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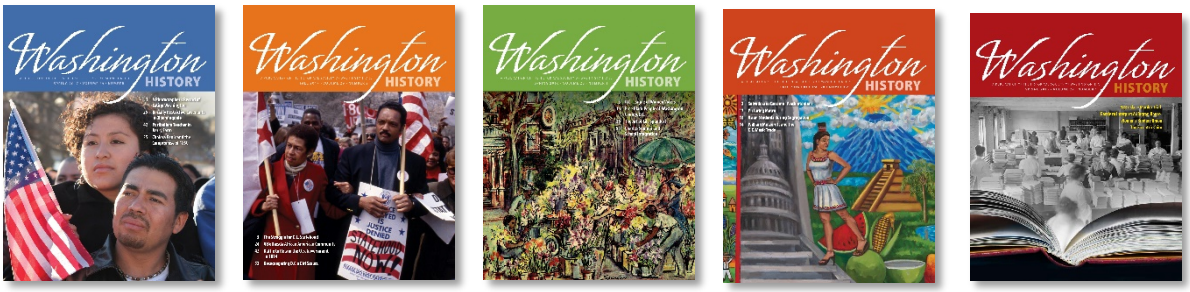
 It has been chosen to complement the DC Public Schools curriculum during this time of sheltering at home in response to the COVID-19 pandemic.



"***Washington History*** magazine is an essential teaching tool," says Bill Stevens, a D.C. public charter school teacher. "In the 19 years I've been teaching D.C. history to high school students, my scholars have used *Washington History* to investigate their neighborhoods, compete in National History Day, and write plays based on historical characters. They've grappled with concepts such as compensated emancipation, the 1919 riots, school integration, and the evolution of the built environment of Washington, D.C. **I could not teach courses on Washington, D.C. history without *Washington History*.**"

Bill Stevens engages with his SEED Public Charter School students in the Historical Society's Kiplinger Research Library, 2016.

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The NAACP legal team devised the successful legal strategies for the Brown and Bolling cases. From left to right are George E.C. Hayes, U. Simpson Tate, Louis Redding, Thurgood Marshall, Jack Greenberg, Frank Reeves, Spottswood Robinson, James Nabrit, and Howard Jenkins. Courtesy, Supreme Court, NAACP Legal Defense Fund.

Race, Education and the District of Columbia: The Meaning and Legacy of *Bolling v. Sharpe*

Lisa A. Crooms

In 1896, the United States Supreme Court decided *Plessy v. Ferguson*, which questioned "the constitutionality of an act of the General Assembly of . . . Louisiana, passed in 1890, providing for separate railway carriages for the white and colored races." The Court declared the act constitutional, observing that the Louisiana statute was no "more obnoxious to the Fourteenth Amendment than the acts of Congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned." The case established the legal principle of "separate but equal," which endured for the next 68 years.[1]

In 1954, the Supreme Court returned to the issue raised in *Plessy*. Faced with the five school-desegregation cases commonly known as *Brown v. Board of Education*, the Court had to decide if racial segregation remained constitutional. Unlike its predecessor 68 years earlier, however, this Court unanimously announced "that in the field of public education the doctrine of 'separate but equal' has no place."[2] Brown articulated a legal rule, which, on its face, resolved the inconsistencies of the Reconstruction amendments' promise of constitutional equality and the legal precedent of cases such as *Plessy*. Having loosed *Plessy*'s precedential moorings, *Brown* ushered in a hopeful era, in which its principles might extend beyond its narrow holding to reach all aspects of state-sanctioned racially segregated life in the United States.

As *Brown* has been celebrated and examined on the occasion of its fiftieth anniversary, most of the efforts have been limited to the *Brown* case itself. Less attention has been paid to the details of its companion cases and the contexts in which the Supreme Court decided them. Four of the cases claimed that racial segregation of public school students in Kansas, South Carolina, Vir-

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ginia, and Delaware violated the Fourteenth Amendment's command that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[3] The fifth case, *Bolling v. Sharpe*, was different in at least two important ways. First, *Bolling* challenged the way Congress used its power "[t]o exercise exclusive Legislation in all cases whatsoever" over the District of Columbia. The case required the Court to examine Congress's Article I, Section 8 authority, in light of its obligations under the Fifth Amendment's due process clause. Second, the lawyers in *Bolling* contended that the United Nations Charter was part of the law directly applicable to this District of Columbia case because, as a treaty "made . . . under the Authority of the United States," it was part of "the supreme Law of the Land."[4]

Despite these differences, *Bolling* has come to represent the Court's reading of an equal protection guarantee into the Fifth Amendment's due process clause. Consequently, the real differences between liberty and equality emphasized by the *Bolling* lawyers are lost in an opinion that turns due process and liberty into equality, and invokes the Court's Fourteenth Amendment jurisprudence to support its conclusion. Also lost is the fact that the lawyers litigated *Bolling* as a human rights case. To use the United Nations Charter to challenge congressionally maintained racial discrimination in the District's public schools placed the *Bolling* lawyers within the tradition of those who sought to make American racism a matter of international concern.

Following World War II, the District of Columbia's black students faced "a critical classroom shortage while white children were rattling around in half-empty schools in some places." Overcrowding was particularly acute at the junior high school level. In 1947, many of the black junior high schools held double sessions to accommodate 8,400 students in buildings designed for 6,500. During the 1947-1948 school year, almost all of the students at Browne Junior High School participated in a general strike. They wanted the Board of Education to address the overcrowded conditions in their school. The strike ended when attorney Charles Hamilton Houston agreed "to file a . . . series of lawsuits and [to] take other actions aimed at winning equal facilities for the black schoolchildren of Washington." Houston believed equalization was the only viable option because legal precedent foreclosed claims that the District's "Negroes had been deprived of due process of law."[5]

Houston died in April 1950, but not before two things occurred that directly affected his equalization plan. First, in February 1950, the United States Court of Appeals for the District of Columbia Circuit upheld the constitutionality of the District's racially segregated public schools in *Carr v. Corning*.[6] Second, Houston counseled his Browne Junior High School clients to ask James Nabrit to take over the lawsuits. Nabrit, whom Houston knew from their days on the Howard University School of Law (HUSL) faculty, had misgivings about Houston's plans. He considered the "equalization strategy . . . a lost and wasteful cause." If, however, the parents would change directions, then Nabrit would be willing to represent them. His only condition was that they abandon equalization in favor of a direct attack on the District's racially segregated schools. He "saw that the ultimate risk of challenging *Plessy* head-on, without giving the Court any escape hatch, had to be faced if any massive gain in black education was to be realized in his generation."[7] He soon found that the parents were up for the fight.

In 1950, at the start of the school year, the children at the center of *Bolling* went to Principal Eleanor McAuliffe of Sousa Junior High School and asked to be admitted to the school. She refused them admission because of their race. It was the "policy, practice, custom and usage" of the D.C. public schools to maintain racial segregation. Repeated appeals to end this racial segregation were met with the same response.[8] Finally, the Board of Education voted, on November 1, 1950, to uphold the earlier decisions, thereby preventing the black students from enrolling at Sousa.[9] On November 9, 1950, Nabrit and fellow HUSL faculty member George Hayes led a team of lawyers that filed a complaint in the United States District Court for the District of Columbia.

Central to the argument advanced by Nabrit and his colleagues was the distinction between the Fifth Amendment's due process clause and the Fourteenth Amendment's equal protection clause. According to Nabrit,

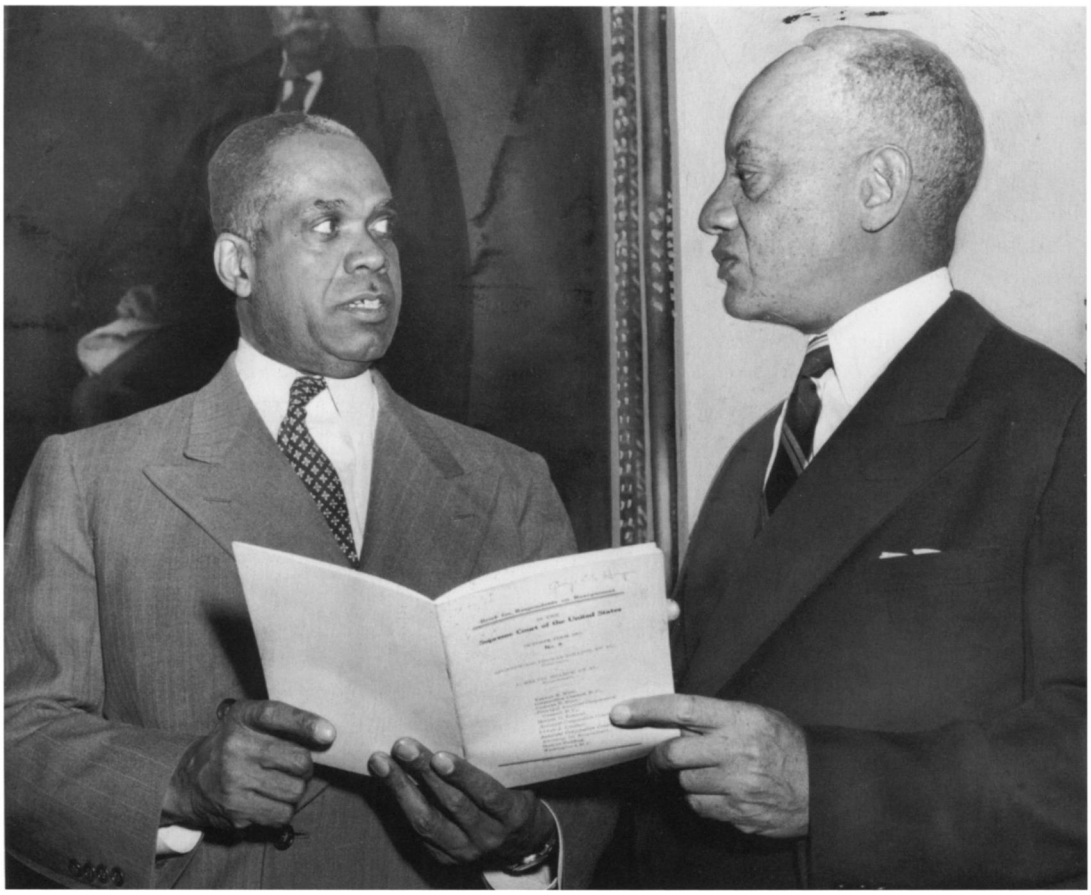
> The basic question here is one of liberty, under the due process clause[.] [Y]ou cannot deal with [liberty] as you deal with equal protection of laws because . . . [equal protection of laws involves] a quantum of treatment, substantially equal.
>
> You either have liberty or you do not. When liberty is interfered with by the state, it has to be justified, and you cannot justify it by saying that we only took a little liberty. You justify it by the reasonableness of the taking.[10]

Nabrit laid out the differences between the central constitutional issues raised by *Bolling* and those raised in the four state companion cases. As a matter of constitutional law, the District of Columbia case was about liberty and due process, which are different from the equality involved both in the other four cases and the Circuit Court's *Carr v. Corning*.

The lawyers melded congressional authority under Article I, Section 8(17) with the limitations set forth in the Fifth Amendment's Due Process Clause. They did not dispute Congress's exclusive legislative authority over the District of Columbia. Rather, they argued Congress was required to use that authority without depriving "the people of the District of Columbia . . . of Constitutional guarantees of life, liberty, and property." Specifically, the District's racially segregated schools violated the constitutional rights of the students and their parents "to acquire useful knowledge, to choose a particular public school, and to enjoy public education opportunities without government enforced limitations or restrictions based solely on race or color."[11] They argued further that "[t]o be compelled to accept segregation on the basis of race or color and to have one's feelings outraged is injurious per se."[12] The lawyers used the Supreme Court's Fifth Amendment cases to demonstrate that liberty was expansive enough to support the petitioners' due process claims.

Civil rights attorney and Howard University School of Law Dean Charles Hamilton Houston laid much of the groundwork for the Bolling *case during the 1930s and 1940s before his untimely death in 1950. Courtesy, LC.*

Relying on liberty rather than equality allowed the *Bolling* lawyers to shift the burden of proof to Congress. Congress, not the petitioners, would have to justify the use of race to segregate the District's public schools. The petitioners' brief set forth four criteria by which Congress's actions should be assessed. First, racially segregated schools would have to be based on "an affirmative showing of peculiar circumstances, present emergency or pressing public necessity." Second, Congress must have acted to achieve a "purpose . . . it ha[d] authority to effect." Third, the racial segregation must have been "clearly authorized and if implied authority [was] relied upon, it must appear that the restriction [was] clearly and unmistakably indicated by the language used in the granting authority." Fourth, segregating public-school students based on race must have been reasonably related to "an authorized purpose within the competency of the government to effect."[13]



George E. C. Hayes and James Nabrit, pictured here in December 1953, led the legal effort to dismantle segregation. Courtesy, MLK.

According to the *Bolling* legal team, Congress neither had nor could meet its four-part burden. The relevant period could not be said to be a "peculiar circumstance, present emergency or pressing public necessity" to justify racially segregating the District's public schools. The lawyers identified Congress's "apparent purpose" as "compel[ling] Negroes to attend only schools attended by Negroes and to accept instruction by Negro teachers only." They concluded "the Federal Government has no authority to effect such a purpose." Next, Nabrit and his colleagues compared the language in Congress's 1864 statute with that of other laws to demonstrate that Congress had "not clearly authorize[d]" racial segregation in clear and unmistakable terms. Finally, the *Bolling* lawyers contended that "the exclusion of minor petitioners from Sousa Junior High School solely because of race or color has no reasonable relationship to any educational purpose suggested by respondents, for they have suggested no purpose."[14]

In a relatively brief opinion, the Supreme Court held that "racial segregation in the public schools of the District of Columbia is a denial of the due process of law guaranteed by the Fifth Amendment to the Constitution." While the Court acknowledged the absence of Equal Protection language in the Fifth Amendment, it characterized both equality and due process as "not mutually exclusive," but rather "stemming from our American ideal of fairness." Inequality "may be so unjustifiable as to be violative of due process," and, in those cases, the government must justify the inequality. [15]

Like the *Bolling* lawyers, the Court looked to its Fifth Amendment cases to determine how Congress might justify the District's racially segregated public schools. It distilled the cases to require Congress to demonstrate that the racial segregation was reasonably related to a government objective and not arbitrary. It agreed with the petitioners that, in this case, Congress could not meet its burden.

The Court found additional support for its interpretation of due process in its opinion in *Brown*. It stated, "In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government."[16] The Court's rationale is a mirror image of the rationale of *Plessy* 68 years earlier. Among the practices cited to support the Court's ruling in 1896 was Congress's segregation of the District of Columbia's public schools. If the constitutionality of that practice was not questioned, the Court reasoned, then Louisiana's practice was similarly beyond serious question. In *Bolling*, however, the Court looked to the states' new obligations set forth in *Brown* and concluded they represented the minimum obligations imposed on Congress by the Fifth Amendment.

Directly challenging the federal government rather than the states allowed the *Bolling* lawyers to rely on treaty law without concerns about federalism and states' rights. According to the Constitution's Supremacy Clause, United States law comprises the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States."[17] Since the United Nations Charter was a treaty within the meaning of the Constitution, the *Bolling* lawyers claimed, it was law to which federal courts had a constitutional duty "to give effect." It was also "a declaration of Public Policy," and a "morally binding promise to the other signatories of the United Nations Charter."[18]

In the period between the end of World War II and 1954, the ideological struggles between the United States and the Soviet Union cast a long shadow over international affairs. In April and May 1945, the world's major powers gathered in San Francisco to found the United Nations. Concerned primarily with international cooperation in the interest of international justice, peace, and security, the United Nations was riddled with inconsistencies. For many, however, it had potential. It could become a forum in which the claims of the world's colonized and disenfranchised might be heard. It might provide some relief for those seeking to hold its members to their promise of "achiev[ing] international co-operation in solving problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion."[19]

This and other human-rights language became part of the Charter largely due to the efforts of those on the frontlines of the struggle for racial justice. W.E.B. DuBois, Walter White, Mary McLeod Bethune, Mordecai W. Johnson, and others "joined oppressed and colonial peoples from around the world in lobbying the 'great powers' to include basic guarantees of fundamental rights in the United Nations Charter."[20] These efforts put them at odds with officials from the United States who "neither propose[d] nor support[ed] a human rights declaration as an integral part of the Charter."[21] Those people favoring human rights prevailed, but their success was limited by the absence of real enforcement mechanisms within the document. Soon the impact of this limitation was felt by William Patterson, Paul Robeson, and the National Negro Congress (NNC) as they filed the first United Nations petition chronicling the grievances of blacks in the United States.

In December 1945, Robeson and Patterson simultaneously presented the NNC petition to the United Nations Secretariat in New York and the United Nations General Assembly in Paris. In it, the NNC charged the United States with genocide against Americans of African descent, which included "'economic genocide,' the 'silent, cruel killer' that reaped its harvest from the deprivations of daily life." In the United States, whites and blacks alike dismissed the petition as the product of exaggeration and hyperbole. At the United Nations, it raised questions about the

institution's authority to consider such complaints. Determined not to have its domestic race issues debated as a matter of international concern, the United States used its considerable influence to prevent the United Nations from discussing the NNC's charges.[22] Consequently, the petition was never seriously considered.

Convinced of the soundness of the strategy but not of the petition's rigor nor the NNC's effectiveness, DuBois embarked on another petition project with the National Association for the Advancement of Colored People (NAACP).[23] This petition would, in much more detail than the NNC's document, make the case for using the United Nations to hold the United States accountable for its treatment of blacks. On October 20, 1947, almost two years after the failed NNC petition was received, DuBois presented "An Appeal to the World" to the director of the United Nation's division of human rights.[24]

Like the NNC petition, "An Appeal to the World" was a lightning rod. By 1947, many in the United States had come to question whether human rights language, standards, and norms were compatible with American ideals. To promote "higher standards of living, full employment and conditions of economic and social progress and development," many believed, would threaten the individual effort and enterprise on which constitutional liberty rests.[25] Some also saw the Charter's anti-discrimination language as particularly problematic for the maintenance of *Plessy's* racial status quo. These factors conspired not only to taint the concept of human rights, but also to support a false dichotomy between human rights and fundamental American principles.

Within a month of being introduced, the DuBois/NAACP petition's fate was sealed. The United States successfully quashed attempts by Russia and Poland to have it received by the United Nations Human Rights Commission.[26] The petition was later referred to the United Nations Commission on the Prevention of Discrimination and Protection of Minorities, where it eventually died.

By 1950, many who initially saw the United Nations as a worthwhile effort abandoned the goals and language of human rights in favor of a less controversial civil-rights agenda. For some members of the legal community, the United Nations activities detracted from "targeted litigation to advance . . . the steady dismantling of *Plessy v. Ferguson*."[27] Nevertheless, James Nabrit and the other *Bolling* lawyers saw things differently. They launched their "frontal attack on segregation" in the District of Columbia's public schools by relying, in part, on the United Nations Charter.[28]

In the District Court complaint, the plaintiffs challenged the actions of the District's public school officials as part of the "policy, practice, custom and usage of excluding . . . Negro children . . . from attendance at and denying them admission to the Sousa Junior High School and the educational opportunities afforded therein," which violated the Charter of the United Nations. The purposes of the United Nations included solving "economic, social, cultural, and humanitarian problems" and "promoting and encouraging respect for human rights and fundamental freedoms for all, without distinctions as to race, sex, language or religion." Racially segregating the District of Columbia's public schools did not "promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all," but rather was the very type of problem the United Nations was founded to address. By refusing to desegregate the District's public schools, Congress had failed to discharge its obligation to the United Nations to take "joint and separate action in co-operation with" the world body to achieve the organization's purposes.[29] The petitioners further developed these Charter-based claims in their Supreme Court brief.

First, the United Nations Charter was a United States treaty within the meaning of the Constitution. Consequently, both federal and state courts had a constitutional duty "to give effect to its provisions."[30] This claim, which rested on the text of the Constitution's Article VI, Section 2, sought to force the federal government to honor the commitments it assumed with United Nations membership. It cut through waters muddied by Cold War rhetoric and racism in the United States to hold the government to account for what the lawyers saw as unconstitutional conduct.

Second, the relevant articles of the Charter were both capable of judicial enforcement and self-executing. A hallmark of justiciability, judicial enforceability helps both to separate legal rights from other types of obligations and to mark the dividing line between matters within the purview of the judiciary and those more properly addressed by the political branches, i.e. the executive and legislative. If the relevant provisions were self-executing, then they needed no additional legislative or executive action before the individuals in whom the rights vested could enforce them. According to the *Bolling* lawyers, this determination turned on the subject matter of the treaty, which, in this case, comprised human rights and fundamental freedoms. These were subjects with a long but checkered history in American constitutional law. The judiciary had already demonstrated its ability to adjudicate these types of claims.[31]

The *Bolling* lawyers found further support for their self-executing argument in the Court's own corpus of case law. *Oyama v. California* challenged the application of California's Alien Land Law, which forbade those ineligible for citizenship from owning agricultural land. The Supreme Court held that, as applied to Mr. Oyama's minor son, the law violated the Fourteenth Amendment's equal protection guarantee, as well as his privileges and immunities of citizenship. Justices Murphy and Douglas concurred, concluding the Alien Land Law was not only unconstitutional, but also that it violated the U.N. Charter's obligation "to promote respect for and observance of, human rights and fundamental freedoms for all without distinction as race, sex, language and religion."[32] The *Bolling* lawyers cited similar cases from state and lower federal courts as additional proof that the Charter had already been treated as self-executing.[33]

The lawyers also argued, in the alternative, that even if the Charter was not self-executing, "the ratification of the Charter by the Senate of the United States and the signing of the Charter by its officially appointed representatives constitute a declaration of the Public Policy of the United States." They charged the United States with having made "a morally binding promise to the other signatories of the U.N. Charter." Therefore, they concluded, "the Charter provisions should [at the very least] serve as an aid in the interpretation of the Constitution and statutes of the United States."[34]

Third, the *Bolling* lawyers argued, if the relevant articles were properly construed, then they would "prohibit the segregation of races in free public education." They urged the Court to liberally construe Articles 55 and 56 to give effect to their objectives, which included securing to all persons basic freedoms and rights, such as the right to public education without racial discrimination. To conclude otherwise would do "violence to the high ideals of the Constitution of the United States and the Charter of the United Nations." They urged the Court to see that, in their words, "[o]ur international relations, our concepts of liberty, our belief in democracy, cannot be reconciled with government imposed racial segregation in education in the District of Columbia."[35] For these reasons, the petitioners argued, the Court had to declare this racial segregation unconstitutional as a matter of both United States law and international human rights.

Despite the force with which the *Bolling* lawyers asserted their human-rights claims, it appears that only one of the justices seriously considered them. Justice Stanley Reed asked a judicial clerk to research the "attitudes of other nations toward segregation as manifested in the evolving draft of the United Nations Declaration and the Covenant on Human Rights." The research convinced Reed that "[t]he United Nations had expressed no interest in the abolition of segregation." Consequently, Reed concluded, "'segregation' as . . . presented [in these cases] does not mean 'discrimination' to me."[36]

The absence of an unequivocal denunciation of Jim Crow as a violation of international human rights, however, was no surprise. The original inconsistencies and imperfections of the United Nations were laid bare in the clash of human-rights language and ideals with the actual practices of the United Nations's members. Professed commitments to anti-discrimination principles starkly contrasted with the realities of colonialism, occupation, annexation, apartheid,

and Jim Crow. Furthermore, the political wrangling of U.S. officials in the United Nations's bodies and proceedings not only strengthened the shield of national sovereignty, but also quashed any real hope that individuals might hold member states accountable to the Charter's basic requirements. This was a task left to individual countries because the United Nations had neither the power nor the means to police its members and enforce its rules.

In *Bolling*, a team of eight lawyers challenged Congress's use of its exclusive legislative authority as a violation of domestic and international law. The *Bolling* case is usually taught and learned as a Fifth Amendment footnote to the Fourteenth Amendment's equal protection jurisprudence. But this simple assessment of its importance loses the case's true richness and complexity. The lawyers litigated *Bolling* as a human-rights case on behalf of black schoolchildren and their parents. By seeking to use the United Nations Charter to challenge congressionally maintained racial discrimination in the District's public schools, they placed themselves within the tradition of those who sought to make racism in the United States a matter of international concern. They formed their arguments in contexts marked by a marriage of law and extra-legal activism, united in the struggle for racial justice. Their victory, in the end, was a bittersweet one: they arguably achieved their desired result, but they did so based on reasoning that reduced liberty to equality and ignored the importance of both international cooperation and the United Nations.

NOTES

1. *Plessy v. Ferguson*, 163 U.S. 537 (1896).
2. *Brown v. Board of Education*, 345 U.S. 972 (1954)
3. *Brown* (Kansas), *Briggs v. Elliot* (South Carolina), *Davis v. County School Board of Prince Edward County* (Virginia) and *Gebhart v. Belton* (Delaware);United States Constitution, Amendment XIV.
4. United States Constitution, Article I, Section 8(17) and Article VI, Section 2.
5. Richard Kluger, *Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality* (New York: Vintage Books, 1977), 508, 515, 517.
6. *Carr v. Corning*, 182 F.2d 14 (1950).
7. Kluger, *Simple Justice*, 518, 520.
8. Complaint, *Bolling, et al. v. Sharpe, et al.*, Civil Action No. 4949-50, United States District Court for the District of Columbia (filed Nov. 9, 1950), 6.
9. Brief for the Petitioners, *Bolling, et al. v. Sharpe, et al.*, No. 413, United States Supreme Court, Oct. Term, 1952, 5.
10. Kluger, *Simple Justice*, 580.
11. Petitioners' Brief, 11 (*quoting Callen v. Wilson*, 127 U.S. 540, 550 (1888)).
12. Complaint, 22.
13. Petitioners' Brief, 17–21.
14. *Ibid.*
15. *Bolling v. Sharpe*, 347 U.S. 497 (1954).
16. *Ibid.*
17. United States Constitution, Article VI, Section 2.
18. Petitioners' Brief, 55, 59–60.
19. United Nations Charter, Article 1, Section 3.
20. Gay J. McDougall, "Toward a Meaningful International Regime: The Domestic Relevance of International Efforts to Eliminate All Forms of Racial Discrimination," *Howard Law Journal* 40 (3) (Spring 1997): 571–595.
21. David Levering Lewis, *W.E.B. Du Bois: The Fight for Equality and the American Century* (New York: Henry Holt & Co., 2000), 508.
22. Martin Bauml Duberman, *Paul Robeson: A Biography* (New York: Random House, 1989), 397–98.
23. Carol Anderson, *Eyes Off the Prize: The United Nations and the African American Struggle for Human Rights, 1944–55* (New York: Cambridge University Press, 2003), 273.
24. Lewis, *W.E.B. Du Bois*, 528.
25. United Nations Charter, Article 55(a).
26. Lewis, *W.E.B. Du Bois*, 531.
27. *Ibid.*, 520.
28. Kluger, *Simple Justice*, 523.
29. Complaint, 8.
30. Petitioners' Brief, 55.
31. *Ibid.*, 56-59.
32. *Oyama v. California*, 332 U.S. 633 (1948).
33. Petitioners' Brief, 57-59.
34. *Ibid.*, 59–60.
35. *Ibid.*, 59, 61, 65.
36. Kluger, *Simple Justice*, 655.