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Addressing Federalism and Separation of Powers Social Violence: The Ordinary Citizen's Voting Rights beyond Shelby County, North Carolina and Ohio

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ADDRESSING FEDERALISM AND SEPARATION OF POWERS SOCIAL VIOLENCE: THE ORDINARY CITIZEN'S VOTING RIGHTS BEYOND SHELBY COUNTY, NORTH CAROLINA AND OHIO

*Benjamin G. Davis**

ABSTRACT

This essay builds on my experience with a voter integrity group, True the Vote, at its Ohio Summit meeting on August 25, 2012, and subsequent developments in the United States Supreme Court and states. I examine this topic experience through four lenses: (1) private and public forms of what I term social violence; negotiation theory; (2) recent work on explicit bias, implicit bias, and stereotype threat; (3) Derrick Bell's work on interest convergence theory and the personal limits of that approach when one operates in both the domestic and international law spheres; (4) Francesco Alberoni's work on how movements get started and, in particular, how a person reaches "depressive overload" and what he terms the "nascent state," seeking affinity with others to create a movement that confronts institutions. Through these four lenses, I hope to assist reflection on a manner of thinking about voting rights beyond Shelby County, North Carolina, and Ohio.

I. INTRODUCTION

As Max Weber noted in his lecture on politics as a vocation, it has become axiomatic that "the modern state is a compulsory association which organizes domination. It has been successful in seeking to monopolize the legitimate use of physical force as a means of domination within a territory."[1] This monopoly on violence operates to both set the structure in which the state makes legitimate exercise of its monopoly on violence (public social violence) and the space for legitimate private violence in that state (private social violence). The types of private violence described in the next section are lawful, in the sense of being permitted under concepts

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1. MAX WEBER, LECTURE ON POLITICS AS A VOCATION 4-5, *available at* http://www.sscnet.ucla.edu/ polisci/ethos/Weber-vocation.pdf (last visited June 25, 2014).

of freedom of speech and freedom of association in our polity permitted in the structure of the state (public social violence). The interplay between the articulation of the structure by the organs of the state and the private acts gives one the sum of the kinds of (although legitimate in the sense of lawful, nevertheless) social violence inflicted upon the ordinary citizen as part of the American polity. Part II, in the setting of voting rights, provides some illustrations of different types of private and public social violence that confront the ordinary citizen. Part III will then explore different approaches to addressing these types of social violence, and the opportunity an international dimension might play in sharpening the ordinary citizen's ability to confront voting and racial discrimination. Part IV builds on this expanded view, the experience of what I term a dissociative moment when the ordinary citizen experiences the full contradiction of voting and racial discrimination within the domestic polity, and suggests a path from this state of dissonance to coherence in the manner of confronting these twin evils of voting and racial discrimination. Part V serves as a conclusion.

II. Private and Public Social Violence

This Part is divided into a presentation of (A) private social violence, (B) public social violence, and (C) the combined effect of those sources of social violence on the ordinary citizen in the American polity.

A. Private Social Violence on Voting Rights—an Ohio Example

At the height of the lead up to the 2012 Presidential election, I was subjected to a type of non-physical violence—private social violence for want of a better term. It started at an August 25, 2012 True the Vote "Voter Integrity" Meeting at a Holiday Inn in Worthington, Ohio, at which I was essentially the only person of color in the audience, and subsequently continued over a few days. At the event, the sheer quantity of criticism of black leaders under the "race hustlers" meme by an African-American woman speaker was oppressive. Being threatened with removal and having security called on me after asking questions at the Question and Answer part of the event was intimidating. Finding out later that, due to the threat of hostile private individuals with guns in the room, some persons of good will in the audience felt impelled to call the police out of fear for *my safety* was disturbing. Organizers called the police because I asked questions. People of goodwill called the police fearing I might be shot. End result: having the police called on me while exercising democratic rights. Being called a "coon" and "faggot" in front of my son was shocking. All was not bad, and in fact several persons were genuinely welcoming. I learned at the True the Vote meeting of the "voter integrity" methods being used by the group through statistical voter roll purging, private poll observers challenging voters at the polls, the bringing of lawsuits to purge rolls, and the encouragement of law changes such as voter identification that increases the burdens on ordinary citizens seeking to vote. All of these actions appeared to be perfectly permissible by private citizens. But, overall, various

messages of unwelcome were directed at me over the day, leaving my son and I exhausted by the end. The harassment continued over the next days as a blog-post excoriated me and private citizens took it upon themselves to communicate to the Dean of my Law School their displeasure with me, notwithstanding that I had been at the True the Vote meeting in my private capacity. Discussion of me even rose to the level of the margins of the Board of Directors meeting at the state university where I am employed, demonstrating, at least to me, the virulence of the animosity toward me of some in that True the Vote meeting room.[2] All of these persons were of course ordinary citizens and none of them actually inflicted any physical violence on me. However, the experience of spiritual violence was persistent, aggressive, debilitating, and, as a result, deeply troubling.

B. Public Social Violence on Voting Rights—Across the Nation

In our compound republic, public social violence is made up of actions by those at the levers of power in the 50 states in our federalism (discussed in 1 below) and actions by those at the levers of power at the federal level in the separation of powers (discussed in 2 below).

1. Federalism Social Violence—Voter Suppression

In contrast to the private social violence described in the previous section, public social violence on voting rights is reflected through the use of the public process (such as in North Carolina, but well beyond that state) in order to put in place restrictive laws that increase the burdens on those seeking to exercise the franchise. This type of experimentation includes: [1] identification laws including photo identification laws (2013 - 25 states; 2014 - 11 states) and proof of citizenship laws (2013 - 8 states; 2014 - 2 states), [2] making voter registration harder (2013 - 8 states; 2014 - 8 states), [3] reducing early voting opportunities (2013 - 8 states; 2014 - 2 states), [4] making it harder for students to vote (2013 - 2 states, 2014 - 1 state), [5] making it harder to restore voting rights (2013 - 2 states), [6] reducing opportunities to vote by mail (2014 - 5 states), and [7] making voter purges worse (2014 - 1 state).[3]

A graphic presentation of these activities by state across our federalism is presented in Illustration 1 below.[4]

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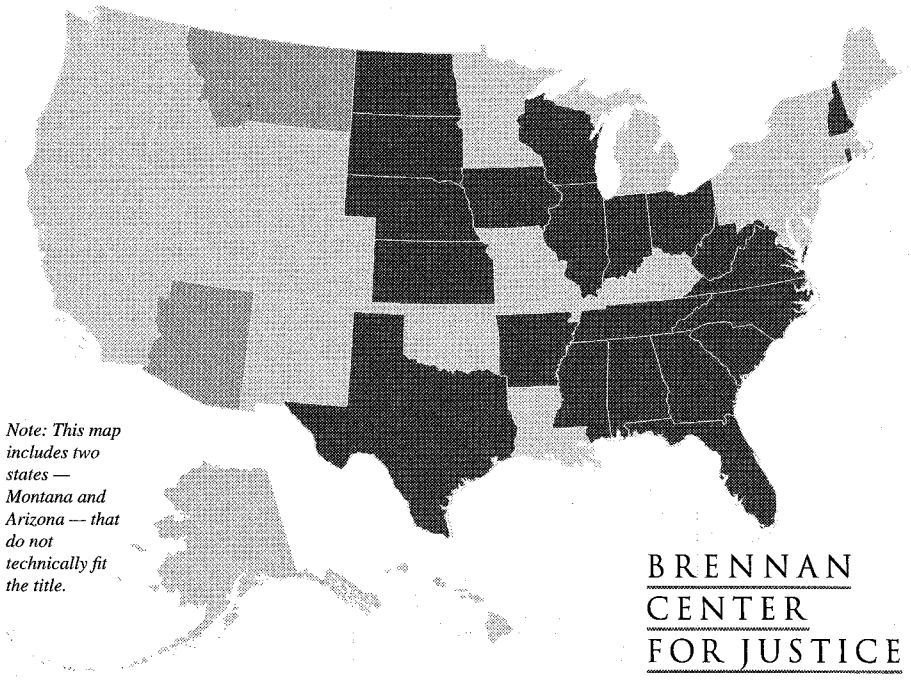
2. A more detailed version of this experience is discussed in Benjamin G. Davis, *On an Ordinary African-American Citizen Negotiating Voting Rights and Voter Intimidation in Ohio 2012*, CARDOZO J. CONFLICT RESOL. BLOG (Apr. 29, 2014), *available at* http://cardozojcr.com/blog/2014/04/benjamin_davis (last visited June 25, 2014).

3. Brennan Center for Justice, New York University School of Law, *Voting Laws Roundup 2013* (Dec. 19, 2013), *available at* http://www.brennancenter.org/analysis/election-2013-voting-laws-roundup (last visited June 25, 2014); Brennan Center for Justice, New York University School of Law, *Voting Laws Roundup 2014* (Feb. 6, 2014), *available at* http://www.brennancenter.org/analysis/voting-laws-roundup-2014 (last visited June 25, 2014).

4. Wendy R. Weiser & Erik Opsal, *The State of Voting in 2014*, Brennan Center for Justice, 2 (June 17, 2014), *available at* http://www.brennancenter.org/sites/default/files/analysis/State_of_Voting_2014.pdf (last visited June 25, 2014).

ILLUSTRATION 1



As shown above, voting restrictions have been implemented in a wide number of states since 2010. To be specific,

> new laws range from photo ID requirements to early voting cutbacks to voter registration restrictions. Partisanship and race were key factors in this movement. Most restrictions passed through GOP-controlled legislatures and in states with increases in minority turnout. In 15 states, 2014 will be the first major federal election with these new restrictions in place. Ongoing court cases could affect laws in six of these states. The courts will play a crucial role in 2014, with ongoing suits challenging laws in seven states. Voting advocates have filed suits in both federal and state courts challenging new restrictions, and those suits are ongoing in seven states – Arizona, Arkansas, Kansas, North Carolina, Ohio, Texas, and Wisconsin. There is also an ongoing case in Iowa over administrative action that could restrict voting. More cases are possible as we get closer to the election.[5]

The racial component of these voting restrictions is born out in the analysis of the patterns of where these restrictions have been put in place.[6] As a recent study has found,

5. *Id.* at 1.
6. *Id.* at 3.

> [r]ace was also a significant factor. Of the 11 states with the highest African-American turnout in 2008, 7 have new restrictions in place. Of the 12 states with the largest Hispanic population growth between 2000 and 2010, 9 passed laws making it harder to vote. And nearly two-thirds of states – or 9 out of 15 – previously covered in whole or in part by Section 5 of the Voting Rights Act because of a history of race discrimination in voting have new restrictions since the 2010 election. Social science studies bear this out. According to the University of Massachusetts Boston study, states with higher minority turnout were more likely to pass restrictive voting laws. A University of California study suggests that legislative support for voter ID laws was motivated by racial bias.[7]

2. Public Social Violence on Voting Rights—Separation of Powers Voter Suppression

> *At the same time, voting discrimination still exists; no one doubts that. The question is whether the [Voting Rights] Act's extraordinary measures, including its disparate treatment of the States, continue to satisfy constitutional requirements. As we put it a short time ago, "the Act imposes current burdens and must be justified by current needs."*[8]

This quote from the majority opinion in the *Shelby County* case reflects a balancing of the recognition that voting discrimination still exists with the concerns of disparate treatment of the States.[9] Viewed by an ordinary citizen in the context of a key framer's vision of both separation of powers and federalism, it is both an ironic and troubling phrase for the following reasons.

Our Constitution creates this compound republic as a means to provide a double security to the rights of the people, a source of state sovereignty in our system. As was described by one of our key Framers of the Constitution:

> In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a

7. *Id.* (citations omitted).

8. Shelby Cnty., Ala. v. Holder, 133 S. Ct. 2612, 2619 (2013) (quoting Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 203 (2009)).

9. This concern for a "tradition" of "equal sovereignty" has its origins in the ante-bellum and infamous *Dred Scott* decision. *See* James Blacksher & Lani Guinier, *Free at Last: Rejecting Equal Sovereignty and Restoring the Constitutional Right to Vote Shelby County v. Holder*, 8 HARV. L. & POL'Y REV. 39, 40 (2014).

> double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.[10]

The relative solicitude of the Supreme Court for the burdens on the states subject to the Voting Rights Act while recognizing the existence of voting discrimination turns on its head for the ordinary citizen the apparent goal of the double security structure of the Constitution. Here, the federal and state structure operate together to narrow the public protections of voting rights of those subject to voting discrimination. The public social structure's preference for state equality and relative indifference to the impact of this preference on those experiencing voting discrimination leaves the ordinary citizen to his own devices. The ordinary citizen is left to find other means to protect himself against experienced or potential voting discrimination in an effort to vindicate the exercise of the franchise (whether the franchise is viewed as a privilege or right of citizenry).[11] By awarding relative primacy to the state's concerns of sovereignty over the ordinary citizen concerns with voter discrimination, the significance of the ordinary citizen's experience of voter discrimination is diminished. At the same time, and this aspect is also troubling, state-based restrictive measures are given a new lease on life. Because these enactments are lawful (i.e. developed within the social structure of the Constitution), and the citizen has a duty to abide by the laws, the reasoning calls on the citizen to acquiesce in his or her subordination in front of the power of the 50 states (undergirded with this federal support) in our federalism. Put another way, the citizen's experience of voter discrimination matters, but the *Shelby County* decision makes it matter a little less.

This decision can be coupled with the recent *Schuette* decision with regard to the Michigan state ban of affirmative action by majority vote through referendum in a polarized vote in which 90 percent of the black Michigander voters who exercised the franchise opposed the proposition.[12] Justice Kennedy, speaking for the majority, wrote that:

> There is no authority in the Constitution of the United States or in this Court's precedents for the Judiciary to set aside Michigan laws that commit this policy determination to the voters. *See Sailors v. Board of Ed. of County of Kent*, 387 U. S. 105, 109 (1967) ("Save and unless the state, county, or municipal government runs afoul of a federally protected right, it has vast leeway in the management of its

10. THE FEDERALIST NO. 51 (James Madison), *available at* http://www.constitution.org/fed/federa51.htm (last visited June 10, 2014).

11. *See* Michelle D. Deardorff, *Constructing the Franchise: Citizenship Rights Versus Privileges and Their Concomitant Policies*, 33 MISS. C. L. REV. (forthcoming 2014).

12. *See* Transcript of Oral Argument of Shanta Driver on behalf of Respondent, Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. By Any Means Necessary (BAMN), 134 S. Ct. 1623 (2014) (No. 12-682), full transcript *available at* http://www.oyez.org/cases/2010-2019/2013/2013_12_682 (last visited June 10, 2014).

> internal affairs"). Deliberative debate on sensitive issues such as racial preferences all too often may shade into rancor. But that does not justify removing certain court-determined issues from the voters' reach. Democracy does not presume that some subjects are either too divisive or too profound for public debate.[13]

In a setting of state (or local) majority vote determinations where no individual federally-protected right is viewed by the majority as in-play, the ordinary citizen is again left to a political process of deliberative debate on sensitive issues at the state level. This reinforcing of the state and lack of interest in the polarized voting suggests that a deliberative process with a polarized electorate on a highly divisive issue of race at the state level is perfectly permissible and of no concern to the Supreme Court. The ordinary citizen impacted by racial discrimination finds the Constitutional structure's objective of a double security for the rights of the people, at least for him, once again turned on its head by leaving him at the mercy of polarized majorities. Again, this decision is lawful (done within the confines of the Constitutional structure) and the citizen is called to acquiesce consistent with the civic duty to abide by the laws as interpreted by the Courts.

C. Combining Private and Public Social Violence

Yet, taken together, these public acts along with the private acts described in the previous section can be perceived as forming a whole that the ordinary citizen finds difficult to abide. The Court decisions are calling for dialogue within the state structure. Yet, to the extent dialogue seeking interest convergence is met, as occurred in the private setting above, by a request to leave or a threat of the police being called on the ordinary citizen (or similar private social violence), one senses that one's presence and assertion of one's agency as an ordinary citizen are seen as an existential challenge for the others in this dialogue space. One realizes rapidly that dialogue is not being sought from the ordinary citizen concerned about voting discrimination or racial discrimination. Rather, what is being sought is acquiescence to the subordination of one's concerns to a Constitutional structure of federalism and majoritarian decision-making that was supposed to provide a double security but is turned on its head for this ordinary citizen. The ordinary citizen, by obeying the law, is asked to accept his own subordination both to other citizens not at risk of such discrimination and the Constitutional structure. To the extent said ordinary citizen is not reassured by those who see no invidious purpose in those majoritarian acts at the state level whatever the effect, a form of *anomie* is reignited in him. The ordinary citizen experiences a dissociative moment feeling abandoned

13. Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. By Any Means Necessary (BAMN), 134 S. Ct. 1623, 1638 (2014).

rather than protected by the aforesaid double security. In sum, the ordinary citizen is confronted with lawful private and public social violence that is countenanced in the structure of separation of powers and federalism in which he exercises his citizenship.

III. Approaches to Protecting Voting Rights

In this section, a series of approaches and their limits to protecting voting rights are discussed as methods for the ordinary citizen to navigate the public and private social violence. Negotiation theory, implicit social cognition theory, and interest convergence theory are first described, as are their limits. Next, alternate social constructs of freedom and limitations, drawn from international experience and United States foreign relations versus international law understanding are introduced as a means of reframing the limits of the earlier theories to provide a sharpening of the analysis of a dissociative moment caused by the heightened contradictions experienced, and the experience of a profound dissonance.

For negotiation theory, confronted with the kind of private social violence that is accepted under the public structure, the ordinary citizen might seek to express his agency through the use of negotiation theory. Principled negotiation might be seen as more effective than positional bargaining in this setting due to its appeal to common principles. Taking advantage of the concepts of principled negotiation, the ordinary citizen can enter the private space and (1) focus on interests over positions, (2) separate the people he or she confronts from the problem of protecting voting rights, (3) try to find objective criteria that might be applied, (4) go to the balcony with some and look at the problem afresh, and (5) attempt to generate positive sum solutions out of a zero-sum environment that move all to a more voting protective consensus.[14] Thus, complying with formal requirements for admission to ensure one is entitled to speak in the space is a first step. Going further and assuring all of a shared belief in the importance of voter integrity is a way to move from a more confrontational to a more cooperative form of dialogue. Doing a searching examination under objective criteria as to whether the means suggested amount to methods of protecting voting rights or suppressing those rights is a way to highlight the perceived incoherence between the stated objective and the means of attaining that objective. Trying to have a dialogue about these incoherencies so as to shape alternative solutions (the classic orange peel, orange pulp splitting of the orange to create a positive sum result) might build consensus. These efforts might encourage the shaping of approaches and means that assure voter integrity while protecting against voter suppression.

14. For a classic presentation of these concepts, *see* Roger Fisher, William Ury, & Bruce Patton, Getting to Yes: Negotiating an Agreement Without Giving In (2d ed., Penguin Books 1991).

On the other hand, the above negotiation tactics depend to a certain extent on the willingness of the interlocutors to actually "hear" the ordinary citizen. Here, the insights from neuroscience and implicit social cognition theory on explicit bias, implicit bias, and stereotype threat[15] might inform the context for the above negotiation. Explicit bias[16] would imply directly being confronted by others with their inability to even "hear" the ordinary citizen because of some characteristic such as race. The "coon" and "faggot" comments mentioned earlier suggest that where the dominant experience is in a situation of explicit bias, it may be nearly impossible to establish a dialogue, as the ordinary citizen is not perceived as worthy of dialogue. Contrast that with the situation of implicit bias made up of stereotypes (or short-cuts of thinking) together with positive or negative attitudes about those stereotypes that result in implicit social cognitions.[17] In such a context, depending on the implicit social cognitions at play, the ordinary citizen would or would not be given sufficient credibility to deploy his art of negotiation. At the same time, the kind of self-inhibiting or self-defeating approaches that are the result of the fear of reinforcing a negative stereotype about one's group might add additional complexity as an internal challenge to communication. The self-policing due to stereotype threat is exhausting and makes dialogue more difficult and confusing. Countermeasures can, of course, be deployed to defuse these implicit biases and stereotype threat risks. The point here is only that explicit biases,

15. This description of explicit bias, implicit bias and stereotype threat borrows substantially from these excellent sources: Gregory S. Parks & Jeffrey J. Rachlinski, *Implicit Bias, Election '08, and the Myth of a Post-Racial America*, 37 FLA. ST. U. L. REV. 659, 659-715 (2010); Samuel R. Bagenstos, *Implicit Bias, "Science," and Antidiscrimination Law*, 1 HARV. L. & POL'Y REV. 477, 477-93 (2007); Jerry Kang, *Implicit Bias: A Primer for Courts*, NAT'L CTR. FOR STATE COURTS (Aug. 2009), *available at* http://www.americanbar.org/content/dam/aba/migrated/sections/criminaljustice/PublicDocuments/unit_3_kang.authcheckdam.pdf (last visited June 25, 2014); *Project Implicit*, https://implicit.harvard.edu/implicit/ (last visited June 25, 2014); Reducing Stereotype Threat, http://www.reducingstereotypethreat.org/ (last visited June 25, 2014) (as presented in Benjamin G. Davis, Implicit Bias and Stereotype Threat CLE, Toledo Bar Association (Apr. 12, 2013) (powerpoint available with the author)).

16. Recent clear examples are described in *Cliven Bundy: Are Black People 'Better Off As Slaves' Than 'Under Government Subsidy?'*, HUFFINGTON POST, Apr. 24, 2014, http://www.huffingtonpost.com/2014/04/24/ cliven-bundy-racist_ n_5204821.html (last visited June 25, 2014); TMZ, *Clippers Owner Donald Sterling to Girlfriend: Don't Bring Black People to My Games (Audio)*, YOUTUBE (Apr. 25, 2014), http://www.youtube.com/watch?v=YhT6d5fMhzI&feature=youtu.be (last visited June 25, 2014).

17. I used the example of my name being similar to that of the late General Benjamin O. Davis, Jr. as an example of an implicit bias working in one's favor. Thus, on many occasions I have been mistaken for the General's grandson based on the implicit bias of the person with whom I am. I am no relation and have no reason to speak of a relationship with this distinguished person, yet this implicit social cognition operates to some extent in my life and completely independent of my will. Thus, the implicit social cognition becomes a lens through which my every act is viewed. Another more negative example is demonstrated in one study that brought out negative stereotypes and confirmation bias among law partners. Each partner was provided an identical memo for review with the only difference in the identification of the author as being African-American or White. The exact same memo averaged a 3.2/5.0 rating under the hypothetical "African American" and a 4.1/5.0 rating under the hypothetical "Caucasian." Yellow Paper Series, *Written in Black & White: Exploring Confirmation Bias in Racialized Perceptions of Writing Skills*, NEXTIONS, No. 2014-0404, http://www.nextions.com/wp-content/files_mf/ 1397223759201404011 4WritteninBlackandWhiteYPS.pdf (last accessed June 25, 2014).

implicit bias, and stereotype threat form a context ever present around the negotiation that impacts the ability for all truly to "hear" each other.

For such a negotiation in the context of explicit bias, implicit bias, and stereotype threat, one would generally expect positive outcomes primarily in situations where the interests of a sufficient number of majority (or white voters or white persons in the room) converged with the ordinary citizen's minority voting rights aspirations. This situation would be the classic example of interest convergence described by the late Derrick Bell.[18] He posited that it is primarily in such settings of interest convergence that decisional law advancing the rights of minorities will occur. Extending that to the social sphere, to the extent a sufficient number of the majority can join with the minorities, the theory posits that progress can be made.

On the other hand, there may be a significant concern as to whether American cultural capacity or social constructs are able to articulate interests in a manner that permits interest convergence. To explain this concern, one first must look at a current tendency in the literature to speak in terms of first and second generation discrimination in America.[19] Yet, this formulation is that of persons expressing a recent experience rather than the full weight of the history of that discrimination. In her dissent in *Schuette*, Justice Sonia Sotomayor went through a detailed history of the kinds of political restructurings done for invidious or other reasons over the years as part of American racial oppression.[20] Rather than speak of first and second generation discrimination, my preference is to speak in terms of twelfth or thirteenth generation discrimination as an imperfect means of bringing into the present the history that well predates our current experience.[21] The weight of that history informing the process of seeking interest-convergence is best expressed in William Faulkner's famous

18. *See* Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

19. *See* Jenigh J. Garrett, *The Continued Need For The Voting Rights Act: Examining Second-Generation Discrimination*, 30 ST. LOUIS U. PUB. L. REV. 77, 80 n.14 (2010) (citing Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1093 (1991) ("[F]irst generation [barriers are] direct impediments to electoral participation [and include] registration and voting barriers. Once [first generation] obstacles were surmounted . . . the focus shifted to second-generation, indirect structural barriers such as at large, vote-diluting elections.")); *see also* Yifat Bitton, *The Limits of Equality and the Virtues of Discrimination*, 2006 MICH. ST. L. REV. 593, 632 (2006), Glenn Kunkes, Note, *The Times, They Are Changing: The VRA Is No Longer Constitutional*, 27 J. L. & POL. 357 (2012), William S. Consovoy & Thomas R. McCarthy, *Shelby County v. Holder: The Restoration of Constitutional Order*, 2013 CATO SUP. CT. REV. 31 (2012-2013), Sudeep Paul, Supreme Court Commentary, *The Voting Rights Act's Fight to Stay Rational: Shelby County v. Holder*, 8 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 271 (June 4, 2013), *and* Angelica Rolong, Comment, *Access Denied: Why The Supreme Court's Decision in Shelby County v. Holder May Disenfranchise Texas Minority Voters*, 46 TEX. TECH L. REV. 519, 550 (2014).

20. Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. By Any Means Necessary (BAMN), 134 S. Ct. 1623, 1651-83 (2014) (Sotomayor, J., dissenting).

21. Whether we see the arrival of blacks in North America as the 20 persons in 1619 at Jamestown, or back in 1508 when the black conquistador Juan Garrido arrived as a free man in Hispaniola.

phrase: "The past is never dead. It's not even past."[22] This weight of the past is expressed also in the great Italian writer Giuseppe Tomasi di Lampedusa's also famous phrase that: "If we want things to stay as they are, things will have to change."[23] This second formulation helps us think about efforts at "progress" and ask the difficult question whether the net result of that progress is maintenance or change of a very old social hierarchy. From an economist's point of view, the kind of long-term analysis of inequality done in Thomas Piketty's Capital in the Twenty-First Century helps us better apprehend the nature of the current period as we see it in a much broader historical panorama than typically is the case.[24]

Seen in this light, the rich, complex history of discrimination in the United States weighs on said efforts at negotiation, informs the implicit social cognitions, and may limit the definition of the limits of interests that can be sought to converge. All citizens negotiate domestic social constructs of freedom and constraint which suggest the types of interests and the limits of convergence. Even in the dynamic process of change in a given society, the underlying social history may be reinterpreted on many occasions, but that interpretation is against a longer term backdrop of the accumulation of prior instances of change, stasis, oppression, and progress. Said social reality may be only intuitively seen as stultifying, or not seen at all as stultifying, as these are the social constructs in which we live.

By breaking out of this self-referential structure, it may be possible to sharpen the understanding of its opportunities and limits. A new way of seeing what freedom and its limits can be is both invigorating and destabilizing as new insights developed. In this regard, I was brought back to a comment by James Meredith to me in 2007 that it was in his service in Japan in the military after World War II that he came to realize that segregation was not something ordained by God.[25] The freedom and limits in Japan tracked in a different manner from the constraints of segregation of

22. WILLIAM FAULKNER, REQUIEM FOR A NUN 92 (Random House 1951). During the *Voting Rights* Symposium held at Mississippi College School of Law on March 21, 2014, I spoke about the experience of staying at the Hilton Garden Inn, which in the Nineteenth century was called the King Edward Hotel, then the Confederate Hotel (burned down in 1863 by General Sherman), and then the Third House (because of the legislators who lived and worked there). It was closed in 1967 right after the passage of the Civil Rights Act of 1965. All of these experiences just in where one slept were a powerful reminder of the history, and I imagined what would have been the case if I had tried to walk in the hotel back in the ante-bellum period. One felt the ghosts, the blood in the soil, and the change in the spirits. I thank Dean Jim Rosenblatt of Mississippi College School of Law for taking me on a walking tour of sites in Jackson, Mississippi, especially to the statuary for the three great literary figures of Mississippi—Eudora Welty, William Faulkner, and Richard Wright—where I had the honor to stand among such giants.

23. GIUSEPPE TOMASI DI LAMPEDUSA, THE LEOPARD 26 (Archibald Colquhoun trans., Time Incorporated 1966).

24. THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY, 1-35 (Arthur Goldhammer trans., Harvard Univ. Press 2014).

25. Private Conversation with James Meredith at the Robert Jackson Center in the Carl Cappa Theater (Mar. 26, 2007), event details *available at* http://www.roberthjackson.org/the-center/events/event/?date_time_id=99&KeepThis=true&TB_iframe=true&width=600&height=400%2000 (last visited June 25, 2014).

his youth in Mississippi. In the new setting, Meredith experienced freedoms unavailable in the social construct of his youth, opening him to alternative visions of possibility. That opening of his spirit forever changed the manner in which he viewed his home and helped start a process that led to his integration of the University of Mississippi.

Another version of this experience is in the oft-repeated phrase of Richard Wright: "I've found more freedom in one square block of Paris than there is in the entire United States."[26] That quote is frequently misquoted as only referring to Mississippi during segregation. That Wright was referring to the entire United States suggests that the kind of freedom he was permitted to experience in the United States wherever he went was a social construct far narrower than what a foreigner would experience as even a non-French citizen in France. Put another way, the private and public social construct within which interest convergence could be sought in the United States allowed a restricted form of freedom more or less constrained, depending on one's geography in the United States. Yet, that kind of freedom permitted in the American social construct was no match in its breadth for the ordinary freedom experienced on a typical day walking down the street in Paris.

Going from these private experiences overseas of freedom and limitation that were both invigorating and destabilizing for Meredith and Wright to the public domain, one notes that as in each polity, the American social construct is built on state structure embodied in domestic law, including international law to the extent it is integrated in the domestic law. The dissonance that comes from the comparative private experience of freedom under the state structures of different countries—a form of comparative social dualism—is also mirrored in the law. Each country constructs its space of freedom and limit in a different manner. Americans privileged to have personal experience in other countries have their vision of personal potentialities back in the United States challenged and changed.

But not all Americans are so privileged to have that experience abroad. For the ordinary citizen who does not have the opportunity for such an experience of comparative dualism, the *anomie* with regard to experienced oppression remains a burden. One can call out to principles enshrined in the Constitution, religious thought, or other sources as a support for efforts at redress, but the stultifying social burden of the history continually frames those calls and channels them through well worn structures of thinking that are purely domestic.

So how does one get to the international plane without being able to travel to the international plane? Incoherent exposure is available through internet access but it may be difficult for reasons of language and culture to apprehend the significance of those signals from foreign cultures. Education (even in translation) can open the spirit to alternative social structures coming from abroad. Yet, in a system that does not see education as a

26. MICHEL FABRE, THE WORLD OF RICHARD WRIGHT 146 (Univ. Press of Mississippi 1985).

fundamental right,[27] where local property tax-based financing and housing segregation are aided and abetted by reduced state and federal level spending, shifting of resources from traditional public school funding to charter schools, student loan burdens with merit-based versus need-based financial packages, the proliferation of questionable for-profit schools and colleges, an orientation of resources toward the hard sciences for reasons of competitiveness (rather than the humanities and social science), and other structural changes to education, the access to such a more open and meaningful education is made attainable primarily by luck or wealth.

Returning to the law in the context of the above constraints of the social structure, a first step might be to inform one's concerns in the common frames of domestic law. Here, the matrix of the domestic social construct is revealed. While still self-referential, one begins to understand the how and why of the domestic social structure. But, unfortunately, such an effort still maintains the ordinary citizen in the American construct. Access to the international plane through law might be further progressed through the study of international law. At a minimum, the domestic social structure of domestic law is reframed in terms of obligations on the United States that are indifferent to the manner in which the United States is organized as a polity.

However, even with international law, whether Americans are made familiar with international law as practiced on the international plane (as opposed to its integration in the domestic law regime and social construct) influences their sense of legal potentialities. There are dualisms that can be experienced between the domestic law structure and the international law plane. This dualism of domestic and international law as experienced in the United States comes from the extent, or not, international law is integrated into, or intentionally kept out of, the domestic law space. If one sees only parts of international law integrated into the system and other parts simply not considered part of the system, one has only a partial sense of the valence of international law for oneself as the ordinary citizen. The lack of or broken access to the international plane (either as law or personal context) deprives the citizen of the full experience of the dualism of the self as constructed in a domestic setting and a non-domestic setting of different social constructs of limits and freedom.

The potential impact of international law on the ordinary citizen can be summarized in three of its basic concepts. First, is the idea of sovereignty: that states are generally free to determine their internal structure.[28]

27. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

28. Report of the International Committee of Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion upon the Legal Aspects of the Aaland Islands Question, League of Nations Official Journal, Special Supp. No. 3, at 5-6 (1920), *available at* http://www.ilsa.org/jessup/jessup10/basicmats/aaland1original.pdf (last visited June 25, 2014). Generally speaking, the grant or refusal of the right to a portion of its population of determining its own political fate by plebiscite or by some other method is exclusively an attribute of the sovereignty of every State which is definitively constituted. *Id.*

Second, whatever the internal structure, the people's meaningful participation in their governance is an essential rule.[29] Third, a state "may not invoke the provisions of its internal law as justification for its failure to perform a treaty."[30] Together, these concepts emphasize the autonomy of each state in the international system while delimiting constraints on that autonomy.

For the United States, our domestic law approach to integrating international law is that the "Constitution stands above all other laws [including customary international law], executive acts, and regulations, including treaties."[31] This vision might be termed the "United States foreign relations law vision" that places the Constitution above all law, including international law.

From the perspective of international law, like any other state, the United States consents to be bound by treaties and is subject to customary international law and general principles of law recognized by civilized states. We might term this approach the "international law vision." These international law obligations bind the United States, whatever its internal governing structure. Even if the United States asserts the United States foreign relations law vision both on the international plane as a political-legal position and as a matter of domestic law, from the international law vision that assertion does not alter the obligation on the United States, whatever its internal structure of separation of powers and federalism. Thus, even though internally a rule of international law is breached in the public or private social structure, to the extent said rule is an international law obligation on the United States, the United States is bound by said rule of international law. This dualism is expressed somewhat succinctly by the concept that "a rule of international law or a provision of an international agreement is superseded as domestic law does not relieve the United States of its international obligation or of the consequences of a violation of that obligation."[32]

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29. Reference re Secession of Quebec, [1998] 2. S.C.R. 217, 282 (Can.), *available at* http://scc-csc.lexum.com/scc-csc/scc-csc/en/1643/1/document.do (last visited June 25, 2014) (stating "The recognized sources of international law establish that the right to self-determination of a people is normally fulfilled through *internal* self-determination – a people's pursuit of its political, economic, social and cultural development within the framework of an existing state."); *Id.* at 285-86 ("A number of commentators have further asserted that the right to self-determination may ground a right to unilateral secession in a third circumstance. Although this third circumstance has been described in several ways, the underlying proposition is that, when a people is blocked from the meaningful exercise of its right to self-determination internally, it is entitled, as a last resort, to exercise it by secession. The *Vienna Declaration* requirement that governments represent 'the whole people belonging to the territory without distinction of any kind' adds credence to the assertion that such a complete blockage may potentially give rise to a right of secession.").

30. Vienna Convention on the Law of Treaties, art. 27, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980), *available at* http://www.worldtradelaw.net/misc/viennaconvention.pdf (last visited June 25, 2014).

31. International Human Rights Instruments, *Common Core Document Forming Part of the Reports of States Parties: United States of America*, ¶ 23, U.N. Doc. HRI/CORE/USA/2011 (Dec. 30, 2011), *available at* http://www.un.org/en/ga/search/view_doc.asp?symbol=HRI/CORE/USA/2011 (last visited June 25, 2014).

32. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 115(1)(b) (1987).

So, if the United States has an international obligation but it is not implemented domestically, there is a space of law between what is an obligation on the international plane and what is experienced in our domestic public and private social structure. In contrast to the situations of purely self-referential visions of potentialities within the internal legal structure, the admission of an international law vision by the ordinary citizen within that internal legal structure allows him to see potentialities that have not been made manifest, or only imperfectly made manifest, in their daily experience inside the United States. Like those persons who experienced a different form of freedom in their experience in other countries, the domestic ordinary citizen is able to see a different way of understanding their place in the social structure that is independent of the implications of the selected political structure under our Constitution. Thus, all the internal law is of interest, but it is viewed in the context of the United States international law obligations freed of the domestic constraints that shape that internal law.

An example of this might be expressed in the definition of racial discrimination in the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). Inside the United States we focus on intentional discrimination and, subject to certain hurdles, disparate treatment.[33] On the international plane, the definition of "racial discrimination" is:

> any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural[,] or any other field of public life.[34]

Thus, the focus is on both "purpose and effect" across a vision of racial discrimination that was not as narrow as the United States domestic law vision. Coming back to the solicitude for state's rights expressed in the *Schuette* decision and the increasing of burdens to race-conscious affirmative action in *Parents* and *Fisher*,[35] all might be reframed in terms of Article 1.4 of the ICERD which states that:

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33. Periodic Report of the United States of America to the United Nations Committee on the Elimination of Racial Discrimination Concerning the International Convention on the Elimination of All Forms of Racial Discrimination, 6-7 (June 12, 2013), *available at* http://www.state.gov/documents/organization/210817.pdf (last visited June 25, 2014) (stating "... although establishing a race discrimination violation of the U.S. Constitution requires proof of discriminatory intent, many U.S. civil rights statutes and regulations go further, prohibiting policies or practices that have discriminatory effects or disparate impact on members of racial or ethnic minorities or other protected classes").

34. International Convention on the Elimination of All Forms of Racial Discrimination, art. 1.1, Dec. 21, 1965, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969), *available at* http://www.ohchr.org/Documents/ProfessionalInterest/cerd.pdf (last visited June 25, 2014).

35. *See generally* Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. By Any Means Necessary (BAMN), 134 S. Ct. 1623 (2014), Fisher v. Univ. of

> Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.[36]

Here, the international law indifference to the internal structure of the United States, the *de jure* and *de facto* distinctions, and even state versus private action concerns while focusing on special measures that combat racial discrimination reframes the struggle on affirmative action in a broader light.[37]

A person with access to the experience of freedom overseas, or, at a minimum, access to an understanding of what international law creates as obligations for states that express a greater freedom than is internally recognized in the United States, creates a dissonance as one compares what one has with what international law says is possible. Rather than attaching one's *anomie* to personal, moral or religious principles, or interpretation of domestic law principles, the person is able to see anew their *anomie* in an international law vision that is unburdened by the domestic social constructs. The importance of this experience is that the person is able to step out of the purely domestic space of domestic interest convergence and see to what extent the convergence is on too narrow a basis as compared to a more international standard. In this setting, the implicit social cognitions that might define context for a negotiation are recognized as implicit American social cognitions consistent with our social hierarchies, but only ours. These cognitions are not immutable; on the contrary, they are alterable. The essential experiences of Richard Wright and James Meredith, once overseas, are able to be experienced through the understanding of international law on its own rather as part of an American social construct of international law. The end result is experiential shock in terms of the

Tex., 133 S. Ct. 2411 (2013), *and* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007).

36. International Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 34, at art. 1.4.

37. A similar indifference (verging on disdain) pertains to the debates on the "proper" manner of domestic interpretation of the Constitution—more internal law of little moment in the international law vision. Internally sacrosanct discussions of the meanings of the Thirteenth, Fourteenth, and Fifteenth Amendments, and subsequent Supreme Court decisional law or legislative enactments are seen more as information as to the manner of compliance rather than as ends in themselves. The formation of the political system into parties and the racial or other makeup of those parties is similar information as to a choice of structure rather than as immutable structure.

experience of freedom, and legal shock as to what is permitted in the international regime as opposed to the domestic public and private social structure.

The hope is that from such an experience the unstated limits of freedom in the domestic social structure become both more evident and painful to experience. As a consequence, an experience of shock or dissonance may occur and grow in the person. What life could be, and what life is expected to be, come into contradiction for the person. Particularly for a person who has experienced public and private social violence, who has attempted to negotiate that experience taking into account purely domestic implicit social cognitions and domestic views of what interests might converge within a domestic legal structure, the opening to the international plane breaks the connection between each of these links of the chain and suggests alternative social constructs. Another experience of invigoration and destabilization happens. The question then arises as to how one can move on a path from this dissociative moment of dissonance to coherence, which is the subject of the next section.

IV. FROM DISSONANCE TO COHERENCE—ONE POSSIBLE PATH

Armed with a sharpened understanding of the domestic social construct through the incorporation of international law and, hopefully, experience on the international plane, a person might reframe the experience of freedom in the United States as a series of relative social burdens to be overcome that are more or less difficult, depending on one's place in the social hierarchy. The domestic experience is viewed as a form of distributed freedom built on our social history, even with the progress that has been made. The person can contrast that experience of freedom with what international law describes. For example, in thinking of governance, one can think of meaningful participation in one's governance as countenanced within the domestic social structure and as a matter of international law. Same words, but with different meanings. Being able to hold these two visions in one's head is to have the sense of contradictions sharpened.

Where is one's path forward, especially if one is experiencing dissonance and shock? In such an unsettling situation, the contradictions can seem too much and one might feel paralyzed. Yet, a further reframing of that experience may be possible through a theory that embraces that dissociative moment as the precursor to social movement. In this regard, the work of Francesco Alberoni is particularly apropos as it describes a process of reaching coherence without identifying the specific idea around which one might rally.[38] Alberoni speaks to that dissociative moment as a time of depressive overload in which the contradictions between one's internal experience or reality and one's day to day reality become too much. Through

38. *See* FRANCESCO ALBERONI, MOVEMENT AND INSTITUTIONS (Patricia C. Arden Delmoro trans., Columbia Univ. Press 1984). Depressive overload, the nascent state, seeking affinity to create a movement, and the four responses of institutions to such a movement are key concepts of this monumental work.

the integration of domestic and international law, a person is able to reshape the internal experience they have and contrast said experience with what they live within the American polity. Those contradictions between what one thinks and one experiences create the depressive overload. The path out of that depressive overload is through the emergence of an idea as to how to make coherence between the internal and external experiences of reality. That idea, in an almost Marxist sense of praxis, is derived from the experience of the contradictions of depressive overload. It is an imperfect process of envisioning coherence—Alberoni terms it the "nascent state."[39] With said nascent state starts a process of seeking affinity through the discussion and shaping of the idea with others. To the extent others are emboldened by the reframed idea that brings some coherence to the contradictions, a movement starts to emerge among those who come together with affinity. These movements come into contact with other movements and from them affinity can increase or decrease. What I find remarkable is that Alberoni takes the person from the state of depressive overload through the development of a movement and then goes farther. His concern is with what happens to said movements as they confront the institutions of daily life—in law, the domestic law social construct of private and public social violence described at the beginning of this essay. These structures of ordinary life confront the movement and the responses of the institutions are said to fall into four broad categories: (1) institutionalization, (2) extinction, (3) repression, or (4) dissolution in illusion of the movement. Thus, the path from the point of depressive overload to a new coherence is suggested without indicating the nature of the specific endpoint.

With the integration of the domestic approaches with the international approaches as one comes to the point of depressive overload, the suggestion I make is that a clearer understanding of the limits and potential of the American social construct is possible. With that clearer understanding, a more perceptive process of identifying the idea may be the basis of a movement. The movement that draws on twin sources in domestic law and international law, rather than strictly moral, religious, or domestic law constructs alone, might help anchor the efforts of those demonstrating in the streets (such as in North Carolina) or in other public and private venues against the state oppression. Appeals to law that are purely domestic-focused are made to contend with appeals to international law obligations that are on the entire United States rather than stuck in the interminable issues of federalism and separation of powers. The citizen's duty to abide by the law and the legitimacy of state lawful acts are reframed by both the domestic law and international law obligations on the United States. These twin sources of power allow the citizen to reinterpret the public and private social violence and the manner in which he negotiates such experience in

39. *Id.* at 19-22.

terms of tactics, implicit social cognitions, and the meaning of interest convergence. In doing so, said negotiation of voting rights and voting intimidation is done in a manner that is less tethered to the burdens of our common and difficult history, opening a tentative but hopeful space for new forms of freedom.

IV. CONCLUSION

A synthesis of the concepts in this essay would be to encourage the ordinary citizen to (1) understand the private social violence, (2) understand the federalism and separation of powers public social violence, (3) understand social theory and its limits, (4) understand the domestic-international dualism, (5) experience depressive overload on a path through a nascent state, affinity, movement, and reactions of institutions from a range of predictable scenarios, and (6) incorporate the above as an aid to resilience in the face of adversity. It would be naïve to argue that, just by the expansion of the ordinary citizen's view through the integration with domestic law and experience of international law and experience, a process of social progress on voting rights would be inevitable. The myriad forces at play within the domestic system preclude such a view.[40] What this short essay attempts to do is to suggest a path to allow the ordinary citizen to see themselves both as an American with rights and obligations in our social construct and as a person who is a subject of international law—someone who derives rights and obligations from international law. In that sense, one begins to see freedom in a different manner than the one based on the distributed burdens of our social history. By appropriating that recognition in a manner that is not tied to the United States domestic law or even foreign relations law vision, the result is to encourage agency of that ordinary citizen on both the domestic and international planes.[41] In that manner, said persons renew with an older, less state-centric tradition of international law viewing individuals as both subjects of international law as well as ordinary citizens of the United States. In that sense, the broader view helps the ordinary citizen capture the vision at the highest levels of

40. *See* Martin Gilens and Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSP. ON POL. (forthcoming Fall 2014), *available at* https://www.princeton.edu/~mgilens/Gilens%20homepage%20materials/Gilens%20and%20Page/Gilens%20and%20Page%202014-Testing%20Theories%203-7-14.pdf (last visited June 25, 2014); *see also* MARTIN GILENS, AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA (Princeton Univ. Press 2012).

41. For example, the shadow reporting done by United States Human Rights Groups with the United Nations committees on human rights with respect to the periodic reports of the United States of America on its compliance with its international obligations under the relevant international instruments. *See* United States Human Rights Network, "Shadow Reports," *available at* http://www.ushrnetwork.org/icerd-project (last visited June 25, 2014). During the 2008 review by the United Nations Committee on the Elimination of Racial Discrimination of the United States periodic report to the United Nations Committee on the Elimination of Racial Discrimination in Geneva, Switzerland on March 5, 2008, a black high-school student from Chicago who participated in said process for the ICERD was overheard to exclaim his new sense of agency on the international plane in saying, "I am a human rights activist." Maybe someday he would, as well as being a lawyer for domestic law, be a human rights lawyer too.

American society and might, in some possibly even modest sense, help level the playing field of discourse and action in our system of federalism and separation of powers.