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Abstract

Adoption of the UN Charter and the Universal Declaration of Human Rights created a new international norm prohibiting racial discrimination. That anti-discrimination norm had been a part of the paper Constitution in the United States since adoption of the Fourteenth Amendment. However, it did not become a part of the living Constitution until the Fourteenth Amendment was subjected to the magnetic pull of international human rights law. Adoption of the Charter sparked a chain of events culminating in the Supreme Court decision in *Brown v. Board of Education*, which heralded the end of apartheid in the United States. Many Americans think that modern anti-discrimination law was a U.S. invention that we exported to the rest of the world. In fact, U.S. anti-discrimination law is properly understood as an outgrowth of the creation of modern international human rights law.

Introduction

In July 1948, Mr. Sei Fujii paid $200 to purchase land in Los Angeles County. He sought to provoke a legal confrontation with the State of California to challenge the validity of California's Alien Land Law. Fujii was a 65-year-old Japanese citizen who had lived in the United States since 1903. He was a graduate of the University of Southern California Law School and publisher of the *Kashu Mainichi,* a bilingual Japanese-American newspaper that he founded in the 1930s. Fujii hired his long-time friend and law school classmate J. Marion Wright to represent him. Shortly after Fujii purchased the land, Wright filed a complaint in California Superior Court in *Fujii v. California*.[1] The story of the ensuing legal battle presents, in microcosm, the story of how international human rights law transformed the U.S. Constitution.

In a widely acclaimed book, Professor Samuel Moyn contends that human rights did not exert significant influence over socio-legal developments until the 1970s.[2] This essay shows that he is wrong. The term "apartheid" refers to a system of legally sanctioned racial segregation. The United States maintained its own version of apartheid from the post-Civil-War era until the 1950s or 1960s. Adoption of the UN Charter in 1945 and the Universal Declaration of Human Rights in 1948 created a new international norm prohibiting racial discrimination. That anti-discrimination norm had been a part of the "paper Constitution" in the United States since adoption of the Fourteenth Amendment in 1868. However, the norm did not become a part of the "living Constitution" until the Fourteenth Amendment was subjected to the magnetic pull of international human rights law. Adoption of the UN Charter and the Universal Declaration sparked a chain of events culminating in the Supreme Court decision in *Brown v. Board of Education*, which heralded the end of apartheid in the United States.

Part One explains how the advent of international human rights law transformed the conduct of international diplomacy. Part Two discusses the *Fujii* case. Part Three analyses the politics of human rights in the United States between 1947 and 1954. Part Four contends that the Supreme Court in *Brown* effectively incorporated the anti-discrimination norm from the Charter and the Universal Declaration into the Fourteenth Amendment.

I.
Human Rights and International Diplomacy

The United Nations Charter entered into force in October 1945. Articles 55 and 56 obligated States to take "joint and separate action" to promote "human rights . . . for all *without distinction as to race,* sex, language, or religion."[3] Article 13(1) authorized the General Assembly to "initiate studies and make recommendations" to promote "the realization of human rights and fundamental freedoms for all."[4] The General Assembly established the Commission on Human Rights to carry out this mandate. Eleanor Roosevelt

chaired the Commission from its initial meeting in January 1947 until April 1951.[5] During its first two years, the Commission drafted the Universal Declaration of Human Rights (UDHR). Article 2 states: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour . . . ."[6] After the General Assembly adopted the UDHR in December 1948, the Commission focused on drafting a Covenant on Human Rights. The main purpose of the Covenant was to translate the Declaration's broad principles into binding treaty language that would create international legal obligations for States. In February 1952, the General Assembly decided to divide the single Covenant into two separate treaties, which became the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social, and Cultural Rights (ICESCR).[7] As discussed below, many conservatives in the United States believed that the Commission's effort to codify human rights in international treaties posed a serious threat to the U.S. constitutional order.

In the late 1940s and early 1950s, racial discrimination in the United States was a serious liability for the Truman Administration's conduct of foreign policy. In a letter to the Fair Employment Practice Committee, Acting Secretary of State Dean Acheson stated:

> [T]he existence of discrimination against minority groups in this country has an adverse effect upon our relations with other countries. We are reminded over and over by some foreign newspapers and spokesmen, that our treatment of various minorities leaves much to be desired. . . . Frequently we find it next to impossible to formulate a satisfactory answer to our critics in other countries; the gap between the things we stand for in principle and the facts of a particular situation may be too wide to be bridged. . . . The Department of State, therefore, has good reason to hope for the continued and increased effectiveness of public and private efforts to do away with these discriminations."[8]

In October 1947, when the National Association for the Advancement of Colored People (NAACP) submitted a human rights petition to the United Nations, Attorney General Tom Clark told the National Association of Attorneys General "he was humiliated that African Americans had to seek redress of their grievances from the UN."[9] In a brief submitted to the

Supreme Court in December 1947, the government stated: "The fact that racial restrictive covenants are being enforced by instrumentalities of government has become a source of serious embarrassment to agencies of the Federal Government in the performance of many essential functions, including . . . the conduct of foreign affairs."[10] Other scholars have demonstrated that the adverse foreign policy effect of race discrimination was a key factor supporting civil rights reform in the United States in the decades after World War II.[11] However, prior accounts have understated the significance of international human rights law as a critical factor linking domestic racial discrimination to the conduct of foreign policy.

Racial discrimination was a fact of life in the United States from the end of Reconstruction until World War II.[12] During that period, "the gap between the things we stand for in principle and the facts of a particular situation," in Acheson's words, was as wide, if not wider, than the gap that existed after World War II. Nevertheless, racial discrimination was not generally a handicap in our relations with other countries before 1945. In the late nineteenth and early twentieth centuries, racial discrimination against Chinese nationals, for example, was sometimes an irritant in the U.S. relationship with China.[13] Before World War II, though, discrimination against Chinese nationals was a bilateral issue with China that did not affect U.S. relationships with other countries. Adoption of the UN Charter and the Universal Declaration signalled a change in the conduct of international diplomacy by creating a new international norm that effectively multilateralized the problem of racial discrimination. Before 1945, the obligation not to discriminate against Chinese nationals was an obligation owed to China. After adoption of the Charter, the obligation not to discriminate on the basis of race became an obligation *erga omnes*: an obligation owed to the entire international community.[14] This helps explain why racial discrimination in the United States became a subject of intense media interest throughout the world in the late 1940s,[15] even though foreign media generally ignored the problem before 1945.

My claim is not that the Charter itself caused a change in the conduct of international diplomacy. Rather, the decisions to include human rights provisions in the UN Charter and to adopt the Universal Declaration manifested a changed attitude about "domestic" racial discrimination. Before 1945, diplomats rarely criticized other countries for their treatment of racial minorities unless the complaining country shared a national, ethnic, or religious affiliation with the persecuted minority. Unspoken rules of diplomatic protocol dictated that a country's treatment of its own racial minorities was a purely domestic matter. Thus, before 1945, if a European state criticized the United States for its treatment of African-Americans, it was a sufficient response to say, "That's none of your business." After adoption of the Charter, though, that response was no longer sufficient. Adoption of the Charter and the UDHR manifested a shared belief that a nation's treatment of its own minorities had become a matter of international concern. By codifying the norm against racial discrimination in various international instruments, States converted "domestic" race discrimination into a subject of international diplomacy. Human rights law provided an international standard that countries could apply to judge the behavior of other countries. The creation of a new, international anti-discrimination norm transformed Jim Crow from a domestic matter into a foreign policy issue.

II.
The *Fujii* Case

In *Fujii v. California*, Mr. Sei Fujii, a Japanese national, challenged the validity of California's Alien Land Law.[16] The statute did not explicitly target Japanese for discriminatory treatment. Instead, the statute barred all non-citizens from owning land in California unless they were eligible to become naturalized citizens.[17] Federal law, not California law, determined who was eligible for naturalization. Under then-existing federal law, Japanese were one of the few groups ineligible for citizenship because of their nationality. Moreover, of those national groups who were ineligible for citizenship, Japanese

were the only group with a sizeable population in California. Therefore, the main practical effect of the Alien Land Law was to preclude Japanese from owning land in California. Fujii and his attorney, J. Marion Wright, were well aware of these facts; they were determined to end California's longstanding practice of discriminating against Japanese people.

The trial court upheld the validity of the Alien Land Law and Fujii appealed. Wright's appellate brief contended that the Alien Land Law violated the Fourteenth Amendment Equal Protection Clause. From a modern perspective, it seems obvious that a state law barring Japanese nationals from owning property violates the Equal Protection Clause. However, it was not obvious in 1949. To the contrary, the California Attorney General cited a long string of decisions by the U.S. Supreme Court and the California Supreme Court upholding the validity of the Alien Land Law.[18] Thus, in terms of legal precedent, Wright and Fujii faced an uphill battle.

Perhaps recognizing the weakness of his Equal Protection claim, Wright also argued that the Alien Land Law conflicted with "the exalted principles and high resolutions of our nation as expressed in the United Nations Charter."[19] Two Charter provisions are especially relevant for *Fujii*. Article 55 states: "the United Nations shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." Under Article 56, Member States "pledge themselves to take joint and separate action . . . for the achievement of the purposes set forth in Article 55." [20] Thus, Articles 55 and 56 obligate the United States to take "separate action" to promote "human rights . . . for all without distinction as to race." But this statement raises several questions. Is the right to own property a "human right"? If so, what type of "separate action" must the United States take to promote that right? Is a statutory distinction between citizens and non-citizens a "distinction as to race" within the meaning of Article 55 if, in practice, the statute has a disparate impact on Japanese nationals?

Finally, assuming there is an actual conflict between the Alien Land Law and the UN Charter, should a California court apply the statute to decide the case, or should it apply the Charter? The Constitution's Supremacy Clause addresses that question. The Clause specifies that treaties ratified by the United States are "the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[21] Thus, if there is a conflict between a ratified treaty and state law, the Supremacy Clause directs "Judges in every State" to apply the treaty. Therefore, if Fujii's equal protection argument failed, the combination of the UN Charter and the Supremacy Clause provided an alternative legal rationale for invalidating the Alien Land Law.

The California Court of Appeal issued its decision in April 1950.[22] The court easily dismissed Wright's equal protection argument, citing a string of decisions by the U.S. Supreme Court and the California Supreme Court upholding the validity of the Alien Land Law. The court concluded that portion of its opinion as follows:

> [T]his opinion might well be terminated under the doctrine of *stare decisis* with a reaffirmation of the former decisions, since upon constitutional questions we deem ourselves obliged to follow the decisions of the Supreme Courts of the United States and of this State until one of those courts should announce the overruling of its own decisions.[23]

The court then addressed Fujii's human rights argument. It held that California's Alien Land Law was invalid because California law conflicted with the Charter, and the Supremacy Clause required state courts to apply the treaty.[24] The court's decision sent a shock wave through the U.S. political system whose effects are still felt today.

The Court of Appeal issued its decision on April 24, 1950. An article the next day in the *Los Angeles Times* described *Fujii* as a "precedent-setting decision."[25] The *Los Angeles Daily Journal*, a newspaper written primarily for the legal profession, correctly described *Fujii* as "the first decision in which the Charter of the United Nations has been invoked to

invalidate a law of a State."[26] The *San Francisco Chronicle* and *New York Times* also published short stories about the case.

On April 28, 1950, four days after the court's decision, Senator Forrest Donnell, a Republican from Missouri, warned his Senate colleagues about the dangers of *Fujii*. The fact that the Senate devoted floor time to a discussion of the *Fujii* case is extremely unusual. U.S. Supreme Court decisions routinely attract the Senate's attention. The Senate sometimes heeds decisions by state supreme courts and lower federal courts. However, *Fujii* was a decision by an intermediate appellate court in California — a state court, not a federal court. Intermediate appellate courts throughout the United States issue hundreds or thousands of decisions every day. The Senate rarely notices any of them. Even so, the Senate spent approximately one hour of its valuable time on April 28, 1950, discussing the implications of *Fujii*.[27]

Senator Donnell read a statement quoting several paragraphs from the Court of Appeal's decision.[28] He summarized the case as follows: "Mr. President, the opinion from which I have just read holds . . . that a valid treaty, which is, by the Constitution of the United States, the supreme law of the land, invalidates the law of a state which is in conflict with said treaty."[29] Senator Homer Ferguson (R-MI) was not prepared to concede that the court's decision was correct. However, if the decision was correct, he noted, the effect of the Charter "may be to nullify or make void all statutes in any State in relation to distinctions made between the sexes; and, in addition, we may find that by that means equal rights have already been established in the United States."[30] He did need to state explicitly —– because it was obvious to everyone present — that the Charter would also invalidate Jim Crow laws throughout the South.

Senator Donnell recalled the 1920 Supreme Court decision in *Missouri v. Holland*.[31] He explained that *Holland* held that "the adoption of a treaty on a given subject matter which is within the treaty power and as to which subject matter there had been no previous grant to

Congress of legislative power causes Congress . . . to be possessed of power to legislate to carry into effect such treaty."[32] Senator George Malone (R-NV) responded: "If I correctly understand the Senator's interpretation . . . it does open the door to Congress to legislate on subjects which were never given by the States through the Constitution of the United States to the Congress in the first place."[33] Donnell said, "That is precisely correct." Malone replied, "To that extent, it is dangerous." Donnell agreed: "To my mind, it is highly dangerous" because "the effect of a treaty may possibly be to vest in the Congress of the United States a vast reservoir of power to legislate on matters which perhaps previously had been confined to the States."[34]

The perceived danger did not stem from the *Fujii* decision itself. From Donnell's perspective, the real danger lay in the Constitution's Supremacy Clause, which meant that treaties ratified by the United States automatically invalidated conflicting state laws. Additionally, the Supreme Court's prior decision in *Missouri v. Holland* was dangerous because it meant that the federal government could utilize the Treaty Power to extend Congress' legislative powers into areas previously reserved to the States. Still, *Fujii* was a dramatic reminder that ratification of the Charter opened the door to legal arguments by aggrieved groups who sought to invalidate state laws that discriminated on the basis of "race, sex, language, or religion."[35]

While Senators discussed *Fujii*'s implications, the State was preparing its next move in the litigation. Two weeks after the Court of Appeal's decision, the California Attorney General filed a petition for rehearing.[36] Three days later, the American Civil Liberties Union (ACLU) and the American Jewish Congress (AJC) filed a joint *amicus curiae* brief opposing the petition for rehearing.[37] They contended that the Court of Appeal's decision was correct: the Alien Land Law was invalid because it conflicted with the Charter's human rights provisions. A few days later, the Japanese American Citizens' League and the NAACP filed

an application to join the ACLU/AJC brief, stating that the brief "is in accordance with the views of these petitioning amici curiae and petitioning amici curiae join therein."[38] *Fujii* was one of many cases during this period where groups that we now identify as "domestic civil rights" organizations invoked the Charter's human rights provisions to support their preferred outcomes in domestic civil rights cases.[39] The Court of Appeal denied the petition for rehearing on May 22, 1950.[40] That decision effectively closed the first chapter of the *Fujii* litigation. By that time the battle lines were drawn. The ACLU, the NAACP and other civil rights organizations supported judicial application of the UN Charter to invalidate discriminatory state laws. Senate Republicans, state governments and others feared that judicial application of the Charter would disrupt the racial status quo in the Jim Crow South and upset the constitutional balance between the federal and state governments.

The California Supreme Court issued its final decision in *Fujii* in April 1952.[41] By that time it had become clear that, regardless of the merits of the Charter rationale, it was politically dangerous for courts to apply the Charter to invalidate state laws. Accordingly, the California Supreme Court repudiated the lower court's Charter rationale, holding that the Charter's human rights provisions are not self-executing.[42] *Fujii* was the first published judicial decision in U.S. history that held a treaty to be non-self-executing in a case involving an alleged conflict between a treaty and state law. Before 1950, non-self-execution doctrine was a federal separation of powers doctrine that did not affect the relationship between treaties and state law. In contrast, the doctrine of treaty supremacy — a doctrine firmly rooted in the text of the Supremacy Clause — governed the relationship between treaties and state law. *Fujii* was influential because it effectively merged the doctrines of treaty supremacy and self-execution, which had previously been distinct doctrines.[43]

Despite controlling U.S. Supreme Court precedent upholding the validity of the Alien Land Law,[44] the California Supreme Court held that the statute violated the Fourteenth

Amendment.[45] A leading critic of the decision observed:

> [T]hough in a technical legal sense the California Supreme Court holds the charter is not a self-executing treaty, the charter is allowed to produce the same effect by projecting itself into the thinking of the court in a new construction of the equal protection clause of the 14th amendment to the Constitution of the United States to the extent that earlier statutes and decisions of years' standing, even of the Supreme Court of the United States, are overruled by the Supreme Court of California upon the identical issue because of the influence of this international thinking.[46]

In short, the California Supreme Court effectively incorporated the anti-discrimination norm from the UN Charter and the Universal Declaration into the Fourteenth Amendment. In this respect, the California Supreme Court decision in *Fujii* foreshadowed the U.S. Supreme Court decision in *Brown* two years later. In both cases, the decision to apply the Fourteenth Amendment, instead of applying the Charter, can be explained as a judicial response to the politics of human rights in the early 1950s. Part III addresses the politics of human rights.

III.
The Politics of Human Rights in the United States, Circa 1947-54

During the period under review, the UN Commission on Human Rights provided a forum in which African Americans could air their grievances about racial discrimination before an international audience. In October 1947, the NAACP submitted a petition to the head of the UN Human Rights Division.[47] The document presented "a searing indictment of America's failure to practice what it preaches."[48] The NAACP petition became a subject of debate at the December 1947 meeting of the UN Subcommission on the Prevention of Discrimination and Protection of Minorities.[49] The Soviet delegate, wielding a copy of the petition, "exploited every opportunity to launch into a severe attack on U.S. discrimination practices."[50] Some U.S. newspapers "criticized the NAACP for furnishing Soviet Russia with new ammunition to use against us."[51] Throughout the Cold War, the Soviet Union routinely attacked racism in the United States as part of its propaganda campaign in the ideological battle between communism and capitalism.

Charges of aiding the Soviets did not tarnish the NAACP's reputation significantly because it carefully avoided communist affiliations. However, the same could not be said of the Civil Rights Congress (CRC), a leading civil rights organization "on the attorney general's list of subversive organizations."[52] In late 1951, the CRC released a petition to the United Nations entitled "*We Charge Genocide*."[53] William Patterson, the national secretary of the CRC, was the principal author. He acted "with encouragement and support from the Communist Party."[54] The petition accused the United States of committing genocide. Patterson "argued forcefully that Jim Crow was the result of a deliberate government policy to destroy African Americans."[55] The Commission on Human Rights would not accept the petition unless it came from a national government. Patterson recognized that the document "would lose its impact if it was seen as just another propaganda blast from the Soviet Union or its allies,"[56] so he sought a government sponsor from outside the Soviet bloc. In January 1952 he persuaded two "countries from outside the Soviet bloc . . . to place the *Genocide* petition on the agenda of the Commission on Human Rights."[57] Given the CRC's links to the Communist Party, the petition probably reinforced the growing belief among American conservatives that the UN's human rights agenda was really "a Communist plan for destroying the American way of life."[58] That charge had significant political force at a time when McCarthy anti-communism was at its peak and the Cold War was in full swing.

While civil rights groups petitioned the United Nations, they also invoked the Charter and Universal Declaration in domestic litigation. Professor Lockwood has identified fourteen Supreme Court cases between 1948 and 1955 in which one or more briefs invoked the Charter's human rights provisions to support a civil rights claim.[59] *Shelley v. Kraemer* is illustrative.[60] *Shelley* involved a Missouri case and a Michigan case that were consolidated before the Supreme Court. African-Americans invoked the Fourteenth Amendment to challenge the validity of private contracts that precluded non-whites from buying homes in

residential neighborhoods. In both cases, state supreme courts upheld the racially restrictive covenants against equal protection challenges.[61] Petitioners in both cases raised Charter arguments in briefs filed with the U.S. Supreme Court. Thurgood Marshall, the future Supreme Court Justice, represented petitioners in the Michigan case. He argued: "The human rights provisions of the United Nations Charter, as treaty provisions, are the supreme law of the land and no citizen may lawfully enter into a contract in subversion of their purposes. The restrictive agreement here presented for enforcement falls within this proscription."[62] Moreover, he added:

> The attempt by the courts of the various states to aid private individuals in the prosecution of a course of action utterly destructive of the solemn treaty obligations of the United States must be struck down by this Court or America will stand before the world repudiating the human rights provisions of the United Nations Charter and saying of them that they are meaningless platitudes for which we reject responsibility.[63]

The United States filed an amicus brief supporting petitioners. The government's brief added an international relations twist to Marshall's legal argument. Specifically, the government argued that racially "restrictive covenants are entirely inconsistent with the future national and international welfare of the United States in its relations with the "non-white" peoples. . . . We will have better international relations when these reasons for suspicion and resentment have been removed."[64]

Shelley illustrates the close linkages between domestic civil rights groups and international human rights groups during the first decade after World War II. In *Shelley*, several domestic civil rights organizations filed amicus briefs invoking the Charter to support petitioners' arguments.[65] Meanwhile, leading international law experts intervened to support the petitioners. The American Association for the United Nations filed an amicus brief signed by several prominent international law experts, including Philip Jessup and Myres McDougal.[66] The brief asserted: "Enforcement of racial restrictive covenants is a violation of

Article 55(c) and 56 of the treaty known as the United Nations Charter." Additionally, it said, "the express language of the United States Constitution and . . . decisions of this Court . . . make the provisions of treaties binding in all law suits brought in any court in the United States."[67]

In sum, liberals thought the marriage of domestic civil rights and international human rights gave them a powerful tool to challenge racially discriminatory laws and practices. The executive branch supported civil rights reform, in part because U.S. diplomats warned that racial discrimination at home impeded accomplishment of U.S. foreign policy goals overseas. However, conservatives feared the unholy trinity of domestic civil rights litigation, inflammatory petitions to the United Nations accusing the United States of genocide, and continued work in the Commission on Human Rights to draft a legally binding Covenant on Human Rights. So conservatives launched a counter-attack.

Frank Holman, a practicing lawyer from the State of Washington, led the conservative charge.[68] Holman was President of the American Bar Association (ABA) in 1948-49. In an article in the ABA Journal, Holman warned of the danger posed by human rights treaties. The perceived danger stemmed from both the Genocide Convention,[69] which the UN adopted in 1948, and the Covenant on Human Rights, which was then in draft form. In Holman's view, the treaty power was "being used to destroy or modify the rights of the states and the rights of American citizens."[70] He feared that human rights treaties would "increase the powers of the Federal Government at the expense of the states," thereby changing "our form of government from a republic to a socialistic and completely centralized state."[71] He claimed that international human rights advocates sought "to level out our basic rights to a common denominator with rights as understood by fifty-seven other nations, [so] that such precious rights as jury trial and the writ of habeas corpus may . . . have to yield to the so-called common denominator of the other nations."[72] Holman commented specifically on *Fujii*: "The

Fujii decision means that our right to self-government, both state and national, and our right to determine for ourselves what kind of laws we want to live under, can be nullified whenever the President and two-thirds of the members of the Senate . . . approve a treaty on a particular subject."[73] Finally, he added, "It may be that a full and impartial study of the disturbing implications and legal effects of Article VI of our Constitution will indicate the necessity of a constitutional amendment"[74] to prevent treaties from being used to alter domestic law.

Holman used his influence in the ABA to advance his policy agenda. In addition to serving as ABA President, he was also a member of the influential ABA Special Committee on Peace and Law Through United Nations.[75] In 1949, that Committee suggested that the "threat posed by human rights treaties" could potentially be averted "through amendment of the Constitution."[76] Then, in September 1950, the ABA House of Delegates passed a resolution "calling for a study to propose a constitutional amendment protecting the Bill of Rights and states' rights from any treaty infringement."[77] Thus, the nation's leading bar association endorsed the possibility of amending the Constitution to avert the perceived threat posed by human rights treaties.

While Holman rallied support within the ABA for a constitutional amendment, Senator John Bricker, a Republican from Ohio, pursued a similar agenda in the Senate. In September 1951, Bricker introduced a bill with the text of a proposed constitutional amendment.[78] He introduced a revised version of his proposed amendment in February 1952.[79] Later that month, the ABA House of Delegates approved its own version of a constitutional amendment.[80] Different versions of the amendment emphasized different details, but all were designed to respond to the perceived threat posed by human rights treaties. In April 1953, Secretary of State John Foster Dulles helped counter support for the Bricker Amendment by testifying before the Senate Judiciary Committee that the United

States did not "intend to become a party to any such covenant [on human rights] or present it as a treaty for consideration by the Senate."[81] Despite Dulles' pledge and despite firm resistance from the Eisenhower Administration, the Senate voted 60-31 in favor of one version of the Bricker Amendment in February 1954.[82] That was one vote short of the requisite two-thirds majority, but it was sufficiently close to convince any remaining doubters that Bricker's supporters constituted a potent political force.

IV.
Brown and Bolling

The Supreme Court issued its landmark decisions in *Brown v. Board of Education* and *Bolling v. Sharpe* in May 1954.[83] *Brown* involved four consolidated cases from Kansas, South Carolina, Virginia, and Delaware. Plaintiffs alleged that racially segregated public schools violated the Fourteenth Amendment. *Bolling* was a single case challenging racially segregated public schools in the District of Columbia. Petitioners raised arguments based on the Fifth Amendment and the UN Charter.[84] The Court heard oral argument in the school segregation cases in December 1952; it then requested additional argument and deferred final decision until the following term. Ultimately, the Court held that racial segregation in state-run schools violated the Fourteenth Amendment and racial segregation in D.C. schools violated the Fifth Amendment. The UN Charter argument featured prominently in the parties' briefs in *Bolling,*[85] but the Court's decisions did not mention the Charter.

Several scholars have analyzed the socio-legal context to explain the Court's decisions.[86] Part IV asks why the Court relied on the Fifth and Fourteenth Amendments, and not the Charter, to support its conclusions. The first section analyzes the legal issues in *Brown* and *Bolling*, examining arguments based on the Fifth Amendment, the Fourteenth Amendment, and the UN Charter. The analysis shows that the Charter-based argument for desegregation was legally sound: perhaps stronger than the constitutional arguments. The

next section considers extra-legal factors that may have induced the Court to disregard the Charter and base its decision on the Fifth and Fourteenth Amendments.

A. The Merits of Arguments Based on the Charter and the Constitution

As of 1952-54, if one viewed the issue from a narrow, legalistic perspective, the argument that racially segregated public schools violated the Fourteenth Amendment was fairly weak. When the Justices met privately to discuss the school segregation cases in December 1952, Justice Robert Jackson assessed the arguments as follows: "There is nothing in the text that says this is unconstitutional. There is nothing in the opinions of the courts that says it's unconstitutional. Nothing in the history of the 14th amendment says it's unconstitutional. On the basis of precedent I would have to say segregation is ok."[87]

Under the Fourteenth Amendment, a State may not "deny to any person within its jurisdiction the equal protection of the laws."[88] Plaintiffs in *Brown* argued that racially segregated public schools were inherently unequal. Therefore, States that maintained such schools denied black children the equal protection guaranteed by the Fourteenth Amendment.[89] As a litigation tactic, the NAACP decided to argue that segregation itself was unconstitutional, even if the State provided physically comparable facilities for white and black children.[90] That approach forced the Court to address the constitutionality of segregation *per se*. In 1866, the same Congress that proposed the Fourteenth Amendment enacted legislation "providing for separate schooling for the white and colored children in the District of Columbia."[91] Hence, the historical evidence demonstrated persuasively that the Fourteenth Amendment's drafters did not believe that racially segregated schools were *per se* unconstitutional. Moreover, the Court held in *Plessy v. Ferguson*[92] and subsequent cases that racial segregation was permissible, provided that the separate facilities were substantially

equal. Additionally, Justice Harlan, the sole dissenter in *Plessy*, believed that segregated schools were permissible.[93] Thus, although the Fourteenth Amendment could be construed to prohibit racial segregation, the Court's precedents and the original understanding of the Fourteenth Amendment weighed heavily against that interpretation. Accordingly, Justice Jackson "ridiculed the NAACP's brief as sociology, not law."[94]

The Fifth Amendment argument for desegregation of D.C. public schools was even weaker. The text provides only that people shall not "be deprived of life, liberty, or property, without due process of law."[95] The Fifth Amendment says nothing about equality or racial discrimination. Moreover, the Amendment took effect in 1791, when the Constitution treated slaves as property. Hence, the drafters of the Fifth Amendment clearly did not intend to guarantee black children a right to attend racially integrated schools. Although *Plessy* did not technically control the Fifth Amendment because *Plessy* was a Fourteenth Amendment case, both the Supreme Court and the lower courts had relied on *Plessy* to uphold racial segregation in the District of Columbia.[96] Thus, text, precedent and original understanding all weighed against petitioners' Fifth Amendment claim in *Bolling*.

When the Justices met initially to discuss the segregation cases in December 1952, they did not follow their usual practice of voting on the cases. However, scholars have reconstructed their likely positions based on available conference notes. Justices Black, Douglas, Burton, and Minton clearly supported a holding that racial segregation in public schools is *per se* unconstitutional.[97] Justice Frankfurter was prepared to invalidate racial segregation in D.C. public schools, but he found the state cases more troubling, in part because the problem of crafting an appropriate remedy was more difficult.[98] Justice Reed spoke in favor of affirming *Plessy*, and Chief Justice Vinson was probably inclined to agree with him. Justices Jackson and Clark were apparently undecided.[99] Ultimately, the Court ordered re-argument for the following term. Despite the prominence of the Charter argument

in the *Bolling* briefs, the available records suggest that the Justices did not discuss the Charter rationale as an alternative to the Fifth and Fourteenth Amendment rationales.

In contrast to the constitutional arguments, the Charter-based argument for invalidating racial segregation was fairly strong. Articles 55 and 56 of the Charter obligate the United States to take "separate action" to promote "universal respect for, and observance of, human rights and fundamental freedoms *for all without distinction as to race*."[100] Whereas the Fourteenth Amendment, by its terms, focuses on "equal protection," the Charter expresses a particularized rule condemning race-based distinctions. Therefore, even if the *Plessy* doctrine of "separate but equal" is a plausible interpretation of the Fourteenth Amendment, *Plessy* is not a textually plausible interpretation of the Charter. That is no accident. States drafted the Charter's human rights provisions against the historical background of race-based classifications in Nazi Germany. Representatives of several civil rights groups served as advisors to the U.S. delegation in San Francisco when the Charter was drafted; they lobbied hard to add strong human rights language to the Charter.[101] Moreover, delegates from several non-European countries supported inclusion of robust human rights provisions in the Charter. Those who favored strong human rights provisions agreed that racial segregation deserved condemnation.

The major powers were not enthusiastic about including human rights language in the Charter. John Foster Dulles, a member of the U.S. delegation and future Secretary of State, devised a compromise solution. The United States would accept "an unequivocal statement guaranteeing freedom from discrimination on account of race, language, religion, or sex," but would insist on inserting a "domestic jurisdiction clause" in article 2.[102] That clause said: "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."[103] The major powers were satisfied with this solution because the domestic jurisdiction clause prevented

the United Nations from adopting coercive measures to compel States to abolish discriminatory laws and practices.

However, the domestic jurisdiction clause did not limit the scope of States' obligations under Articles 55 and 56 to promote human rights "for all without distinction as to race." Clearly, Articles 55 and 56 did not obligate the United States to abolish all forms of racial segregation immediately. However, the Charter did obligate the United States to take concrete steps to promote human rights "for all without distinction as to race."[104] Thus, the petitioners in *Bolling* could argue persuasively that a judicial decision perpetuating racial segregation in public schools would have been inconsistent with that treaty obligation.[105] Respondents' primary counter-argument emphasized that the Charter itself did not specify which "human rights and fundamental freedoms" required protection.[106] Even so, it would not have required a huge leap for the Court to hold that the right to education was one of the rights encompassed within the phrase "human rights and fundamental freedoms" in article 55 of the Charter.

If the Court based its holdings in *Brown* and *Bolling* on the Charter, it could have ruled against the school districts without overruling any of its own precedents, thereby avoiding the *Plessy* problem. The Court could have cited the concurring opinions in *Oyama v. California* as authority for judicial application of the Charter.[107] Such a holding would have been inconsistent with the California Supreme Court decision in *Fujii*, but that decision had limited precedential force. As of 1954, no other state or federal court had followed the California Supreme Court's decision in *Fujii*; it was an isolated precedent. Additionally, *Fujii* was a dramatic departure from 150 years of consistent legislative, executive and judicial practice supporting application of the Constitution's treaty supremacy rule without any exception for non-self-executing treaties.[108]

In sum, a holding that racially segregated public schools violated the UN Charter would have been legally defensible on the basis of treaty text, legal precedent, and the original understanding of the diplomats who drafted the Charter. (In contrast, the Senators who consented to treaty ratification clearly did not believe they were voting to abolish racial segregation in the United States.) Even so, the Court's opinions in *Brown* and *Bolling* did not mention the Charter, and there is no evidence that the Justices discussed the Charter argument explicitly in their internal deliberations. Hence, the question arises, why did the Court disregard the Charter and focus exclusively on the Fifth and Fourteenth Amendments? To answer that question, we must consider extra-legal factors.

B. Extra-Legal Factors in Brown and Bolling

The Court's decision to rest its judgments on the Fifth and Fourteenth Amendments, instead of the Charter, was driven by a combination of foreign policy, domestic politics, and psychological factors. Two briefs emphasized the foreign policy aspects of segregation. The American Civil Liberties Union (ACLU) and five other non-governmental organizations filed a joint amicus brief in *Brown* that said:

> The United States is now engaged in an ideological world conflict in which the practices of our democracy are the subject of close scrutiny abroad. . . . We know that our enemies seize eagerly upon the weaknesses of our democracy and, for propaganda purposes, magnify, exaggerate and distort happenings in the United States. . . . Our discriminatory practices in education, in employment, in housing, have all been the subject of much adverse press comment in those foreign countries which we are trying to keep in the democratic camp.[109]

The brief quoted a series of newspaper articles from France, Austria, Germany, and Belgium that were highly critical of American racism. It concluded that "legally imposed segregation in our country, in any shape, manner or form, weakens our program to build and strengthen world democracy and combat totalitarianism."[110]

Shortly after Eisenhower's election, the lame-duck Truman Administration filed a single amicus brief for all five segregation cases.[111] The brief highlighted the special problems posed by racial discrimination in the District of Columbia.

> This city is the window through which the world looks into our house. The embassies, legations, and representatives of all nations are here, at the seat of the Federal Government. Foreign officials and visitors naturally judge this country and our people by their experiences and observations in the nation's capital . . . . The shamefulness and absurdity of Washington's treatment of Negro Americans is highlighted by the presence of many dark-skinned foreign visitors. Capital custom not only humiliates colored citizens, but is a source of considerable embarrassment to these visitors. Foreign officials are often mistaken for American Negroes and refused food, lodging and entertainment.[112]

Although the government emphasized the unique problems caused by racial discrimination in the nation's capital, it also placed those concerns in a global context.

> It is in the context of the present world struggle between freedom and tyranny that the problem of racial discrimination must be viewed. The United States is trying to prove to the people of the world, of every nationality, race, and color, that a free democracy is the most civilized and most secure form of government yet devised by man. We must set an example for others by showing firm determination to remove existing flaws in our democracy. . . . The continuance of racial discrimination in the United States remains a source of constant embarrassment to this Government in the day-to-day conduct of its foreign relations; and it jeopardizes the effective maintenance of our moral leadership of the free and democratic nations of the world.[113]

The message was not lost on the Justices: nothing less than the United States' leadership of the free world was at stake. Justices Burton and Minton, in particular, were probably swayed by "the Cold War imperative for racial change."[114] The Cold War imperative helps explain why the Justices voted to end racial segregation in public schools, but it does not explain why they based their decision on the Fifth and Fourteenth Amendments. Indeed, a decision based on the UN Charter might have conveyed a stronger message to the world that the United States was truly committed to the *international* norm prohibiting racial discrimination.

Two distinct domestic political factors may have helped persuade the Justices to base their decisions on the Fifth and Fourteenth Amendments, rather than the Charter. First, the Bricker Amendment controversy reached its peak intensity in the Senate between February 1953 and February 1954. The Supreme Court's deliberations in *Brown* and *Bolling* lasted from December 1952 to May 1954. Thus, the Court was weighing its options at a time when the Bricker Amendment controversy was headline news in Washington. The Justices surely recognized that a holding based on the Charter might have tipped the political scales in favor of the Amendment. Even if individual Justices were personally supportive of Bricker's agenda, the Court as a whole was probably reluctant to issue a decision that fanned the flames of a movement for a constitutional amendment.

The second domestic political factor relates to remedies. The Justices were deeply concerned that a judicial order mandating desegregation would face massive resistance in the Deep South. Governor Byrnes of South Carolina had threatened to abolish public schools if the Court ordered desegregation.[115] Justice Frankfurter, in particular, invoked concerns about the sensitivity of remedial issues as the main reason for the Court to hold the case over for an additional term.[116] Given the Court's fears about potential resistance to an order based on the Fourteenth Amendment, the prospect of ordering States to desegregate schools to achieve compliance with the Charter was virtually unthinkable. Such an order would have created a powerful coalition between white supremacists in the South and anti-UN forces in the ABA and the Senate, who were already concerned about UN intervention in matters of national sovereignty.[117] As it happened, the Court's Fourteenth Amendment decision in *Brown* contributed to substantial political turmoil in the South;[118] the level of domestic political unrest might have been far worse if the Court relied on the Charter as a legal hook to support a desegregation order.

The preceding analysis might be construed to imply that the Justices consciously weighed the costs and benefits of judicial reliance on the Charter versus the Fifth and Fourteenth Amendments. However, the available evidence suggests that they did not seriously consider the Charter argument.[119] Why not? The parties devoted a substantial portion of their briefs in *Bolling* to the Charter issue, so one cannot blame the parties for failing to raise it. As explained above, the Charter argument was arguably as strong on the merits as the constitutional arguments, so the Court could not dismiss the Charter argument as frivolous.

Perhaps the best explanation is psychological. Professors Goodman and Jinks contend that human behavior can sometimes be explained as an attempt "to avoid the unpleasant state of cognitive dissonance between what [people] profess in public and what they believe in private."[120] The Charter argument in *Bolling* created severe cognitive dissonance for the Justices. They believed privately in American exceptionalism — the belief that the United States has the best Constitution in the world. The Charter argument forced them to confront the unpleasant fact that the Constitution, as it had been previously interpreted, was seriously deficient, because it permitted a form of apartheid that violated international human rights norms embodied in the UN Charter and the Universal Declaration. A judicial decision based on the Charter would have implicitly acknowledged that deficiency. As Professor Charles Fairman wrote, "It would seem, indeed, a reproach to our constitutional system to confess that the values it establishes fall below any requirement of the Charter. One should think very seriously before admitting such a deficiency."[121] The Justices were not psychologically prepared to admit such a deficiency because that admission would have been inconsistent with their faith in American exceptionalism. Hence, one could infer that the Justices applied the Fifth and Fourteenth Amendments, and not the Charter, "to avoid the unpleasant state of cognitive dissonance between what they profess in public and what they believe in

private."[122] By reinterpreting the Fifth and Fourteenth Amendments to incorporate the international norm prohibiting racial segregation, the Justices could reconcile their public pronouncements about the meaning of the Constitution with their private faith in American exceptionalism.[123]

Conclusion

Although the Court did not mention the UN Charter in its published opinions in *Brown* and *Bolling*, the anti-discrimination norm codified in the Charter and the Universal Declaration probably influenced the Court's decisions in at least three ways. First, the birth of modern international human rights law after World War II provided a powerful source of inspiration for civil rights activists in the United States between 1945 and 1954. The political synergy between human rights and civil rights helped embolden the plaintiffs in *Brown* and *Bolling* to confront segregation directly, rather than seeking half-measures. Second, the advent of human rights law altered the conduct of international diplomacy, transforming racial segregation in the United States from a purely domestic issue to a foreign policy issue. The foreign policy implications of racial segregation helped persuade the Justices to depart from established precedent and overrule *Plessy*. Third, the stark contrast between the new international anti-discrimination norm and the entrenched practice of racial segregation in the United States created severe cognitive dissonance for the Justices. They responded to the cognitive dissonance problem by reinterpreting the Fifth and Fourteenth Amendments, thereby incorporating the Charter's anti-discrimination norm into the living Constitution.

[1] California Supreme Court Archives, 2nd Civ. No. 17309, L.A. 21149, Fujii v. California [hereinafter, Fujii Case File]. The case is often called "Sei Fujii v. California," but that name is based on a misunderstanding. The petitioner's first name was Sei. His last name was Fujii.
[2] SAMUEL MOYN, THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY (2010).
[3] UN Charter, art. 55, 56 (emphasis added).
[4] UN Charter, art. 13, para. 1.
[5] *See* MARY ANN GLENDON, A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 32, 198-99 (2001).
[6] Universal Declaration of Human Rights, Preamble.
[7] International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 999 U.N.T.S. 3.
[8] TO SECURE THESE RIGHTS: THE REPORT OF THE PRESIDENT'S COMMITTEE ON CIVIL RIGHTS, at 146-47 (1947) (quoting letter from Dean Acheson, Acting Secretary of State).
[9] CAROL ANDERSON, EYES OFF THE PRIZE: THE UNITED NATIONS AND THE AFRICAN AMERICAN STRUGGLE FOR HUMAN RIGHTS, 1944-1955, at 108 (2003) (quoting statement by Attorney General Tom Clark).
[10] Brief for the United States as Amicus Curiae at 4–5, Shelley v. Kraemer, McGhee v. Sipes, 334 U.S. 1 (1948) (Nos. 72, 87) & Hurd v. Hodge, Urciolo v. Hodge, 334 U.S. 24 (1948) (Nos. 290, 291), *available at* 1947 WL 44159.
[11] *See* MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY (2000).
[12] *See* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 8-170 (2004).
[13] *See* GEORGE C. HERRING, FROM COLONY TO SUPERPOWER: U.S. FOREIGN RELATIONS SINCE 1776, at 353-54 (2008).
[14] *See* Barcelona Traction, Light and Power Co., Ltd., (Belg. v. Spain), 1970 I.C.J. 3, ¶¶ 33-34 (noting that obligations *erga omnes* derive "from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination").
[15] *See* DUDZIAK, *supra* note 11, at 29-39.
[16] *See* Fujii Case File, *supra* note 1.
[17] The Alien Land Law permitted non-citizens to own land if the right to own land was specifically protected by a bilateral treaty. However, as of 1950, the United States was not party to any bilateral treaty with Japan that protected the right of Japanese nationals to own land in the United States.
[18] Fujii Case File, Respondent's Brief, pp. 24-43 (Feb. 20, 1950).
[19] Fujii Case File, Appellant's Opening Brief, p. 100 (Nov. 15, 1949).
[20] United Nations Charter, arts. 55, 56.
[21] U.S. Const. art. VI, cl. 2.
[22] Fujii v. California, 217 P.2d 481 (Cal.App.2nd 1950).
[23] *Id*. at 484.
[24] *Id*. at 484-88.
[25] "Ruling Holds Alien Land Law Invalid," LOS ANGELES TIMES, April 25, 1950 (A1).
[26] "Charter of United Nations Held to Invalidate California Alien Land Act," LOS ANGELES DAILY JOURNAL, April 25, 1950 (*reprinted in* 96 Cong. Rec. 5993, 6000).
[27] *See* 96 Cong. Rec. 5993-6000 (April 28, 1950). The Congressional Record does not record the time spent on a subject. The one-hour estimate is based on the length of printed material.
[28] *Id*. at 5997-98.
[29] *Id*. at 5998.
[30] *Id*. at 5996.
[31] Missouri v. Holland, 252 U.S. 416 (1920).
[32] 96 Cong. Rec., at 5997.
[33] *Id*. at 5998.
[34] *Id*. at 5998-99.

[35] United Nations Charter, art. 55.
[36] Fujii Case File, Petition for Rehearing (May 9, 1950).
[37] Brief of American Civil Liberties Union, Southern California Branch, and American Jewish Congress, Amici Curiae in Support of Appellant in Opposition to Petition for Rehearing (Fujii Case File).
[38] Fujii Case File, Application for Leave to Join with Brief Amici Curiae (May 16, 1950).
[39] *See* Bert B. Lockwood, Jr., *The United Nations Charter and United States Civil Rights Litigation: 1946-1955*, 69 IOWA L. REV. 901 (1984).
[40] Fujii v. State, 218 P.2d 595 (Cal.App.2nd 1950).
[41] Fujii v. State, 242 P.2d 617 (CA 1952).
[42] *Id*. at 619-22.
[43] *See* DAVID SLOSS, TREATY SUPREMACY AND HUMAN RIGHTS: THE STORY OF AN UNKNOWN CONSTITUTIONAL REVOLUTION AND ITS UNINTENDED CONSEQUENCES (forthcoming 2015-16).
[44] Porterfield v. Webb, 263 U.S. 225 (1923) (upholding the validity of California's Alien Land Law against a Fourteenth Amendment challenge).
[45] *See Fujii*, 242 P.2d at 627-30.
[46] Testimony of Mr. Frank Holman, *Treaties and Executive Agreements: Hearings Before a Subcommittee of the Committee on the Judiciary*, U.S. Senate, 83rd Cong., 1st Sess., at 138 (1953).
[47] AN APPEAL TO THE WORLD: A STATEMENT ON THE DENIAL OF HUMAN RIGHTS TO MINORITIES IN THE CASE OF CITIZENS OF NEGRO DESCENT IN THE UNITED STATES OF AMERICA AND AN APPEAL TO THE UNITED NATIONS FOR REDRESS New York: National Association for the Advancement of Colored People, 1947.
[48] ANDERSON, *supra* note 9, at 108 (quoting *Chicago Defender*).
[49] *See id*. at 106-112.
[50] *Id*. at 109.
[51] DUDZIAK, *supra* note 11, at 45 (quoting *Morgantown Post*).
[52] *Id*. at 66.
[53] WE CHARGE GENOCIDE: THE HISTORIC PETITION TO THE UNITED NATIONS FOR RELIEF FROM A CRIME OF THE UNITED STATES GOVERNMENT AGAINST THE NEGRO PEOPLE (New York: International Publishers, 2d ed. 1970).
[54] ANDERSON, *supra* note 9, at 179.
[55] *Id*. at 179-80.
[56] *Id*. at 182.
[57] *Id*. at 199-200.
[58] NATALIE HEVENER KAUFMAN, HUMAN RIGHTS TREATIES AND THE SENATE: A HISTORY OF OPPOSITION 16 (1990) (describing Frank Holman's views).
[59] *See* Lockwood, *supra* note 39, at 950-56.
[60] 334 U.S. 1 (1948).
[61] *See* Kraemer v. Shelley, 198 S.W.2d 679 (1946); Sipes v. McGhee, 25 N.W.2d 638 (1947).
[62] Brief for Petitioners, McGhee v. Sipes, 334 U.S. 1 (1948) (No. 87), at 9.
[63] *Id*. at 90.
[64] Brief for the United States as Amicus Curiae, *supra* note 10, at 19-20.
[65] *See* Lockwood, *supra* note 39, at 953 (listing briefs).
[66] McDougal was an international law professor at Yale Law School. Jessup was then a professor at Columbia Law School; he later served as a judge on the International Court of Justice.
[67] Brief for the American Association for the United Nations as Amicus Curiae, at 15, Shelley v. Kraemer, McGhee v. Sipes, 334 U.S. 1 (1948) (Nos. 72, 87) & Hurd v. Hodge, Urciolo v. Hodge, 334 U.S. 24 (1948) (Nos. 290, 291), *available at* 1948 WL 47412.
[68] *See generally* KAUFMAN, *supra* note 58, at 16-35.
[69] Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951).
[70] Frank E. Holman, *Treaty Law-Making: A Blank Check for Writing a New Constitution*, 36 A.B.A. J. 707, 708 (Sept. 1950).

[71] *Id*.
[72] *Id*. at 710
[73] *Id*. at 787.
[74] *Id*. at 790.
[75] The ABA changed the name of the Committee twice between 1944 and 1947. After 1947, it was known as the Special Committee on Peace and Law Through United Nations. KAUFMAN, *supra* note 58, at 212, n.36.
[76] *Id*. at 23-24.
[77] 75 Ann. Rep. A.B.A. 102, 117-18 (1950). *See also* DUANE TANANBAUM, THE BRICKER AMENDMENT CONTROVERSY: A TEST OF EISENHOWER'S POLITICAL LEADERSHIP 33-34 (1988).
[78] S.J. Res. 102 (Sept. 1951).
[79] S.J. Res. 130 (Feb. 7, 1952). The texts of the resolutions are reprinted in TANANBAUM, *supra* note 77, at 221-23.
[80] Proceedings of the House of Delegates, Feb. 25-26, 1952, 77 Ann. Rep. ABA 425, 447-48 (1952).
[81] Testimony of Secretary of State John Foster Dulles, *Treaties and Executive Agreements: Hearings Before a Subcommittee of the Committee on the Judiciary*, U.S. Senate, 83rd Cong., 1st Sess., at 825 (1953).
[82] *See* TANANBAUM, *supra* note 77, at 175-81.
[83] *Brown*, 347 U.S. 483 (1954); *Bolling*, 347 U.S. 497 (1954).
[84] *See* Brief for Petitioners, Bolling v. Sharpe, 347 U.S. 497 (1954) (No. 8), *available at* 1952 WL 47257.
[85] The petitioners' brief in *Bolling* devoted about twelve pages to the Fifth Amendment issue and eight pages to the Charter issue. *See id*. The respondents' brief in *Bolling* devoted about fifteen pages each to the Charter argument and the Fifth Amendment argument. See Brief for Respondents, Bolling v. Sharpe, 347 U.S. 497 (1954) (No. 8), *available at* 1952 WL 47280.
[86] *See* KLARMAN, *supra* note __; MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-1961 (1994); RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (1976).
[87] KLARMAN, *supra* note 12, at 296. The statement in the text is not a direct quotation; it is based on Professor Klarman's review of the conference notes of Justices Burton, Clark, Douglas, and Jackson. *See id*. at 543, n.6.
[88] U.S. Const. amend XIV.
[89] *See* Brief for Appellants, at 7, Brown v. Bd. of Education, 347 U.S. 483 (1954) (No. 1), *available at* 1952 WL 82046.
[90] *See* TUSHNET, *supra* note 86, at 150-67.
[91] Brief for Respondents, Bolling v. Sharpe, *supra* note 85, at 17.
[92] 163 U.S. 537 (1896).
[93] *See* KLARMAN, *supra* note 12, at 294; KLUGER, *supra* note 86, at 590.
[94] KLARMAN, *supra* note 12, at 296.
[95] U.S. Const. amend V.
[96] *See* Brief for Respondents, Bolling v. Sharpe, *supra* note 85, at 16-21.
[97] *See* KLARMAN, *supra* note 12, at 292-301; KLUGER, *supra* note 86, at 589-614; TUSHNET, *supra* note 86, at 187-95.
[98] *See* KLARMAN, *supra* note 12, at 295; KLUGER, *supra* note 86, at 600-02. Justice Frankfurter was especially troubled by the prospect that the Court might issue a remedial order and one or more States would refuse to comply. The prospect of non-compliance in the District of Columbia was not a serious risk, but the risk was far more serious in South Carolina.
[99] I rely here on secondary sources. The authors of those sources do not agree fully among themselves how best to construe the conference notes. *See* KLARMAN, *supra* note 12, at 292-301; KLUGER, *supra* note 86, at 589-614; TUSHNET, *supra* note 86, at 187-95.
[100] UN Charter, arts. 55, 56.
[101] *See* ANDERSON, *supra* note 9, at 40-46.
[102] *See id*. at 48-50.

[103] UN Charter, art. 2(7).
[104] *See generally* Oscar Schachter, *The Charter and the Constitution: The Human Rights Provisions in American Law*, 4 VAND. L. REV. 643 (1951). For a contrary view of the Charter's human rights provisions that is more favorable to the defendants in *Brown* and *Bolling*, see Manley O. Hudson, *Editorial Comment: Charter Provisions on Human Rights in American Law*, 44 AM. J. INT'L L. 543 (1950).
[105] *See* Brief for Petitioners, Bolling v. Sharpe, *supra* note 84, at 59 ("Articles 55 and 56 . . . prohibit government enforced racial segregation in the public schools."). The brief did not defend this point in great detail because the attorneys devoted most of their Charter argument to the self-execution issue.
[106] Brief for Respondents, Bolling v. Sharpe, *supra* note 85, at 52-54.
[107] *See* Oyama v. California, 332 U.S. 633, 649-50 (1948) (Black, J., concurring); *id*. at 672-73 (Murphy, J., concurring).
[108] *See* SLOSS, *supra* note 43 (demonstrating that non-self-execution was a federal separation of powers doctrine that courts did not apply to cases involving alleged conflicts between treaties and state law until litigants began invoking the Charter's human rights provisions to challenge the validity of state laws).
[109] Brief on Behalf of American Civil Liberties Union, American Ethical Union, American Jewish Committee, Anti-Defamation League of B'nai B'rith, Japanese American Citizens League, and Unitarian Fellowship for Social Justice as Amici Curiae, at 28, Brown v. Bd. of Education, 347 U.S. 483 (1954) (No. 1), *available at* 1952 WL 47256.
[110] *Id*. at 31.
[111] *See* Brief for the United States as Amicus Curiae, Brown v. Bd. of Education, Briggs v. Elliott, Davis v. Prince Edward County, Bolling v. Sharpe, Gebhart v. Belton, 347 U.S. 483 (1954) (Nos. 1, 2, 3, 4, 5), *available at* 1952 WL 82045.
[112] *Id*. at 4-5.
[113] *Id*. at 6-8.
[114] KLARMAN, *supra* note 12, at 299.
[115] *See* KLUGER, *supra* note 86, at 593 (stating that Justice Black "agreed with Vinson that South Carolina might well abolish its public schools [in response to a judicial order requiring desegregation] as Governor Byrnes had threatened").
[116] *See id*. at 599-601.
[117] Fears about UN intervention in matters of national sovereignty featured prominently in arguments opposing human rights treaties and supporting the Bricker Amendment, both in Senate hearings and in internal ABA deliberations. *See* KAUFMAN, *supra* note 58, at 106-15.
[118] *See* KLARMAN, *supra* note 12, at 348-63.
[119] The accounts of the Justices' deliberations in KLARMAN, *supra* note 12, KLUGER, *supra* note 86,and TUSHNET *supra* note 86, do not mention the UN Charter.
[120] RYAN GOODMAN AND DEREK JINKS, SOCIALIZING STATES: PROMOTING HUMAN RIGHTS THROUGH INTERNATIONAL LAW 153 (2013).
[121] Charles Fairman, *Finis to Fujii*, 46 AJIL 682, 689 (1952).
[122] GOODMAN & JINKS, *supra* note 120, at 153.
[123] I have made an abbreviated version of this argument previously. *See* David Sloss, Book Review (reviewing GOODMAN & JINKS, *supra* note 120), 108 AM. J. INT'L L. 576 (2014).