction in South Africa . . . engaged in racist propaganda for many years and had conducted political campaigns for that policy.” *Id.* at 7–8. Ketrzynski maintained that had these states taken action earlier against racist manifestations, neither Hitler nor the *apartheid* government would have been able to come to power. *See id.* For Ketrzynski, if the Sub-Commission adopted the United States' approach to regulating racism, the Sub-Commission would create a legal framework that would, ironically, allow the worst types of racism to flourish. *See id.*

239. *See* U.N. ESCOR, Sub-Comm'n on the Prevention of Discrimination & Prot. of Minorities, 16th Sess., 412th mtg. at 6, U.N. Doc. E/CN.4/Sub.2/SR.412 (Jan. 15, 1964) [hereinafter Sub-Comm'n 412 mtg.]; *see also* Mr. Abram: Suggested Draft, *supra* note 186, at 1 (“No State Party shall permit its officials or any agency or organization supported in whole or in part by government funds to promote and incite racial hatred, nor shall it grant a franchise or license . . . for the purpose of promoting and inciting to racial hatred.”).

240. *See* Guidance Paper, *supra* note 20, at 4; Ivanov and Ketrzynski, *supra* note 178, at 2.

241. *E.g.*, The Civil Rights Cases, 109 U.S. 3, 11 (1883).

242. Comments by Dean Clyde Ferguson, Jr. (Morris Abram concurring) on Sub-Comm'n Draft Convention on the Elimination of All Forms of Racial Discrimination - Preamble and Substantive Articles 4 (Jan. 30, 1964) (on file with MARBL, Abram Papers, Folder 94, Box 9). In Ferguson's memorandum to the State Department, he wrote, “While the Supreme Court has not yet passed on the validity of miscegenation statutes, it is clear that such State laws are unconstitutional.” *Id.* He then cited for this proposition a prediction he made regarding anti-miscegenation laws in *Desegregation and the Law*, the book he had co-authored. *Id.*; *see* BLAUSTEIN & FERGUSON, *supra* note 93, at 22–23 (asserting that the Supreme Court would eventually decide the constitutionality of anti-miscegenation laws and that *Brown* “offere[d] insight into the trend of decision which will prevail in the future”). The U.S. Supreme Court invalidated state bans on interracial marriage three years after Ferguson submitted this memorandum to the State Department. *See* *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

More significantly, the U.S. draft's equal protection framework left private discrimination virtually unscathed.²⁴³ Private discrimination was rampant in essential areas of U.S. life, such as healthcare, housing, and employment, a fact of which the U.S. experts were keenly aware.²⁴⁴ In fact, Abram and Ferguson had become racial statesmen due to each man's willingness to confront well-entrenched forms of public and private discrimination.²⁴⁵ Furthermore, the U.S. experts acknowledged that given the resounding demands for justice heard throughout the world, many hoped the Convention would cover both public and private discrimination.²⁴⁶ Abram and Ferguson, however, also understood the nuanced context of the draft proposals and the Cold War dynamics operating in the background. They were at the United Nations to promote U.S. foreign policy interests as part and parcel to their efforts, not to expose the limitations of U.S. constitutional law or gift the Eastern bloc with new sources of credible fodder.

A serious tension emerged. On one hand, while the U.S. draft was imperfect, it could nonetheless enhance the human rights protections offered to millions throughout the world. If adopted, the treaty would guarantee other countries' citizens no less than what the United States guaranteed its own citizens. Adopting the U.S. draft would also place the United States at the forefront of racial progress and help limit the Soviet Union's advances with hollow calls for equality.

At the same time, centering the Convention on the Equal Protection Clause seemed woefully inadequate and even inappropriate considering the express mission of the race treaty. The state action

243. Ferguson reiterated this point in an often-overlooked reflection on the Convention's legislative history. He wrote, "[T]he convention is comprehensive as it applies to discrimination in public life," as the construction of the term "public life" reflects "the intent of the drafters of the convention to comprehend something like our conception of state action, and to reserve some area of privacy . . ." Ferguson, *CERD*, *supra* note 19, at 43.

244. The Civil Rights Cases, 109 U.S. 3, 11 (1883); see CIVIL RIGHTS '63, *supra* note 190 *passim*.

245. For examples of Abram's leadership in the attack on public and private discrimination, see ABRAM, *supra* note 12, at 153–54, which discusses his work to end racial discrimination in public accommodations and criminal justice and how his leadership in civil rights led to President Lyndon B. Johnson naming him co-chair of the White House Conference on Civil Rights. For an example of Ferguson's leadership in the attack on public and private discrimination, see generally CIVIL RIGHTS '63, *supra* note 193. In the report, the Commission criticizes public and private discrimination in areas including education, employment, housing, the administration of justice, and health, and the Commission then offers recommendations to end public and private discrimination in each area. *Id. passim*.

246. See, e.g., Ferguson, *United Nations*, *supra* note 141, at 69–70.

requirement of the Equal Protection Clause had often frustrated racial progress in the United States, as it recast private discrimination as constitutionally permissible, politically acceptable, and morally defensible behavior. Admittedly, the Soviet Union's draft, like the Soviet Constitution, made legal promises the country did not actually deliver to its own citizens. But the U.S. draft threatened to export a legal problem that had long stood in the way of achieving true racial progress in the United States.

The Eastern bloc seized on the state action limitation, declaring that the concept was an unacceptable regression from the protections in the original Declaration on the Elimination of All Forms of Racial Discrimination.²⁴⁷ The Soviet expert, Boris Ivanov, gave pointed commentary highlighting the tensions between the United States' rhetoric and the limited protections offered by the U.S. draft. Under the Declaration, "No State, institution, group[,] or individual [could] make any discrimination whatsoever in matters of human rights and fundamental freedoms in the treatment of persons, groups of persons[,] or institutions on the ground of race, colour[,] or ethnic origin."²⁴⁸ The U.S. draft, however, would only prohibit discrimination by the State and thus would leave private racism unchecked.²⁴⁹ The equal protection framework restricted the reach of the U.S. draft, and the Soviets knew it.

The Eastern bloc's draft did not contain this limitation; instead, it would prohibit any "acts or manifestations of racial discrimination of any kind" within a State's territory.²⁵⁰ Ivanov continued to insist that merely limiting state discrimination would be inadequate.²⁵¹ There were too many "passive" states that some Sub-Commission members were attempting to placate.²⁵² The General Assembly had adopted the

247. Sub-Comm'n 412 mtg., *supra* note 239, at 8.

248. G.A. Res. 1904 (XVIII), *supra* note 53, at 36.

249. See Sub-Comm'n 412 mtg., *supra* note 239, at 8. Ivanov contended that Abram's draft was "unacceptable" and "represented a backward step in relation to the Declaration" because the draft "would leave the door open to discrimination and racism by giving the State the role of a mere observer." *Id.*

250. Ivanov and Ketrzynski, *supra* note 178, at 2.

251. Sub-Comm'n 412 mtg., *supra* note 239, at 8.

252. For members of the Eastern bloc, nations like the United States were too "passive" in their approaches to ending racial discrimination. See *id.* Wojciech Ketrzynski also criticized Peter Calvocoressi, the U.K. expert on the Sub-Commission, for failing to support a broad mandate to end "manifestations of racial discrimination of any kind." *Id.* at 2, 9. Furthermore, Calvocoressi looked "passive" in the fight against racism after he submitted a draft Convention which targeted

Declaration, Ivanov argued, that “expressly said that racism must be ended.”²⁵³ He believed that the Eastern bloc’s bold draft was thus a “logical sequel to [the] Declaration,” and so his conclusion was simple: replace “Mr. Abram’s draft of article II” with “article II as submitted by Mr. Ketrzynski and himself.”²⁵⁴

The Soviet’s impassioned remarks were the types of affronts that Abram had come to expect. Ivanov’s tone was not per se out of line, and his penetrating analysis of the primary text before the Sub-Commission was a completely valid exercise of his duties as an expert. What exasperated Abram was Ivanov’s empty self-righteousness, or what Abram perceived as such. Abram found that the Russian expert taunted him about glaring inequities in the United States.²⁵⁵ This frustrated Abram because he knew that U.S. society “could stand inspection, [while] Soviet society could not.”²⁵⁶ The Soviets’ human rights record was, without question, abysmal,²⁵⁷ and Abram spent much of his time on the Sub-Commission proving the Soviets’ “pious denials” of institutionalized discrimination in the U.S.S.R. wrong—while attempting to honor U.N. protocol by addressing general and not country-specific human rights violations.²⁵⁸ Nonetheless, in 1964, Abram and Ivanov began a year-long battle over the Soviet commitment to ending all forms of discrimination after the Ukrainian Academy of Science published *Judaism Without Embellishment*.²⁵⁹ The book “resembled a reprint of Julius Streicher’s *Der Stürmer*,” a Nazi newspaper of the early and mid-twentieth century with violent anti-

state-sponsored discrimination and not private discrimination. See U.N. ESCOR, Sub-Comm’n on Prevention of Discrimination and Prot. of Minorities, Mr. Calvo-coressi: Draft Convention on the Elimination of All Forms of Racial Discrimination at 2–3, U.N. Doc. E/CN.4/Sub.2/L.309 (Jan. 13, 1964).

253. Sub-Comm’n 412 mtg., *supra* note 239, at 8.

254. *Id.*

255. ABRAM, *supra* note 12, at 153.

256. *Id.* at 152–53.

257. See generally, e.g., Decter, *supra* note 175, at 420 (“[The Soviet nationalities policy was] based on the ideological acceptance of the concept of national self-determination and on the legal recognition of the right of all nationalities within Soviet borders to cultural freedom. Actual Soviet policy toward the Jews clearly violate[d] these principles.”).

258. See ABRAM, *supra* note 12, at 151–53 (discussing Abram’s struggle against anti-Semitism in the U.S.S.R.).

259. See *id.* at 151–52 (writing that he “had gotten hold of a book entitled *Judaism Without Embellishment*” and was “soon directly embroiled in a struggle against institutionalized anti-Semitism in the USSR”).

Semitic imagery.²⁶⁰ For Abram and other human rights watchers, the state-sponsored press' willingness to print the book and to deny that "the crudest imaginable caricatures of Jews polluted [the book's] pages" epitomized the Soviet Union's hollow calls for equality.²⁶¹ Yet, given the Sub-Commission's rules, many of these topics never bubbled to the surface of the Convention debates. The Soviets offered straight-faced denials about human rights abuses, and Ivanov feigned sincerity about ensuring total equality, while also criticizing the U.S. human rights record.²⁶²

C. *The Full Sub-Commission Considers the Drafts*

The session reached a feverish pitch between the two global superpowers. Other countries attempted to intervene in the clash, though each joined for their own political motivations as well. Arcot Krishnaswami, the Sub-Commission's expert from India, attempted to calm the situation by constructing a compromise text.²⁶³ Krishnaswami had spent much of his life watching human rights battles between global superpowers, and his father was one of the "architects of the U.N. Charter."²⁶⁴ Krishnaswami proposed that the Soviet and U.S. drafts be combined, reconciling the two points of view.²⁶⁵ But the U.S. delegation saw this suggestion as far from a compromise; the amended text would still require states to prohibit racial discrimination in private life.²⁶⁶

The U.K. delegation, too, found the compromise unacceptable. Peter Calvocoressi, the Sub-Commission's expert from the United Kingdom, simply "did not think that the two viewpoints were

260. *Id.*; RANDALL L. BYTWERK, JULIUS STREICHER: NAZI EDITOR OF THE NOTORIOUS ANTI-SEMITIC NEWSPAPER DER STÜRMER 171 (Cooper Square Press 2001) (1983).

261. ABRAM, *supra* note 12, at 151–52. One 1935 issue, for instance, featured replies from readers in Argentina, Australia, Brazil, Great Britain, Greece, Paraguay, and the United States. BYTWERK, *supra* note 260, at 172. The controversy over *Judaism Without Embellishment* became such an international embarrassment for the Soviets "that the Communist Party Ideological Commission took the very rare initiative of condemning the book as a 'serious mistake.'" WILLIAM KOREY, NGOS AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: "A CURIOUS GRAPEVINE" 67 (Palgrave 2001) (1998). Khrushchev eventually removed the anti-Semitic text from bookstands. *Id.*

262. ABRAM, *supra* note 12, at 150–53.

263. Sub-Comm'n 412 mtg., *supra* note 239, at 2, 8.

264. Abram-Goodwin Letter, *supra* note 231, at 2.

265. Sub-Comm'n 412 mtg., *supra* note 239, at 8.

266. *See id.* at 13.

reconcilable.”²⁶⁷ Calvocoressi feared that State prohibition of “all acts and manifestations of racial discrimination” could also “endanger freedom of thought, opinion[,] and expression.”²⁶⁸ The British barrister’s retreat to a defense of free speech was predictable. At first blush, Calvocoressi’s comments seemed to be a principled move to safeguard rights recognized under Articles 19 and 20 of the Universal Declaration of Human Rights.²⁶⁹ Calvocoressi’s free speech defenses, however, were a mere pretext. The members of the Sub-Commission had already agreed to delay the debates over regulation of hate speech and organizations.²⁷⁰ It was eminently possible, for example, to ban all forms of racial discrimination with a hate-speech exception.

The real issue for the U.K. delegation was that Article II of the Soviet-Polish draft posed serious legislative problems for the United Kingdom. There was no hiding that racism was endemic to British rule. In parts of the South Atlantic, Indian, and Pacific Oceans, the crumbling empire still clutched tightly to some remaining colonial territories and abdicated legal responsibility for settlers crushing popular uprisings in indirectly ruled lands.²⁷¹ In the North Atlantic, postwar immigrants to Britain found employment, education, and housing discrimination in abundance.²⁷² London’s rapidly growing Black communities were victims not only of racial riots but also widespread police misconduct.²⁷³ Money often could not even buy immigrants better accommodations. Immigrants simply confronted crude signs with clear messages: “‘NO BLACKS[,]’ . . . ‘NO DOGS.’”²⁷⁴ And in 1963, as Dr. King crusaded in the streets of Birmingham, Alabama, a multiracial coalition of African, Asian, and Caribbean

267. *Id.* at 2, 8.

268. *Id.* at 8–9.

269. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, at 74–75 (Dec. 10, 1948).

270. See Sub-Comm’n 412 mtg., *supra* note 239, at 6; see also Mr. Abram: Suggested Draft, *supra* note 186, at 1 (“No State Party shall permit its officials or any agency or organization supported in whole or in part by government funds to promote and incite racial hatred, nor shall it grant a franchise or license . . . for the purpose of promoting and inciting to racial hatred.”).

271. See generally JAN C. JANSEN & JÜRGEN OSTERHAMMEL, *DECOLONIZATION: A SHORT HISTORY* (Jeremiah Riemer trans., Princeton Univ. Press 2017) (2013) (describing colonialism’s demise).

272. See CAROLE BOYCE DAVIES, *LEFT OF KARL MARX: THE POLITICAL LIFE OF BLACK COMMUNIST CLAUDIA JONES* 82, 86–88 (2008).

273. See *id.* at 88, 92–93; KENNETTA HAMMOND PERRY, *LONDON IS THE PLACE FOR ME: BLACK BRITONS, CITIZENSHIP, AND THE POLITICS OF RACE* 7 (2015).

274. PEARSON NURSE, *MY JOURNEY THROUGH RACISM: NO IRISH, NO BLACKS, NO DOGS: BEING BRIGHT BUT NOT CLEVER* 26 (2011).

immigrants, who had followed King's meteoric rise to global prominence, launched their own protests in Bristol, England.²⁷⁵ The Bristol Bus Boycott, styled after the Montgomery Bus Boycott, attracted worldwide sympathies to the dismay of British officials.²⁷⁶

In the British Foreign Office's private discussions of the Convention, officials routinely confessed that the empire would be unable to immediately cease all manifestations of racial discrimination.²⁷⁷ It seemed impractical, foolhardy, and, in many ways, a complete disregard to the British way of life. The private conversations disclosed that, while the British officials believed that their government could encourage ending racial discrimination in the private sphere, eliminating private, entrenched prejudices would be difficult.²⁷⁸ The British government's approach to racial justice was equal parts defeatism, unwillingness, and bald racism.²⁷⁹ The British

275. MADGE DRESSER, *BLACK AND WHITE ON THE BUSES: THE 1963 COLOUR BAR DISPUTE IN BRISTOL 15–17*, 27 (1986) (discussing the connections between the King-led protests and the Bristol protests). For early news coverage of the U.K. boycott, see *Bus Boycott by West Indians: Company's Refusal To Employ Man*, *TIMES* (London), May 3, 1963, at 11. Perhaps, equally interesting, the Bristol Bus Boycott officially ended on August 28, 1963, the same day as the March on Washington. *Bus Crew Colour Bar Ends*, *TIMES* (London), Aug. 29, 1963, at 6; *March on Washington for Jobs and Freedom*, STANFORD: MARTIN LUTHER KING JR. RSCH. & EDUC. INST., <https://kinginstitute.stanford.edu/encyclopedia/march-washington-jobs-and-freedom> [<https://perma.cc/D8Z5-6LHT>].

276. Cf. *Bus Boycott by West Indians: Company's Refusal To Employ Man*, *supra* note 275, at 11 (noting that officials “of Trinidad and Tobago were in the city inquiring into the dispute”).

277. See, e.g., Memorandum from C.A. Axworthy, Colonial Off., to M.T. Pill, Esq., Foreign Off. 1–4 (June 23, 1964) (on file with Population and Discrimination: Sub-Comm'n on Discrimination, National Archives, Kew, United Kingdom, FO 371/178331) (discussing a series of conversations on racial problems throughout the empire, including “‘European only’ clubs and hotels,” racially separate voting rolls, European over-representation in overseas legislatures, employment discrimination, potential housing discrimination, and segregated education); Memorandum from C.A. Axworthy, Colonial Off., to M.T. Pill, Esq., Foreign Off. 1 (July 2, 1964) (on file with Population and Discrimination: Sub-Comm'n on Discrimination, National Archives, Kew, United Kingdom, FO 371/178331) (conceding that Fiji “presents an insuperable [barrier] to ratification of the Convention” and emphasizing that “it is not possible to foresee the time when racial attitudes in the Colony will have changed sufficiently to permit the ending of discriminatory practices”).

278. See, e.g., Memorandum from Ministry of Labour to M. Pill, Esq., United Nations Dep't, Foreign Off. 2 (Feb. 10, 1964) (on file with Population and Discrimination: Sub-Comm'n on Discrimination, National Archives, Kew, United Kingdom, FO 371/178331) [hereinafter *Labour-Pill Letter*] (describing a series of conversations on difficulties of ending discrimination in private employment, including instances where there was “sheer prejudice”).

279. See, e.g., Memorandum from Home Office to M. Pill Esq. Foreign Office (June 22, 1964) (on file with Population and Discrimination: Sub-Comm'n on Discrimination, National Archives, Kew, United Kingdom, FO 371/178331). In the memo, British officials called the Convention draft

Office, nonetheless, urged Calvocoressi “to display a positive attitude towards the drafting of [the] convention” because it would “stand us in good stead if we are compelled later in the year to express serious reservations” on the Convention.²⁸⁰ The British Office aimed to prevent communists and extreme anticolonialists’ efforts to draft a convention which could “obscure the distinction between racial discrimination and colonialism” and “damage British interests vis-à-vis our dependent territories.”²⁸¹ Publicly, Calvocoressi served Her Majesty’s Government well;²⁸² his tall, emotionless face betrayed no confidence. He could be sure that revealing Britain’s insecurities and willingness to harbor racism would not endear the body of experts to his government’s positions.

Beyond the United Kingdom, the Sub-Commission’s expert from the Philippines, Judge José Inglés, also entered the debate, arguing that the broader Soviet draft was preferable to the United States’ draft.²⁸³ Inglés was a longtime Sub-Commission expert who had served as the body’s chairman, vice chairman, and special rapporteur.²⁸⁴ He had demonstrated such commitment to ending discrimination that, at times, he was willing to defy the Sub-Commission’s protocol, expose

“unacceptable” because “legislation would be required to implement [the] provisions” of the draft. *Id.* The Home Office stressed that the British “Government remain[s] of the view that legislation would be undesirable and . . . it would not be practicable to draft legislation to prevent racial discrimination which would be effective and enforceable.” *Id.*

280. Steering Comm. on Int’l Orgs., Sub-Comm’n on Prevention of Discrimination & Prot. of Minorities (Jan. 11, 1964), Population and Discrimination: Sub-Comm’n on Discrimination, National Archives, Kew, United Kingdom, FO 371/178331 (quoting “The United Kingdom Objective”).

281. *Id.* (emphasis omitted).

282. See generally Peter Calvocoressi & Roger Adelson, *Interview with Peter Calvocoressi*, 55 HISTORIAN 235 (1993) (describing his career in international relations). Calvocoressi was a former British intelligence officer who broke foreign codes in Bletchley Park, *id.* at 242, and given the sensitivity of the British government’s memoranda, he was certain not to reveal them to the full Sub-Commission. Throughout the Convention’s negotiations, the British underscored the need to conceal their government’s inability to end private discrimination. See, e.g., Labour-Pill Letter, *supra* note 278, at 2 (privately admitting Britain’s weak approach to ending “sheer prejudice” in private employment and even reminding the Foreign Office that the government’s “approach to the problem of discrimination is not one which could be published or should be discussed before the Human Rights Commission,” the Sub-Commission’s parent body).

283. See Sub-Comm’n 412 mtg., *supra* note 239, at 2, 9 (preferring a draft that “would place the State under the obligation of refraining from all acts of discrimination itself and forbidding such acts by others”); Abram-Goodwin Letter, *supra* note 231.

284. Brief Biographies of Sub-Commission Members (on file with National Archives, College Park, Md., Central Foreign Policy Files, Record Group 59, Box 550, Folder 341.707/5-1860) (listing Inglés’ professional accomplishments).

country-specific bigotry, and shame human rights abusers on the international stage, the United States included.²⁸⁵ Inglés reminded the Sub-Commission that it already had a drafting guide in the Declaration, and that the Declaration, like the Soviet draft, targeted the actions of “States, institutions, groups[,] and individuals.”²⁸⁶

The Sub-Commission’s chairman, Hernán Santa Cruz, agreed with the Judge’s observations.²⁸⁷ The chairman counseled the Sub-Commission’s members to remember the fundamental ideas of the Declaration in drafting and “prepar[ing] a truly effective instrument, capable of achieving the purposes set out in the Declaration.”²⁸⁸ To that end, Santa Cruz emphasized that the U.S. draft was inadequate in preventing private discrimination.²⁸⁹ He also, however, seemed to recognize Abram’s dilemma as the U.S. expert. Santa Cruz maintained that although Abram was not formally a U.S. government representative, the legal questions before the Sub-Commission were “extremely complicated and could [leave] certain States Parties to the Convention with many constitutional problems and problems of domestic legislation.”²⁹⁰ Nonetheless, the chairman felt that those problems should not be Abram’s concerns or the concerns of any member of the Sub-Commission, since the Sub-Commission was a group of independent experts tasked with “prohibit[ing] all acts of discrimination.”²⁹¹

Abram’s allies rose to his defense despite Santa Cruz’s admonishment. Voitto Saario, the Sub-Commission’s expert from Finland, objected to the mounting criticisms of the U.S. draft.²⁹² Saario claimed that the U.S. draft mirrored the Declaration because both dealt with a state obligation not to discriminate.²⁹³ Likewise, Francesco

285. For more on Inglés’ willingness to take public notice of facts outside of official government accounts, see generally José D. Inglés, *Study of Discrimination in Respect of the Right of Everyone To Leave Any Country, Including His Own, and To Return to His Country*, U.N. Doc. E/CN.4/Sub.2/229/Rev.1 (1963). Throughout the report, Inglés examined general and country-specific accounts of discrimination, and he even publicized an account of how the United States violated the human rights of a prominent civil rights activist and journalist. *See id.* at 30.

286. Sub-Comm’n 412 mtg., *supra* note 239, at 9.

287. *Id.* at 2, 10.

288. *Id.* at 10.

289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.* at 2, 10.

293. *See id.* at 10.

Capotorti, the Sub-Commission's special rapporteur and expert from Italy, "recalled for the benefit of Mr. Ingl[é]s" that a convention was not legally equivalent to a declaration under international law.²⁹⁴ A convention was legally binding and thus required a more precise formulation of obligations than a declaration.²⁹⁵ Capotorti's patience was growing thin due to the extended and, at times, unfocused series of arguments in the plenary session.²⁹⁶ He wanted the Sub-Commission to be decisive on the issue of state action against private discrimination.²⁹⁷ Thus, Capotorti, a well-regarded professor of international law from Naples, mapped two routes for the Sub-Commission's future discussions. On one hand, the Sub-Commission could adopt "an instrument which could be accepted by the greatest number of States, and hence the necessity to adopt as flexible a formulation as possible."²⁹⁸ On the other hand, real progress would require "a more rigid and precise formulation."²⁹⁹ Capotorti proposed that the rigid formulation should be applied to forbid state discrimination, while the flexible formulation could be employed for private discrimination.³⁰⁰

Ivanov held the line, however, insisting that a flexible formulation—Abram's formulation—would not effectively prohibit racial discrimination. Ivanov insisted that the Soviet-Polish draft would remove the state from "the role of mere observer," compelling it "to promise that it would adopt the necessary measures to deal with racial discrimination."³⁰¹ But Abram countered this point.³⁰² Despite having remained relatively quiet during the debates, attempting to not appear defensive or apologetic for the U.S. draft, he believed that the federal government was taking great strides to end racial discrimination—

294. *Id.* at 11.

295. *See* Keane, *supra* note 49, at 368, 374–77.

296. *See* Sub-Comm'n 412 mtg., *supra* note 239, at 11 (noting that Capotorti asserted "that the time had come for the Sub-Commission to define its stand" and be specific on measures around the state action issue).

297. *See id.* (noting that the Sub-Commission must focus on "the question of the measures to be taken by the State against individuals who practi[c]ed discrimination").

298. *Id.* at 12.

299. *Id.*

300. *Id.*

301. *Id.* at 13.

302. *Id.*

despite the limitations caused by state action doctrine.³⁰³ Furthermore, he found many of the criticisms of his Article II draft “were unwarranted if the document as a whole was taken into account.”³⁰⁴ Abram was adamant that states should not intervene in the private lives of individuals. He was firmly convinced that both the norms, as set forth in the Declaration, and education should work to end private discrimination.³⁰⁵

The Sub-Commission’s debate had reached a stalemate. Francisco Cuevas Cancino, the expert from Mexico, was aggravated by the direction of the drafting session.³⁰⁶ The Sub-Commission had “take[n] Mr. Abram’s text as a basis for its work,” Cuevas Cancino sighed, but now the Sub-Commission was using other members’ drafts as the basis for the group’s work.³⁰⁷ The day was already late,³⁰⁸ and the Sub-Commission had found a way to become preoccupied with a mere fraction of its agenda.

Moreover, Ivanov and Ketrzynski had commandeered the debates. Abram and Ferguson seemed stuck. The Soviet and Polish experts had executed their drafting coup by presenting the Eastern bloc’s proposal after the Sub-Commission’s session was well underway.³⁰⁹ It gave the U.S. members no time to study the Soviet-Polish draft or prepare well-considered rebuttals. The Eastern bloc, in turn, had kept Soviet anti-Semitism out of the spotlight while now taking the moral and legal high ground in the race debate.³¹⁰

D. Peering Behind the Convention’s Travaux Préparatoires

The impasse over Article II and resulting delay in the drafting progress had been one of the State Department’s main concerns going into the 1964 session.³¹¹ The protracted debates over the Convention were reducing the time allotted to drafting the Declaration on

303. See ABRAM, *supra* note 12, at 152–53 (describing Abram’s broad approach to Soviet criticisms of shortcomings in U.S. democracy).

304. Sub-Comm’n 412 mtg., *supra* note 239, at 13.

305. *Id.*

306. *Id.* at 2, 13–14.

307. *Id.* at 13–14.

308. *Id.* at 14.

309. See *supra* notes 177–81 and accompanying text.

310. Guidance Paper, *supra* note 20, at 3 (discussing the Soviet’s strategy to postpone and prevent discussion on religious discrimination).

311. *Id.*

Religious Intolerance. The Bureau of International Organizations surmised that this was part of the Eastern bloc's plan for the Sub-Commission's 1964 session.³¹² The Bureau wanted drafts on both subjects available for the General Assembly's consideration in the fall. As a means of achieving this, the Bureau suggested that working groups should meet outside the Sub-Commission's formal sessions to discuss the subject.³¹³ In these working groups, members could avoid the Sub-Commission's puritanical rules and hash out their real differences. These conversations were deeply ideological, often indecorous, and, perhaps most important, off the public record.³¹⁴ Additionally, many of the Sub-Commission's experts took themselves and their U.N.-designated titles quite seriously. The Bureau informed Abram and Ferguson that they should use these working groups to create understandings with and counter possible opposition among the other experts.³¹⁵

As the working group prepared to meet off the record, Abram and Ferguson responded to the Eastern bloc's draft with a plan that allowed the United States to take an equally bold stance without offending U.S. constitutional law. The U.S. experts developed a theory that a reasonable reading of Article I of the Soviet-Polish draft would allow a state party to the Convention to define racial discrimination as only race-based infringements on *public* life. As Ferguson later explained, this language—introduced by Ivanov—prohibited “discrimination in ‘political, economic, social, cultural[,] or *any other field of public life*. . . .”³¹⁶ Ferguson believed that the U.S. policymakers could

312. *Id.* The Bureau's guidance paper insisted that “[o]n the question of priorities, the drafting of the convention on racial discrimination should not be allowed to delay or crowd out completion of the declaration on religious intolerance.” *Id.* The paper further instructed that “[u]nless the draft Declaration against Religious Intolerance is discussed in the General Assembly in advance of, or at the same time as the second (convention) stage of its action on race discrimination, there is danger that problems of religious discrimination may be pushed aside as of less significance.” *Id.*

313. *Id.*

314. *Id.*

315. *Id.*; see 1963 Nason-Abram Letter, *supra* note 18.

316. Ferguson, *United Nations*, *supra* note 141, at 69 (alteration in original); see Ivanov and Ketrzynski, *supra* note 178, at 2; see also U.S. Position on Articles Adopted by the Human Rights Commission at its 1964 Session, on the U.S. Proposal for an Additional Article on Anti-Semitism and Soviet Amendments Thereto 3 (May 12, 1964) (on file with MARBL, Abram Papers, Box 94, Folder 9) [hereinafter U.S. Position on Articles Adopted] (explaining their intention to keep the limited definition of discrimination). State Department officials would later write:

interpret the grammatical ambiguity inherent in “any other field of public life” in a way that would cover for U.S. constitutional shortcomings caused by the state action doctrine.³¹⁷ This ambiguity could mean either that the ban on discrimination covers only fields of public life or that “both public and private fields are covered respecting economic, social and cultural affairs, but beyond these enumerated fields *only* rights respecting public affairs are covered.”³¹⁸ Ferguson reiterated, “[T]he ambiguity is of critical import to the United States.”³¹⁹

If the phrase “other field of public life” could be construed as only prohibiting public discrimination, then the draft Convention arguably conformed to the obligations already imposed by the U.S. Constitution. And, though odious, private discrimination did not violate the U.S. Constitution or the Convention. Furthermore, the provision in the Soviet-Polish draft that mandated nondiscrimination in economic, social, and cultural rights would not cause the United States legal problems under the U.S. Constitution or the Convention. The U.S. Constitution did not guarantee economic, social, or cultural rights; thus, even if the Convention prohibited state-sponsored discrimination in economic, social, and cultural rights, the United States could not violate Convention in this way because no person in the United States had any of these rights, regardless of race.³²⁰ Consequently, the U.S. delegation had successfully crafted an interpretation of the Convention to comport with the state action doctrine.

The Convention’s private–public divide posed a similar conceptual problem for Peter Calvocoressi. Behind closed doors, officials in London worried that the draft Convention might contain

A principal U.S. objective is to retain the present definition limiting the application of the convention to discrimination in fields of “public life.” This was proposed in the Subcommission by the Soviet member The Delegation should avoid focusing attention on this important phrase, but if any substantial move develops to eliminate it, the Delegation should strongly resist such revision.

U.S. Position on Articles Adopted, *supra*.

317. Ferguson, *United Nations*, *supra* note 141, at 69 (emphasis omitted).

318. *Id.*

319. *Id.*; see also Comments by Dean Clyde Ferguson, Jr., *supra* note 242, at 2–3 (discussing the meaning of “public” in Article II of the Convention and arguing that where “public” means “the State and all its organs,” it “is clearly consistent with U.S. Constitutional Law”).

320. See Ferguson, *United Nations*, *supra* note 141, at 69; Comments by Dean Clyde Ferguson, Jr., *supra* note 242, at 2–3.

elements like the Declaration that would force governments to legislate to end racism in the private sphere.³²¹ Racial discrimination in areas like public accommodations posed the same troubles for the British government as it did for the U.S. government. The British had not yet adopted the Race Relations Act of 1965,³²² and the civil rights bill then before the U.S. Congress was stalled. The proposed U.S. legislation still needed another forty signatures.³²³ The British turned to English and Commonwealth law to explain its position on its public accommodations problem. “Every person does have an equal right to access to any public place,” the Foreign Office acknowledged, “although in some cases the person responsible for that place may, at his discretion, exclude him.”³²⁴ Yet, this position was becoming unpopular around the world and could easily be construed as hostile to the spirit of and social movements behind the race treaty.

The British government instructed Calvocoressi to “maintain close contact during debate . . . with other interested and friendly members,” and he did precisely that.³²⁵ The British and the U.S. members on the Sub-Commission aligned their strategies. Calvocoressi was Abram’s closest ally on the Sub-Commission. The two had known each other since the Nuremberg trials,³²⁶ and perhaps more importantly here, they had the same national interests. During the private meeting between Calvocoressi, Abram, and Ferguson, the U.S. members shared their reading of the draft Convention. The British diplomat was impressed by their argument, and officials back in London were too.³²⁷ The British Foreign Office beamed:

321. Steering Comm. on Int’l Orgs., Sub-Comm’n on Prevention Discrimination and Prot. of Minorities (Jan. 11, 1964), Population and Discrimination: Sub-Comm’n on Discrimination, National Archives, Kew, United Kingdom, FO 371/178331; see ECOSOC, Draft Convention on the Elimination of All Forms of Racial Discrimination (June 30, 1964) (on file with National Archives, Kew, United Kingdom, Population and Discrimination: Sub-Commission on Discrimination, FO 371/178331) [hereinafter ECOSOC].

322. See generally Race Relations Act 1965 c. 73 § 1 (Eng.) (outlawing racial discrimination in places of public resort).

323. NICK KOTZ, JUDGMENT DAYS: LYNDON BAINES JOHNSON, MARTIN LUTHER KING JR., AND THE LAWS THAT CHANGED AMERICA 92 (2005).

324. ECOSOC, *supra* note 321.

325. Tactics (1964) (on file with National Archives, Kew, United Kingdom, Population and Discrimination: Sub-Commission on Discrimination, FO 371/178330).

326. Abram-Goodwin Letter, *supra* note 231, at 1.

327. Calvocoressi Report, *supra* note 183, at 1; ECOSOC, *supra* note 321.

The expression “public life” is extremely useful as part of this definition. We should maintain it. Its effect is to turn the Draft Convention into one of racial discrimination in public life. The line between what is public and what is private might be extremely difficult to draw. For example, what is a Golf Club or a Political Party?³²⁸

The Foreign Office also recommended that the U.K. delegation to the United Nations take the United States’ approach in the Convention’s future negotiations and to narrowly interpret “public life.”³²⁹

Beneath the bluster, the U.S. and British members were quietly hatching their plan. Certainly, Calvocoressi’s demonstrated commitment to racial equality was less than that of either Abram or Ferguson. Yet, their national interests converged. When Abram and Calvocoressi joined the working group on Article I, they carved out a compromise. The group agreed that there would be no ban on all “manifestations” of racial discrimination under Article I of the draft Convention, but Abram and Calvocoressi caved to Ivanov and Ketrzynski’s definition of racial discrimination.³³⁰ With all delegations satisfied by this compromise, the Chairman put Article I to vote. The newly drafted language declared the following:

In this Convention[,] the term ‘racial discrimination’ shall mean any distinction, exclusion, restriction or preference based on race, colour, national[,] or ethnic origin . . . which has the purpose or effect of nullifying or impairing the recognition, enjoyment[,] or exercise of human rights and freedoms in political, economic, social, cultural[,] or any other field of public life set forth inter alia in the Universal Declaration of Human Rights.³³¹

The working group’s amendment unanimously passed, and the Sub-Commission broke for the weekend.³³²

Early on Monday morning, eight Sub-Commission members spoke in succession to address the implications of the winding Article

328. ECOSOC, *supra* note 321.

329. *Id.*

330. *See* Rep. of Sixteenth Session, *supra* note 230, at 22.

331. *See id.*

332. *See* U.N. ESCOR, Sub-Comm’n on the Prevention of Discrimination and Prot. of Minorities, 16th Sess., 414th mtg. at 10, 13, U.N. Doc. E/CN.4/Sub.2/SR.414 (Jan. 17, 1964) [hereinafter Sub-Comm’n mtg. 414].

I debates.³³³ Mohammed Mudawi and Arcot Krishnaswami reminded the Sub-Commission that they should also be preparing a draft “declaration on the elimination of all forms of religious intolerance” (the “Religious Declaration”).³³⁴ Just as the State Department had feared, the race debates were crowding out the religion debates. Mudawi and Krishnaswami suggested that the Sub-Commission take up the Religious Declaration alongside the Convention.³³⁵ Ferguson, sitting in the meeting as Abram’s alternate, concurred, suggesting that the Convention work could continue in working groups, while the Sub-Commission meetings could focus on the Religious Declaration.³³⁶ Ferguson had merely repeated the instructions contained in the State Department’s guidance paper and letter.³³⁷ José Inglés shared his colleagues’ sentiments and proposed that the Sub-Commission could extend its deliberations, if necessary, to complete work on both the Religious Declaration and the Convention.³³⁸ Peter Calvocoressi, Jean-Marcel Bouquin, Francesco Capotorti, and Mohammed Awad, the Sub-Commission’s expert from the United Arab Republic, joined the chorus.³³⁹ Capotorti urged members to collaborate privately over the next two days to complete their drafts of the Religious Declaration.³⁴⁰ Awad endorsed Inglés’s recommendation that “the Sub-Commission might extend its session for several days if necessary.”³⁴¹ The momentum on the Sub-Commission was shifting back to the United States.

Ivanov’s indignation was palpable. The Soviet had countered, seeking to push the Sub-Commission to conclude the Convention work before beginning the Religious Declaration.³⁴² He emphasized that the General Assembly had stated, in no uncertain terms, that the preparation of the Convention was its “absolute priority” and that

333. *Id.* at 1, 3–4.

334. *See* U.N. ESCOR, Sub-Comm’n on the Prevention of Discrimination and Prot. of Minorities, 16th Sess., 415th mtg. at 3, U.N. Doc. E/CN.4/Sub.2/SR.415 (Jan. 20, 1964) [hereinafter Sub-Comm’n mtg. 415].

335. *Id.*

336. *Id.*

337. *See* 1963 Nason-Abram Letter, *supra* note 18; Guidance Paper, *supra* note 20, at 3.

338. *See* Sub-Comm’n mtg. 415, *supra* note 334, at 3.

339. *Id.* at 2–4.

340. *Id.* at 4.

341. *Id.* at 3.

342. *Id.*

ending racial discrimination “was the most important task before the Sub-Commission.”³⁴³ But the Soviet’s efforts were in vain. The chairman dismissed Ivanov’s plea based on the Sub-Commission’s general agreement that discussion on the Religious Declaration should begin.³⁴⁴ Debate of that proposal would soon begin.³⁴⁵ Ivanov’s filibuster was nearing its end.

The Sub-Commission returned to its discussion of the draft Convention. The experts endeavored to have much shorter discussions of the articles, and as the body had already agreed, they would discuss the articles in the order originally proposed by the United States. As the Sub-Commission returned to discussions of Article II, each delegation offered its own draft version. Article II of the Abram’s draft read, “No State Party shall make any discrimination whatsoever against persons, groups of persons or institutions on the grounds of race, colour, or ethnic origin, or where applicable, on the basis of ‘nationality’ or national origin.”³⁴⁶ This provision outlined the obligations of each state, struck a blow against Soviet discrimination, and directly responded to Ivanov’s concern that states had to take an active role in ending racial discrimination. Ivanov and Ketrzynski responded with their own version of Article II, which declared, “Each Contracting Party shall undertake to admit within its territory no acts or manifestations of racial discrimination of any kind, and to provide for, if appropriate, in its legislation, and implement, necessary measures with a view to speedy elimination or [sic] racial discrimination.”³⁴⁷ Calvocoressi and Capotorti offered their own draft Article II, which stated, “Each Contracting State undertakes to pursue by all appropriate means a policy of eliminating racial discrimination in all its forms.”³⁴⁸ The provision maintained, “Each Contracting State shall rigorously abstain from any act or practise of racial discrimination and undertakes that all its legislative, executive, administrative[,] and judicial organs, and also local authorities and public institutions of all

343. *Id.*

344. *Id.* at 4.

345. *Id.*

346. Rep. of Sixteenth Session, *supra* note 230, at 23.

347. *Id.* at 24. Earlier in the Convention debates, the Sub-Commission adopted a lengthy preamble, which acknowledged the importance of the U.N. Charter, Universal Declaration of Human Rights, the Declaration on the Granting of Independence to Colonial Countries and Peoples, and other pertinent resolutions on racial discrimination. *See id.* at 16–21.

348. *Id.* at 25.

kinds within its territory, shall act in conformity with this obligation.”³⁴⁹ It added, “No Contracting State shall encourage, advocate[,] or support racial discrimination by any individual, group[,] or private organization.”³⁵⁰

The Sub-Commission eventually chose the Calvocoressi-Capotorti draft to serve as the basis for the Article II debates.³⁵¹ The language in the draft incorporated ideas from the U.S., Soviet, and Polish members and tracked the state obligations under Article II of the Declaration.³⁵² Some of the Sub-Commission’s experts, however, found Calvocoressi and Capotorti’s draft text still lacking. A flurry of amendments followed.³⁵³

In the midst of these revisions, one key task remained for the Western bloc: establish a reading of the Convention that might conform to its respective constitutional obligations. The key, however, was not to reopen the highly contentious and long-winded Article I debates or reveal the bloc’s Article I strategy.³⁵⁴ Clyde Ferguson, on behalf of the coalition, requested improvements to Article II that avoided certain difficulties. These revisions included a clarification of “local authorities” and “public institutions” to be defined as state parties, thus limiting the Article’s scope to cover only state discrimination.³⁵⁵ Ferguson additionally recommended that Calvocoressi and Capotorti “delete[] the words ‘within its territory’” in the draft.³⁵⁶ This change emphasized that state responsibility would

349. *Id.*

350. *Id.*

351. *Id.* at 26.

352. See U.N. ESCOR, Comm’n on Human Rights, Sub-Comm’n on the Prevention of Discrimination and Prot. of Minorities, 16th Sess., U.N. Doc. E/CN.4/Sub.2/L.324 (Feb. 11, 1964) (draft of Calvocoressi and Capotorti). Article 2(2) of the Declaration states, “No State shall encourage, advocate[,] or lend its support . . . to any discrimination based on race, colour[,] or ethnic origin by any group, institution[,] or individual.” G.A. Res. 1904 (XVIII), *supra* note 53, art. 2(2).

353. See Rep. of Sixteenth Session, *supra* note 230, at 26–27.

354. See, e.g., Calvocoressi Report, *supra* note 183, at 1. The U.S. and the British experts had established under Article I that a plausible reading of “racial discrimination” only required that states end state-sponsored, racial discrimination. See, e.g., Comments by Dean Clyde Ferguson, Jr., *supra* note 183, at 2–3. These experts surely did not want to revisit the Soviet mistake that made the entire Convention much more palatable to the United States and United Kingdom.

355. See U.N. ESCOR, Comm’n on Human Rights, Sub-Comm’n on the Prevention of Discrimination and Prot. of Minorities, 16th Sess., 416th mtg. at 4–5, U.N. Doc. E/CN.4/Sub.2/SR.416 (Jan. 20, 1964) [hereinafter Sub-Comm’n mtg. 416].

356. *Id.* at 5.

extend to areas even outside a state's territory where the state exercised authority.³⁵⁷ Ferguson felt this change made the Convention clearer and more precise.³⁵⁸ Jean-Marcel Bouquin agreed,

suggest[ing] that, in the interests of clarity and coherence, subparagraph (a) should be amended to read as follows: "Each State Party shall abstain from any act or practice of racial discrimination and undertakes that all public authorities and public institutions, national and local, shall act in conformity with this obligation."³⁵⁹

Calvocoressi accepted this amendment, believing that it would also satisfy Ferguson.³⁶⁰ After several additional amendments that made the draft more coherent and readable, the British and Italian members revised their article.³⁶¹ Article II's final language declared:

1. State Parties [to the present Convention] condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination . . . in all its forms and promoting understanding among all races, and, to this end:
 - (a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons[,] or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;
 - (b) Each State Party undertakes not to sponsor, defend[,] or support racial discrimination by any persons or organizations.³⁶²

Abram and Ferguson's strategy worked brilliantly. Article II appeared to offer a vision of a more active state, precisely what the Eastern bloc had demanded. On the other hand, the Western bloc had established a legislative record where they could credibly argue that "public" referred to "state action."

357. *Id.*

358. *See id.* at 4–5.

359. *Id.* at 6.

360. *See id.*

361. *See id.* at 6–14.

362. International Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 3, 660 U.N.T.S. at 216, 218.

IV. CIVIL RIGHTS LIBERALISM AND THE POLITICS OF HOPE

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.³⁶³ He found that the draft Convention was generally a considerable improvement from the Declaration in draftsmanship and in the articulation of duties and obligations.³⁶⁴ Additionally, Abram and Ferguson were pleased to report that there was substantial legislative history on the meaning and scope of critical Convention terms such as “public.”³⁶⁵

The memorandum explained that Article I of the draft Convention defined the term “racial discrimination.”³⁶⁶ Article I prohibited racial discrimination in “political, economic, social, cultural or *any other field of public life*,”³⁶⁷ Ferguson was concerned that this provision raised some obvious constitutional and policy questions for the United States.³⁶⁸ These same difficulties caused by the word “public” recurred in Article II of the draft Convention. Ferguson’s memorandum outlined how these Articles could raise major law and policy problems for the United States since “each State undertakes to eliminate racial discrimination practices by public authorities and public institutions.”³⁶⁹ But the memorandum also outlined how Ferguson and Abram had delineated the definition of “public” as used in the article, defined as “the State and all its organs, and State-supported or connected institutions.”³⁷⁰ Ferguson repeated, however unartfully, the point: “That meaning, as is clear from the legislative history, is clearly consistent with U.S. Constitutional Law.”³⁷¹

But just as the lawyers had to work the Convention’s draft language down to fit U.S. constitutional principles, so too did they have to bolster constitutional obligations and principles to accord with those imposed by the Convention. In the memorandum, the civil rights lawyers thus turned to the sit-in cases—a series of Warren Court

363. Comments by Dean Clyde Ferguson, Jr., *supra* note 183, at 1–4.

364. *See id.* at 1.

365. *See id.* at 2–3.

366. *Id.* at 2.

367. Ferguson, *United Nations*, *supra* note 141, at 69.

368. *See* Comments by Dean Clyde Ferguson, Jr., *supra* note 183, at 2.

369. *Id.*

370. *Id.* at 3.

371. *Id.*; *see* Ferguson, *United Nations*, *supra* note 141, at 70.

decisions that redefined the state action doctrine—to justify their position that Articles I and II of the draft Convention accorded with the Constitution.³⁷² The sit-ins transformed U.S. constitutional politics. Activists fought over the future of U.S. constitutional law by making constitutional claims with their bodies in racially segregated spaces. As these protesters filled the air with songs that became the soundtrack to the civil rights movement, they were simultaneously raising profound legal questions over the meaning of the Equal Protection Clause, the potential reaches of the commerce power, and the scope of private property rights.³⁷³

Ferguson justified his reading of “public life” by examining the Court’s decision in *Burton v. Wilmington Parking Authority*.³⁷⁴ In *Wilmington Parking Authority*, William “Dutch” Burton, a Black city councilman in Wilmington, Delaware, staged a sit-in at the Eagle Coffee Shoppe, a racially segregated restaurant.³⁷⁵ The restaurant was located in a parking garage owned and operated by the Wilmington Parking Authority, a Delaware state agency, and the restaurant’s operator was the Parking Authority’s lessee.³⁷⁶ Burton’s sit-in was far from spontaneous. Burton and many of his constituents had longed to challenge a state statute permitting racial discrimination in public accommodations. Before staging the sit-in, Burton met with Louis Redding, a Black graduate of Harvard Law who had risen to international heights as the chief lawyer in the Delaware school desegregation lawsuits consolidated into *Brown v. Board of Education*.³⁷⁷ Redding urged Burton to challenge segregation by attacking the private restaurant located in a publicly owned parking garage.³⁷⁸ In *Wilmington Parking Authority*, the Warren Court held that “when a State leases public property in the manner . . . shown . . .

372. See Ferguson, *United Nations*, *supra* note 141, at 70–71 (outlining the contributions of three Warren Court decisions to the state action doctrine).

373. See BROWN-NAGIN, *supra* note 198, at 247–50 (describing local civil rights activists as “[a]gents of [c]onstitutional [c]hange”).

374. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961); Comments by Dean Clyde Ferguson, Jr., *supra* note 183, at 2–3.

375. *Wilmington Parking Auth.*, 365 U.S. at 716; ANNETTE WOOLARD-PROVINE, *INTEGRATING DELAWARE: THE REDDINGS OF WILMINGTON* 122, 130 (2003).

376. *Wilmington Parking Auth.*, 365 U.S. at 716.

377. See WOOLARD-PROVINE, *supra* note 375, at 122, 130; Frank H. Hollis, *My Memories of Law Practice in Wilmington, Delaware*, 16 DEL. L. 22, 26–27 (1998) (explaining the test case strategy).

378. See Hollis, *supra* note 377.

here, the proscriptions of the Fourteenth Amendment must be complied with by the lessee as certainly as though they were binding covenants written into the agreement itself.”³⁷⁹ Ferguson asserted that the Convention’s definition of racial discrimination was consistent with these legal developments. The U.S. delegation had “clearly limited the scope of the word ‘public’ to State action and State-supported institutions along the lines of the Supreme Court decision in the *Wilmington Parking Authority Case*.”³⁸⁰

Ferguson then turned to sit-in cases in Richmond, Virginia; Savannah, Georgia; and Memphis, Tennessee, to buttress the experts’ argument that Article II conformed with U.S. constitutional law.³⁸¹ In three 1963 Supreme Court decisions, the Court had affirmed that “no municipally owned and operated facilities may be segregated and no unreasonable delay will be allowed in effectuating their desegregation.”³⁸² Each of the 1963 decisions extended the reach of the Equal Protection Clause. In the Richmond case, Ford Johnson, a student at Virginia Union University, the city’s historically Black institution, staged a one-person protest to challenge segregated seating in a Virginia courtroom.³⁸³ Johnson, a leader in the movement sweeping campuses across the country, had already challenged segregation outside of courtrooms.³⁸⁴ He felt compelled to confront segregation inside of courtrooms too. The Warren Court overturned the student’s conviction in short order, holding that “it is no longer open to question that a State may not constitutionally require segregation of public facilities.”³⁸⁵ Accordingly, Article II of the Sub-Commission’s draft, if ratified, Ferguson observed, would not impose any new obligations on the U.S. government.³⁸⁶

379. *Wilmington Parking Auth.*, 365 U.S. at 726.

380. Comments by Dean Clyde Ferguson, Jr., *supra* note 183, at 2–3 (discussing *Wilmington Parking Auth.*, 365 U.S. 715).

381. *Id.*; see Ferguson, *United Nations*, *supra* note 141, at 70–71.

382. Comments by Dean Clyde Ferguson, Jr., *supra* note 183, at 3; Ferguson, *United Nations*, *supra* note 141, at 70–71.

383. See *Negro Is Fined for Contempt in Traffic Court*, RICHMOND TIMES-DISPATCH, Apr. 28, 1962, at 4; *34 Are Arrested in Sitdowns Here*, RICHMOND TIMES-DISPATCH, Feb. 23, 1960, at 1.

384. *34 Are Arrested in Sitdowns Here*, *supra* note 383.

385. *Johnson v. Virginia*, 373 U.S. 61, 62 (1963).

386. See Comments by Dean Clyde Ferguson, Jr., *supra* note 183, at 3 (discussing *Johnson*, 373 U.S. 61 and stating that the scope of the term public is “clearly consistent with U.S. Constitutional Law”).

*Wright v. Georgia*³⁸⁷ similarly supported Ferguson and Abram's argument. In Savannah, six young Black men were arrested for playing in Daffin Park, a gorgeous, fifty-acre city park surrounded by homes with colonnaded front porches and racially restrictive covenants.³⁸⁸ The "Savannah Six," as they were known in civil rights circles, were arrested and convicted of breaching the peace when they refused police instructions to leave the park.³⁸⁹ The Court eventually overturned their convictions.³⁹⁰ Article II's prohibition on state-sponsored discrimination accorded with *Wright*, Ferguson argued, because "in *Wright v. Georgia*, the Court held that a municipality cannot arrest and prosecute Negroes for peaceably seeking the use of city-owned and operated recreational facilities."³⁹¹

And, in Memphis, Black college students teamed with local leaders, like Maxine Smith, Benjamin Hooks, and Billy Kyles—individuals who would later play starring roles in the Poor People's Campaign—to launch their own set of sit-in strikes.³⁹² The city agreed to desegregate municipal facilities, yet proceeded slowly and gradually, citing the Court's opinion in *Brown II*.³⁹³ However, in *Watson v. Memphis*,³⁹⁴ the Court declared that Memphis must promptly desegregate all municipal facilities. "The rights here asserted are, like all such rights, *present* rights; they are not merely hopes to some *future* enjoyment of some formalistic constitutional promise," the Court held.³⁹⁵ Ferguson's use of the Memphis movement in U.S. diplomacy vindicated the cries for "freedom now" in the Blues City.³⁹⁶ In the

387. *Wright v. Georgia*, 373 U.S. 284 (1963).

388. *Id.* at 285.

389. *Id.* at 286; *Georgia High Court Affirms Convictions of Savannah Six*, ATLANTA DAILY WORLD, Nov. 11, 1961, at 5.

390. *Wright*, 373 U.S. at 291–93.

391. Ferguson, *United Nations*, *supra* note 141, at 71 (footnote omitted) (citing *Wright*, 373 U.S. 284).

392. BOBBY L. LOVETT, *THE CIVIL RIGHTS MOVEMENT IN TENNESSEE: A NARRATIVE HISTORY 191–92* (2005).

393. *See Watson v. City of Memphis*, 373 U.S. 526, 533 (1963) (describing the city's delay in ending discrimination against the petitioners).

394. *Watson v. City of Memphis*, 373 U.S. 526 (1963).

395. *Id.* at 533. *See generally* Ferguson, *United Nations*, *supra* note 141, at 71 (relying on *Watson*, 373 U.S. at 533).

396. Ferguson, *United Nations*, *supra* note 141, at 70–71. Ferguson maintained that "three 1963 decisions again reaffirmed that no municipally owned and operated facilities may be segregated and no unreasonable delay will be allowed in effectuating their desegregation." *Id.* *Watson* was the third 1963 decision.

process, the U.S. expert's reading of the sit-in cases offered the Warren Court newfound significance in the Cold War and gave the U.S. government good reason to ratify the race treaty.

Ferguson's memorandum to the State Department offered a final legal argument. It would allow the United States to assert even greater leadership in the Convention debates. Although Article II of the draft Convention only targeted public discrimination, Congress had the authority to enact legislation that would exceed its Article II duty.³⁹⁷ Thus, Congress could reach both public and private discrimination through the Commerce Clause, so long as the subject of the discriminatory instrumentality affected interstate commerce.³⁹⁸ This was the same legal argument proponents of Title II of the Civil Rights Act had endorsed. Secretary of State Dean Rusk, for example, had testified before the Senate Commerce Committee in favor of Title II. Rusk declared that U.S. prestige abroad suffered due to the "treatment of nonwhite diplomats and visitors to the United States" in the nation's public accommodations.³⁹⁹ Abram and Ferguson reasoned that if civil rights law provided U.S. citizens with more legal protection than the Convention offered others around the world, then the United States could point to its constitutional revolution and remind foreign critics of how exceptional it really was.

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 a Bureau of International Organizations memorandum praised their remarkable success during the Convention debates.⁴⁰⁰ Morris Abram traveled back to Washington, D.C., following the Sub-Commission's historic session to meet with Assistant Secretary of State Harlan Cleveland about the "critical issues" in the draft Convention.⁴⁰¹

397. *Id.* at 70 n.9 ("Under the commerce clause of the Constitution, public and private discrimination could be reached as long as the subject of the instrumentality of discrimination affected interstate commerce.").

398. *Id.*; *see also* U.S. CONST. art. I, § 8, cl. 3 (conferring upon Congress the right to regulate interstate commerce).

399. *Civil Rights: Public Accommodations, Hearings on S. 1732 Before the S. Comm. on Commerce*, 88th Cong. 283 (1963) (statement of Hon. Dean Rusk, Secretary of State).

400. Letter from Morris Abram to Mrs. Ronald Tree (Jan. 2, 1964) (on file with MARBL, Abram Papers, Box 94, Folder 9); Memorandum from Joseph Sisco to William Stibravy (on file with MARBL, Abram Papers, Box 94, Folder 9).

401. Suggested Agenda for Cleveland-Abram Consultation (Feb. 1964) (on file with MARBL, Abram Papers, Box 94, Folder 9).

The first two issues on their agenda were the “Definitions [of] ‘[r]acial [d]iscrimination’—Article I” and the meaning of “‘Public’—Article I and Article II (c).”⁴⁰² By all accounts, the meeting went exceedingly well. In fact, Abram and Ferguson’s 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.⁴⁰³ In the guidance papers issued to U.S. representatives at each level of the treaty negotiations, State Department officials repeated that they would support the Sub-Commission’s draft Convention, particularly in light of its legislative history pertaining to discrimination and public life.⁴⁰⁴ The State Department’s guidance papers emphasized that the draft Convention’s discrimination definition clearly distinguished between public and private activities.⁴⁰⁵ The memoranda directed U.S. representatives who would continue to negotiate the treaty to avoid focusing on the phrase but resist any other states’ attempts to eliminate the phrase in negotiations.⁴⁰⁶ The guidance papers continued: “Should this limitation be removed, the paragraph would be unacceptable since it would require governmental action in areas of private conduct beyond the reach of federal authority.”⁴⁰⁷

Although U.S. constitutional law and the experts’ guidance papers might not have gone as far as some in the movement might have wanted in January 1964, the experts felt at ease with their positions because the definition of public discrimination was rapidly changing in their favor. The Supreme Court, in particular, was finding new ways to reach and end forms of racial segregation in areas once considered private.⁴⁰⁸ Racial progress was often toilsome and always messy, yet the gap between what the United States practiced and what it preached was steadily closing. Abram and Ferguson had not only witnessed these developments; they had been integral parts of that change. Never in their lifetimes—and perhaps in the nation’s history—had so many

402. *Id.*

403. Position Paper, 20th Regular Session of the General Assembly (Aug. 5, 1965) (on file with MARBL, Abram Papers, Box 94, Folder 9); U.S. Position on Articles Adopted, *supra* note 316, at 3–4.

404. U.S. Position on Articles Adopted, *supra* note 316, at 3–4.

405. *Id.*

406. *Id.*

407. *Id.* at 4.

408. See Ferguson, Jr., *Civil Rights Legislation 1964*, *supra* note 194, at 102, 108–11.

Americans, Black and white, been so serious about forcing their country to live up to its promises. The future was filled with hope from the experts' perspectives and that hope was well justified.

The U.S. experts, like many racial liberals during the mid-twentieth century, read racial progress teleologically. Abram, for example, believed that legislative malapportionment was a tool of racial domination, and he was certain the Warren Court would make this form of discrimination a "political dinosaur."⁴⁰⁹ Ferguson, more sober in expression but just as optimistic in outlook, believed that it was "probable that the Supreme Court will go even further in extending the application of the present meaning of state action."⁴¹⁰ Scholars, practitioners, and everyday people were forcing the United States to reconsider the public-private divide.⁴¹¹ This constitutional question was at the core of America's racial crisis. In 1964, the Warren Court's civil rights jurisprudence appeared to project well for many movement participants. Ferguson theorized several directions the Court might take to expand the state action concept. The Court, for example, could extend *Shelley v. Kraemer*⁴¹² to establish the principle that "any slight participation by any state instrumentality in a discriminatory scheme—no matter how limited that 'participation'—is unconstitutional action."⁴¹³ In private education, for example, "racial classifications might be outlawed . . . [because] educational standards are prescribed by the state."⁴¹⁴ A private corporation's employment policies using racial classifications might be struck down because the corporation's existence depends upon a state charter.⁴¹⁵

Thus, the Court could extend the Fourteenth Amendment in the same way that it had done with the Fifteenth Amendment in *Smith v. Allwright*⁴¹⁶—where any "statutory scheme so pervasive as to substantially limit the area of operation of a private enterprise results

409. ABRAM, *supra* note 12, at 79, 104.

410. Ferguson, Jr., *Civil Rights Legislation 1964*, *supra* note 194, at 102, 107 (quoting BLAUSTEIN & FERGUSON, *supra* note 93, at 265).

411. *Id.* at 102, 105–07.

412. *Shelley v. Kraemer*, 334 U.S. 1 (1948).

413. Ferguson, Jr., *Civil Rights Legislation 1964*, *supra* note 194, at 107 (quoting BLAUSTEIN & FERGUSON, JR., *supra* note 93, at 265).

414. *Id.* (quoting BLAUSTEIN & FERGUSON, JR., *supra* note 93, at 266).

415. *See id.*

416. *Smith v. Allwright*, 321 U.S. 649 (1944).

in such enterprise becoming subject to the obligations of the state.”⁴¹⁷ In this manner, the Court might tackle some forms of private racial discrimination by regulating ostensibly private entities “clothed with a public interest.”⁴¹⁸ Ferguson noted that in *Guillory v. Administrators of Tulane University*,⁴¹⁹ Judge J. Skelly Wright, reviled as “Judas Scalawag Wright” by New Orleans blue bloods and blue collars alike, had relied on this logic to desegregate the Uptown campus two years earlier.⁴²⁰ And if Congress actually passed the pending civil rights bill, the Court could easily uphold the legislation using the Interstate Commerce Clause.⁴²¹ Ferguson emphasized that the Justices were increasingly issuing progressive civil rights opinions, and this development “forecast[ed] the trend of future decisions,” a view that captured the era’s liberal ethos.⁴²²

Morris Abram and Clyde Ferguson were far from alone in their views. Leading legal thinkers of the 1960s were consumed with the state action problem. Yale Law Professor Charles Black believed that the state action issue was the most pressing functional and conceptual issue in U.S. law.⁴²³ According to Black, “[t]he amenability of racial injustice to national legal correction is inversely proportional to the durability and scope of the state action ‘doctrine,’ and of the ways of thinking to which it is linked.”⁴²⁴ Likewise, in *A Century of Civil Rights*, Cornell Law Professor Milton Konvitz welded *Shelley v. Kraemer*’s holding to an expansive reading of the Thirteenth Amendment as a way to resolve the constitutional questions raised by the sit-ins.⁴²⁵ Konvitz argued that federal courts should apply the rationale of *Shelley* to states if, by police and court action, states perpetuated the incidents

417. Ferguson, Jr., *Civil Rights Legislation 1964*, *supra* note 194, at 107.

418. *Id.* at 109 (quoting *Munn v. Illinois*, 94 U.S. 113, 126 (1876)).

419. *Guillory v. Adm’rs of Tulane Univ.*, 203 F. Supp. 855, 859 (E.D. La. 1962).

420. *Id.*; Michael S. Bernick, *The Unusual Odyssey of J. Skelly Wright*, 7 HASTINGS CONST. L.Q. 971, 972, 991 (1980) (describing Wright’s nickname and ostracism as well as his desegregation decisions, including *Guillory*).

421. See Ferguson, Jr., *Civil Rights Legislation 1964*, *supra* note 194, at 115 (“Congress has the unquestioned power to enact . . . legislation forbidding acts of racial discrimination in places of public accommodation having a substantial effect upon interstate commerce.”).

422. See *id.* at 106.

423. Charles L. Black, Jr., *The Supreme Court 1966 Term—Foreword: “State Action,” Equal Protection, and California’s Proposition 14*, 81 HARV. L. REV. 69, 69 (1967).

424. *Id.* at 70.

425. MILTON R. KONVITZ & THEODORE LESKES, *A CENTURY OF CIVIL RIGHTS* 151–52 (1961).

and badges of slavery.⁴²⁶ Along the same lines, Theodore St. Antoine, future law dean at the University of Michigan, offered his own reformulation of the state action doctrine in an award-winning article.⁴²⁷ St. Antoine found that application of the state action doctrine could hinge on whether a private activity was invested with the public interest and impaired Fourteenth Amendment rights.⁴²⁸ Although St. Antoine recognized that his test would not cure all racism, his “realistic” and “meaningful” reformulation of the state action doctrine would be “no small gain” for “the millions fighting the battle for racial equality in our day.”⁴²⁹ These scholars, like the U.S. experts, believed that the Warren Court would soon recognize how dated and incoherent the state action doctrine was for a modern democratic society, and the Court would in turn narrow the public–private distinction.⁴³⁰

Other scholars went beyond the positions of Black, Konvitz, and St. Antoine. They predicted that the Court would eventually reject the state action requirement altogether in equal protection cases. University of Texas Law Professor Jerre Williams published a heavily cited law review article entitled, “The Twilight of State Action.”⁴³¹ In this article, Williams declared that *Burton* had opened the door for abandoning the state action doctrine as decisive on constitutional discrimination issues.⁴³² Such a doctrinal shift for Williams would be the *natural* course of events, since state action was now present in virtually all cases.⁴³³ The racial teleology that flowed through civil rights practice and the U.S. experts’ strategy also flowed through liberal camps in the legal academy.⁴³⁴

426. *Id.*

427. Theodore J. St. Antoine, *Color Blindness but Not Myopia: A New Look at State Action, Equal Protection, and “Private” Racial Discrimination*, 59 MICH. L. REV. 993, 993 n. (1961) (noting that the “paper was awarded the first prize in the 1960 Broomfield Essay Competition at The University of Michigan”).

428. *Id.* at 1011, 1016.

429. *Id.* at 1016.

430. See, e.g., Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 505 (1985) (acknowledging the “irrationality of current state action doctrines” and suggesting that a “rethinking” was due).

431. Jerre S. Williams, *The Twilight of State Action*, 41 TEX. L. REV. 347 (1963).

432. *Id.* at 382.

433. *Id.* at 389 (“The sun is setting on the concept of state action as a test for determining the constitutional protections of individuals. . . . [S]tate action is so permeating that it is present in virtually all cases.”).

434. See Chemerinsky, *supra* note 430, at 505. Chemerinsky aptly noted, “For twenty years, scholars persuasively argued that the concept of state action never could be rationally or

The U.S. experts' strategy, moreover, offered racial liberals a way to dignify a movement typically cast as "irresponsible."⁴³⁵ Black protesters, like the "Savannah Six," had been denounced by segregationists for shattering the image of the 230-year-old seaport city lined with quaint cobblestone streets and lush squares of moss-laden oaks.⁴³⁶ Then a century after General Sherman's March to the Sea, the State Department had used another siege of Savannah to help chart a path for others around the world to follow. Placing the Savannah protests within a larger narrative of U.S. progress rendered the demonstrations as more constructive, more familiar, and more American. Similarly, the State Department's strategy lent greater legitimacy to the tireless efforts of civil rights lawyers. The U.S. experts and their colleagues—individuals like Constance Baker Motley, Derrick Bell, and Louis Redding—had risked life and reputation for representing allegedly "extremist" clients and causes.⁴³⁷ Yet, when the principals in a legal relationship became more "respectable," so did the agents. The vibrancy of the civil rights movement was not a sign that U.S. values were flawed. It instead symbolized citizens' commitment to perfecting the United States' ideal.

The U.S. members felt genuine pride for their personal accomplishments and for the nation's ongoing march to freedom. "I was keenly aware that I was representing the only great power that stands for human rights," Morris Abram remembered of his time on the Sub-Commission.⁴³⁸ Clyde Ferguson considered his contribution to the Convention as one of his signal achievements. In the spring of 1965, Ferguson organized a Howard Law symposium on the Convention, and the dean told the audience that the United States' conception of rights

consistently applied. The inability to construct principled state action doctrines led many experts to predict that the concept might completely vanish." *Id.* (footnote omitted). *See generally* Williams, *supra* note 431 (discussing the impact of the *Civil Rights Cases* on the modern development of the state action doctrine).

435. *See, e.g., Tear Gas Halts Negro March in Savannah*, L.A. TIMES, July 12, 1963, at 2, 9 (blaming the "irresponsible elements" for the racial violence).

436. *See* Homer Bigart, *Savannah Is Tranquil*, N.Y. TIMES, July 19, 1964, at 1; *cf.* *Wright v. Georgia*, 373 U.S. 284, 285–86 (1963) (overturning Black petitioners' convictions for breach of the peace for peacefully playing basketball).

437. *See, e.g.,* CONSTANCE BAKER MOTLEY, *EQUAL JUSTICE UNDER LAW: AN AUTOBIOGRAPHY* 184–85 (1999) (describing Motley and Bell's legal advocacy for the NAACP); *see also* WOOLARD-PROVINE, *supra* note 375, at 130–31 (discussing Louis Redding's civil rights practice and his association with the NAACP).

438. ABRAM, *supra* note 12, at 150–51.

was broader than at “any period within the last 100 years.”⁴³⁹ This moment, for Ferguson, was indeed the second Reconstruction and the third American Revolution. “[W]e are in the midst of a very definite historical development in the United States which demonstrates that our traditional conception of Civil Rights has been perceptively broadened. This broadening over the last 5 years has moved at a very very rapid pace.”⁴⁴⁰ Dean Ferguson, proud of Howard’s central role in creating “the very revolution that we have now,” concluded, “I would say that at the present time, what we generally understand to come within the compass of human rights as used in the international dialogue is roughly the same as Civil Rights as we use the term here in the United States.”⁴⁴¹

But a paradox remained. Two pioneering civil rights attorneys advanced a reading of the Convention that circumscribed the treaty’s definition of racial discrimination. Abram and Ferguson believed in American exceptionalism and were willing to wager on U.S. racial progress over time. They expected that their country would eventually eviscerate both public and private discrimination, then blaze a trail for the world to follow. Yet, the racial progress they envisioned never arrived, and the state action problem they expected to disappear never left.

CONCLUSION

Ironically, Abram and Ferguson recreated the state action problem that so many people of color had hoped to overthrow. U.S. race relations had improved dramatically in their lifetimes, and Abram and Ferguson had been at the forefront of making the United States a better version of itself. Still, the experts’ confidence that the nation would overcome the state action problem—and many more racial problems—allowed them to put the struggle for freedom on a timetable. Three major lessons emerge from Abram and Ferguson’s diplomacy during the Convention debates. In today’s renewed drive toward racial justice and in an atmosphere of what might seem like impending progress, activists and legal thinkers would do well to remember them.

439. Ferguson, *Nature and Dimensions*, *supra* note 23, at 452.

440. *Id.*

441. *Id.* at 452–53, 456–57.

First, racial progress is never promised. Even though Abram and Ferguson profoundly understood how the state action doctrine hindered U.S. racial reform, they approached the state action doctrine as a problem that would certainly be resolved in the near future. Here, history has proven them—like many of the very best minds of their generation—wrong. Racism, domestically and internationally, is stubborn and persistent. In fact, racist backlash often follows racial progress. Those who, like Abram and Ferguson, are privileged to have an opportunity to change the course of law in antiracist ways must understand that racial progress is never inevitable.

Second, well-intentioned and even racially progressive people can perpetuate racial injustice. The U.S. State Department sent Abram and Ferguson—a diverse team—to represent the United States at the Sub-Commission. Descriptive representation mattered in a way that it had never mattered before in the State Department, and this was particularly remarkable given the Department's long history of exclusion. Moreover, the State Department allowed and trusted Abram and Ferguson to help lead a lawmaking process filled with great geopolitical risk. These were no doubt social justice gains. Nonetheless, Abram and Ferguson faced serious institutional constraints. Federal officials would have never allowed the experts to export any legal framework that did not accord with U.S. constitutional law. The experts, however, as dutiful and ambitious attorneys, believed that they could advance their racial interests while also advancing their nation's foreign policy interests. Their political calculus, to many at the time, seemed sound. However, as this history reminds us, in the pursuit of racial justice, it is often difficult to serve multiple masters.

Finally, this episode in the history of American diplomacy and racial reckoning shows how delaying freedom now can mean delaying freedom in the future. Policy windows for racial reform are often short. Delay can be fatal for change. U.S. courts never interpreted the Equal Protection Clause the way Abram, Ferguson, and many other racial liberals anticipated.

Today, the U.S. government continues to rely on the public-private distinction when deciding whether racial discrimination is actionable. Because the U.S. government relied on a narrow reading of the treaty when it ratified the Convention, ultimately entering a formal reservation to this end, the public-private distinction remains enshrined in both U.S. domestic and international law. Since the Convention's ratification, many U.S.-based, nongovernmental organizations have submitted shadow reports to the U.N. Committee

on the Elimination on Racial Discrimination—the Convention’s monitoring body—detailing instances of discrimination that could violate the Convention. The State Department, however, has found these instances nonactionable, relying on a narrow reading of the Convention and on the United States’ reservation. The State Department has insisted that given that reading, the United States has no treaty obligation to “prohibit and punish purely private conduct of a nature generally held to lie beyond the proper scope of governmental regulation under current U.S. law.”⁴⁴²

Surely, the contemporary authors of these shadow reports would have never imagined that an attorney for Martin Luther King, Jr. and the former dean of Howard Law gave the State Department the legal arguments and legislative record to oppose modern calls for racial justice. And surely, Abram and Ferguson would have never imagined that their diplomacy would be used to defeat calls for racial justice a half-century later.

442. See U.S. DEP’T OF STATE, INITIAL REPORT TO THE COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION (2000), <http://hrlibrary.umn.edu/usdocs/cerdinitial.html> [<https://perma.cc/3ARV-2S82>].