

# Michigan Journal of International Law

---

Volume 18 | Issue 4

---

1997

## Race-Based Affirmative Action and International Law

Jordan J. Paust  
*University of Houston*

Follow this and additional works at: <https://repository.law.umich.edu/mjil>



Part of the [Constitutional Law Commons](#), [International Law Commons](#), and the [Law and Race Commons](#)

---

### Recommended Citation

Jordan J. Paust, *Race-Based Affirmative Action and International Law*, 18 MICH. J. INT'L L. 659 (1997).  
Available at: <https://repository.law.umich.edu/mjil/vol18/iss4/3>

This Essay is brought to you for free and open access by the Michigan Journal of International Law at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Journal of International Law by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact [mlaw.repository@umich.edu](mailto:mlaw.repository@umich.edu).

## ESSAY

# RACE-BASED AFFIRMATIVE ACTION AND INTERNATIONAL LAW

*Jordan J. Paust\**

International law, which is part of the supreme law of the United States,<sup>1</sup> provides significant affirmation of the legal propriety of race-based affirmative action. At least two human rights treaties ratified by the United States are particularly useful in identifying the acceptability of certain measures of affirmative action as well as the duty to take special and concrete measures of affirmative action in certain circumstances. Such a duty is not merely based in supreme federal law, relevant to decision-making at federal and state levels, but is also contained in federal policy relevant to the constitutional precept of federal preemption. Treaty-based legal acceptability does not guarantee that particular measures of affirmative action will survive challenges under other constitutional provisions, such as the Fifth and Fourteenth Amendments, but it is pertinent to a continuing or emerging meaning of constitutional rights and competencies. Indeed, treaty-based permissibility of affirmative action coupled with relevant duties provide a compelling state interest for both federal and state initiatives.

## THE INTERNATIONAL COVENANT

The International Covenant on Civil and Political Rights (ICCPR),<sup>2</sup> a fundamental human rights treaty ratified by the United States,<sup>3</sup> contains a norm of non-discrimination in Article 2 that prohibits distinctions based on race (among other categories) in connection with the enjoyment of

---

\* Law Foundation Professor, University of Houston; Edward Ball Eminent Scholar Chair in International Law, Florida State University, (1997); J.S.D. Candidate, Yale University; LL.M., University of Virginia (1972); J.D., University of California at Los Angeles (1968); A.B., University of California at Los Angeles (1965).

1. See, e.g., *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796); *Ross v. Rittenhouse*, 2 U.S. (2 Dall.) 160, 162 (1792); *United States ex rel. Wheeler v. Williamson*, 28 F. Cas. 686, 692 (D.C.E.D. Pa. 1855) (Case No. 16,726); 1 Op. Att'y Gen. 26, 27 (1792); *Peters v. McKay*, 238 P.2d 255, 230-31 (Ore. 1951); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 111, cmt. d (1987) [hereinafter RESTATEMENT]; *infra* notes 42, 47.

2. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

3. Ratified on September 8, 1992. See RICHARD B. LILlich & HURST HANNUM, INTERNATIONAL HUMAN RIGHTS 261 (3rd ed. 1995).

human rights recognized in the treaty by all individuals within a signatory's territory or subject to its jurisdiction.<sup>4</sup> Article 26 of the ICCPR also

---

4. ICCPR, *supra* note 2, art. 2, para. 1, at 173. The proscription includes a "distinction of any kind" based on prohibited categories "such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." *Id.* On the general prohibition of race-based discrimination under international law, see, e.g., MYRES S. MCDUGAL ET AL., HUMAN RIGHTS AND WORLD PUBLIC ORDER 583-601 (1980).

Actually, rights concerning education as such are not addressed directly in the ICCPR, but application of the norm of non-discrimination to educational processes is provided by the general rights of all persons to be "equal before the law," to "equal protection of the law," and to "equal and effective protection against discrimination" contained in Article 26 of the ICCPR. ICCPR, *supra* note 2, art. 26, at 179. Article 13 of the International Covenant on Economic, Social and Cultural Rights, a treaty which the United States has signed but not yet ratified, also expressly sets forth rights concerning education. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, art. 13, 993 U.N.T.S. 3, 8 [hereinafter Economic Rights Covenant]. President Carter signed the Economic Rights Covenant in 1977 and sent it to the Senate for advice and consent. See LILICH & HANNUM, *supra* note 3, at 197-98, 240. The norm of non-discrimination is contained in Article 2, paragraph 2; but there is a broad "clawback" clause in Article 4, allowing limitations "determined by law" that are "compatible with the nature of . . . [the] rights" set forth in the treaty and are "solely for the purpose of promoting the general welfare in a democratic society," which may apply to certain forms of affirmative action. Even the right to education in connection with higher education has language compatible with affirmative action: "[h]igher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means." Economic Rights Covenant, *supra*, art. 13, para. 2(c), at 8 (emphasis added). See *id.* art. 13, para. 1, at 8 (The goals of education include the "[enabling of] all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups.").

Under international law, the United States can take no action inconsistent with the object and purpose of a treaty that it has signed but has not yet ratified. See, e.g., Vienna Convention on the Law of Treaties, May 23, 1969, art. 18, 1155 U.N.T.S. 331, 336. Although the Vienna Convention has also not been ratified by the United States, this provision (and others mentioned below) are considered by the United States to reflect customary international law. See, e.g., JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 286-87 n.595, 318 n.5 (1996).

The Convention Against Discrimination in Education, Dec. 14, 1960, 429 U.N.T.S. 93 [hereinafter CADE], which the United States has neither signed nor ratified, prohibits "'discrimination' includ[ing] any distinction, exclusion, limitation or preference." *Id.* art. 1, para. 1, at 96. However, certain educational processes involving distinctions concerning sex, religion, or language are permissible under Article 2. Article 4 of the CADE expresses the undertaking of signatories to "apply a national policy which, by methods appropriate to the circumstances . . . , will tend to promote equality of opportunity and of treatment." *Id.* art. 4, at 48. In effect, this emphasizes dual policy prongs of opportunity and treatment through circumstantially appropriate methods. Article 10 of the treaty states that it "shall not have the effect of diminishing the rights which individuals or groups may enjoy by virtue of [other international] agreements . . . where such rights are not contrary to the letter or spirit of" the CADE. *Id.* art. 10, at 102. It is apparent from materials and points that follow that rights pertaining to affirmative action of individuals and groups under the ICCPR and the Race Discrimination Convention, discussed *infra*, are not necessarily inconsistent with the letter or spirit of the CADE which itself emphasizes the need for appropriate methods that will "tend to promote equality of opportunity." CADE, *supra*, art. 4, at 48. Indeed, the preamble to the Race Discrimination Convention, *infra*

recognizes that "[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law," adding a specific right to "equal and effective protection against discrimination on any ground such as race."<sup>5</sup> Even a derogation or "clawback" clause in Article 4 of the ICCPR that allows signatories to deviate from full protection of certain rights "to the extent strictly required" in time of public emergency ("the existence of which is officially proclaimed") contains a proviso that derogations "not involve discrimination solely on the ground of race" or certain other categories.<sup>6</sup> Thus, race-based discrimination as such is generally impermissible under the ICCPR.

One can identify a textual difference in the treaty between an Article 2 "distinction" and "discrimination" within the meaning of Articles 4 and 26. By using different terms, the treaty-makers imply, perhaps counter-intuitively, that a "distinction" is not necessarily "discrimination."<sup>7</sup> In fact, Article 4 contains the evidently more limiting phrase "solely on the ground of."<sup>8</sup> Whatever the reasons, it is apparent that the prohibition in Article 2(1) of a "distinction of any kind" is more sweeping in coverage than the prohibitions of "discrimination" contained in Articles 4 and 26. From a solely textual viewpoint, Article 2(1) stands more closely in opposition to race-based affirmative action than do Articles 4 or 26.<sup>9</sup>

Regardless, both of these general rights or guarantees involving distinctions (in Article 2) or discrimination (in Article 26) are derogable.<sup>10</sup> For this reason, a signatory might permit actions in derogation of Articles 2(1) and 26 that meet the test concerning derogable measures found in

---

note 11, refers to the CADE. As developed later, *infra* notes 17–26 and accompanying text, the provisions of the Race Discrimination Convention allow affirmative action.

Institutions of higher education should expressly recognize that they will not "discriminate" solely on the basis of any such grounds. For example, some universities do not expressly mention "religion" or "political or other opinion" as protected classes even though the ICCPR, as U.S. treaty law, is supreme federal law.

5. ICCPR, *supra* note 2, art. 26, at 179.

6. *Id.* art. 4, para. 1, at 174. Even if arguably necessary, no derogation is permitted with respect to certain human rights. See *id.* art. 4, para. 2, at 174. However, the rights to be "equal before the law" and to "equal protection of the law," *id.* art. 26, at 179, are not among the non-derogable rights listed in Article 4, paragraph 2—nor is the norm of non-discrimination (concerning "distinctions") contained in Article 2, paragraph 1, although Article 4, paragraph 1, contains a prohibition concerning "discrimination" as such that is also tied to the limiting phrase "solely on the ground of."

7. See also *infra* notes 12, 26, 35–38 and accompanying text.

8. ICCPR, *supra* note 2, art. 4, para. 1, at 174. Admissions or hiring decision processes utilizing race as one factor among several might appear to involve "distinctions" on the basis of race, but certainly are not decisions based "solely on the ground of" race (whether or not they involve "discrimination").

9. But see *infra* notes 12, 29, 37–41 and accompanying text.

10. See *supra* note 6.

Article 4. Using such a test, the ICCPR would allow some "distinctions" based on race that do not amount to "discrimination solely on the ground of race" if, in time of public emergency officially proclaimed, such distinctions are "strictly required." Yet, affirmative action programs in higher education, if based on "distinctions" and arguably not "discrimination" as such, are not likely to meet such a test, whether or not there is an officially proclaimed public emergency. This is because, while affirmative action "distinctions" may be useful, rational, or reasonable, they are not likely to be "strictly required."<sup>11</sup>

Despite this evident textual meaning of the treaty, however, the United States adopted a formal "Understanding" during the ratification process that would permit certain forms of affirmative action. The Understanding states in pertinent part: "The United States understands distinctions based upon race"—as those terms are used in Article 2, paragraph 1 and Article 26—to be permitted when such distinctions are, "at [a] minimum, rationally related to a legitimate governmental objective."<sup>12</sup>

---

11. See Symposium, *Security of the Person and Security of the State: Human Rights and Claims of National Security*, 9 YALE J. WORLD PUB. ORD. 1 (1982) (regarding derogation tests). Concerning the differences between the human rights derogation "strictly required" or reasonable necessity test and U.S. domestic tests of strict scrutiny and rational basis, see, e.g., Jordan J. Paust, *The Human Right to Die With Dignity: A Policy-Oriented Essay*, 17 HUM. RTS. Q. 463, 471 n.17, 477 n.30, 484-85 n.63 (1995).

Perhaps one could show that in particular circumstances affirmative action was reasonably necessary, but the threshold is quite high. Since special meanings of the treaty terms pertain, however, proof of reasonable necessity will generally not be required. Special meanings hinge upon various policies at stake and something akin to a contextual or reasonable rationality test. See *infra* notes 12, 29-30, 37-41 and accompanying text; cf. International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, art. 1, para. 4, 660 U.N.T.S. 195, 216 [hereinafter *Race Discrimination Convention*] (allowing measures aimed at the "adequate advancement of . . . 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." Thus, advancement need not be strictly required, but the form of protection should be necessary in order to ensure enjoyment or protection, as if non-use of such a measure would not ensure equal enjoyment or protection).

12. S. REP. NO. 102-23, at 22 (1992), *reprinted in* 31 I.L.M. 645, 659 (1992). In the Report of the Senate Committee on Foreign Relations addressing the ICCPR, it was noted that the Committee created by the ICCPR had interpreted it to allow certain forms of "differentiation":

In interpreting the relevant [ICCPR] provisions, the Human Rights Committee has observed that not all differentiation in treatment constitutes discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the [ICCPR]. In its General Comment on nondiscrimination, for example, the Committee noted that the enjoyment of rights and freedoms on an equal footing does not mean identical treatment in every instance.

*Id.* at 14.

This Understanding appears to contain two errors. First, Article 2 prohibits a "distinction of any kind" based on race and the Understanding uses the phrase "distinctions based on race." This error may be mitigated because "distinctions" might not constitute impermissible "discrimination" within the meaning of Article 26 which is also cited in the Understanding. Second, the proffered test involving a rational relation to a legitimate governmental objective uses a far lower threshold concerning permissibility than does the strict requirements test found in Article 4 which should be used in connection with permissible derogations from the guarantees contained in Article 2.

From this, one can conclude that the U.S. Understanding operates in a manner that "purports to exclude or to modify the legal effect of certain

---

The Human Rights Committee had stated:

[T]he principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the [ICCPR] . . . . Such action may involve granting for a time . . . certain preferential treatment in specific matters . . . [A]s long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the [ICCPR].

*Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, Hum. Rts. Comm., General Comment 18, para. 10, at 27, U.N. Doc. HRI/GEN/1 (1992) [hereinafter *Human Rights Comments*]; See Neil A.F. Popovic, *CCRI's Hidden Conflict: Prop 209 Would Violate Human Rights Treaties Recently Ratified by the U.S. Senate*, THE RECORDER, Oct. 9, 1996, at 4. See also *Human Rights Comments*, supra, General Comment 18, para. 13, at 27 ("Not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the [ICCPR]."); *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant*, Hum. Rts. Comm., 53d Sess., para. 30, at 5, U.N. Doc. CCPR/C/79/Add.50 (1995) (noting that "[t]he Committee emphasizes the need for the government [of the United States] to increase its efforts . . . , where appropriate, through the adoption of affirmative action"). Attorney Popovic's insightful comment also addresses the Race Discrimination Convention and concludes that both treaties allow affirmative action, the Race Discrimination Convention even requires affirmative action in some cases, and the California initiative, see *infra* note 52, would be invalidated under the Supremacy Clause of the U.S. Constitution. Popovic, supra. These same points are made more recently in an important inquiry into possible effects of the treaties, especially concerning civil rights litigation. See Connie de la Vega, *Civil Rights During the 1990s: New Treaty Law Could Help Immensely*, 65 U. CINN. L. REV. 423, 455, 467-68, 470 (1997).

The Human Rights Committee had also addressed the propriety of "affirmative action" with respect to sex-based discrimination. See *Human Rights Comments*, supra, General Comment No. 4, para. 2, at 3-4. Cases brought under the Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, better known as the European Convention on Human Rights, have also recognized that objective and reasonable differences in treatment are not proscribed "discrimination." See, e.g., *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A), para. 226-27, at 85-86 (1977); *The Belgian Linguistic Case*, Eur. Ct. H.R. (ser. A), at 34-35 (1968). The European Court of Justice has also recognized the propriety of affirmative action while placing limits on particular applications. See *Case C-450/93, Eckhard Kalanke v. Freie Hansestadt Bremen* 1995 E.C.R. I-3069, reprinted in 35 I.L.M. 265 (1996), with an introductory note by Nancy Perkins, *id.* at 265-68.

provisions of the treaty in their application to that State.”<sup>13</sup> “However phrased or named,” the Understanding operates as a reservation to the treaty.<sup>14</sup> A reservation that is “incompatible with the object and purpose of the treaty” is void *ab initio*,<sup>15</sup> but it is highly questionable whether the U.S. reservation retaining the legal propriety of certain rationally related “distinctions,” presumably including certain forms of affirmative action, is necessarily incompatible with the overall object and purpose of the ICCPR.<sup>16</sup> If the reservation is legally operative, then certain forms of race-based affirmative action are permitted as a matter of U.S. treaty law (i.e., they are “permitted” whenever such distinctions are rationally related to a legitimate governmental objective). At a minimum, the U.S. Understanding contains a formal expression of federal policy relevant to the propriety of affirmative action, the interpretation of other federal laws, and the operation of federal preemption.

### THE RACE DISCRIMINATION CONVENTION

The other significant treaty, the International Convention on the Elimination of All Forms of Racial Discrimination (Race Discrimination

---

13. Quoted language is from the text in the Vienna Convention on the Law of Treaties, *supra* note 4, art. 2, para. 1(d), at 333. On its customary nature, see PAUST, *supra* note 4, at 286–87, 381–82. If the U.S. understanding had not used the term “distinctions” and had not expressly noted “as those terms are used in Article 2,” one could conclude that the understanding was not an attempt to exclude or modify the legal effect of the term “distinction” contained in Article 2. The United States could have used the term “differentiations” and referred to the Human Rights Committee’s Comment No. 18, see *Human Rights Comments*, *supra* note 12, General Comment No. 18, at 25, but it did not. Thus, the Understanding does appear to purport to exclude or modify the legal effect of Article 2.

14. Vienna Convention on the Law of Treaties, *supra* note 4, art. 2, para. 1(d), at 333. If it were not a reservation, the Understanding would still be a significant part of the treaty package consented to by the Senate and ratified by the President. See also RESTATEMENT, *supra* note 1, § 314, cmt. d.

15. See *id.* art. 19, at 336; PAUST, *supra* note 4, at 286–87, 318, 366–68, 373–76.

16. See also *supra* notes 12–13; *infra* notes 37–41 and accompanying text; cf. *General Comment Adopted by the Human Rights Committee Under Article 40, Paragraph 4, of the International Covenant on Civil and Political Rights*, Addendum, Hum. Rts. Comm., General Comment No. 24 (52), para. 9, at 3, U.N. Doc. CCPR/C/21/Rev.1/Add.6, (1994) [hereinafter Comment No. 24] (“[A] reservation to the obligation to respect and ensure the rights, and to do so on a non-discriminatory basis (Article 2 (1)) would not be acceptable.”). With respect to the Committee’s General Comment No. 24, there is room for argument that affirmative action differentiations, or even “distinctions” (the term used in the U.S. Understanding), are not proscribed “discrimination,” the treaty referring to “distinction” and the Committee referring to “discriminatory” (and otherwise not addressing affirmative action or special measures as such). Indeed, its prior General Comment had already recognized such differing uses of these terms and the propriety of race-based differentiations. See *Human Rights Comments*, *supra* note 12, General Comment No. 18, at 25.

Convention),<sup>17</sup> is more clearly useful as supreme federal law authorizing certain forms of race-based affirmative action. As its name suggests, the treaty contains general provisions outlawing racial "discrimination."<sup>18</sup> Nonetheless, certain "special measures" that can cover certain forms of race-based affirmative action are expressly excluded from the definition of proscribed racial "discrimination," which otherwise includes "any distinction, exclusion, restriction or preference based on race . . . 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 . . . public life."<sup>19</sup> As the Race Discrimination Convention states in paragraph 4 of Article 1:

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.<sup>20</sup>

There is no exception or limitation expressly related to this article elsewhere in the Race Discrimination Convention or in the U.S. instrument of ratification. Indeed, in the formal statement of Conrad Harper, the Legal Adviser to the Secretary of State, to Chairman Claiborne Pell of the Senate Foreign Relations Committee concerning ratification of the Race Discrimination Convention, the Legal Adviser noted: "[A]rticle 1 (4) explicitly exempts 'special measures' taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection. As a result, the Convention leaves undisturbed existing U.S. law regarding affirmative action programs."<sup>21</sup>

Another article in the Race Discrimination Convention generally reiterates the recognized propriety of special measures and adds a

---

17. Race Discrimination Convention, *supra* note 11. The treaty was ratified by the United States on November 20, 1994. See LILICH & HANNUM, *supra* note 3, at 269.

18. See, e.g., Race Discrimination Convention, *supra* note 11, arts. 2-4, 6, at 216-20.

19. *Id.* art. 1, para. 4, at 216. See also *id.* art. 2, para. 2, at 218; de la Vega, *supra* note 12, at 427, 467.

20. Race Discrimination Convention, *supra* note 11, art. 1, para. 4, at 216.

21. Statement of May 11, 1994 of Legal Adviser Conrad Harper to the Senate Committee on Foreign Relations, reprinted in 88 AM. J. INT'L L. 721, 722 (1994). See also *infra* notes 29-30 and accompanying text (regarding similar interpretations of the treaty).



requirement that certain special measures "shall" be taken in certain circumstances. Paragraph 2 of Article 2 states:

States Parties shall, when the circumstances so warrant, take, in social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.<sup>22</sup>

However, the duties contained in Article 2 are generally conditioned by Article 5, which addresses, among others, the "right to education and training,"<sup>23</sup> and states:

In compliance with the fundamental obligations laid down in Article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights . . . .<sup>24</sup>

Article 5 does not refer to or condition Article 1(4), but it refers to Article 2 and would seem to be inconsistent with paragraph 2 of Article 2 unless "special measures" (in Article 2) are considered to involve neither impermissible "discrimination" (consistently with Article 1(4)'s mandate) nor impermissible "distinctions" as to race (within the meaning of Article 5). This construction of the Race Discrimination Convention is logical both with respect to possible meanings of terms and phrases and the objects and purposes of the treaty evident in Articles 1, 2 and 5.<sup>25</sup> Furthermore, one should construe a treaty in a manner that is logically consistent and with reference to the terms of the treaty considered in their context and the treaty's object and purpose.<sup>26</sup>

---

22. Race Discrimination Convention, *supra* note 11, art. 2, para. 2, at 218.

23. *Id.*, art. 5, para. (e)(v), at 222.

24. *Id.*, art. 5, at 220.

25. See also *supra* note 12 and *infra* notes 29–30, 37–41 (regarding ICCPR's special meaning).

26. See, e.g., Vienna Convention on the Law of Treaties, *supra* note 4, art. 31, para. 1, at 340. ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given the terms of the treaty in their context and in light of its object and purpose."); RE-STATEMENT, *supra* note 1, § 325(1), cmt. b. See generally PAUST, *supra* note 4, at 286–87, 318, 366–68, 373–76.

In view of the the U.S. Legal Adviser's statement and Articles 1(4), 2, and 5 of the Race Discrimination Convention, at least two conclusions follow: (a) Article 5 does not prohibit special measures of affirmative action, since Article 1(4) permits them and Article 5 (despite a theoretical clash with Article 2) does not reach Article 1; and (b) Article 2(2) sometimes requires special measures, since the language "shall, when the circumstances so warrant," sets up a legal duty under the Race Discrimination Convention and Article 5 can be interpreted in a manner that prohibits "discrimination" and "distinctions" but not warranted and even mandated "special measures."<sup>27</sup> To be sure, outside the context of the Race Discrimination Convention it may not be as appropriate to differentiate between "distinctions as to race" and "special measures" designed "to ensure adequate development and protection of certain racial groups or individuals belonging to them," but these terms and phrases appear within the same treaty and should be interpreted as if they are part of a consistent scheme under the Race Discrimination Convention.<sup>28</sup> If not, affirmative action would remain permissible under Article 1(4), but no such action would be required under Article 2(2) because of a different, yet unacceptable, interpretation of the reach of Article 5 beyond "discrimination" and "distinctions" to "special measures."

Professors McDougal, Lasswell, and Chen add:

The Convention's broad formulation of forbidden acts is not, however, intended to prescribe that all differentiations are unlawful discriminations. The differences made impermissible are those which fail to establish a demonstrable, rational relation to individual potentialities for self-development and contribution to the aggregate common interest. The basic requirement of rationality, that is, an absence of arbitrariness, is implicit in the reference in Article 1(1) . . . and is made explicit in Articles 1(4) and 2(2).<sup>29</sup>

---

27. See *supra* note 12 (regarding ICCPR); *infra* notes 29–30 (regarding the Race Discrimination Convention), 37–40 (regarding ICCPR).

28. See *supra* note 26.

29. MCDUGAL ET AL., *supra* note 4, at 596. McDougal et al. find support from Dr. W.A. McKean, *The Meaning of Discrimination in International and Municipal Law*, 44 BRIT. Y.B. INT'L L. 177, 185–86 (1970) ("[I]n international legal usage, 'discrimination' has come to acquire a special meaning. It does not mean any distinction or differentiation but only arbitrary, invidious or unjustified distinctions . . . . Moreover, it does not forbid special measures of protection . . . . In this respect, the definition accepted in the international sphere is more advanced and sophisticated than that adopted in most municipal legal systems."). They also cite Judge Tanaka's opinion in the South West Africa Cases (Eth. v. S. Afr.; Liber. v. S. Afr.), 1966 I.C.J. 4, 306 (Tanaka, J., dissenting) (different treatment should be allowed if based on justice). See also *supra* note 12 (regarding ICCPR).

"Thus," they aptly conclude, "these articles provide that appropriate measures of assistance . . . do not come within the purview of the prohibition" of race-based distinctions or discrimination.<sup>30</sup>

### AN INTERFACE BETWEEN THE TREATIES

If the U.S. "reservation" concerning affirmative action does not lawfully pertain to the ICCPR<sup>31</sup> and the ICCPR is not otherwise interpreted to allow affirmative action or race-as-a-weight-factor types of "distinction," then the provisions of the Race Discrimination Convention should nevertheless prevail and serve as aids for interpreting the Covenant. Clearly, the Race Discrimination Convention is more subject-specific and detailed with respect to race-based differentiations, distinctions and discrimination—with greater attention to a fuller range of policies and interests at stake. Such detail arguably provides normative guidance in connection with other human rights treaties developed around the same time.<sup>32</sup> Additionally, the more specific treaty, developed nearly simultaneously, arguably prevails in the case of an unavoidable clash between the two since it pays greater attention to a fuller range of policies and interests at

---

30. See MCDUGAL ET AL., *supra* note 4, at 596–97. See THOMAS BURGENTHAL, *INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL* 63 (2d ed. 1995) ("This language [in art. 1, para. 4] suggests that temporary affirmative action programs and preferential quota systems for minority groups are lawful . . ."); *The Rights of Indigenous Peoples: A Comparative Analysis*, 68 PROC., AM. SOC. INT'L L. 265, 276 (1974) (remarks by Louis B. Sohn that affirmative action is permissible under the Race Discrimination Convention); de la Vega, *supra* note 12, at 427, 467–68, 470; *supra* note 12 (regarding ICCPR).

31. Nonetheless, I assume that it does. See *supra* notes 13–16 and accompanying text.

32. The Human Rights Committee under the ICCPR has expressly referred to the Race Discrimination Convention for guidance. See *Human Rights Comments*, *supra* note 12, General Comment No. 18, paras. 6–7, at 26. See also Vienna Convention on the Law of Treaties, *supra* note 13, art. 31, para. 3(c), at 340 ("There shall be taken into account, together with the context . . . any relevant rules of international law applicable in the relations between the parties."). Each treaty contains relevant "rules of international law" *vis a vis* the other, and the vast majority of parties to one are also parties to the other. Both multilateral treaties were opened for signature with U.N. General Assembly resolutions at nearly the same time. See G.A. Res. 2106, U.N. GAOR, 20th Sess., Supp. No. 14, at 47, U.N. Doc. A/6014 (1965) (the Race Discrimination Convention); G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966) (the ICCPR).

Additionally, the preamble to the Race Discrimination Convention expressly refers to the prohibition of a race-based "distinction" under the U.N. Charter and the Universal Declaration of Human Rights (two instruments that the ICCPR also sought to build upon)—the same word addressed in the ICCPR. See Race Discrimination Convention, *supra* note 17, at 212–13. This indicates that the Race Discrimination Convention relates to interpretation of the ICCPR, since both human rights treaties address the same terms (such as "distinction" and "discrimination") and refer to the same more basic human rights instruments (i.e., the U.N. Charter and the Universal Declaration).

stake that must have been of concern to the international community at the time of formation of each treaty.<sup>33</sup> Further, the Race Discrimination Convention was ratified by the United States two years after ratification of the ICCPR, so the Race Discrimination Convention, within the United States, presumably reflects the last will of the American people and, under a domestic latter-in-time analysis,<sup>34</sup> it arguably prevails.

---

33. The ICCPR also states: "There shall be no restriction upon or derogation from any fundamental human rights recognized or existing in any State Party . . . pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent." ICCPR, *supra* note 2, art. 5, para. 2, at 174. The word "conventions" may or may not refer to other international conventions, like the Race Discrimination Convention, but it seems that "fundamental human rights" are to prevail even if recognition of such rights in the ICCPR is ambiguous or it "recognizes them to a lesser extent." If "special measures" of affirmative action required in Article 2, paragraph 2, of the Race Discrimination Convention are equated with "fundamental . . . rights," or in other words, if the duty of States contained in the language: "shall, when the circumstances so warrant, take special and concrete measures," is equated with a fundamental right to such measures, it would seem that Article 5 of the ICCPR assures their primacy (especially within the United States where the Race Discrimination Convention is a law of the United States as well as a "convention"). Cf. G.A. Res. 41/120, U.N. GAOR, Supp. No. 53, at 178-79, U.N. Doc. A/41/53 (1987) ("Emphasizing the primacy of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights in this network" of "international standards in the field of human rights").

More generally, and by analogy, consider the maxims: *generalia specialibus non derogant* (general words do not derogate from special); *lex specialis generalem derogat* or *lex specialis derogat generali* (special law prevails over general law); *generalis clausula non porrigitur ad ea quae antea specialiter sunt comprehensa* (a general clause does not extend to those things which are previously provided for specially). On *lex specialis*, see, e.g., J.G. STARKE, AN INTRODUCTION TO INTERNATIONAL LAW 457 (9th ed. 1984); Michael Akehurst, *The Hierarchy of the Sources of International Law*, 1974-75 BRIT. Y.B. INT'L L. 273, 273; Patricia Anne Kuhn, Comment, *Societe Nationale Industrielle Aerospatiale: The Supreme Court's Misguided Approach to the Hague Evidence Convention*, 69 B.U.L. REV. 1011, 1050 n.288 (1989); Martin A. Rogoff, *Interpretation of International Agreements by Domestic Courts and the Politics of International Treaty Relations: Reflections on Some Recent Decisions of the United States Supreme Court*, 11 AM. U. J. INT'L L. & POL'Y 559, 591 (1996); Gerhard Wegen, *Discontinuance of International Proceedings: The Hostage Case*, 76 AM. J. INT'L L. 717, 736 (1982) (citing Hans von Mangoldt, *Methods of Dispute Settlement in Public International Law*, in SETTLEMENT OF SPACE LAW DISPUTES 15, 25-26 (Karl-Heinz Bockshegel ed., 1980)); Chris Wold, *Multilateral Environmental Agreements and the GATT: Conflict and Resolution?*, 26 ENVTL. L. 841, 912 (1996) (citing SIR IAN M. SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 98 (2d ed. 1984) and Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points*, 33 BRIT. Y.B. INT'L L. 203, 236 (1957)); cf. MYRES S. MCDUGAL ET AL., *THE INTERPRETATION OF INTERNATIONAL AGREEMENTS AND WORLD PUBLIC ORDER* 206 (1967) ("It would be better . . . to say that specific (central) provisions prevail over general (peripheral) ones only if all other indices both of the parties' expectations and of relevant community policies so require.").

34. On the "last-in-time" rule generally, see, e.g., RESTATEMENT, *supra* note 1, § 115; PAUST, *supra* note 4, at 81-88, 95-97, 99-101 *passim*.

Moreover, one should attempt to read the U.S. "reservation" to the ICCPR, and the ICCPR itself, consistently with the Race Discrimination Convention,<sup>35</sup> thereby assuring the propriety of the U.S. "reservation" concerning affirmative action and the Race Discrimination Convention's "special measures." Indeed, the Human Rights Committee established by the ICCPR has already interpreted the ICCPR to allow certain forms of "differentiation" in a manner not unlike permissible "special measures."<sup>36</sup> Textwriters also affirm that neither Article 2 nor Article 26 of the ICCPR prohibit affirmative action.<sup>37</sup>

For example, Oscar Garibaldi writes: "differential treatment . . . does not violate the principle of non-discrimination of the ICCPR unless it constitutes discrimination" and "discrimination is an objectionable (or not justifiable) differentiation."<sup>38</sup> He adds:

The travaux preparatoires make clear that the drafters of the [ICCPR] did not intend to prohibit all legal distinctions . . . but only those considered "wrong." . . . What seems to be required is that the distinction be, in some sense, justifiable . . . . There is clear evidence in the travaux preparatoires that this type of differential treatment ["special measures"] was considered justifiable and, hence, not discriminatory. Because these "special measures" do not constitute discrimination, they are not prohibited . . . .<sup>39</sup>

Others similarly state, that Article 2 of the ICCPR:

was intended only to bar unjustified, invidious or improper distinctions; not all distinctions based on the specifically proscribed criteria are barred. The drafters clearly recognized the legitimacy

---

35. See *supra* note 32. They are generally co-equal treaties. Concerning the need to interpret treaties consistently, but with other suggestions as to priorities, see generally the Vienna Convention on the Law of Treaties, *supra* note 4, art. 30, para. 3, and art. 31 para. 3(c), at 339-40; RESTATEMENT, *supra* note 1, §§ 323, 325; also consider the maxim: laws *pari materia* (laws on the same subject must be construed with reference to each other).

36. See *supra* note 12.

37. See, e.g., David Filvaroff et al., *The Substantive Rights and United States Law, in UNITED STATES RATIFICATION OF THE INTERNATIONAL COVENANTS ON HUMAN RIGHTS* 125 (Hurst Hannum & Dana D. Fischer eds., 1993) (Article 26 "does not either require or prohibit affirmative action on behalf of minorities."); Oscar M. Garibaldi, *The Principles of Non-Discrimination and Equality Before the Law, in Filvaroff et al., supra*, at 62, 65-68; Jose E. Alvarez, *International Law: Some Recent Developments*, 46 J. LEG. ED. 557, 561 (1996); Popovic, *supra* note 12; Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 AM. U. L. REV. 1, 42 (1982) (when the ICCPR was created, "it was generally accepted that the prohibition of discrimination" does not prohibit "special protective measures, called 'affirmative action' in some countries."); de la Vega, *supra* note 12, at 427, 433, 445, 467-68, 470-71.

38. Garibaldi, *supra* note 37, at 65.

39. *Id.* at 65-67.

of some differences of treatment . . . [and] intended that the article not be read to preclude the taking of "affirmative action" to benefit disadvantaged or minority groups . . . .<sup>40</sup>

Both treaties adopt special meanings concerning the terms "distinction" and "discrimination." Clearly, not all forms of differentiation<sup>41</sup> are impermissible, and race-based affirmative action is at least permissible (if not required) under both forms of treaty law of the United States. Article 2 of the Race Discrimination Convention also mandates affirmative action "when the circumstances so warrant."

### SUPREME FEDERAL LAW

As U.S. treaty law, the ICCPR and the Race Discrimination Convention are supreme law of the land and set important federal policy with respect to federal preemption of state laws. As such, they will trump inconsistent state law.<sup>42</sup> Though the instruments of ratification for each treaty contain declarations that they are "non-self-executing,"<sup>43</sup> these declarations function as reservations that are fundamentally inconsistent with the objects and purposes of the treaties and are thus void *ab initio*.<sup>44</sup> Even if "non-self-executing," the treaties should still trump inconsistent state law under the Supremacy Clause of the U.S. Constitution and the doctrine of federal preemption.<sup>45</sup> As the Supreme Court emphasized in

---

40. Filvaroff et al., *supra* note 37, at 84.

41. The term "differentiation" seems preferable in order to emphasize the special meanings that pertain concerning both treaties. For use of such a term or "differential," see *supra* notes 12, 29 and text accompanying notes 36, 38–39.

42. See LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 157 (2d ed. 1996) ("[T]he International Covenant on Civil and Political Rights. . . and other conventions to which the United States is party, are binding on the states and supersede any inconsistent state law or policy."); *supra* note 1 and *infra* notes 45, 47. See also Michael A. Olivas, *Preempting Preemption: Foreign Affairs, State Rights, and Alienage Classifications*, 35 VA. J. INT'L L. 217, 234–36 (1994) (preferring a "preeminent federal role" based partly on international law, especially in contradistinction to California's Proposition 187 regarding education rights of undocumented alien children); PAUST, *supra* note 4, at 51–57, 62–64, 67–68, 92, 97, 133–35, 143, 202, 314, 384, 386, 413 (citing numerous cases and documenting the views of the Framers and Founders).

43. See S. REP. NO. 102–23, *supra* note 12, at 23, reprinted in 31 I.L.M. at 659 (ICCPR not self-executing); Statement of May 11, 1994, *supra* note 21, at 728 (stating that the Race Discrimination Convention is not self-executing).

44. See, e.g., PAUST, *supra* note 4, at 361–68, 373–76 (quoting Comment No. 24, *supra* note 16, paras. 7–9, 11–12, 20, at 3–5, 8). Non-self-execution of the Race Discrimination Convention would be unavoidably inconsistent with the object and purposes of the treaty and, in particular, with Articles 2–4, 6–7.

45. See, e.g., *Oyama v. California*, 332 U.S. 633, 649–50 (1948) (Black, J., concurring) (Human rights articles in the U.N. Charter, which to date have not been found to be self-

*United States v. Pink*,<sup>46</sup> "state law must yield when it is inconsistent with, or impairs the policy or provisions of, a treaty . . . [and] must give way before the superior Federal policy evidenced by a treaty."<sup>47</sup>

---

executing, provide additional reasons why a California law "stands as an obstacle to the free accomplishment of our policy in the international field" and cannot prevail.); *id.* at 673 (Murphy, J., concurring) ("Its inconsistency with the Charter . . . is but one more reason why the statute must be condemned."); *Gordon v. Kerr*, 10 F. Cas. 801, 802 (C.C.D. Pa. 1806) (No. 5,611) (stating that a seemingly non-self-executing treaty "is supreme" over a state constitution); 6 Op. Att'y Gen. 291, 293 (1854) (asserting that all treaties are supreme law over that of the states—even treaties requiring "enactment of a statute to regulate the details"); PAUST, *supra* note 4, at 62–64, 68, 97, 134–35; LOUIS B. SOHN & THOMAS BUERGENTHAL, *INTERNATIONAL PROTECTION OF HUMAN RIGHTS* 947 (1973); BURNS H. WESTON ET AL., *INTERNATIONAL LAW AND WORLD ORDER* 192 (1980); Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 HARV. L. REV. 853, 867 n.65 (1987); Carlos M. Vazquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1097–1104 (1992); Quincy Wright, *National Courts and Human Rights — The Fujii Case*, 45 AM. J. INT'L L. 62, 69 (1951); *supra* note 42; *infra* note 47. *But see In re Alien Children Education Litigation*, 501 F. Supp. 544, 590 (S.D. Tex. 1980); *Sei Fujii v. State*, 242 P.2d 617 (Cal. 1952). Subsequent legal developments have obviated the two prongs of the *Sei Fujii* rationale related to its conclusion about the non-self-executing character of the human rights obligations in the U.N. Charter. *See* PAUST, *supra* note 4, at 74, 282. The Supremacy Clause, U.S. CONST. art. VI, cl. 2, provides that "all Treaties . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby . . .," not that some treaties or only "self-executing" treaties have that effect. *See also* RESTATEMENT, *supra* note 1, § 115, cmnt. e ("any treaty . . . supersedes inconsistent State law or policy . . . . Even a non-self-executing agreement . . . may sometimes be held to be federal policy superseding State law or policy . . . [and] may also . . . preempt" (emphasis added)). Professor Connie de la Vega adds that even if non-self-executing, the treaties can be used to interpret other laws. *See* de la Vega, *supra* note 12, at 457 n.206, 460, 467, 470; *see also* PAUST, *supra* note 4, at 62–64, 68, 97–98, 134–35, 370, 384, and references cited. She also notes that "governmental entities may use the treaty clauses defensively without worrying about the non-self-executing declaration because . . . that only affects the basing [of] a private cause of action on the treaty clauses." De la Vega, *supra* note 12, at 467; *see also id.* at 470 (Even if no private cause of action pertains, "the standards apply . . . and can be used to defend programs designed to meet the goals of the treaties."); PAUST, *supra* note 4, at 377–78 n.4.

During the process leading to ratification, the executive explained that the "intent" of the declaration on non-self-execution "is to clarify that the [ICCPR] will not create a private cause of action in U.S. courts." *See* S. REP. NO. 102–23, *supra* note 12, at 19, *reprinted in* 31 I.L.M. at 657. Thus, whether or not the declaration is void *ab initio*, the "intent" was not to preclude other uses of the ICCPR, e.g., defensive uses, use under the Supremacy clause, use for purposes of federal preemption or to provide a compelling state interest.

46. *United States v. Pink*, 315 U.S. 203 (1942).

47. *Id.* at 230–31. On supremacy more generally, see, e.g., *Asakura v. City of Seattle*, 265 U.S. 332, 341 (1924); *Maiorano v. Baltimore & Ohio R.R. Co.*, 213 U.S. 268, 272–73 (1909); *Chirac v. Chirac*, 15 U.S. (2 Wheat.) 259, 271, 274–76 (1817); *Owings v. Norwood's Lessee*, 9 U.S. (5 Cranch) 344, 348–49 (1809); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796); *Gordon v. Kerr*, 10 F. Cas. 801, 802 (C.C.D. Pa. 1806) (No. 5,611); *Hamilton v. Eaton*, 11 F. Cas. 336, 337–38, 340, 342 (C.C.D. N.C. 1792) (No. 5,980); *Page v. Pendleton*, 1 Wythe Rep. 127, 129, 132 (Va. High Ct. of Chancery, May 3, 1793); 6 Op. Att'y Gen. 291, 293 (1854); *supra* notes 1, 42.

Each of the treaties also has an understanding that contains a federal clause. The Race Discrimination Convention's clause is typical. It reads:

this Convention shall be implemented by the Federal Government to the extent that it exercises jurisdiction over the matters therein, and otherwise by the state and local governments. To the extent that state and local governments exercise jurisdiction . . . , the Federal Government shall, as necessary, take appropriate measures to ensure the fulfillment of this Convention.<sup>48</sup>

Such a clause does not change the fact that permissibility of affirmative action is assured under the treaty, nor that the Convention's obligations are to be fulfilled.

Yet, whether or not various entities within the federal government or the states are to proceed to mandate affirmative action may be a relevant question for consideration. For example, although Article 2(2) of the Race Discrimination Convention requires the United States, "when the circumstances so warrant," to take "special and concrete measures," it may be left to the discretion of the United States to exercise its jurisdictional competence to implement the treaty or to allow states to proceed.<sup>49</sup> If the states do not proceed, the United States is bound by Article 2 of the treaty to take action (i.e., there is no gap in the U.S. duty under Article 2 merely because neither the states nor federal governmental entities have yet proceeded to adopt special measures).<sup>50</sup>

That the federal government has jurisdictional competence to implement treaty law is well understood.<sup>51</sup> Moreover, at a minimum, the states cannot deny the permissibility of affirmative action assured under the treaties. Indeed, the federal clauses require that the treaties "shall be implemented . . . otherwise by the state and local governments," thus making duties under the treaties concurrent.

---

48. See S. REP. NO. 102-23, *supra* note 12, at 23, reprinted in 31 I.L.M. at 659; Statement of May 11, 1994, *supra* note 21, reprinted in 88 AM. J. INT'L L. at 728.

49. Race Discrimination Convention, *supra* note 11, art. 2, para. 2, at 218.

50. See David P. Stewart, *United States Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings, and Declarations*, 42 DEPAUL L. REV. 1183, 1201-02 (1993) (stating that the United States remains bound under the ICCPR, that the United States will also "ensure that the state and local governments fulfill their obligations," and that the Understanding "concerns the steps to be taken domestically by the respective federal and state authorities").

51. See, e.g., *Missouri v. Holland*, 252 U.S. 416 (1920). The same applies with respect to customary international law. See, e.g., *United States v. Arjona*, 120 U.S. 479, 483-88 (1887); *Frend v. United States*, 100 F.2d 691, 692-93 (D.C. Cir. 1938), *cert. denied*, 306 U.S. 640 (1939).



In view of the above, the recent effort in California to outlaw affirmative action<sup>52</sup> is both inconsistent with the provisions of the treaties and superior federal policy set forth in the treaties and cannot prevail. Under the Supremacy Clause, California must yield to the permissibility of affirmative action assured in treaty law of the United States.<sup>53</sup> The question as to the permissibility of affirmative action has also been preempted by unmistakable treaty law and policy, including the unswerving U.S. Understandings concerning affirmative action.<sup>54</sup> The decision whether to mandate a particular affirmative action program, however, may not have been preempted in view of the federal clauses pertaining to each treaty which leave some discretion in the federal government to allow states to take affirmative steps to implement the treaties. Yet, the federal scheme is otherwise complete.

#### OTHER CONSTITUTIONAL CONSIDERATIONS

Although treaties cannot prevail in the case of an unavoidable clash with the U.S. Constitution,<sup>55</sup> treaties can be used as aids for the interpretation and enhancement of constitutional rights, duties, and powers.<sup>56</sup> Thus, the treaty-based permissibility of affirmative action and related duties can

---

52. See CAL. CONST. art. I, § 31. See also Michael S. Greve, *Prop 209: A Graceful Exit for the Courts*, L.A. TIMES, Feb. 14, 1997, at B9; de la Vega, *supra* note 12, at 427-28.

53. See, e.g., Popovic, *supra* note 11.

54. Concerning federal preemption, see *Coalition for Econ. Equity v. Wilson*, 946 F. Supp. 1480 (N.D. Cal. 1996), *vacated* 110 F.3d 1431 (9th Cir. 1997) (en banc), *petition for cert. filed*, 66 U.S.L.W. 3171 (U.S. Sept. 9, 1997) (No. 97-369) (The District Court granted a preliminary injunction against enforcement of California Proposition 209 because plaintiffs had demonstrated a likelihood of success on their claim that it is preempted by Title VII of the 1964 Civil Rights Act. The Ninth Circuit, however, vacated the injunction.). The District Court in *Coalition for Economic Equity* addressed various forms of federal preemption recognized with respect to federal legislation. For example: (1) field preemption, and (2) conflict preemption, with two subsets of conflict preemption: (a) actual, and (b) obstacle. *Id.* at 1510-12. As the court explained, obstacle preemption pertains when state law "stands as an *obstacle* to the accomplishment and execution of the full *purposes and objectives* of Congress." *Id.* at 1511 (emphasis added) (*quoting* *International Paper Co. v. Ouellette*, 479 U.S. 481, 492 (1987)). The court added that obstacle preemption has occurred even "where states are explicitly permitted to legislate." *Id.* at 1512 n.39. This analysis also seems to be relevant to international treaty preemption where a federal clause allows some leeway for state measures of affirmative action as long as there is no denial of the permissibility of affirmative action and no interference with other federal purposes and objectives or affirmative measures. Clearly, the California law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of" the Race Discrimination Convention.

55. See, e.g., PAUST, *supra* note 4, at 81, 102.

56. See, e.g., *id.* at 34, 83, 108, 112-13, 191-96, 246, 248-56; de la Vega, *supra* note 12, at 462.

be used to condition the meaning of relevant constitutional norms, an approach that should prove useful against attempted extensions of *Hopwood v. Texas*.<sup>57</sup>

For example, when considering the phrase "equal protection" (found in both the Fourteenth Amendment to the U.S. Constitution and Article 26 of the ICCPR), one might refer to relevant treaty interpretations of this and related phrases that clearly allow certain forms of affirmative action. The word "protection" should be interpreted with reference to all legal policies at stake and in a manner that allows certain forms of affirmative action to promote, for each person, an "equal" and effective "protection" against ongoing processes of discrimination. Further, since international law is supreme law of the United States, the Fourteenth Amendment should be interpreted to preclude any state from denying "the equal protection of the laws" by denying the protection of treaty laws realized in permissible affirmative action.<sup>58</sup> Such a shared protection, realized ultimately for each person, is protection from ongoing processes of discrimination, and no state should deny to any person such protection of the laws.

With respect to the requirement of "compelling state interests" utilized in connection with strict scrutiny tests of racial classifications not involving treaties,<sup>59</sup> treaty-based permissibility of affirmative action coupled with U.S. duties under Article 2 of the Race Discrimination Convention provide a compelling state interest for the United States,<sup>60</sup> and

---

57. 78 F.3d 932 (5th Cir. 1996), *reh'g denied*, 84 F.3d 720 (5th Cir. 1996), *cert. denied*, 116 S.Ct. 2580 (1996). Even *Hopwood* did not require that laws treat and protect each person at every social moment in exactly the same way. *See id.* at 946-47. The latter approach might lead to a denial of the constitutional propriety of any laws protecting special interests or distinctions, such as certain tax codes, welfare laws, pollution laws, laws providing government subsidies, laws providing judicial and official immunities, and laws concerning the selection of judges.

58. Concerning the protection of human rights through the Fourteenth Amendment, *see* PAUST, *supra* note 4, at 179-80, 186, 193, 196, 237, 244, 248, 255-56, 315. *See also* Myres S. McDougal & Richard Arens, *The Genocide Convention and the Constitution*, 3 VAND. L. REV. 683, 708 (1950).

59. *See, e.g.,* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 231-32 (1995).

60. *See Finzer v. Barry*, 798 F.2d 1450, 1462-63 (D.C. Cir. 1986) (U.S. obligations under international law, reaffirmed by treaty, support a compelling governmental interest in First Amendment analysis), *rev'd in part and aff'd in part sub nom. Boos v. Barry*, 485 U.S. 312, 322-24 (1988) ("[T]he fact that an interest is recognized in international law does not automatically render the interest 'compelling' for purposes of First Amendment analysis. We need not decide today whether, or to what extent, the dictates of international law could ever require that First Amendment analysis be adjusted to accommodate the interests of foreign officials."); *Adams v. Howerton*, 673 F.2d 1036, 1041-42 (9th Cir. 1982), *cert. denied*, 458 U.S. 1111 (1982) ("Recognition that First Amendment rights are implicated, however, is not dispositive of our inquiry" regarding "principles of international law" and congressional power.) (*quoting* *Kleindeinst v. Mandel*, 408 U.S. 753, 765 (1972)); *United States v. Lundquist*, 932 F. Supp. 1237, 1241 (D. Or. 1996) ("The government clearly has a compelling interest," based in part on

the Supremacy Clause makes relevant concurrent duties and interests of the states all the more compelling.<sup>61</sup> Even in *Hopwood*, several judges had stressed that "diversity" in higher education can be a compelling state interest.<sup>62</sup> Treaty-based permissibility of affirmative action and duties to take "special and concrete measures" must necessarily enhance such a recognition.

Both the ICCPR and the Race Discrimination Convention ratification processes produced non-binding provisos that nothing contained in the treaties shall require the United States to act inconsistently with its Constitution,<sup>63</sup> but such a proviso is basically content neutral. Thus, it demands and precludes no particular interpretation or reinterpretation of the Constitution.<sup>64</sup>

## CONCLUSION

Race-based affirmative action in higher education is permissible under treaty law of the United States and is even required "when the circumstances so warrant."<sup>65</sup> As supreme law of the land and superior federal policy, the

---

the Migratory Bird Treaty Act (and, thus, a treaty base as well) in maintaining the viability of eagles as a species in opposition religious interests.); *Jewish Defense League, Inc. v. Washington*, 347 F. Supp. 1300, 1301 (D.D.C. 1972) ("paramount governmental interest" stems from international law); 1 Op. Att'y Gen. 52, 52-53 (1852) (prosecution for criminal libel is permissible regarding publication that inspires "foreign minister with fears of being killed" and domestic "law is strengthened by the law of nations"); de la Vega, *supra* note 12, at 468, 470; *cf.* *Bullfrog Films, Inc. v. Wick*, 847 F.2d 502, 512 (9th Cir. 1988) (The government did not advance a compelling state interest and "[c]ertainly the existence of a Treaty does not by itself justify content-based discrimination in violation of the First Amendment.).

61. See de la Vega, *supra* note 12, at 468, 470. Professor de la Vega correctly states: "The treaty obligations themselves can constitute a compelling state interest. This is particularly true for the United States government, which has affirmative obligations under [the Race Discrimination Convention] . . ." *Id.* at 468. She rightly adds that "states and local entities also are obligated . . . [This] obligation can be the basis of the compelling state interest for affirmative action programs." *Id.*

62. 78 F.3d at 964-65 (Wiener, J., concurring) (diversity might be a compelling interest); 84 F.3d at 724 & n.11 (Politz, J., dissenting) (stating that Justice Powell's diversity analysis in *Bakke* has continued validity and "student body diversity is a compelling governmental interest for the purposes of strict scrutiny"); *id.* at 725 (Stewart, J., dissenting).

63. See S. REP. NO. 102-23, *supra* note 12, at 24, reprinted in 31 I.L.M. at 660; Statement of May 11, 1994, *supra* note 21, reprinted in 88 AM. J. INT'L L. at 728. Neither proviso was included in an instrument of ratification. Thus, they are not part of either treaty. To save the United States from violating either treaty if it follows its own Constitution in contradistinction to the treaty, the provisos should have been reservations.

64. See, e.g., PAUST, *supra* note 4, at 313-14, 370, 384-85.

65. See Popovic, *supra* note 12 (Treaty law "requires—not just permits—parties to take 'special and concrete measures'"); de la Vega, *supra* note 12, at 471 ("affirmative action . . . is not only endorsed, but required by both treaties").

permissibility of affirmative action assured under U.S. treaty law must prevail over inconsistent state law or action. This does not guarantee that particular measures of affirmative action will survive all constitutional challenges, but the propriety of affirmative action under treaty law of the United States and related duties provide compelling state interests and can contribute to a continuing or evolving meaning of the Constitution compatible with generally shared values and human dignity.<sup>66</sup>

---

66. For a discussion of human dignity as a constitutional precept, see Jordan J. Paust, *Human Dignity as a Constitutional Right: A Jurisprudentially Based Inquiry Into Criteria and Content*, 27 How. L.J. 145 (1984).