The International Convention on the Elimination of All Forms of Racial Discrimination: Implications for Challenging Racial Hierarchy

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From July 23 to 25, 1900, thirty-two individuals from around the world gathered in London at the behest of Trinidadian barrister Henry Sylvester-Williams. The purpose of this meeting was to bring together delegates to serve under the first Pan-African Congress. At this meeting a Committee on Address to the Nations of the World was appointed with one of the delegates, W. E. B. Du Bois, as its chair. In his committee report, shared with "sovereigns in whose realms are subjects of African descent," Du Bois proposed the following:

> In the metropolis of the modern world, in this the closing year of the nineteenth century, there has been assembled a congress of men and women of African blood, to deliberate solemnly upon the present situation and outlook of the darker races of mankind. The problem of the twentieth century is the problem of the color line, the question as to how far differences of race—which show themselves chiefly in the color of the skin and the texture of the hair—will hereafter be made the basis of denying to over half the world the right of sharing to their utmost ability the opportunities and privileges of modern civilization.[1]

Du Bois was touching on an issue that was not simply a problem of ignorance and misunderstanding, but more fundamentally one of power utilized to maintain colonialism and racial world order. Du Bois's report is important for two reasons. First, it identifies the fact that the "color line" is significant. Second, it suggests that the nature

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1. *Address to the Nations of the World, in* W.E.B. DU BOIS: SPEECHES AND ADDRESSES 1890-1919 at 125 (Philip S. Foner ed., 1977).

of this division is not simply one of attitudes, or individual prejudices between groups of people, but, instead, a reflection of power and inequitable distributions of social, economic, and cultural resources.

In a slightly different way, Richard Falk describes the enduring impact of issues related to race and ethnicity in the international arena, both in the current century and very likely the next one. He writes, that one of the great current problems of world order is the condition and status of national minorities within sovereign states that have either historically subjugated these groups, or continue to force them to accommodate to a collective identity defined by the state's most powerful interests.[2] A quick survey of racial and ethnic tensions today, as well as a review of the plight of national minorities as suggested by Falk, illustrates that the next century will open with the same problem described by Du Bois. In fact, it seems that U.S. problems associated with racial and ethnic divisions and consequent racial discrimination continue with frequency and intensity in many societies. Recently, the watchdog organization, Human Rights Watch suggested that the manipulation of ethnicity to further political ends was an ever-present factor in Africa, Asia, Latin America, and Europe throughout 1996.[3] Thus, although initially adopted by the General Assembly of the United Nations on December 21, 1965, the International Convention on the Elimination of All Forms of Racial Discrimination continues to be relevant and to serve as a useful mechanism for understanding how to reduce or eradicate invidious racial and ethnic divisions as the twenty-first century unfolds.[4]

The Convention was considered a major development in advancing human rights in the international arena. Despite this, the United States resisted its adoption and ratification for many years. There are several factors that explain this resistance. When the Convention was first adopted by the United Nations, the United States was in the midst of the Cold War with the Soviet Union. The issue of human rights was treated at times as a political football between the two superpowers. Another factor underlying the United States' slow pace in ratifying the Convention is the federalist structure of the U.S. government. Federalism may actually work to inhibit an aggressive posture

2. Richard Falk, *The Struggle of Indigenous Peoples and the Promise of National Political Communities*, *in* THE RIGHTS OF INDIGENOUS PEOPLES IN INTERNATIONAL LAW 1, 6 (Ruth Thompson ed., 1987).

3. *See generally* HUMAN RIGHTS WATCH, HUMAN RIGHTS WATCH WORLD REPORT 1997.

4. *See generally* 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).

toward human rights on the part of national administrations. Some treaties and agreements between the executive branch and international bodies had to be approved by the U.S. Senate, introducing another level of negotiations. Yet another factor molding the U.S. posture toward human rights is the relative political weakness of the black community in this country—still a relevant explanation today. It was not until the passage of the Voting Rights Act of 1965, the same year that the Convention was passed by the United Nations, that blacks enjoyed the legal enforcement of their right to register and vote in elections. A politically stronger black community would have possibly served to put pressure on government representatives to ratify the Convention earlier than was the case.

Despite the fact that blacks have the right to vote, however, the U.S. resistance to the strengthening and expansion of human rights continues in the current period. According to the Human Rights Watch, in 1996 "politically popular proposals made by Congress and the White House contributed to the accelerated erosion of basic due process and human rights protections in the United States."[5] The Human Rights Watch report further stated that, "[d]espite his public proclamations in support of civil and human rights, President Bill Clinton displayed a startling lack of will to preserve rights under attack, and in some cases took the lead in eliminating human rights protections."[6]

Added to the factors above is the traditional U.S. posture that its own domestic arena is off limits to international bodies. As was observed some time ago by Dana Fisher, "[o]bjections to accepting international human rights obligations via treaty have ranged from frivolous to reasonable concerns about conflicts with United States law . . . There have been fears that the treaties would authorize what the Constitution prohibits even though the Supreme Court has always upheld the Constitution when there was a conflict." Fisher continues: "Problems with the concept of economic and social rights will be formidable. The Constitution is silent on economic and social rights. In the American tradition the right to life has meant the right to the protection of a policeman, not to the services of a physician."[7] The differentiation of social and economic rights from political rights explains

5. HUMAN RIGHTS WATCH, *supra* note 3, at 315.

6. Dana D. Fischer, *The International Protection of Human Rights, in* THE CHANGING UNITED NATIONS: OPTIONS FOR THE UNITED STATES 51 (David A. Kay ed., 1977).

7. *Id.* at 52.

the limitations of U.S. approaches to the problem of racial discrimination.

Although the United States has realized much racial progress and has enunciated its stand, through legislation, court decisions, and amendments to its Constitution, that racial discrimination is no longer permissible, the state of race relations is in some ways similar to that described by the Kerner Commission Report almost three decades ago—that is, that U.S. society is characterized by a deeply entrenched racial division.[8] In light of such continuing divisions, it is interesting that a cursory view of race relations in the United States today indicates that, at least compared to thirty years ago, certain racial conditions have vastly improved. And certainly, albeit to a limited degree, attitudes have changed toward wide support for values related to racial equality in the United States.[9] Regardless of this finding, a comprehensive assessment of race relations shows that racial divisions provide systemic advantages to whites, at the expense of people of color, but especially blacks. The distribution of economic, social, and cultural benefits in this nation reflects a well-ingrained hierarchy based on race. The existence of racial hierarchy, as well as its implicit approval and exploitation by representatives of white power structures, greatly limits the aim, reach, and ultimately the effectiveness of the Convention.

Surveys showing a decline in the level of white prejudice toward blacks in the United States are strikingly juxtaposed with the fact that the number of hate groups and incidents of racial harassment and violence is increasing. Further examples of concomitant support for the rhetoric but growing resistance to the implementation and actualization of racial equality include the approximately 2,900 incidents of racial harassment and violence reported across the United States between 1980 and 1986, including 121 murders, 138 bombings, and 302 assaults.[10] A 1989 report from the Southern Poverty Law Center

8. Symposium, *The Urban Crisis: The Kerner Commission Report Revisited*, 71 N.C. L. REV. 1283 (1993).

9. *See* HOWARD SCHUMAN, CHARLOTTE STEEH, & LAWRENCE BOBO, RACIAL ATTITUDES IN AMERICA (1985) (discussing the changes of racial attitudes in the United States since the Second World War). *See also* A. Wade Smith, *Racial Insularity at the Core: Contemporary American Racial Attitudes*, 2 TROTTER INST. REV. 9 (1988) (showing that despite greater consensus among whites in support of the values of social equality, white attitudes and black attitudes have grown increasingly apart). Professor of Politics and Public Affairs Jennifer L. Hochschild also discusses major attitudinal differences between blacks and whites in her book FACING UP TO THE AMERICAN DREAM (1995).

10. Jerry M. Guess, *Race: The Challenge of the 90s*, THE CRISIS Nov. 1989, at 28.

states that hate violence based on race in the United States has reached a crisis stage. The report indicates that there are 230 known organized hate groups, and that more than half of all hate crimes in the past decade occurred during the last two years of the 1980's.[11]

While black and white Americans seem to be interacting more in the workplace, residential segregation continues to be a major problem among racial and ethnic groups. A major work by Douglas Massey and Nancy Denton, appropriately titled *American Apartheid,* documents the fact that black residential segregation is greater today than in previous periods, leading these two authors to use the term *hypersegregation* to describe this situation.[12] These authors state that "[d]espite the optimism of the early 1970s, a comprehensive look at trends and patterns of racial segregation within large metropolitan areas in the ensuing decade provides little evidence that the residential color line has diminished in importance."[13] Thus, in spite of the extent and nature of racial progress realized in this country, "among those metropolitan areas where a large share of African Americans live, segregation persists at extremely high levels that far surpass the experience of other racial or ethnic minorities. In sixteen metropolitan areas that house one-third of the nation's black population, racial separation is so intense that it can only be described as hypersegregation."[14] The authors conclude that hypersegregation of blacks has become accepted by most whites as a natural feature of this society.

In addition to residential segregation, there exists growing job segregation as pointed out by urbanist Edward J. Blakely and others.[15] Blakely describes a primary job market composed of the most desirable jobs and higher wages that is predominantly occupied by whites, and a secondary job market of low-level service jobs where blacks and Latinos appear in concentrated numbers. In particular, he notes, black women are especially dominant in the lower-wage service sectors:

> Workers in these areas of the city are vulnerable to job shifts as economic cycles and lower-waged world labor markets produce volatile job movements. Furthermore, technological innovation might eliminate these jobs entirely. This form of employment segregation

11. SOUTHERN POVERTY LAW CENTER, WHITE SUPREMACY AND NATIONAL VIOLENCE: A DECADE OF REVIEW 1980-1990 (1989).
12. DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID (1993).
13. *Id.* at 81.
14. *Id.*
15. EDWARD J. BLAKELY, PLANNING LOCAL ECONOMIC DEVELOPMENT (1989).

> covers many occupational categories ranging from manufacturing to clerical areas. Individuals in this type of employment seldom have any job security and enjoy few benefits from their employers. Typical wages in these occupations average around $4.25 per hour, only marginally above the poverty line. As a consequence, individuals and/or families in most urban areas are forced to send more members of the family to work, including working-age children.[16]

It should be noted, again reflecting a racially divided society, that blacks and whites also hold different political attitudes regarding the extent of racial discrimination and the appropriate government responses to such discrimination.[17]

The apparent inconsistency between racial progress and continuing racial divisions, including major differences in the political attitudes of blacks and whites, can be explained by the concept of racial hierarchy, or what others have referred to as racial stratification or subordination. Racial hierarchy is the social fact that blacks continually and consistently occupy positions lower in status than whites, regardless of certain social, political, or economic advances that have been made by blacks either as individuals or as a group. Racial hierarchy is manifested economically, educationally, culturally, and politically in all facets of life in the United States. Even when class factors are controlled, there is strong evidence of racial hierarchy in the United States. This means that even poor whites in a context of racial hierarchy are much better off than poor blacks; working-class whites as well as middle-class whites are much better off and enjoy a higher status than their black counterparts. Other illustrations of racial hierarchy include the fact that female-headed white families are significantly better off than female-headed black families; the poverty rate for black families headed by a married couple is usually twice the rate of that for white families headed by a married couple; and unemployment rates for blacks are generally higher than those of whites with comparable levels of education.[18]

The consideration of the existence of racial hierarchy is key to understanding and ultimately eliminating racial discrimination. While legal responses to racial discrimination and bigotry might be effective at one level of social interaction, it is not enough to erase racial hierar-

16. *Id.* at 15.

17. *See* SCHUMAN ET AL., *supra* note 9; *see also* Smith, *supra* note 9, HOCHSCHILD, *supra* note 9.

18. For an overview of poverty and racial characteristics, *see* JAMES JENNINGS, UNDERSTANDING THE NATURE OF POVERTY IN URBAN AMERICA (1994).

chy. There are important differences between bigotry, discrimination, and racial hierarchy. Bigotry and discrimination involve attitudes felt by one group about another, or individual acts of harassment or violence that are directed at one group or exchanged between groups. Racial hierarchy involves a pervasive system of caste based on race. While bigotry and discrimination typically feature "horizontal" racial relations, racial hierarchy reflects a "vertical" order of domination. The differentiation of these concepts helps to illustrate why a legal apparatus that enforces antiracial discrimination does not solely guarantee the actualization of racial equality or social justice. Legality is far more effective in resolving horizontal relations that reflect bigotry and discrimination. But unless it is linked to human rights, legality is often ineffective in resolving vertical structures of domination based on race.

While the International Convention on the Elimination of All Forms of Racial Discrimination is limited insofar as it focuses on racial discrimination, it can serve as a mechanism or bridge to move this society from simple, legal responses to the problem to more comprehensive approaches of abolishing racial hierarchy. It can serve this purpose because it places the issue of racial discrimination within the context of the international arena and encourages nations to consider the basic rights that should be available to all people regardless of national boundaries. The focus on rights as they cross national boundaries also means that there is less intellectual and legal emphasis on the cultural, institutional, or political factors used to explain or justify the failure of societies in guaranteeing these rights. The focus is, rather, on human rights that should be enjoyed by all people, and thus all the obstacles to the existence of such a state, including racial hierarchy, must be examined and challenged. Furthermore, the Convention, by making a strong linkage between human rights and racial discrimination, discourages a simplistic or purely legalistic definition of the latter concept. Thus, racial discrimination will exist as long as human rights are not directly addressed.

A review and analysis of the Convention by the International Human Rights Law Group states that, "the Convention represents a milestone in the world's search for an end to discrimination on the basis of race, color, decent, and national or ethnic origin."[19] The defi-

19. INTERNATIONAL HUMAN RIGHTS LAW GROUP, U.S. RATIFICATION OF THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION: AN OVERVIEW OF UNITED STATES LAW WITH ANALYSIS OF POTENTIAL RESERVATIONS, UNDER-

nition of racial discrimination utilized by the Convention states any, "distinction, exclusion, restriction or preference based on race, color, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, . . . on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."[20] This definition represents a broader conceptualization of racial discrimination than has been traditionally identified in the United States.

This last point is explained further by Y. N. Kly, who writes that, "[t]he concept of non-discrimination has traditionally been understood within the context of the right of individuals to equality before the law. However, the right to non-discrimination in the human rights context includes the dimension of individual *and* collective affirmative action."[21] Effective responses to racial discrimination, therefore, have to incorporate the concept and social existence of national minorities and their own group interests in order to eliminate the basis and manifestations of racial discrimination. This approach is not inconsistent with, but certainly greater than, a focus on individual remedies to problems of racial discrimination. According to Kly, the definition of racial discrimination within a human rights context is supported by a range of legal instruments established internationally that are aimed at expanding human rights. Such support is reflected specifically in the "notion of 'effective remedy' . . . included in ART. 2(3a) of the International Covenant on Civil and Political Rights and in ART. 6 of the Declaration on the Elimination of All Forms of Racial Discrimination."[22] Elevating the issue of racial discrimination to the arena of human rights leads one to approach racial hierarchy as a fundamental cause for continuing tensions between racial and ethnic groups.

Although frequently overlooked in public and scholarly dialogues in the United States, the relationship between racial discrimination and human rights is fundamental, as suggested by many observers including the late Supreme Court Associate Justice Thurgood Mar-

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STANDINGS, AND DECLARATIONS TO THE CONVENTION 1 (1994). It should be noted that several observers have noted and discussed the limitations of legal restrictions against racial discrimination in completely eliminating this problem. *See Committee on the Elimination of Racial Discrimination*, 14 HUM. RTS. L. J. 249 (1993).

20. *Id.* at 15 (citations omitted).

21. Y. N. Kly, *Human Rights, American National Minorities, and Affirmative Action*, 25 BLACK SCHOLAR 65 (1995).

22. *Id.* at 66.

shall.[23] He argued that civil rights aimed at preventing racial discrimination are strongly linked to the fate of human rights in a society. Justice Marshall observed that the fact that, "the fates of equal rights and liberty rights are inexorably intertwined was never more apparent" than in the current period.[24] The weakening of the civil rights of minorities, he explained, actually facilitates challenges to the actualization and maintenance of human rights for other groups: "The Court's decisions last term put at risk not only the civil rights of minorities, but of all citizens. History teaches that when the Supreme Court has been willing to shortchange the equality rights of minority groups, other basic personal civil liberties like the rights to free speech and to personal security against unreasonable searches and seizures are also threatened."[25] Thus, the link between eliminating racial discrimination and expanding traditional understandings of what encompasses human rights should not be overlooked.

This linkage is reviewed by political scientist Winston Langley in a research report, *Human Rights, Women and Third World Development*, as it specifically applies to the human rights of women.[26] He summarizes some of the Conventions of the United Nations and shows that increasingly the intersection of racial and gender discrimination is approached within a global framework of human rights. Urban affairs specialist Walter Stafford also notes the connection between racial discrimination and human rights when he observes that, "[in] a period in which affirmative action laws are being weakened in the United States, it is important to assess how these policies and practices resonate with broader conceptions of racial discrimination and human rights."[27] Examination of this question is significant because placing racial discrimination and bigotry within a context of human rights represents a critical step in achieving fully the goals of the Convention. This step includes exploring effective responses to problems like racial hierarchy in the United States and in the international arena. The proposition that combating overt racial discrimination through legal mechanisms is necessary though limited in

23. Thurgood Marshall, *Remarks Made at the Second Circuit Judicial Conference*, 4 TROTTER INST. REV. 3 (1990).

24. *Id.* at 4.

25. *Id.*

26. WINSTON E. LANGLEY, HUMAN RIGHTS, WOMEN, AND THIRD WORLD DEVELOPMENT (1988).

27. Walter Stafford, Human Rights and Racial Discrimination in the United States 1 (June 3, 1996) (a paper on file with the author).

advancing democracy and racial justice was expressed by President Lyndon B. Johnson on June 4, 1965, at the commencement ceremonies of Howard University in Washington, D.C. President Johnson suggested that legal solutions declaring racial discrimination illegal are not effective alone in expanding U.S. democracy and social justice:

> Freedom is not enough. You do not wipe away the scars of centuries by saying: Now you are free to go where you want, and do as you desire, and choose the leaders you please. You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, "you are free to compete with all the others," and still justly believe that you have been completely fair. Thus, it is not enough just to open the gate of opportunity. All our citizens must have the ability to walk through those gates. This is the next and the more profound stage of the battle for civil rights. We seek not just freedom but opportunity. We seek not just legal equity but human ability, not just equality as a right and a theory but equality as a fact and equality as a result . . . To this end equal opportunity is essential, but not enough, not enough.[28]

The president proceeded to explain that for the great majority of blacks who are poverty-stricken or continuously unemployed, "court orders and laws" and "legislative victories" are not adequate responses to their inequality.[29]

President Johnson's admonition was delivered almost a decade after the famous *Brown v. Board of Education of Topeka, Kansas,* decision, which declared segregation unconstitutional.[30] Johnson's call for a focus on substantive racial equality in areas like housing, health, economic development, and education, rather than stopping at the mere opening of the gate of opportunity, reflected the reasoning underlying the *Brown* decision. Donald E. Lively observes:

> A fundamental tenet of Brown was that desegregation was essential for equal educational opportunity and thus was a means rather than a mere end in itself. The Court thus characterized education as "the most important function of state and local governments . . . success in life . . . [and] a right which must be made available to all on equal terms." Post-Brown jurisprudence largely has foreclosed the possibility of equal educational opportunity as a function of constitu-

28. Lyndon B. Johnson, To Fulfill These Rights: Commencement Address at Howard University, June 4, 1965, *in* PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: LYNDON B. JOHNSON 1965, 635 at 636 (1966).

29. *Id.* at 637.

30. 347 U.S. 483 (1954).

> tional imperative. By concluding that education is not a fundamental right, wealth classifications are not suspect and racially disproportionate impact by itself is insufficient to establish constitutional responsibility, the Court has more than repudiated Brown's potential.[31]

President Johnson was proposing, in effect, that legal redress to the problem of racial discrimination is but a first step toward the realization of substantive racial equality. Such a state cannot be achieved by outlawing racial discrimination while at the same time ignoring and permitting the existence of racial hierarchy.

The Convention on the Elimination of All Forms of Racial Discrimination serves as a framework for identifying, first, racial discrimination as a major cause of social, political, and economic tensions throughout the world, and second, effective legal strategies for eliminating this problem across nations. Despite the urgency of these particular goals, the problem of racial hierarchy must be resolved in order to reduce the possibility of violence and tension and to implement the Convention fully. In addition to its use as a legal and constitutional tool for eradicating racial discrimination in the United States and abroad, the Convention and similar instruments can be effective in challenging the existence of social, economic, and cultural hierarchies that are also racialized. Such arrangements encourage and facilitate racial and ethnic discrimination and tension. Ignoring racial hierarchy limits the reach of the Convention as a tool for eliminating racial discrimination.

In a review of earlier U.N. conventions and activities directed at the problem of discrimination against women, Langley cautions that:

> If one defines concrete action in terms of ratification of or accession to the instruments in question, then states have done well, although not spectacularly. In the case of the most important convention, that on the Elimination of All Forms of Discrimination Against Women [CEDAW], over 85 nation-states have ratified or acceded to it. Indeed, at the beginning of 1985, some 74 states were parties to it; but, in honor of the end of the U.N. Decade for Women, some 30 or more states took the necessary steps to become parties thereto. However, ratification or accession, as important as they are, do not by themselves, mean much if nothing else is done . . . One of these states that has ratified CEDAW is Egypt; yet, in 1985, as before seen, many of the rights enjoyed by women under a 1979 law were

31. DONALD E. LIVELY, THE CONSTITUTION AND RACE 174 (1992).

> eliminated by a court decision. China also ratified the above-cited convention, but it has not foregone its traditional preference for sons . . . And Zimbabwe, which is suppose [sic] to be one of the more progressive of Sub-Sahara African states, has a constitution that bans discrimination on the basis of race, tribe, geography of origin, political opinion, or religious persuasion but omits sex on the basis that to do otherwise would be to offend traditional culture.[32]

This reminder is not intended to minimize or deny the significance of the work reflected in the Convention, nor of much racial progress that has been realized in the United States as stated earlier.

As observed by Dr. Martin Luther King Jr., at the same time that the United States has achieved significant racial progress, in large part due to the legal reforms borne out of the Civil Rights Movement, an entrenched hierarchy of race is a fact of life in this country. He wrote in his last major work, *A Testament of Hope*:

> The largest portion of white America is still poisoned by racism, which is as native to our soil as pine trees, sagebrush and buffalo grass. Equally native to us is the concept that gross exploitation of the Negro is acceptable, if not commendable. Many whites who concede that Negroes should have equal access to public facilities and the untrammeled right to vote cannot understand that we do not intend to remain in the basement of the economic structure . . . This incomprehension is a heavy burden in our efforts to win white allies for the long struggle.[33]

Similar to the sentiment described by King is the major conclusion of a national study involving numerous scholars focusing on race in the United States: that is, legal mechanisms may be established forbidding racial discrimination and calling for equality at the same time that racial stratification is strengthened. Referring to this study, E. Yvonne Moss and Wornie L. Reed note:

> Scholars in this study have sought to evaluate developments in race relations, particularly since 1940, by examining racial stratification, subordination, and change in various aspects of American life. Our general conclusion is that despite improvements in various aspects of American life, racial stratification has not changed in any fundamental sense. In addition to the structural mechanisms that perpetuate differential status, researchers point to social factors—

32. LANGLEY, *supra* note 26, at 39-40.

33. MARTIN LUTHER KING, JR., A TESTAMENT OF HOPE, *reprinted in* A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR. 316 (James Melvin Washington ed., 1986).

> attitudes, values, ideology, and racial violence—that reinforce racial domination. Legal doctrines and the courts have always provided justification and legality for whatever structural form the system of racial stratification has taken. Historically, the U.S. Constitution has been one of the primary supports for white supremacy.[34]

Moss and Reed continue to explain that:

> The established image of "equality" has meant that African-Americans can possess all manner of civil rights in the abstract, but little property. Wealth remains in white hands so that even under this so-called "equality" the social results are the same. The equality doctrine both masks and justifies the prevailing inequalities. Mechanisms other than color distinction are employed to subjugate black citizens. Growing disparities between black and white Americans coincide with the legal expansion of equal rights.[35]

The issue of whether racial hierarchy is intentionally constructed and maintained is not as important as its very existence because the question of intent does not diminish the impact of such a hierarchy on the social conditions of blacks. The existence of racial hierarchy and the evidence that it is indeed becoming more rigid suggest that racism is still a major problem for American society. Even if acts of bigotry could be somehow erased or eliminated today, we still could not assert that racism is no longer a problem. As long as blacks systemically occupy social positions lower than whites—that is, as long as racial hierarchy exists in this society—racism remains a significant problem. Racial hierarchy is fundamentally a social, economic, and cultural reality for Americans. Racism and racial discrimination emerge from and are facilitated by the existence of racial hierarchy, and legally preventing racial discrimination does not necessarily alter racial hierarchy.

While bigotry in the United States is still a significant concern in terms of race relations, it is not the critical problem that has to be resolved; rather, it is but a manifestation of a more fundamental issue. Prejudice is defined by sociologist Ellis Cashmore as any:

> learned beliefs and values that lead an individual or group of individuals to be biased for or against members of particular groups . . . Technically then, there is a positive and negative prejudice, though, in race and ethnic relations, the term usually refers to the negative

34. E. Yvonne Moss & Wornie I. Reed, *Stratification and Subordination: Change and Continuity in Race Relations*, 4 TROTTER INST. REV. 3 (1990).

35. *Id.* at 4.

> aspect when a group inherits or generates hostile views about a distinguishable group based on generalizations.[36]

Thus bigotry is any act of racially, ethnically, or religiously based prejudgment, harassment, or violence. As such, bigotry is not synonymous with racial hierarchy, although it is certainly a form of racial discrimination. Racism, in contrast, is the existence and institutional maintenance of a racial hierarchy in American society. The distinction between these concepts is explained by sociologist Robert Blauner:

> The processes that maintain domination - control of whites over nonwhites - are built into the major social institutions. These institutions either exclude or restrict the participation of racial groups [through] procedures that have become conventional, part of the bureaucratic system of rules and regulations. Thus there is little need for prejudice as a motivating force. Because this is true, the distinction between racism as an objective phenomenon, located in the actual existence of domination and hierarchy, and racism's subjective concomitants of prejudice and other motivations and feelings is a basic one.[37]

Bigotry, racism, and racial hierarchy are often treated similarly, which leads to faulty analysis of the state of race relations and thereby incomplete responses to racial discrimination. But it is a mistake to approach racism as insignificant based solely on the absence of signs of bigotry. As a result of this error, an interesting situation arises in which well-meaning people fight bigotry at the same time that they ignore—and therefore strengthen —racial hierarchy, which in turn gives rise to racism.

We can reiterate this argument by using the metaphor that historian Peter Steinfels develops in his book *The Neo-Conservatives* that many whites approach racism in the United States as if it were merely graffiti on a solid brick wall of social justice and equality; but, in fact, it is bigotry that represents graffiti on the wall containing a major racial fault.[38] The absence of bigotry in a particular setting is not a guarantee of the absence of racism or racial hierarchy. An existing racial hierarchy is socially, economically, and culturally beneficial to whites as a group. Racial hierarchy, as suggested earlier, is treated as a "natural" feature of society and therefore not considered in much of the

36. ELLIS CASHMORE, DICTIONARY OF RACE AND ETHNIC RELATIONS 257 (3d ed. 1994).
37. ROBERT BLAUNER, RACIAL OPPRESSION IN AMERICA 9-10 (1972).
38. PETER STEINFELS, THE NEO-CONSERVATIVES 24-25 (1979).

analysis, or treatment, of racial discrimination. Donald Lively's point cited earlier regarding desegregation is resonant here: like desegregation, the outlawing of racial discrimination has become an end rather than a means to a more just society.[39]

Sociologist Robert Blauner proposed that white Americans enjoy the benefits of a racial order even if they consciously abhor prejudice and racism: "It cannot be avoided, even by those who consciously reject the society and its privileges."[40] Psychologists W. H. Grier and P. M. Cobbs have argued similarly that racism has become prominent, almost natural, even among well-intentioned whites:

> The hatred of blacks has been so deeply bound up with being an American that it has been one of the first things new Americans learn and one of the last things old Americans forget. Such feelings have been elevated to a position of national character . . . The nation has incorporated this oppression into itself in the form of folkways and storied traditions.[41]

And in their book *The Bakke Case: The Politics of Inequality,* Joel Dreyfuss and Charles Lawrence explain that the continuing rigidity of this new racism is a major problem in overcoming the gap between the two American societies.[42] They go on to state that, "[t]he greatest danger that the New Racism poses to minority efforts at equality is its assumptions that racism no longer exists, that whites have finally overcome several hundred years of cultural reinforcement, and that they can make objective judgments about the ability and performance of minority-group individuals."[43]

The existence of racial hierarchy gives rise to certain ways of thinking about people of color generally, and blacks in particular, which make it difficult for society to eliminate racial discrimination simply on the basis of legal instruments, without considering more comprehensive policy tools that go beyond legal redress as well. Eliminating racial hierarchy in the United States would require the elevation of black life and community in the psyche of whites and others in this society. This involves educational strategies that celebrate the nation's multi racialism. It involves political practices that seek to ensure the full participation of blacks and other people of color in the

39. LIVELY, *supra* note 31.
40. BLAUNER, *supra* note 37, at 23.
41. W.H. GRIER & P.M. COBBS, BLACK RAGE (1968).
42. JOEL DREYFUSS & CHARLES LAWRENCE III, THE BAKKE CASE: THE POLITICS OF INEQUALITY (1979).
43. *Id.* at 159-60.

electoral process. It means that governmental appointees would reflect the nation's racial diversity. And it means that black communities could be places that do not overwhelmingly carry the burden of dilapidated housing, unemployed workers, or poverty-stricken individuals and families. Such widespread changes call for an expansion of social welfare policies as well as greater investment in the urban areas where most blacks reside.

Incidents of racial bigotry occur frequently because whites have been socialized to think of blacks as somehow lower than or not as important as whites. This socialization takes place because U.S. citizens constantly see and experience racial hierarchy and because they learn values within a framework of this hierarchy. The suggestion that a particular social and economic order leads to a way of racialized thinking calls to mind a recent observation by Adele D. Terrell, program director for the National Institute against Prejudice and Violence:

> My point is that the cross burnings and harassment which occur when an African-American family moves into a traditionally white neighborhood, or the name calling which occurs when an African-American student walks across an Ivy-League campus, or the racist cartoons that appear on the desk of the newly promoted African-American supervisor are all to some extent manifestations of the same thought process . . . [that includes] long-held beliefs that some groups of people are different and can be treated by different standards.[44]

Despite such caveats, many nations have responded to the problem of racial discrimination merely by relying on legal regulations prohibiting discrimination. Establishing such regulations without reference to the history of racial oppression or ongoing racial stratification in a particular society is not enough to wipe out racial discrimination. Ironically, as social scientist Paula Rothenberg argues, color-blind social policies that ignore racial differentiation and its impact in this society but that are nonetheless developed within a historical context of racism may actually perpetuate racial discrimination rather than eradicate it because racial hierarchy remains a fact of life.[45] In a similar vein, Lively writes that when the, "presence and implications [of race] are pervasive and selectively unattended to, ju-

44. Adele D. Terrell, Forum, National Institute Against Prejudice and Violence, Baltimore, Md., Sept. 1989.

45. Paula Rothenberg, *The Hand that Pushes the Rock*, 3 TROTTER INST. REV. 3 (1989).

risprudence seriously confounds even the limited aims of the Fourteenth Amendment. The Court actually may impede progress toward real color blindness insofar as premature insistence on neutrality may deter morally inspired initiatives intended to remedy the consequences of past policy and practice."[46] If racial hierarchy is instead openly acknowledged, then public dialogue can move from the debate about the resolution of racial discrimination to a focus on what social justice and racial equality might look like in the United States.

Effective responses to racial hierarchy have to be more comprehensive in nature than merely legal solutions are. Bigotry on the campus or on the street, for example, may be lessened or eventually eliminated through legal action or even through an educational process that raises the level of awareness and respect for cultural and racial diversity. While the eradication of bigotry is an important social goal for all Americans, the demise of racial hierarchy, which facilitates both bigotry and racism, will take place only when blacks and others have the political power to challenge and change both public and private institutional arrangements and practices that maintain racial hierarchy.

Overall, responses to racial discrimination in the United States reflect a strong commitment to the idea of pluralism, an ideology that posits that any group in society can organize freely in order to influence political decision making to get a response to its interests. And while some groups may win some favorable decisions, they may lose at other times, and, therefore, keeping the political system open and available for bargaining between groups is fundamental to any democratic society.[47] In part, this ideology of pluralism has discouraged U.S. leadership from treating the problem of racial discrimination as one of human rights. This occurs because it is presupposed that society is free and just, and that any deviation from such a state can be rectified by a person acting on his or her injured interests. But the suggestion that all people, including blacks, simply can act effectively based on injured interests can be challenged in terms of U.S. history as well as the plethora of legal cases raised under the umbrella of discriminatory practices.

Again, noting the observations of Walter Stafford, he writes:

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46. LIVELY, *supra* note 31, at 178.

47. *See, e.g.*, THE FEDERALIST NOS. 10, 51 (James Madison) (published in 1787-88, essays 10 and 51 are particularly helpful in explaining the connection between "security for civil rights" and the maintenance of "multiplicity of interests" in society).

> Historically, the United States had refrained from ratifying the Covenants and the Convention because they went beyond the American concept of rights. The American conception of rights grew out of a commitment to government for limited purposes. This concept of negative rights . . . has emphasized civil and political rights that government activities must not violate.[48]

But a review of the history of pluralism regarding race shows that this ideology has major limitations in its utility for eliminating racial discrimination or for advancing the social interests of masses of blacks. A major finding of this critical literature is that social and legal analysis based on the presumption that the United States is a pluralist society by nature either overlooks issues related to race and class or simply negates the significance of race and class.[49] The ideology of pluralism permits this conceptual oversight because it does not consider the existence of racial hierarchy. Abstract appeals to the value of color blindness are utilized by pluralist apologists to justify this stance.

It is assumed by the leadership of some countries, including the United States, that racial discrimination is simply a problem of legality, and thus, once discrimination is outlawed and neutral, and once color-blind government regulations are applied equally to all citizens, society will have completed its task regarding racial and ethnic divisions. Such divisions may exist, it has been argued, but they are no longer the province of government. This was the stance of the United States in refusing to ratify the above Convention over a long period of time unless its proposed changes were adopted. Despite a focus on legal technicalities, and even on what Justice Marshall referred to as "hypertechnical language games," recent U.S. history of racial discrimination reflects some ambivalence about a purely legal approach to eliminating racial discrimination.[50]

Affirmative action in the United States is an example of this ambivalence of the American public regarding effective responses to racial equality. Affirmative action, and other policies aimed at equipping blacks, Latinos, and other communities of color as well as women with resources to make them more competitive and effective in the labor market, has significant political support. But at the same

48. Stafford, *supra* note 27, at 2.

49. See Herman George Jr., *Black America, the Underclass, and the Subordination Process*, 19 BLACK SCHOLAR (May/June 1988) for a review and summary of major racial critiques of pluralism.

50. Marshall, *supra* note 23, at 4.

time, many others support the popular and electorally exploited notion that enough has been done about the problem of racial discrimination and that additional responses are unnecessary, as is suggested in the United States' responses to the Convention. As Kly observes, "[t]hus far, however, the U.S. has not seen fit to give a fuller and more serious content to its affirmative action programs. In fact, it appears that the notion of affirmative action as introduced into the heavily social Darwinist-oriented American society (as a form of reverse job and education discrimination) has been predictably rejected."[51] Until the concept of racial hierarchy is considered, the validity of affirmative action as a tool remains confined by the issue of whether or not racial discrimination exists. Yet we now know that racial discrimination can be legally eliminated even in the presence and impact of racial hierarchy.

Although the United States has realized substantial legal advances aimed at ensuring racial equality, several recent Supreme Court decisions illustrate the tenuous status of laws and court decisions, considered critical by some, for moving American society toward social and racial equality. A shift has occurred in U.S. jurisprudence from the pursuit of substantive racial equality as reflected in the Warren Court, and particularly reflected in the *Brown v. Board of Education* decision, to a response to racial discrimination by merely requiring the use of legal language that is color-blind.[52] For instance, the decision in *Wards Cove Packing Company v. Antonio* shifts the burden of proof of invidious racial discrimination to the alleged victim of racial discrimination.[53] The *Martin v. Wilks* decision gave white male employees of the Birmingham Fire Department the right to challenge a 1974 consent decree to hire qualified minorities, although these same white firemen were not employed at the time of the decree.[54] The *Richmond v. Croson* decision outlawed a requirement that 30 percent of construction contracts be minority set-asides in the city of Richmond, Virginia.[55] The program was established as a result of the finding that over a period of several decades blacks comprising 30 percent of Richmond's population by 1990 had received less than 1 percent of all construction contracts from the city. And the

51. Kly, *supra* note 21, at 67.
52. 347 U.S. 483 (1954).
53. 490 U.S. 642 (1989).
54. 490 U.S. 755 (1989).
55. 499 U.S. 469 (1989).

Runyon v. McCrary decision made it more difficult for an alleged victim of discrimination to sue under one of the oldest civil rights laws in the United States—Section 1981 of the 1877 Civil Rights Act.[56] Thus, while in some ways the country has initiated movement toward the idea of racial equality, it has also retarded this development significantly by insisting on a singular focus on racial discrimination.

One recent decision of the U.S. Supreme Court is useful in illustrating the limitations of approaching racial discrimination as simply an issue of rectifying legal aberrations in a fundamentally color-blind society. In the *Shaw v. Reno* decision, which dealt with the redrawing of voter districts in North Carolina and was submitted in the summer of 1993, the Supreme Court ruled that redistricting congressional boundaries resulting in black representation is unconstitutional, even if the expressed purpose is to increase black representation in regions with a history of blacks lacking representation.[57] Writing for the 5-to-4 majority, Associate Justice Sandra Day O'Connor reasoned in part that "[r]acial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions."[58] This presupposes that society has eliminated the racial balkanization described in the Kerner Commission Report in 1968 and the continuing racial divisions documented in numerous studies since the 1960s. Associate Justice O'Connor argued further that redrawn districts that reflect racial considerations will encourage racial stereotyping and continue patterns of racial bloc voting. Her rationale seems to have been based on a profound faith in the notion that color blindness has been a value practiced in all arenas of social and economic life in this country.

Some of the conceptual and legal reasoning underlying the majority opinion is certainly not new. In fact, as suggested earlier, the argument that all should strive for a color-blind society has been used throughout U.S. history to defend the racial status quo with its hierarchy of whites at the top and blacks at the bottom. The social reality, as described by the eminent historian John Hope Franklin, is that the

> color line is alive, well, and flourishing in the final decade of the twentieth century. It thrives because we have been desensitized to its significance over two centuries, and it permeates our thinking and our actions on matters as far apart figuratively as New York's Harlem and New York's Upper East Side, or an African American

56. 427 U.S. 160 (1976).
57. 509 U.S. 630 (1993).
58. *Id.* at 657.

> mayor of Los Angeles and the videotaped beating of Rodney King by four members of the Los Angeles Police Department.[59]

Once again, the color line is not a recent occurrence but has strong historical roots in the United States.

In *The Black Laws in the Old Northwest* historian Stephen Middleton explains that under the Ordinance of 1787, the Northwest Territory of the United States was ordained to be a land free of slavery where blacks were entitled to citizenship.[60] Yet despite the legal affirmation of racial equality, "clever white residents found ingenious ways to violate America's antislavery and civil rights document."[61] Middleton shows how states like Ohio passed "racially neutral" or "color-blind" legislation with the knowledge that whites could easily continue subjugating blacks economically and politically and thus maintain racial hierarchy, even though overt racial discrimination had been outlawed. In the 1990s, Justice O'Connor's reasoning regarding the existence of racial hierarchy has not progressed far from the position of powerful whites trying to keep blacks "in their place" in the 1790s. The position that racial discrimination is merely a matter of legality and, therefore, that the United States as a color-blind society has resolved the problem of race has encouraged some interests to challenge the very laws and legal interpretations that were passed to eliminate racial discrimination. This society is still at a stage where the constitutional propriety of its legal apparatus aimed at eradicating racial discrimination is debated. As suggested here, the Supreme Court of the United States has taken a lead role in encouraging this kind of debate.

The United States and other nations will not resolve the problem of racial discrimination in the remaining years of this century, or in the next, without considering how this problem is intricately related to—and perpetuated by—racial hierarchy. While the Convention is an important first step, it will flounder if the international community does not consider it as but a first step in building a more hopeful vision of life and society. Acknowledging the existence of racial hierarchy, and how it is maintained, is critical to understanding race relations and the deteriorating living conditions of black people in the United States.

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59. JOHN HOPE FRANKLIN, THE COLOR LINE: LEGACY FOR THE TWENTY-FIRST CENTURY 72 (1993).

60. STEPHEN MIDDLETON, THE BLACK LAWS IN THE OLD NORTHWEST: A DOCUMENTARY HISTORY (1993).

61. *Id.* at xv.

As an idea, racial hierarchy can be used as a conceptual bridge by which to transform the issue of racial discrimination into a broader concern for human rights.