Racial Disparities in U.S. Public Education and International Human Rights Standards: Holding the U.S. Accountable to CERD

*by Amelia Parker**

They "were underprivileged anyway," commented former first lady Barbara Bush in reference to the thousands of 2005 Hurricane Katrina evacuees — the majority of whom were poor, African American, and disabled — seeking refuge in the Houston, Texas Astrodome after losing everything in the storm. "This is working very well for them," she continued.[1] Mrs. Bush toured the Astrodome with her husband, former President George Bush, as part of the Bush Administration's campaign to counter criticism of the inadequate federal response to the forewarned impact of the hurricane's destruction on racial minorities and the poor in the Gulf Coast area. However, the former first lady's comments only reinforced an elite mentality that justifies the racial and economic marginalization that permeates equal protection jurisprudence in the U.S. and shapes the discourse on racial equality.

At the center of the debate on racial equality and discrimination in the U.S. is the issue of educational opportunities afforded racial minorities. On February 22, 2007, academics, critical race theorists, human rights and civil rights activists, teachers and students gathered at American University Washington College of Law (WCL) for a discussion of *U.S. Education Law and Its Human Rights Impact on Racial Minorities*.[2] Organized by the WCL Center for Human Rights and Humanitarian Law, the conference addressed the failure of the U.S. federal government to remedy rampant racial disparities in public education despite its obligations under the International Convention on the Elimination of all Forms of Racial Discrimination (CERD). This article will discuss: (1) political barriers to racial equality in the U.S., and the failure of the federal government to protect the fundamental rights of racial minorities; (2) the weakening of judicial remedies for racial discrimination; and (3) the inadequacy of the *No Child Left Behind Act* and other federal initiatives in fulfilling U.S. obligations under CERD.

Until the federal government fully acknowledges its responsibility to protect the fundamental rights of racial minorities and incorporate international human rights norms into the domestic legal system, the U.S. may see more failures similar Katrina, and our nation's minority children, especially those in urban settings, may continue to suffer sub-standard educational conditions, maintaining inequality between the races for generations to come. Civil society as well as individuals must take a proactive role in holding the U.S. accountable to CERD and other international agreements in order to break the cycle of racial subordination that permeates the U.S. justice system.

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Gay McDougall speaking about U.S. obligations under CERD, and how to address the disparate impact of laws and policies on racial minorities.

Political Barriers to Racial Equality: An Historical Analysis of the Federal Government's Failure to Protect the Fundamental Rights of African Americans

Following the U.S. Civil War, the physical battle between the North and the South ended, but the political battle remained. Central to this was a dispute over the degree of social and political rights that newly freed African Americans should be afforded. These political influences caused the federal legislature and the courts to submit to majority opinion and leave unprotected the fundamental rights denied African Americans during slavery, such as property ownership, participation in the political process, and access to education.[3] Despite the U.S. Supreme Court's perceived autonomy from political influence, throughout history it has proven to be a political institution that aligns its decisions with known public opinion, especially in the context of race and equal protection jurisprudence. Consequently, the status quo is continually reinforced and the federal government fails to adequately protect the rights of its minority population. This section of the paper will discuss: (1) the political blockades faced by African Americans pursuing equality in a post-Civil War era; (2) the political influences on equality rhetoric following World War II; and (3) the dissolution of judicial remedies for racial disparities in education.

Politics and the Post-Civil War Pursuit of Equality

Political opposition to the equal protection of fundamental rights for African Americans following the U.S. Civil War led to

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federal indifference to civil and human rights abuses of African Americans in politically conservative states throughout the U.S. South. Despite the political gains won by the African American community following emancipation, all gains were lost once the federal government abandoned its responsibility to protect and allowed southern states to create a system of social apartheid.

After the U.S. Civil War, many African Americans ventured out of the plantation counties of the South, seeking land, employment and education, as well as family members from whom they were separated during slavery. Also, because travel was forbidden for slaves without official permission, many African Americans also took to the road simply to test their freedom. In 1863, the War Department created the Freedmen's Bureau as a temporary agency to assist African Americans in their transition from slavery to freedom. The under-funded Bureau established schools, banks, and hospitals for freedmen, adjudicated claims among the races, and attempted to secure equal justice for African Americans in state territories. Veterans of the Bureau in the 1870s viewed the establishment of a public education system as the foundation for an egalitarian society and by 1873, with the help of support from the abolitionist Republican party, public education systems began to take shape throughout U.S. states. Yet stark political opposition from white southern leaders led to the imposition of *Black Codes* in southern states, also known to as *Jim Crow* legislation, designed to restrict civil rights for African Americans.

Beginning in 1866, Congress passed a series of civil rights legislation and constitutional amendments in an attempt to protect the rights of African Americans from state-sponsored racial discrimination and arbitrary acts of violence perpetrated by private individuals. In 1868, Congress passed the Fourteenth Amendment, mandating that no state shall make laws to abridge "the privileges and immunities of citizens"; deprive any person of "life, liberty or property without due process of law"; or "deny any person within its jurisdiction the equal protection of the laws." Two years later, after much contentious debate, Congress passed the Fifteenth Amendment, granting African American men the right to vote but failing to recognize the rights of women. As a result, over 600 African American men, the majority of whom were former slaves, were elected to state legislatures throughout the U.S., securing control over both houses of the South Carolina state legislature.[4]

The South erupted in violent protests against the post-war amendments and the dramatic growth of African American political participation. News emerged from the South of brutal lynchings (public hangings) of African Americans committed by members of the Ku Klux Klan (KKK). Founded in 1866 by veterans of the U.S. Confederate Army, the KKK is a white supremacist organization that used extreme violence to terrorize the African American community and to intimidate many from exercising their new rights and freedom. This private secret society was comprised of news journalists, ministers, and political officials and by 1868 had become somewhat of a shadow government in many southern counties over which state officials had no control. In response to the violence, Congress passed what is commonly known as the KKK Act of 1871 in an effort to enforce the provisions of the Fourteenth Amendment and protect the African American community from the violence. The Act provided a federal judicial remedy for civil rights abuses committed in the South by both state officials and KKK members. Congress also passed during that period the Civil Rights Act of 1875, prohibiting racial discrimination in public accommodations such as hotels and theaters. In subsequent civil rights cases, however, the Court struck down the KKK Act and Civil Rights Act of 1875, finding that the powers Congress possessed under the Fourteenth Amendment pertained only to state actors and not to private individuals such as KKK members.[5]

As support for federal intervention in the South to enforce the Fourteenth and Fifteenth Amendments disappeared, the U.S. Supreme Court issued its most notorious post-Civil War decision to reinterpret Congress's powers under the Fourteenth Amendment Equal Protection Clause, *Plessy v. Ferguson* (1896). In *Plessy*, the Court held that a state provision of separate facilities for African Americans was constitutional, thus giving legal authority to state-sponsored social apartheid predicated on the principle of "separate but equal." In hindsight, *Plessy* represents the final erosion of federal will to enforce the Fourteenth and Fifteenth Amendments and to combat racial discrimination in the South. Following this decision, *Black Codes* and state-sponsored social apartheid remained the rule of law in the South until the Court's decision in *Brown v. Board of Education* (1954) and subsequent dismantling of this institutionalized system of *de jure* discrimination.

> "If U.S. courts fail to adopt a more impact-oriented approach to equal protection jurisprudence and the federal government continues to offer inadequate remedies for solving existing racial disparity that remains, we may see more failures like the federal government's pathetic response to Hurricane Katrina"

The Political Influences on Equality Rhetoric Post-WWII

During World War II, African American leaders learned that Allied countries were coming together to form a new organization called the United Nations to replace the ineffective League of Nations. When world leaders met in San Francisco in 1945 to create the Charter of the United Nations, a delegation from the NAACP — the leading organization representing the rights of racial minorities — was present to advocate on behalf of African Americans and colonial peoples. W.E.B. Dubois and other delegates argued that "millions had died in vain if the war had not been fought for human rights and self-determination." However, white southern politicians opposed international agreements for fear they would threaten their states' rights. Also problematic during this period was the perceived link between social and economic rights and Communism. Because of these political barriers, the U.S. delegation rejected the case presented by the African American delegation and African American leaders were forced to limit the African American struggle for equality to the narrow arena of political rights.[6] As a result, equality advocates pursued litigation strategies that challenged the segregation of students rather than pursuing a policy of full human rights for fear that the sociopolitical environment was not yet conducive to such claims.

A decade later, when the Supreme Court handed down its decision in *Brown v. Board of Education* (1954), equity advocates celebrated the end of the "separate but equal" doctrine. In *Brown*, the Court reviewed state policies of racial segregation in public schools and found that the policies violated the Equal Protection Clause. In an unanimous decision, the Court found that denying certain classes equal opportunity to enjoy social rights or interests like education impeded their ability to exercise political freedoms such as voting. The Court's broader conception of political citizenship recognized rights historically designated as "social rights" to be an integral component of the political process.[7] The progressive language of *Brown* provided added momentum to the civil rights movement, leading to the passage of federal laws such as the 1964 Civil Rights Act (a reincarnation of the civil rights legislation that followed emancipation) and the 1965 Elementary and Secondary Education Act, which supplied federal funds to schools comprised of students from a disadvantaged socioeconomic background with the purpose of narrowing the achievement gap in education. Also, the Court's interpretation of Congress' powers under the Commerce Clause, Article I of the Constitution, broadened the federal government's influence over issues considered to have a substantial relation to interstate commerce, such as discrimination.[8] Following *Brown*, federal courts became an important and effective tool for enforcing the civil rights of minorities. However, subsequent Supreme Court decisions and federal initiatives have severely limited the role of the federal judiciary in providing remedies.

The Weakening of Judicial Remedies

After the *Brown* decision, the South erupted in violent protests over the end of social apartheid in the U.S. Initially, many southern school districts refused to integrate and the weak mandate of *Brown II*, which ordered state compliance with *Brown*'s mandate to desegregate with all deliberate speed, did little to help. Consequently, an onslaught of cases arose aimed at defining the states' responsibilities in educating minorities and the federal government's power to enforce integration. The key component of jurisprudence following *Brown* was the court's gradual yet sustained adherence to an intent verses impact approach. As evidenced by the following cases, U.S. federal courts overtime crafted a judicial doctrine rejecting disparate impact as the baseline for identifying a constitutional violation; instead, for such a violation to exist, plaintiffs must prove discriminatory intent on the part of state actors. This significantly heightened standard violates U.S. obligations under CERD and has resulted in the continuation of institutionalized racism in educational opportunities in the United States.

> "By adopting CERD's broader definition of racial discrimination, the federal government would be able to offer a legal remedy for racial minorities to challenge the disparate impact of state education policies in federal court."

The U.S. Supreme Court's 1971 decision in *Swann v. Charlotte-Mecklenburg Board of Education* marks the emergence of this doctrine in U.S. equal protection jurisprudence. In *Swann*, the Court found a school zoning plan that attempted to desegregate districts by busing students to be an equitable remedy despite the fact that it resulted in the continuance of *de facto* segregation in many schools. The Court held that the mere existence of "one-race, or virtually one-race, schools" (i.e. *de facto* segregation) is insufficient evidence to prove that legally sanctioned segregation still exists, thus setting the foundation for the U.S. Supreme Court's intent-based definition for racial discrimination.

The Court's decision in *San Antonio Indep. Sch. Dist. v. Rodriguez* weakened equal protection jurisprudence by overruling the Supreme Court of California's broad reading of equal protection in *Serrano v. Priest*. In *Serrano*, public school children and parents brought an action against the state of California, claiming that the public school financing system was discriminatory and violated the U.S. Constitution because it was based primarily on the funds generated from local property taxes, resulting in unequal distribution. The Supreme Court of California found education to be a fundamental right and held that California's school finance system denied equal protection to the plaintiffs in question and others similarly situated.[9] Two years later, however, the U.S. Supreme

Court in *Rodriguez* overruled *Serrano* by upholding a similar finance system in Texas and finding no fundamental right to education.[10] According to the Court in *Rodriguez*, the provision of equal educational opportunities by a state did not require it to provide equal facilities and resources to all students throughout the state.

U.S. equal protection jurisprudence took another blow after the Court's decision in *Washington v. Davis* (1976).[11] In *Brown*, Chief Justice Earl Warren stated that segregating students because of race will create a "feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." Justice Warren recognized that a law's impact on racial minorities must be considered when determining whether that law violates equal protection jurisprudence. However, the Court moved away from this interpretation in its decision in *Washington v. Davis* (1976) by establishing the discriminatory intent rule, which requires direct rather than circumstantial evidence of racial discrimination. In *Davis*, the Court required plaintiffs to show that the defendants acted with "discriminatory purpose" rather than prove that the law or policy had a disparate impact on a historically disadvantaged group. Therefore, to prove discrimination, the plaintiffs must present direct evidence rather than circumstantial, even in cases where sophisticated statistical analysis is available such as was the case in *McCleskey v. Kemp* (1987).

In *McCleskey*, where an African American man was convicted and sentenced to death for killing a white police officer, the defense offered sophisticated evidence to show that African Americans were significantly more likely to receive the death penalty for killing a white person than were whites convicted of killing an African American person. The Supreme Court held that the evidence was insufficient to prove that the defendant was denied equal protection. In order to prove discrimination, the defendant must establish that either the death penalty legislation was created with a purpose to discriminate or that the jurors acted discriminatorily when imposing a death sentence.[12]

To escape the Supreme Court's narrow interpretation of racial discrimination and high burden of proof, advocates also brought claims of discrimination under Title VI of the 1964 Civil Rights Act. Yet recent court decisions have limited the ability of individuals to pursue a private right of action under the Act. In 2001, a federal court decision in *Alexander v. Sandoval* held that the claimant had no private right of action against discriminatory state-mandated driving tests. One year later in *Gonzaga v. Doe* (2002), the U.S. Supreme Court held that there is no private right of action to enforce the 1974 Privacy Act. Pursuant to the decision, the Act in question must explicitly state that Congress intended to create new individual rights under the legislation in order to bring a private suit under the 1964 Civil Rights Act. The Court's decision in *Sandoval* severely limits the scope of federal remedies available to victims of discrimination in the U.S. Although individuals may file discrimination claims with federal civil rights offices charged with enforcing Title VI, a lack of staffing and resources has caused many offices to be ineffective in addressing such claims.

The Court has also narrowed its interpretation of Congress' powers under the Commerce Clause to remedy racial discrimination. Historically, this Clause has been used to eradicate private acts of racial discrimination perpetrated by hotels, restaurants, and other such facilities. Recent Court decisions have functioned though to limit the scope of issues "substantially related" to commerce. In 1990, Congress attempted to provide a remedy for unsafe environments surrounding many public school districts. Yet in *United States v. Lopez*, the Court found that the Gun-Free School Zones Act of 1990, which criminalized the possession of firearms in a school zone under federal law, was outside of Congress' authority under the Commerce Clause. The U.S. argued that the possession of guns may lead to violent crimes, which can be costly among other things. But the Court found no substantial relation between guns and interstate commerce.[13]

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Panel discussing methods for improving the academic record of Washington, D.C.-area public schools.

In aggregate, *Brown II*'s weak mandate, the Court's continued weakening of Congressional powers to regulate racial discrimination, and the lack of access to a private right of action under Title VI have cemented racial disparities in education and rendered the courts impotent to offer viable remedies for systemic discrimination where it is neither blatant nor intentional. This has led many scholars to argue that equal education advocates are in a worst position today than during the time of *Plessy* to argue for equal educational opportunities for racial minorities. Under the *Plessy* doctrine of "separate but equal," equal education advocates argued against the quality of the educational opportunities afforded African Americans and the segregation of the students. However, in a post-*Brown* era, it is difficult to challenge either of those issues since *Rodriguez* makes it difficult to challenge disparities in funding and *Swann* makes it difficult to challenge *de facto* segregation.

The Inadequacy of the *No Child Left Behind Act* and Other Federal Initiatives in Fulfilling Obligations under CERD

The percentage of African American students attending school districts with a majority percentage of African Americans was on the decline until the early 1980s. However, economic factors such as "white flight" — where the white majority, along with its capital, moved to the suburbs and private schools — produced an urban public school system comprised primarily of minority students and racially isolated communities reminiscent of the late 1960s.[14] In 2002, the federal government attempted to respond to the gross racial disparities in education by passing the *No Child Left Behind Act* (NCLB), the most recent reauthorization of the 1965 Elementary and Secondary Education Act (ESEA) that requires states to issue public reports on student progress in meet-

ing academic standards set by the state and teacher quality on a school-by-school basis. Although a system of accountability was a welcome initiative, the under-funded legislation fails to provide the federal support and protections necessary to prevent racial disparities in education. Yet another option remains. As a State Party to the Convention on the Elimination of All Forms of Racial Discrimination (CERD), the U.S. is bound to achieve a higher standard of racial equality. As judicial remedies for racial discrimination weaken and federal legislative remedies prove inadequate, the only viable option for remedying racial disparities in public education is to hold the U.S. accountable domestically to these human rights principals that it has so forcefully promoted and enforced abroad.

The Federalism Excuse

In 1994, the U.S. Senate ratified the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), obligating the U.S. to eradicate all vestiges of racial discrimination from its laws and policies. Under Article VI of the U.S. Constitution, duly ratified treaties become part of the "supreme law of the land" with a legal status equivalent to federal statutes. However, upon ratification of international treaties, the federal legislature tends to attach a series of reservations, understandings, and declarations (RUDs) with the purpose of limiting, modifying, and/or qualifying U.S. obligations under the Convention. The same was true with U.S. ratification of CERD. Included in the RUDs to CERD is a statement by the U.S. that the Convention is not self-executing; thus, additional legislation is required to implement the treaty into domestic laws and create a private right of action.

The U.S. government often claims that its federal system of government prevents it from interfering in matters traditionally reserved for the states, such as education. But this argument fails to recognize the power given treaties under Article VI of the U.S. Constitution and the power maintained by the federal government under the Equal Protection and Due Process Clauses of the Fifth and Fourteenth Amendment and the Commerce Clause of Article I. Moreover, the U.S. Senate explicitly stated its obligation to "take appropriate measures to ensure the fulfillment of this Convention" when it ratified CERD. Therefore, the federal government must assume responsibility for U.S. compliance with CERD. Under CERD and international legal jurisprudence in general, the federal government has the responsibility to protect all persons within its territory from racial discrimination. Federalism is an inadequate excuse for the deprivation of human rights.

The Inadequacy of the NCLB

In April 2007, the U.S. submitted a report to the UN Committee overseeing CERD on its efforts to end racial discrimination in education. Article 2 (1) of CERD requires that each State Party provide laws and policies designed to remedy racial discrimination. In its report, the U.S. identifies *NCLB* as federal legislation that fulfills Article 2 (1) of CERD, suggesting that the Act's effects may be closing gaps in educational attainment in elementary and middle schools. The *NCLB* mandates that states hold teachers and administrators accountable for the testing capabilities of students. Yet the Act fails to hold the state accountable to the school for providing adequate resources and funding in order to meet the standards, nor does the federal government provide such funding and support itself. Consequently, the major impact from NCLB is the widespread documentation of racial inequalities in education with no effective federal remedy offered for repairing it.

For schools labeled as failing under *NCLB*, the only federal remedy offered parents and students is the school choice remedy, which was found to be inadequate by the U.S. Supreme Court almost forty years ago in the 1968 case *Green v. School Board of New Kent County*. Under the school choice provision, parents may transfer their child to another school receiving federal funding if he/she is in an unsafe school or a school which has failed to reach AYP benchmarks.[15] In *Green*, the Court found a school district's plan, which offered a "freedom-of-choice" plan for school assignments similar to that of NCLB, inadequate because whites almost never opted to attend African American-identified schools and African Americans rarely attended white-identified schools for fear of violence and harassment. By implementing rigid standards without ensuring that schools receive the adequate funding and sufficient resources necessary to meet the standards, the federal government fails to offer teachers, administrators, and state officials a remedy.

The Weakening of Judicial Remedies

In the U.S.'s April 2007 report to CERD, it also responded to the Committee's General Recommendation XIV, which states that "unjustifiable disparate impact" results from race-neutral practices that both create statistically significant racial disparities and are unnecessary, i.e., unjustifiable." According to the report, the standards used in U.S. litigation of equal protection claims under the Fifth and Fourth Amendment and of disparate impact claims under Title VI are consistent with the Committee's Recommendation and reading of article 2 (1) (c).

However, Supreme Court decisions such as *McCleskey* and *Sandoval*, have severely limited access to a judicial remedy for racial discrimination, under both equal protection claims and claims of individuals under the Title VI of the 1964 Civil Rights Act. In order to comply with article 2(1)(c), the U.S. should: (1) investigate the effects of a lack of a private right to action under Title VI of the 1964 Civil Rights Act, (2) pass federal legislation expressly authorizing a private right of action, and (3) provide federal agencies charged with preventing racial disparities in education adequate funding.

Private Acts Resulting in Racial Segregation

In August of 1995, the UN Committee on CERD adopted General Recommendation XIX concerning the wording of Article 3, which obligates States parties to undertake to prevent, prohibit, and eradicate all practices of racial segregation and apartheid.[16] In this Recommendation, the Committee recognized "that while conditions of complete or partial racial segregation may in some countries have been created by governmental policies, a condition of partial segregation may also arise as an unintended by-product of the actions of private persons," such as residential patterns reflecting the racial divisions in society which often overlap with economic divisions. The Supreme Court's decision in *Swann*, finding that *de facto* segregation does not constitute discrimination, conflicts with the Committee's Recommendation. To eradicate the rising percentage of racially isolated schools and in compliance with the Committee's Recommendation, the federal government must enact legislation to "monitor all trends which can give rise to segregation" and "work towards its eradication."

In 2002, the Committee issued its first report on U.S. compliance, recommending that the U.S. review existing law and policies to ensure effective protection against discrimination and the elimination of any unjustifiable disparate impact, as required by CERD. Among the Committee's many concerns was racial discrimination and disparities in education. However, five years ago the U.S. ignored the Committee's recommendation that it implement the Convention into its domestic laws and policies and insisted that there is no pervasive discrimination problem in the U.S. The data provided by its own legislation, *NCLB*, suggests a different scenario. The task ahead is holding the federal government accountable to providing effective remedies rather than the inadequate *NCLB*.

Conclusion: Holding the U.S. Accountable

Although the legal and policy changes needed to remedy racial disparities in U.S. public education appear reasonable and tangible, civil society still faces the challenge of organizing a concentrated, vocal constituency that understands and is willing to fight the harsh political battle yet to be fought over racial equality, especially in states with a history of violent opposition towards it, in order to hold the U.S. accountable to international human rights norm. The images of poor and abandoned African Americans on rooftops in New Orleans following Hurricane Katrina were a sad reminder to America of how invisible racial minorities remain in U.S. laws and policies structured to protect basic freedoms such as life, liberty, and the pursuit of happiness. The question remains whether the American people will be motivated by the debacle of Katrina and the growing segregation of the abhorrently unequal public education system to rise up against the declining judicial remedies available and inadequate federal responses to racial disparities in education such as *NCLB* and demand that its government, a world leader in human rights, incorporate human rights norms into its domestic justice system as required by international law.

Now is the time for civil society and individuals to hold the U.S. accountable for its human rights violations. The *NCLB* is up for reauthorization this year. Although most in the U.S. welcomed a system of federal accountability to racial discrimination in education, the approach of *NCLB* is punitive rather than supportive and the legislation is grossly under-funded. The federal government must pass effective legislation to eliminate racial discrimination in education. March 2008 is the U.S.'s review before the UN Committee on CERD concerning its compliance with the treaty. Non-governmental organizations (NGOs) and individuals can hold the U.S. accountable to its obligations under CERD by reporting human rights abuses to the Committee through "shadow reports" with recommendations for ways in which the U.S. can remedy racial disparities in education, such as enacting a federal law that would expressly allow a private right of action to enforce Title VI of the 1964 Civil Rights Act or enacting a new Elementary and Secondary Education Act which provides an adequate remedy for racial minorities whose educational opportunities are restricted. The concluding observations issued by the Committee can then be used in litigation in U.S. courts, as well as in public and legislative advocacy.[17]

The battle for racial equality has gone on too long in the U.S. The federal government must finally be held accountable to international human rights and constitutional obligations to eliminate racial discrimination, and to guarantee the right of everyone to equality before the law. ***HRB***

ENDNOTES: The Politicization of Fundamental Rights in the U.S. and Its Implications

1 "Barbara Bush Calls Evacuees Better Off," *The New York Times* (September 7, 2005).

2 The inspiration for this article comes from the scholarship and presentations of the panelists at the conference. Thank you to all who participated in this very important and timely discussion.

3 Although the U.S. Supreme Court fails to find a fundamental right to education, I use the term "fundamental right" throughout this article to refer to rights historically denied persons of non-white, non-male, and non-protestant origin.

4 For more about the Reconstruction era following the U.S. Civil War, see Foner, Eric, *Reconstruction: America's Unfinished Revolution 1863-1877* (New York, 1988).

5 *See Virginia v. Rives*, 100 U.S. 313 (1879); *United States v. Cruikshank* (1876). A large portion of the language of the KKK statutes was later codified into law under U.S. Code 42 U.S.C. § 1983, known as the 1964 Civil Rights Act.

6 To learn more about the African American struggle for human rights, read Carol Anderson, "Eyes Off the Prize: the United Nations and the African American Struggle for Human Rights," Cambridge University Press (Cambridge 2003).

7 *See*, *generally*, Hutchinson, Darren Lenard, "Unexplainable on Grounds Other Than Race: the Inversion of Privilege and Subordination in Equal Protection Jurisprudence," 2003 U. Ill. L. Rev. 615, 625-626 (2003)(discussing political equality theories).

8 *See Katzenbach v. McClung*, 379 U.S. 294 (1964) (holding that racially discriminate policies of a restaurant affect commerce and thus under the jurisdiction of the federal government).

9 *See*, *generally*, *Serrano v. Priest*, 5 Cal. 3d 584 (Cal. 1971).

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

11 *Washington v. Davis*, 426 U.S. 229 (1976).

12 *McCleskey v. Kemp*, 481 U.S. 279 (1987).

13 *See United States v. Lopez*, 514 U.S. 549 (1995).

14 Kozol, Jonathan, "The Shame of the Nation: the Restoration of Apartheid Schooling in America," Crown Publishers (New York 2005), p. 240.

15 Under NCLB, every state must set academic performance goals for all schools and the schools must demonstrate continuous progress towards those goals by meeting annual benchmarks referred to as the Annual Yearly Progress (AYP). The AYP benchmarks include test scores, graduation rates, attendance, and other indicators determined by the state. Schools that fail to meet the benchmarks are designated "in need of improvement."

16 *See* Committee on the Elimination of Racial Discrimination — General Comment 19: Article 3 (Racial Segregation) (http://www.ohchr.org/english/bodies/cerd/comments.htm).

17 To learn more about the shadow reporting process, visit the website of the U.S. Human Rights Network, a network of over 200 organizations and over 700 individual human rights activists, formed to promote U.S. accountability to universal human rights standards (http://www.ushrnetwork.org/).