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International Legacy of Brown v. Board of Education, The

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The International Legacy of *Brown v. Board of Education*

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I. INTRODUCTION

Our initial approach to this paper was to research and consider the extent to which foreign courts have considered the decision in *Brown v. Board of Education*[1] to be relevant to cases coming before them. We were aware that anti-apartheid activists considered it and *Brown II*[2] as models of civil rights litigation and that on a few occasions *Brown* had been cited by the South African Constitutional Court as persuasive authority. It soon became apparent, however, that the subsequent reputation and use of *Brown* in that context was only part of the story: the international legacy of the decision can only be fully appreciated and understood in light of the international context in which it was decided. *Brown* was part of an international movement towards the development of international human rights. It was relevant to the increased reliance on the rule of law and the use of legal process in enforcing the norms that emerged from the sordid history of Nazi war crimes.

Much has been written about *Brown*, and the international political situation in which *Brown* was decided has been presented in detail elsewhere.[3] What is lacking in this impressive literature is a complete presentation of the international story in which *Brown* plays a very significant role. This article attempts to fill that gap by connecting *Brown's* role as an example of the ability of courts to promote human rights and lawyers to effect social change to the specific historical circumstances—in particular the emerging international human rights movement—that influenced the arguments in this seminal case.

We shall attempt to describe the international legacy of *Brown* in two discrete but related parts. First, we survey the international and domestic political contexts of the decision, which other commentators have convincingly demonstrated played a prominent role in the debates surrounding legalized segregation and in the arguments before the Supreme Court in the case itself. Important in this section is the intense and widespread international attention that was paid both to the problem of race relations in the U.S. and the decision in *Brown*. This background sets up the conclusions we draw from our survey of international use of *Brown* in the second section: notwithstanding the relatively

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1. 347 U.S. 483 (1954).

2. 349 U.S. 294 (1955).

3. *See, e.g.*, Derrick Bell, *Racial Remediation: An Historical Perspective on Current Conditions*, 52 NOTRE DAME L. REV. 5, 12 (1976).

few actual citations to *Brown*, its importance as an example of social change through the legal process—and in the face of apparent majority opposition—has enabled *Brown* and the United States model of democracy generally to play a significant role in the development of human rights throughout the world.

II. INTERNATIONAL POLITICAL CONTEXT

The experience of World War II and, in particular, the horrors of the Holocaust produced an international environment in the post-war period that was ripe for the development of international human rights norms and an effective means of enforcing them. Indeed, blame for the war itself was attributed specifically to the lack of such norms:

> The great and terrible war which has now ended . . . was a war made possible by the denial of democratic principles of the dignity, equality, and mutual respect for men, and by the propagation, in their place, through ignorance and prejudice, of the doctrine of the inequality of men and races.[4]

The struggle to develop such norms and specifically the battle to develop international policies that condemned racism had begun in the aftermath of World War I but gained increased attention and a renewed sense of urgency because the inhumanity of the Holocaust brought racism to the forefront of international concern.[5]

The United Nations was developed in the aftermath of World War II and was explicitly concerned with responding to the human rights abuses of the Holocaust. As a result, the United Nations' human rights regime was created largely in response to the perceived problems of racism.

There was a conflict between the desire to respond to the result of racist Holocaust policies and the political concerns of the United States, United Kingdom and Australia that such response would invite scrutiny of legal segregation policies in the United States and Australia and racist policies in the United Kingdom colonies.[6] Concerns about race played a major role in U.S. policy towards the development of international human rights instruments. Notwithstanding its concerns about the domestic effect of such instruments, however, U.S. policy-makers recognized as early as 1942 that a commitment to

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4. Paul Gordon Lauren, *First Principles of Racial Equality: History and the Politics and Diplomacy of Human Rights Provisions in the United Nations' Charter*, 5 HUM. RTS. Q. 1 (1983) (quoting UNESCO, *Conference for the Establishment of the United Nations Educational, Scientific, and Cultural Organization*, ECO/CONF./29, Nov. 16, 1945, 93).

5. *See* Kevin Boyle & Anneliese Baldaccini, *A Critical Evaluation of International Human Rights Approaches to Racism*, *in* DISCRIMINATION AND HUMAN RIGHTS: THE CASE OF RACISM 135, 141 (Sandra Fredman ed., 2001) (stating "it was largely the search for an effective international response to racism that produced the main components of the UN human rights regime").

6. *Id.*

human rights at the international level was necessary to the maintenance of international peace and that prohibiting discrimination was an essential aspect of such a commitment.[7] A committee in the U.S. Department of State in 1943 produced draft articles for the U.N. which included a prohibition on discrimination on the basis of race, nationality, language, political opinion, or religious belief. The internal analysis of the suggested provision expressly tied the need for it to the racist Nuremberg laws:

> [the] ban on discrimination [is] fundamental because without it no person's rights are assured and those of all may be undermined. . . . The prohibition of discrimination on the grounds of race is intended to prevent the enactment of laws like the notorious Nuremberg laws, and similar laws in other countries, discriminating against "non-Aryans."[8]

Tellingly, however, the committee was also careful to state that the provision would not interfere with segregation laws because of "the most notable omission": "the absence of guarantees or measures of enforcement. . . ."[9]

W.E.B. Du Bois, commenting on the negotiation process of the U.N. Charter, exhorted the participants to focus on the need to address racism as one of the central causes of war.[10] Several consultants to the American delegation similarly argued that human rights—including provisions on racial equality—should play a more significant role in the Charter.[11]

The final draft of the U.N. Charter contained strong language condemning racism and calling for equality. Article 1 listed as a major purpose the achievement of human rights and fundamental freedoms "for all without distinction as to race, sex, language or religion,"[12] and several other provisions, including articles 13 and 55, contained similar language. The inclusion of this language was, however, a very modest victory for the advocates of human rights because of the protection of state sovereignty enshrined in article 2(7): "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement. . . ."[13]

The vision of the original U.S. drafters was thus achieved: the inclusion of language creating an international commitment against discrimination that was unable to have direct impact on the existing domestic situation. The compromise achieved in the Charter did not end the debate over discrimination either internationally or domestically. The establishment of the U.N. was followed by

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7. Lauren, *supra* note 4, at 7.
8. *Id.* at 9.
9. *Id.*
10. *Id.* at 15.
11. *Id.* at 16.
12. U.N. CHARTER art. 1, para. 3.
13. *Id.* art. 2, para. 7.

an intense debate about race and equality which resulted in the development of the Universal Declaration of Human Rights and the Convention on the Prevention and Punishment of the Crime of Genocide in 1948. And, as we discuss below, domestic civil rights activists in the U.S. attempted to creatively use these new international agreements in their fight against segregation.

III. DOMESTIC POLITICAL CONTEXT

The domestic political context in which *Brown* was decided was intimately connected to these international events due to a growing awareness within domestic civil rights organizations of the potential that the development of international human rights norms presented for domestic litigation. There was also increasing pressure from interest groups such as the National Association for the Advancement of Colored People (NAACP) for the U.S. government to live up to its international reputation as a leader of democratic values.

Derrick Bell's "interest convergence" theory[14] highlights the domestic significance of the prevailing international situation for the *Brown* decision. Bell correctly points out that by eliminating legalized segregation the decision provided immediate credibility to the U.S. government's message of freedom and democracy to developing countries in its battle against the spread of Communism.[15] As Bell noted in an earlier article, this aspect of the case was highlighted by the attorneys of the NAACP and the federal government in their briefs to the Supreme Court in *Brown*:[16]

> 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. Racial discrimination furnishes grist for the Communist propaganda mills, and it raises doubts even among friendly nations as to the intensity of our devotion to the democratic faith.[17]

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14. Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 522 (1980). Bell hypothesizes that the result in *Brown* was the result of the convergence for a limited time of dominant white and minority black interests in eliminating legalized racial segregation. *Id.* at 522-25. One of the factors he identifies as creating this convergence is the perceived need to improve the international reputation of the U.S. among developing countries in order to prevent the spread of Communism. *Id.* at 524; *see also* Bell, *supra* note 3 (describing in detail the arguments presented to the U.S. Supreme Court in *Brown* concerning the threat of Communism and the predictions of international reaction to *Brown* in contemporary press publications). Bell goes on to conclude that the subsequent lack of significant progress in desegregating public schools in the United States can be explained by a growing divergence of those same interests. Bell, *supra*, at 526-28.

15. Bell, *supra* note 14, at 524.

16. *See* Bell, *supra* note 3, at 12.

17. Brief for the United States as Amicus Curiae at 6, Brown v. Bd. of Educ., 347 U.S. 483 (1954) (quoted in Bell, *supra* note 3, at 12 n.30).

And contemporary media accounts equally recognized the international significance of the decision.[18] The level of media awareness of the international importance of *Brown* is succinctly described in another account of the *Brown* decision:

> After summing up the effect of the decision on the children in the segregation states, *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." From *Newsweek* came these words: "the psychological effect will be tremendous . . . segregation in the public schools has become a symbol of inequality, not only to Negroes in the United States but to colored peoples elsewhere in the world. It has also been a weapon of world Communism. Now that symbol lies shattered." More pointed is the statement from *Citizen's Guide to De-Segregation*: "The Voice of America carried the news around the world. Hundreds of national and international leaders wired congratulations. Only radio Moscow was silent."[19]

In addition to the perceived foreign policy benefits that would accrue from desegregation, the inconsistency and inequity of the willingness of the U.S. to go to war to fight the racist regime of Nazi Germany while maintaining similar policies at home was keenly perceived by the domestic black population, many of whom had participated as soldiers in World War II.[20] As we discussed above, the evident hypocrisy of this situation and the pressures it created both internationally and domestically was not lost on the federal government. In addition, Chief Justice Earl Warren's awareness of this tension at the time of *Brown* is evident in remarks he made on the topic of civil rights to an academic audience in April of 1972:

> That change [the reversal of race relations policies in the U.S.], however, was fostered primarily by the presence of [World War II] itself. First, the primary enemy of the Allies, Nazi Germany, was perhaps the most conspicuously and brutally racist nation in the history of the world. . . . The segregation and extermination of non-Aryans in Hitler's Germany were shocking for Americans, but they also served as a

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18. Bell, *supra* note 3, at 12 n.30 (quoting ALBERT P. BLAUSTEIN & CLARENCE C. FERGUSON, DESEGREGATION AND THE LAW: THE MEANING OF SCHOOL SEGREGATION 11-12 (1962)).

19. BLAUSTEIN & FERGUSON, *supra* note 18, at 12-13 (quoted in Bell, *supra* note 3, at 12 n.31).

20. *See, e.g.*, Bell, *supra* note 14, at 524-25 (stating that "*Brown* offered much needed reassurance to American blacks that the precepts of equality and freedom so heralded during World War II might yet be given meaning at home").

> troublesome analogy. While proclaiming themselves inexorably opposed to Hitler's practices, many Americans were tolerating the segregation and humiliation of nonwhites within their own borders. The contradiction between the egalitarian rhetoric employed against the Nazis and the presence of racial segregation in America was a painful one.[21]

The domestic civil rights movement recognized the opportunity that this international political situation presented and attempted to take advantage of the leverage created by the language of the new U.N. Charter to challenge domestic racist policies. Initial attempts to invoke the Charter met with some success. Most prominently, in 1948 in *Oyama v. California*,[22] in a concurring opinion, Justice Murphy invoked the Charter and its prohibition against race discrimination. The case involved a challenge to a California state law which prohibited a resident alien who was ineligible for U.S. citizenship from, among other things, purchasing agricultural land, and also created a presumption of a violation where such an alien paid consideration for any land purchased by another person. The majority of the Court held that the law violated the Equal Protection Clause of the Fourteenth Amendment. Justice Murphy concurred with the majority's Equal Protection analysis, adding a moving description of the history of discrimination against the Japanese that gave rise to the legislation, and then discussed an alternative reason for the statute's unconstitutionality based on the newly created U.N. Charter:

> Moreover, this nation has recently pledged itself, through the United Nations Charter, to promote respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language and religion. The Alien Law stands as a barrier to the fulfillment of that national pledge. Its inconsistency with the Charter, which has been duly ratified and adopted by the United States, is but one more reason why the statute must be condemned.[23]

The Charter was also specifically relied on by a California state appellate court in litigation involving a direct challenge to the ban on land ownership by aliens ineligible for citizenship in the same statute. After discussing the U.N. Charter and the U.S. commitment to its "concept of respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion,"[24] the court held that the Alien Land Law's land ownership ban was "[c]learly such a discrimination against a people of one race [which] is contrary

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21. Chief Justice Earl Warren, *Notre Dame Law School Civil Rights Lectures*, 48 NOTRE DAME L. REV. 14, 41 (1972).

22. 332 U.S. 633 (1948).

23. *Id.* at 673 (Murphy, J., concurring).

24. Sei Fuji v. State, 217 P.2d 481, 485-86 (Cal. Ct. App. 1950).

both to the letter and to the spirit of the Charter which, as a treaty, is paramount to every law of every state in conflict with it."[25]

This victory for advocates of the direct enforceability of the Charter was short-lived, however: the California Supreme Court upheld the result in *Sei Fuji* but on different grounds and specifically rejected the lower court's reliance on the Charter, finding that it was not self-executing.[26]

In addition to the formal leverage provided by the United Nations Charter, civil rights groups also recognized and attempted to exploit the moral pressures created by the inconsistency of the U.S. position abroad and its domestic policies. W.E.B. Du Bois articulated the international connection to domestic U.S. racial policies as early as 1923 stating that "the problem of the color line, is international and no matter how desperately and firmly we may be interested in the settlement of the race problem . . . it cannot ultimately be settled without consulation and cooperation with the whole civilized world."[27] In 1946, the National Negro Congress submitted a petition to the U.N. on behalf of thirteen million "oppressed Negro citizens" calling on the U.N. to study racial relations in the U.S. and take any action necessary to ensure U.S. compliance with international standards.[28] The NAACP submitted a similar petition in 1947 seeking international intervention in U.S. race relations. And the American Civil Rights Congress submitted a petition to the U.N. general assembly charging the U.S. with violations of the Convention on the Prevention and Punishment of the Crime of Genocide.[29] Although none of these petitions were ultimately successful, they generated significant attention and support from both domestic organizations and other—primarily developing—countries and thus succeeded in increasing the pressure on the U.S. to take action concerning race discrimination.[30]

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25. *Id.* at 488.

26. Sei Fuji v. State, 242 P.2d 617, 619-22 (Cal. 1952). The Court did, however, express strong support for the Charter and its objectives:

> The humane and enlightened objectives of the United Nations Charter are, of course, entitled to respectful consideration by the courts and Legislatures of every member nation, since that document expresses the universal desire of thinking men for peace and for equality of rights and opportunities. The charter represents a moral commitment of foremost importance, and we must not permit the spirit of our pledge to be compromised or disparaged in either our domestic or foreign affairs.

Id. at 622.

27. 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, 572 (1997) (quoting W.E.B. DUBOIS, PEACE AND FOREIGN RELATIONS, CRISIS, Nov. 9, 1923).

28. McDougall, *supra* note 27, at 573; *see also* Janken, *From Colonial Liberation to Cold War Liberalism: Walter White, the NAACP and Foreign Affairs, 1941-1955*, *in* 21 ETHNIC & RACIAL STUD. 1074, 1098 (1998).

29. McDougall, *supra* note 27, at 574.

30. McDougall provides a succinct account of the specific pressures faced and the, at times, conflicting actions taken by the Truman Administration as a result of the inconsistencies between the international commitments of the U.S. and its domestic policies. *Id.* at 575-76. For an extended discussion of the tremendous

In reaction to this growing trend towards reliance on the Charter and other international treaties to create domestic change, a campaign developed in Congress to restrict the power of the President to commit the U.S. to international agreements.[31] This campaign culminated in 1951 with the introduction of a constitutional amendment by Senator John Bricker, a Republican from Ohio, which would have severely curtailed the ability of the President to enter treaties.[32] In order to avoid the potential that this damaging amendment might succeed, the Eisenhower Administration promised not to submit any international human rights treaties to the Senate for confirmation.[33]

The intense pressure created by creative and persistent exploitation of the development of human rights norms at the international level by domestic interest groups and the reaction by conservatives in Congress thus set the stage for the ultimate decision in *Brown*. That context placed the U.S. Supreme Court in a delicate position. Racial segregation had become a scandal of international proportions from the perspective of many Americans,[34] and the foreign policy establishment keenly perceived the damage it created for the U.S. image abroad.[35] At the same time, the Court recognized the tremendous resistance that an order to desegregate schools would meet in many areas, in particular the South, and the significant pressure that resistance would place on the power and credibility of the courts.

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international attention paid to U.S. race relations in the post-war period, see Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61, 84-92 (1988).

31. *See* Dorothy Q. Thomas, *Advancing Rights Protection in the United States: An Internationalized Advocacy Strategy*, 9 HARV. HUM. RTS. J. 15, 19-20 (1996).

32. *Id.*

33. McDougall, *supra* note 27, at 576.

34. In one example of the growing public concern over U.S. racial policies, in a July 1944 national survey of college students, 68% approved of the statement that the postwar policy should be "to end discrimination against the Negro in schools, colleges and universities." Dudziak, *supra* note 30, at 66 n.16 (quoting HADLEY CANTRIL, PUBLIC OPINION 1935-46, at 509 (1951)).

35. Dudziak describes in detail the great concern expressed by various foreign policy personnel including the following description of exploitation of U.S. race relations by the Soviets:

> By 1949, according to the U.S. Embassy in Moscow, "the 'Negro question' [was] [o]ne of the principal Soviet propaganda themes regarding the United States." "The Soviet press hammers away unceasingly on such things as 'lynch law,' segregation, racial discrimination, deprivation of political rights, etc., seeking to build up a picture of an America in which the Negroes are brutally downtrodden with no hope of improving their status under the existing form of government."

Dudziak, *supra* note 30, at 89-90 (footnote omitted).

This context may help to explain the ambivalent nature of the *Brown* decision and, in particular, the lack of immediate relief in it. It was only in *Brown II*, a year later, that the Supreme Court crafted an order giving effect to the constitutional principles articulated in *Brown* at the local level, including the famous retention of judicial power over implementation of the order:

> [C]ourts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles.
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> . . . .
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> . . . They will also consider the adequacy of any plans the defendants may propose to meet these problems and to effectuate a transition to a racially nondiscriminatory school system. During this period of transition, the courts will retain jurisdiction of these cases.[36]

III. INTERNATIONAL EFFECT

Understood in the foregoing context, *Brown* did not appear out of the blue as a dramatic and unprecedented exercise of judicial power to force societal change. Instead, *Brown* was in part a reaction to and in part a component of an emerging understanding of the need for implementation of legally grounded human rights norms and a growing belief in the power of courts to effectively enforce such norms. Properly understood, then, *Brown*—while a significant milestone—was hardly an anomalous development.

And, as predicted by the foreign policy establishment, *Brown* was heralded by the international community and dramatically enhanced the standing of the U.S. within the international community.[37] Its ongoing legacy, however, has been much more significant than simply providing a temporary boost to the U.S. efforts to counter communist propaganda. Searches through the case law of various constitutional democracies reveals a relatively small number of direct citations to the *Brown* decision itself. Nevertheless, the wide-ranging and intense coverage that *Brown* received internationally and the prominent image it enjoys as a watermark in civil rights litigation demonstrate the tremendous influence that *Brown* has exercised in direct and indirect ways.

There are three specific areas where the legacy of *Brown* can be explicitly traced: First, the elimination of racial segregation on constitutional and legal grounds; second, the importance of education in a democratic society; and third, the development of innovative judicial enforcement powers. A close analysis of

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36. *Brown II*, 349 U.S. 294, 299-301 (1955).

37. *See* Dudziak, *supra* note 30, at 114-15.

selected cases from South Africa and Canada where *Brown* is cited reveal the profound influence that *Brown* continues to exert in these areas.

Brown has played an especially important role in all three of these areas in South Africa as the Constitutional Court has interpreted the post-apartheid constitution. During the apartheid era, South Africa was moving in the precise opposite direction as the rest of the world. Instead of beginning to participate in and be influenced by the emerging international human rights movement, the apartheid regime began to retrench and cut ties with the world community in general and the United States in particular.[38] The U.S. civil rights community began to exert pressure both over U.S. administrations and directly against the South African government beginning in the 1970s. During this period, *Brown* was viewed by anti-apartheid activists as representing the possibility for change through democratic processes and the rule of law.[39]

During the 1980s, leading United States civil rights protagonists played a crucial role in helping South African lawyers, black and white, craft tactics to fight apartheid through the courts. Two of those lawyers had appeared as counsel with Thurgood Marshall in *Brown*. Constance Baker Motley, a judge in the Federal District Court for the Southern District of Manhattan, New York, made a number of visits and encouraged black lawyers to use the law in protecting the rights of their oppressed people. And, Jack Greenberg, then the director of the Legal Defense Fund, played a key role in 1979 in establishing the Legal Resources Center, which had signal successes in the courts in establishing rights for some millions of black South Africans. Their association with *Brown* was perceived as a badge of honor and respectability.

Following the peaceful compromise that resulted in the end of apartheid and transition to a constitutional democracy, the Constitutional Court in several important cases has cited *Brown* as persuasive authority. In the first example, *In re The School Education Bill of 1995 (Gauteng)*,[40] the Court was faced with the politically sensitive question of whether section 32(c) of the constitution, which gives the right for everyone to have educational institutions based on common

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38. *See, e.g.*, Allison Thompson & Elizabeth Omara-Otunnu, *Lawyers Reflect on the 'Ties that Bind' South Africa, U.S.*, Advance on the Web, May 6, 2002, *available at* http://www.advance.uconn.edu/02050602.htm (last visited Mar. 3, 2003) (copy on file with the *McGeorge Law Review*). The article describes a conference organized by the University of Connecticut on the parallels between race and racism and the law between South Africa and the United States. The article describes parallels drawn by prominent anti-apartheid advocate George Bizos:

> "While your lawyers were preparing Brown v. Topeka, we took the opposite direction," he said. In 1953, the apartheid regime, which was in power from 1948 until 1994, implemented the Bantu Education Act, legislation denying African people in South Africa an education that would enable them to become more than "hewers of wood and drawers of water."

Id.

39. *See id.* (noting that George Bizos recalled that "the United States had a significant influence on the struggle in his country: 'We as lawyers followed the example of many of your lawyers and what they were doing, especially in the 1950s'").

40. *In re* The Sch. Educ. Bill of 1995 (Gauteng), 1996 (4) BCLR (CC).

culture and language, imposed an affirmative obligation on the government to establish Afrikaans schools.[41] The Court cited *Brown's* discussion of the importance of education to democracy in framing the issue:

> Afrikaans . . . , like all languages, is not simply a means of communication and instruction, but a central element of community cohesion and identification for a distinct community in South Africa. We are accordingly dealing not merely with practical issues of pedagogy, but with intangible factors, that as was said in *Brown v. Board of Education of Topeka*, form an important part of the educational endeavor. In addition, what goes on in schools can have direct implications for the cultural personality and development of groups spreading far beyond the boundary fences of the schools themselves.[42]

In this passage the Court used *Brown* not only for the specific discussion it contains concerning the role of education in the development and maintenance of a democratic society, but more broadly to establish its democratic credentials. This is an important rhetorical gesture because the ultimate holding is that there is no affirmative obligation to support Afrikaans schools—a conclusion which, unlike *Brown*, can be viewed as supporting majority values and failing to protect minority interests. Given this context, the reference to *Brown* and the acknowledgement that education plays a critical role in maintaining a viable minority culture serves to establish that the Court is not simply running roughshod over the minority claims in the case. The peculiar prominence of *Brown* as paradigmatic of countermajoritarian judicial decisionmaking lends particular emphasis to this gesture that goes beyond the specific language for which it is overtly cited.[43]

The next South African case where *Brown* appears is the highly politicized and controversial *Minister of Health v. Treatment Action Campaign*,[44] popularly referred to as the "TAC case" after the acronym used by the civil rights organization that was the named plaintiff. In that case, the plaintiffs argued that the government's failure to take greater steps to distribute nevirapine, an antiretroviral drug used to treat HIV, to HIV-positive pregnant women violated the right to health care in section 27 of the South African Constitution.[45] The case

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41. Section 32(c) specifically provides that everyone has the right "to establish, where practicable, educational institutions based on a common culture, language or religion, provided that there shall be no discrimination on the ground of race."

42. *In re The Sch. Educ. Bill*, 1996 (4) BCLR 537 (CC) at ¶ 47 (footnotes omitted).

43. Indeed, the lack of any actual quote in the main text from the section of *Brown* referred to highlights that the Court is relying on *Brown* as much for the larger values that it represents as it is for the cited section.

44. 2002 (10) BCLR 1033 (CC).

45. Section 27 provides: "Everyone has the right to access to (a) health care services, including reproductive health care; . . . . The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights." S. AFR. CONST., ch. II, § 27. One of

was controversial not only because of the sensitive subject matter but also because it involved the interpretation of one of the several socioeconomic rights in the South African Constitution. A critical question in the case was to what extent the Court would be willing to put its institutional power to the test by critically examining the government's programs in these areas and issuing orders that would impact budget decisions.[46]

The Court held that the government's existing nevirapine-distribution program was inadequate and violated the section 27 right to health care. The Court thus ordered the government to take steps to expand the program.[47] In doing so, the Court rejected the argument that it lacked the power to provide injunctive relief in the case and referred to *Brown* as the most famous example in foreign jurisprudence of a court exercising such power:

> Most famously, the structural injunction was used in the case of *Brown v. Board of Education* where the U.S. Supreme Court held that lower courts would need to retain jurisdiction of *Brown* and similar cases. Those lower courts would have the power to determine how much time was necessary for the school boards to achieve full compliance with the Court's decision and would also be able to consider the adequacy of any plan proposed by the school boards to "effectuate a transition to a racially nondiscriminatory school system."[48]

Significantly, the trial court in this case had issued a similar order requiring the government to revise its policy and resubmit it to that court for approval.[49] While affirming the power to issue such orders, the Constitutional Court cautioned that they should be used only where necessary and declined to issue an injunction at that point in the case.[50]

Thus, as in the *Education Bill* case, *Brown* operates in *TAC* as a paradigmatic example of the power of courts to make countermajoritarian decisions and to force social change. In *TAC*, the Court was acting in a *Brown* model—although declining to exercise the full panoply of powers established by *Brown*; by contrast, in the *Education Bill* case the Court was using *Brown* as a kind of cover to make plain that it recognized the cost of its decision to a minority group.

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the central interpretive issues surrounding section 27, is to what extent the caveat "within its available resources" limits the ability of courts to require specific action that would impact the state budget. *Id.*

46. *TAC* is analyzed in detail in Ivan Hare, Minister of Health v. Treatment Action Campaign: *The South African AIDS Pendemic and the Constitutional Right to Healthcare*, EUR. HUM RTS. L. REV. 624, 624-30 (2002).

47. *TAC*, 2002 (10) BCLR 1033 (CC), at ¶ 135.

48. *Id.* at ¶ 107 (footnote omitted).

49. *Id.* at ¶ 129.

50. *Id.*

The final South African example involved the compatibility of constitutional standards with prevailing morality. In *S v. Jordan*,[51] the Court dealt with a challenge to an apartheid-era statute criminalizing prostitution. Part of the argument against the constitutionality of the statute involved the fact that it was part of the larger discriminatory apartheid regime. In upholding the statute, the Court stated that "[t]he mere fact that the original legislative purpose of a statute might have been incompatible with current constitutional standards, does not deprive it of the capacity to serve a legitimate legislative purpose today,"[52] and in a footnote quoted the following passage from *Brown*:

> In approaching this problem, we cannot turn the clock back to 1868 when the [Fourteenth] Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.[53]

The Constitutional Court thus referenced *Brown* in support of its refusal to rely on the historical context of the prostitution statute, a necessary predicate to its holding that the statute was constitutional.

The use of *Brown* in this context is very unusual; unlike the *Education Bill* case or *TAC*, which, while making some moves dissimilar from *Brown*, nevertheless cited it for two of its most prominent features: the connection between education and democracy on the one hand and the power to issue continuing injunctive relief on the other, *Jordan* cited *Brown* for a particular approach to constitutional interpretation that is only indirectly connected to the core issues of the case. This unusual use demonstrates the peculiar influence and stature of *Brown* not merely as a seminal civil rights precedent but also more broadly as an example of a court acting to fulfill democratic values. Here, as was the case in the *Education Bill* case, the court is setting up a decision that might be perceived as following majority preferences rather than supporting minority interests and a reference to *Brown* serves to reassert its countermajoritarian credentials.

Although particularly rich in examples, South Africa is not alone in its use of *Brown* in these ways. For example, a New Zealand court referenced *Brown* as the paradigmatic example of a court imposing a flexible remedy in order to change long-standing societal structures.[54] And, in a Trinidad & Tobago case concerning

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51. 2002 (11) BCLR 1117 (CC).

52. *Id.* at ¶ 112.

53. *Id.* at ¶ 112 n.7.

54. Te Runanga o Muriwhenua, Inc. v. Attorney-General, [1990] 2 N.Z.L.R. 641, 651-52 (C.A. Wellington).

a student's right to follow a religious dress code, the student invoked *Brown*'s discussion of the importance of education and equal access to it to argue that she was being denied equal protection.[55]

Canada, like South Africa, provides examples in each of these three categories. Two prominent examples deal with education issues. In the first, Justice LaForest drew on *Brown* in a similar fashion as the South African Constitutional Court did in the *Education Bill* case. In a case dealing with religious objections to provincial compulsory education legislation,[56] LaForest rejected the plaintiff's argument that the legislation's requirement that he seek state approval of an alternative education arrangement unreasonably infringed his right to freely exercise his religion. LaForest adopted *Brown's* emphasis on the important role of education in a democratic society in support of that conclusion:

> Much of what was said by the Supreme Court of the United States in the following passage in Brown v. Bd. of Educ. of Topeka, 347 U.S. 483, 98 L. Ed. 873, 74 S. Ct. 686 (1954), at p. 493, has application here:
>
> > Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.[57]

Similar to the way in which the South African Constitutional Court used *Brown* in support of its decision to permit majority values to overcome minority rights, here the Canadian Supreme Court relied on the same passage to affirm the constitutionality of a state infringement on individual liberty. Again, *Brown*'s power as an iconic civil rights decision permits a court to reaffirm its commitment to countermajoritarian values in spite of a decision that favors the majority.

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55. Sumayyah Mohammed v. Moraine and Another, [1996] 3 L.R.C. 475, 493 (Trin. & Tobago).

56. The plaintiff specifically relied on sections 2(a), the freedom of religion provision, and 7, the right to liberty and security provision, of the Canadian Charter of Rights and Freedoms.

57. R v. Jones, [1986] 2 S.C.R. 284, ¶ 60 (Can).

Ten years later in a controversial case involving the removal of a teacher for espousing anti-semitic views outside of the classroom, LaForest again relied on *Brown*, this time to support the conclusion that removing a teacher from classroom duties under these circumstances does not violate freedom of speech: "As stated in *Brown*, . . . education awakens children to the values a society hopes to foster and to nurture. Young children are especially vulnerable to the messages conveyed by their teachers."[58] Here Justice LaForest used *Brown* both as a classic articulation of the importance of education to democracy but at the same time to reference the Court's commitment to the values represented by *Brown* despite the infringement on individual liberty that the holding represents.

IV. CONCLUSION

Although *Brown* has been cited directly in only a few cases, as these precedents reveal, it stands as an example in many countries of the tremendous potential that the legal process has to promote human rights.[59] In this way, *Brown* really operates as a metaphor for both the promise and the difficulties that the American version of the rule of law offers to the world. On the one hand, the high organization and tremendous willingness of American civil rights organizations to use litigation as a tool and courts as a venue to effect social change gives practical content to the idea that the rule of law has value in itself. Thus one 1999 article discussing human rights litigation in Europe cites "[t]he much-heralded strategic litigation campaign to strike down legalized racial segregation in American public schools," as paradigmatic of the kind of social-change litigation it advocates.[60] The article goes on to contrast the well-developed and innovative use of human-rights litigation in the U.S. with the existing state of affairs in Europe, and further explains that

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58. Attis v. New Brunswick Dist. No. 15 Bd. of Educ., [1996] 1 S.C.R. 825 ¶¶ 81-82.

59. The symbolic power and unique status of *Brown* is further illustrated by the fact that it is often cited in ways that assume knowledge of its details. *See, e.g.*, Egan v. Canada, [1995] S.C.R. 513, 594 (Canada) (Cory, J., dissenting) (discussing the detrimental effect a statute's refusal to recognize a group's legitimacy can have on the "sense of self-worth and dignity of [their] members" and citing *Brown*, noting that "[t]his principle has been recognized in the cases of the U.S. Supreme Court dealing with the segregation of races"); Operation Dismantle v. The Queen, [1985] S.C.R. 441, 468-69 (discussing application of the political question doctrine as articulated in U.S. cases to the Canadian Charter of Rights and Freedoms and noting, without discussing the case, that *Brown* is an example of a case the U.S. Supreme Court was willing to decide despite clear concerns of judicial umanageability). *Brown* is similarly recognized as a "famous" example in secondary literature on civil rights. *See* LITIGATING ECONOMIC SOCIAL AND CULTURAL RIGHTS: ACHIEVEMENTS CHALLENGES AND STRATEGIES 17 (Malcolm Langford, ed. 2004) ("The most famous case in the socio-economic arena is *Brown v. Board of Education*, in which the segregation of black and white school children and university students was ruled a contravention of the constitutional right to equal treatment before the law (Chapter 9)."). In that same book, Croatian civil rights litigators note their use of *Brown* in cases seeking to enforce the education and equal opportunity rights in the Croatian Constitution. *Id.* at 137, Box 3 *Educational Segregation in Europe* (noting that litigators are "citing US case law on segregation like *Brown v. Board of Education*").

60. James A. Goldston, *Race Discrimination Litigation in Europe: Problems and Prospects*, 5 EUR. HUM. RTS. L. REV. 462, 462 (1998).

> [t]hough the entire rights discourse has come under criticism in recent years, particularly in the United States, there can be little doubt that, in areas (such as much of Eastern Europe) where the rule of law rests on fragile foundations, the framing of a social problem in terms of legal rights may itself be revolutionary.[61]

This example demonstrates that *Brown* has come full circle: decided in an international political context dominated by the end of World War II with its promise of freedom and respect for human rights and the emergence of the Cold War ideological battle between democracy and communism, *Brown* sent the important political message that the United States would live up to the promises it had made to the international community. Writing twenty years ago, on the thirtieth anniversary of *Brown*, Thomas Sowell said: "May 17, 1954 was a momentous day in the history of the United States, and perhaps the world. Something happened that afternoon that was all too rare in human history. A great nation voluntarily acknowledged and repudiated its own oppression of a part of its own people."[62]

Now, *Brown*, and more broadly the reliance on human rights to effect political change that it represents, stands as a model for the kind of progressive social change that litigation can create and courts can protect.

If the international story of *Brown* demonstrates one thing it is this: What this nation does for good or ill has international consequences. When the United States ignores international obligations and leads through assertion of raw power rather than through the force of its values, it undermines the international order that examples like *Brown* have helped to establish. By contrast, when the United States takes bold steps and makes moral decisions, as it did in *Brown*, it contributes significantly to the development of humane and democratic societies throughout the world. The far-reaching consequences of American action is undoubtedly a burden because when taken seriously it requires careful consideration of the views of the international community. It is, however, also an exciting challenge for a country that has so often in the past taken the lead in improving human rights throughout the world. Thus, as this country pauses to contemplate the 50th anniversary of one of the most momentous decisions in not only its history but also world history, it is our sincere hope that those reflections include consideration of the important role that America plays in protecting human rights and civil liberties throughout the world.

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61. *Id.* at 464 (footnote omitted).
62. THOMAS SOWELL, CIVIL RIGHTS: RHETORIC OF REALITY 13 (Quill 1984).