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MUNICIPAL ADMINISTRATIVE CONSTITUTIONALISM:  
THE NEW YORK CITY COMMISSION ON  
HUMAN RIGHTS, FOREIGN POLICY,  
AND THE FIRST AMENDMENT

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The University of Natal in South Africa placed a large advertisement in the October 24, 1971 issue of the *New York Times* asking “suitably qualified persons” to apply to teach economics, social anthropology, ceramics, voice, engineering, chemistry, and computer science.<sup>1</sup> A few weeks later, the *Times* ran an ad from the University of Witswatersrand seeking lecturers in philosophy and medical sociology.<sup>2</sup> In December, a “Blue Chip Corporation” advertised for a “General Manager for its South African Subsidiary”; the candidate “[m]ust be willing to relocate to Johannesburg.”<sup>3</sup> None of these job ads mentioned race as a qualification—in fact, the “Blue Chip Corporation” claimed to be “An Equal Opportunity Employer”<sup>4</sup>—but given how restrictive South African apartheid laws were, such professional jobs were almost certainly only available to white applicants.<sup>5</sup> And since those designated as white by the South African government were less than twenty percent of the

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<sup>1</sup> Advertisement, N.Y. TIMES, Oct. 24, 1971, at E12.

<sup>2</sup> Advertisement, N.Y. TIMES, Nov. 7, 1971, at E9.

<sup>3</sup> Advertisement, N.Y. TIMES, Dec. 12, 1971, at F16.

<sup>4</sup> *Id.*

<sup>5</sup> U.N. Dep’t of Political & Sec. Council Affairs, Unit on Apartheid, Basic Facts on the Republic of South Africa and the Policy of Apartheid, at 17-23, U.N. Doc. ST/PSCA/SER.A/12 (1972) (describing how apartheid worked to “restrict opportunities for . . . advancement” for nonwhite South Africans).

country's population, South African employers turned abroad for eligible applicants.<sup>6</sup>

Anti-apartheid activists of the era saw the publication of such employment ads as evidence of the *New York Times*' complicity with South African apartheid and pointed to the paper's hypocrisy in running such ads while editorializing against South Africa's white supremacist regime. What's more, they complained, the ads violated New York City's broad Human Rights Law that, as part of its prohibition on employment discrimination, targeted job ads within the city that "directly or indirectly" discriminated on the basis of race.<sup>7</sup> This Article examines how the activists' statutory challenge to these ads precipitated a constitutional struggle in a municipal agency: how anti-apartheid activists worked with the New York City Commission on Human Rights (CCHR) to build a statutory case against the *New York Times*, how the *Times* defended itself with constitutional arguments about the CCHR's limited powers, how the CCHR asserted its own broad constitutional authority to regulate, and how New York courts ultimately balanced these statutory and constitutional arguments.

This case study builds on existing scholarship on administrative constitutionalism, kicked off almost a decade ago by Sophia Z. Lee's work on economic regulatory agencies and the Fourteenth Amendment. Lee defines administrative constitutionalism as "regulatory agencies' interpretation and implementation of constitutional law"; others have since defined the term to encompass a wider variety of administrative behavior and statutory construction.<sup>8</sup> Taken broadly, this scholarship asks us to take administrators seriously as constitutional actors, and to tease out the mix of constitutional

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<sup>6</sup> *Id.* at 3, 5.

<sup>7</sup> N.Y.C. ADMIN. CODE ch. 1, tit. B, § B1-7.0(1)(d) (1972) ("It shall be an unlawful discriminatory practice: . . . [f]or any employer or employment agency to print or circulate . . . any statement, advertisement or publication . . . which expresses, directly or indirectly, any limitation, specification or discrimination as to age, race, creed, color, national origin . . .").

<sup>8</sup> Sophia Z. Lee, *Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace, 1960 to the Present*, 96 VA. L. REV. 799, 801 (2010). For a broader take that includes legislative action, see WILLIAM N. ESKRIDGE JR. & JOHN FERREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION 33 (2010), which defines administrative constitutionalism as "the process by which legislative and executive officials, America's primary governmental norm entrepreneurs, advance new fundamental principles and policies." For taxonomies of the field, see Sophia Z. Lee, *From the History to the Theory of Administrative Constitutionalism*, in ADMINISTRATIVE LAW FROM THE INSIDE OUT: ESSAYS ON THEMES IN THE WORK OF JERRY L. MASHAW 109, 109 & n.1 (Nicholas R. Parrillo ed., 2017), which calls for more precision in discussions of "administrative constitutionalism," and Gillian Metzger, *Administrative Constitutionalism*, 91 TEX. L. REV. 1897, 1903-15 (2013).

and statutory interpretation, and of legal, intellectual, and political motives involved in administrative decisionmaking.<sup>9</sup>

This article builds on and complicates this scholarship in several ways. First, as Bertrall Ross notes, administrative constitutionalism differs from regular (read: judicial) constitutionalism at least in part because of the way political pressures and outside groups are built into the administrative state.<sup>10</sup> And as Karen Tani points out, we need more work on the granular details of administrative constitutionalism and on the stakes involved.<sup>11</sup> This particular case study of anti-apartheid activism at a municipal commission describes the winners and losers in a fight over racial discrimination and demonstrates how the municipal commission context, and the presence of external groups, mattered. Here agency officials worked with anti-apartheid groups and their lawyers to coordinate legal and constitutional strategies. Activists drew on the CCHR's enforcement authority while the always under-resourced CCHR likely benefited from the lawyering help.

Second, while most scholarship on administrative constitutionalism has focused on federal agencies, little attention has been paid to state and local

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<sup>9</sup> See, e.g., SOPHIA Z. LEE, *THE WORKPLACE CONSTITUTION: FROM THE NEW DEAL TO THE NEW RIGHT* 3-5, 158-67 (2014) (examining Fourteenth Amendment interpretation by officials at the National Labor Relations Board, the Federal Communications Commission, and the Federal Power Commission after the New Deal); Kristin A. Collins, *Bureaucracy as the Border: Administrative Law and the Citizen Family*, 66 DUKE L.J. 1727, 1729 (2017) (examining bureaucrats' role in shaping immigration and naturalization law in the twentieth century); Anjali S. Dalal, *Shadow Administrative Constitutionalism and the Creation of Surveillance Culture*, 2014 MICH. ST. L. REV. 59, 64 (examining how contemporary national security officials have been free to develop their own rules and norms around privacy and surveillance); Anuj C. Desai, *Wiretapping Before the Wires: The Post Office and the Birth of Communications Privacy*, 60 STAN. L. REV. 553, 557-58 (2007) (demonstrating how postal officials' interpretations of the Fourth Amendment in the eighteenth and nineteenth centuries were later adopted by courts); Jeremy K. Kessler, *The Administrative Origins of Modern Civil Liberties Law*, 114 COLUM. L. REV. 1083, 1085 (2014) (focusing on the role of Progressive-era executive branch lawyers in crafting civil liberties law); Reuel E. Schiller, *Free Speech and Expertise: Administrative Censorship and the Birth of the Modern First Amendment*, 86 VA. L. REV. 1, 3-4 (2000) (looking at how state and federal administrators in the early twentieth century interpreted the First Amendment to allow significant regulation of speech); Karen M. Tani, *Administrative Equal Protection: Federalism, the Fourteenth Amendment, and the Rights of the Poor*, 100 CORNELL L. REV. 825, 828-30 (2015) (describing Fourteenth Amendment interpretation by federal bureaucrats administering welfare programs in the middle of the twentieth century).

<sup>10</sup> Bertrall L. Ross II, *Administrative Constitutionalism as Popular Constitutionalism*, 167 U. PA. L. REV. 1783, 1806-09 (2019).

<sup>11</sup> See Karen M. Tani, *Administrative Constitutionalism at the "Borders of Belonging": Drawing on History to Expand the Archive and Change the Lens*, 167 U. PA. L. REV. 1603, 1628 (2019) (calling on scholars "to consider, as systematically as possible, who has reaped the benefits of administrative constitutionalism and who has borne the burdens"); Tani, *supra* note 9, at 830 (asserting that "we badly need additional empirical work, especially on constitutional interpretations that intersect with the theories and practices of American federalism").

agencies' constitutional engagement.<sup>12</sup> While scholars have fruitfully explored dynamics of administrative federalism, their focus often remains on the federal courts, or the activities of federal bureaucrats interacting with state and local governments.<sup>13</sup> If we broaden our focus, however, we can see local officials grappling with some of the same constitutional questions as federal ones—for example, the extent to which the First Amendment limited the CCHR's ability to regulate South African advertising. And in other ways, the institutional dynamics of state and local politics are markedly different from those at the federal level, and state and local administrative law varies accordingly.<sup>14</sup> More specifically, state and local antidiscrimination commissions often operate in ways that differ from federal ones (early CCHR commissioners, for example, volunteered their time<sup>15</sup>), but there is surprisingly little current scholarship on how they operate as institutions and how they grapple with constitutional questions.<sup>16</sup> And unlike work on

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<sup>12</sup> Notable exceptions include Schiller, *supra* note 9, and Katherine Shaw, *State Administrative Constitutionalism*, 69 ARK. L. REV. 527, 528 (2016), which turns needed attention to the largely overlooked practice of state bureaucrats engaging in constitutional interpretation.

<sup>13</sup> See Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023, 2028 (2008) (arguing that “the Court is unwilling to curb Congress on federalism grounds and is instead addressing federalism concerns through an administrative law framework”); Tani, *supra* note 9, at 837-43 (tying together state and federal policy to examine how federal officials developed a theory of “administrative equal protection”); Shaw, *supra* note 12, at 530-31 (describing how “state agencies figure in cooperative federalism analyses primarily as conduits for state interests in federal regulatory processes”).

<sup>14</sup> Scholarship on state approaches to *Chevron* deference makes this clear. See Aaron Saiger, *Chevron and Deference in State Administrative Law*, 83 FORDHAM L. REV. 555, 560-70 (2014) (explaining how institutional factors are behind the wide variety of state *Chevron* applications).

<sup>15</sup> See N.Y.C. COMM'N ON HUMAN RIGHTS, THE CHALLENGE OF EQUALITY: THE WORK OF THE NEW YORK CITY COMMISSION ON HUMAN RIGHTS 1970-1977, at 79 (1977) (describing how, prior to a 1973 revision of the authorizing law, the CCHR was required to use “unpaid, lay, volunteer Commissioners . . . as hearing officers. The need to coordinate the schedules of two volunteer hearing officers, each with his own full-time professional responsibilities that necessarily limited time available to the Commission, produced serious scheduling delays.”).

<sup>16</sup> See RONALD A. KRAUSS, STATE CIVIL RIGHTS AGENCIES: THE UNFULFILLED PROMISE 27 (1986) (“There is no doubt . . . that the establishment and maintenance of state civil rights agencies has secured in large part the legal framework that has the capability to protect against illegal discrimination.”); David Freeman Engstrom, *The Lost Origins of American Fair Employment Law: Regulatory Choice and the Making of Modern Civil Rights, 1943-1972*, 63 STAN. L. REV. 1071, 1074-77 (2011) (examining the development of state fair employment commissions in the post-World War II era); Burton Levy, *The Bureaucracy of Race: Enforcement of Civil Rights Laws and Its Impact on People, Process, and Organization*, 2 J. BLACK STUD. 77 (1971) (examining the operation of nondiscrimination agencies at various levels of government); Kenneth L. Saunders & Hyo Eun (April) Bang, *A Historical Perspective on U.S. Human Rights Commissions* 4-10, Executive Session Papers (Human Rights Commissions and Criminal Justice Executive Session Paper No. 3 2007) (offering a brief comparative history of city, county, and state human rights commissions). A small number of studies have examined the work of the New York City Commission on Human Rights. See GERALD BENJAMIN, RACE RELATIONS AND THE NEW YORK CITY COMMISSION ON HUMAN RIGHTS (1974) (offering a critical history of the CCHR); N.Y.C. COMM'N ON HUMAN RIGHTS, *supra* note

administrative constitutionalism in federal agencies that explores how administrators have relied on the Fourteenth Amendment's Equal Protection Clause,<sup>17</sup> states' expansive police powers allow states and localities to pass robust antidiscrimination statutes that go beyond the Equal Protection Clause to cover a wide array of public and private action. In the case of the CCHR, a key issue was not whether the Equal Protection Clause imposed affirmative obligations but rather how far a municipal agency with broad statutory authority could go to regulate matters arguably reserved to the federal government by the Constitution. While many have examined how courts have parsed the federal government's preemption of foreign affairs issues,<sup>18</sup> there is little scholarship on how local commissions grapple with such questions. The Constitution protects both the federal government's control over foreign affairs and states' and localities' control over their internal affairs. Here the CCHR considered the scope of federal foreign affairs authority as it defended its own authority to regulate matters it saw as profoundly local.

The CCHR's expansive local powers were attractive to activists who had more enthusiasm than authority. Recognizing the White House's exclusive control over foreign policy, and the Nixon administration's move toward closer ties with South Africa,<sup>19</sup> anti-apartheid activists in the early 1970s explicitly sought alternative paths—including federal agency challenges and litigation in state and federal courts—to challenge American institutions' relationships with South Africa. As pioneering human rights lawyer Gay McDougall later recalled, “some of the early efforts to use the domestic courts

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15 (cataloging developments in the CCHR's structure and jurisdiction); Committee on Civil Rights, *It Is Time to Enforce the Law: A Report on Fulfilling the Promise of the New York City Human Rights Law*, 57 REC. ASS'N B. CITY N.Y. 235, 236 (2002) (cataloging the CCHR's deficiencies and concluding that “it is impossible to prevent and remedy discrimination effectively unless the tools employed in the effort include a sustained commitment to confront discrimination as a law enforcement problem as serious as any other”); Michael H. Schill, *Local Enforcement of Laws Prohibiting Discrimination in Housing: The New York City Human Rights Commission*, 23 FORDHAM URB. L.J. 991, 991 (1996) (evaluating the CCHR's role in combating housing discrimination); Marta B. Varela, *The First Forty Years of the Commission on Human Rights*, 23 FORDHAM URB. L.J. 983 (1995) (providing a brief overview of the CCHR's statutory authority over time); Eleanor Holmes Norton, Book Review, 3 HOFSTRA L. REV. 523, 524 (1975) (critiquing the conclusions of GERALD BENJAMIN, RACE RELATIONS AND THE NEW YORK CITY COMMISSION ON HUMAN RIGHTS (1974)).

17 See generally LEE, *supra* note 9; Lee, *supra* note 8.

18 See, e.g., LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 149-70 (2d ed. 1996) (discussing generally “the states and foreign affairs”); Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649, 721-25 (2000) (discussing dormant foreign affairs preemption); Jack L. Goldsmith, *The New Formalism in United States Foreign Relations Law*, 70 U. COLO. L. REV. 1395, 1410, 1414-18 (1999) (criticizing federal courts' ability to determine when foreign relations are at stake); Peter J. Spiro, Note, *State and Local Anti-South Africa Action as an Intrusion upon the Federal Power in Foreign Affairs*, 72 VA. L. REV. 813, 842-46 (1986) (describing the constitutional limits on state activities touching foreign affairs).

19 ALEX THOMSON, U.S. FOREIGN POLICY TOWARDS APARTHEID SOUTH AFRICA, 1948-1994: CONFLICT OF INTERESTS 74-78 (2008).

to enforce human rights norms were attempts to sever ties between the apartheid system and U.S. entities.”<sup>20</sup> Challenging the actions of the *New York Times* in New York City, under New York City’s Human Rights Law, seemed like one way to address the issue of apartheid while avoiding the White House’s exclusive control over foreign policy. The legal issues proved trickier than activists had hoped, however. Was the CCHR authorized to root out all discrimination within state boundaries, regardless of the source? Or did striking a blow, however local, against South Africa’s apartheid regime necessarily constitute foreign policy? How much deference to administrative expertise was appropriate when matters touched on constitutional questions, and when local commissioners were less expert? Existing scholarship on the constitutional questions in this case has largely focused on judges’ resistance to addressing human rights policy through domestic civil rights litigation and judges’ questionable use of the act of state doctrine as an avoidance technique.<sup>21</sup> Much less attention, however, has been paid to how lawyers at and for the CCHR, spurred by anti-apartheid activists and motivated by human rights concerns, used statutory and constitutional law to defend the Commission’s right to regulate.

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<sup>20</sup> Vanita Gupta, *Blazing a Path from Civil Rights to Human Rights: The Pioneering Career of Gay McDougall*, in BRINGING HUMAN RIGHTS HOME: A HISTORY OF HUMAN RIGHTS IN THE UNITED STATES 151 (Cynthia Soohoo, Catherine Albisa & Martha F. Davis eds., 2007) (quotation marks omitted).

<sup>21</sup> See, e.g., Goler Teal Butcher, *Southern African Issues in United States Courts*, 26 HOW. L.J. 601, 637 (1983) (“[T]he basic lesson learned from this series of cases involving southern African issues is that United States tribunals, judicial or administrative, were not inclined to deal with those novel actions whose foreign policy and political ramifications on one hand and complex legal issues on the other could be avoided through traditional judicial escape routes.”); Richard B. Lillich, *The Role of Domestic Courts in Promoting International Human Rights Norms*, 24 N.Y.L. SCH. L. REV. 153, 155 (1978) (noting that “the courts have invoked a variety of techniques to bypass actual determination of the substantive issues presented to them”); W. Michael Reisman, *Foreign Affairs and the Several States: Outline of a Theory for Decision*, in AM. SOC’Y OF INT’L LAW, PROCEEDINGS OF THE 71ST ANNUAL MEETING 182, 188 (1977) (arguing that the Court of Appeals’ “decision has an extraordinary number of errors of international law and is particularly baffling in that it relies on an act of state doctrine and certain earlier decisions which have now been reversed and, moreover, do not apply to the facts of the case”); Joseph A. Rideout, *Recent Decisions: Jurisdiction*, 15 VA. J. INT’L L. 467, 480 (1975) (calling the New York Supreme Court’s act of state reasoning “a novel and unwarranted application of a well-established doctrine”); Peter Q. Montori, Note, *The Act of State Doctrine Applied to Discrimination in Employment Advertising*, 1 W. NEW ENG. L. REV. 371, 373 (1978) (“Reliance on the act of state doctrine . . . demonstrates an acute concern for the motivations supposedly underlying the complaint.”); Terri E. Simon, Comment, *The Act of State Doctrine: International Consensus and Public Policy Considerations*, 8 N.Y.U. J. INT’L L. & POL. 283, 306 (1975) (“By its wooden application of the act of state doctrine in a novel situation, the New York Supreme Court has erected a serious obstacle to enforcement of anti-discrimination legislation in any case where the interests of a foreign government are involved.”); Renee J. Sobel, Comment, *New York Times Co. v. City of New York Commission on Human Rights: Act of State Misapplied*, 44 BROOK. L. REV. 175, 186 (1977) (noting that the New York Court of Appeals had “for the first time extended the act of state doctrine to shield from judicial intervention the local acts of a domestic corporation”).

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The *New York Times*' job ads were flagged by the American Committee on Africa (ACOA), the leading American anti-apartheid group in the 1960s and early 1970s. ACOA's efforts in this period ranged widely, from disseminating information on conditions in South Africa, to working with civil rights groups to organize demonstrations against banks and businesses invested in South Africa, to pushing back on U.S. involvement in South Africa.<sup>22</sup> Advertising was one target of ACOA's many efforts to make it difficult for South Africa to entice American tourists; in 1969 ACOA had successfully pressured a few publications to refuse ads for South African Airways (SAA), and had convinced the Civil Aeronautics Board that SAA ads that were silent as to apartheid restrictions on tourist sites were in fact deceptive.<sup>23</sup>

In 1970 and 1971, ACOA staffers repeatedly wrote to the *Times* to protest that its publication of South African job ads violated state and city antidiscrimination laws (which closely resembled each other).<sup>24</sup> New York City's Human Rights Law barred employment ads that "express[], directly or indirectly, any limitation, specification or discrimination as to age, race, creed, color, national origin or sex, or any intent to make any such limitation, specification or discrimination, unless based upon a bona fide occupational qualification."<sup>25</sup> Although nothing in the ads explicitly stated that the jobs in question were reserved for white applicants, ACOA staffers argued that

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<sup>22</sup> DONALD R. CULVERSON, *CONTESTING APARTHEID: U.S. ACTIVISM, 1960-1987*, at 43-50 (1999); ROBERT KINLOCH MASSIE, *LOOSING THE BONDS: THE UNITED STATES AND SOUTH AFRICA IN THE APARTHEID YEARS* (1997); FRANCIS NJUBI NESBITT, *RACE FOR SANCTIONS: AFRICAN AMERICANS AGAINST APARTHEID, 1946-1994* (2004); David Hostetter, "An International Alliance of People of All Nations Against Racism": *Nonviolence and Solidarity in the Antiapartheid Activism of the American Committee on Africa, 1952-1965*, 32 *PEACE & CHANGE* 134 (2007); Joanna L. Grisinger, "South Africa is the Mississippi of the World": *Anti-Apartheid Activism Through Domestic Civil Rights Law*, L. & HIST. REV. (forthcoming 2020) (manuscript at 38) (on file with author).

<sup>23</sup> "Summary: Immediate Results of South African Airways Campaign" (July 22, 1969), in *Records of the American Committee on Africa, Part 2: Correspondence and Subject Files on South Africa, 1952-1985* (on file with the Amistad Research Center, Tulane University, Reel 9, Box 104, Folder 14); see Grisinger, *supra* note 22, at 38-39 ("Ads welcoming all Americans were deceptive, Diggs protested . . . [O]n this matter, at least, the CAB was willing to act.").

<sup>24</sup> Letter from Janet M. Hooper, Executive Associate, ACOA, to Editor, Advertising Acceptability Department, *New York Times* (Aug. 12, 1970), in *Douglas Wachholz Collection on the Lawyers' Committee for Civil Rights Under Law Africa Project* [hereinafter *Wachholz Papers*] (on file with the Michigan State University Libraries, Special Collections, MSS 415, Box 3, Folder 4); Letter from Janet M. Hooper to J.J. Furey, Advertising Acceptability Department, *New York Times* (July 2, 1971), in *Wachholz Papers, supra* (MSS 415, Box 3, Folder 4); Letter from Janet M. Hooper to J.J. Furey (Sept 1, 1971) in *Wachholz Papers, supra* (MSS 415, Box 3, Folder 4); Letter from Richard W. Leonard, Executive Assistant, ACOA, to J.J. Furey (Nov. 2, 1971), in *Wachholz Papers, supra* (MSS 415, Box 3, Folder 4); see Act of July 16, 1965, ch. 851, § 3, 1965 N.Y. Laws 2037, 2038-39; N.Y.C. ADMIN. CODE ch. 1, tit. B, § B1-7.0(1)(d) (1972).

<sup>25</sup> N.Y.C. ADMIN. CODE ch. 1, tit. B, § B1-7.0(1)(d) (1972).

the location itself indirectly expressed race discrimination, given South Africa's white supremacist regime and New Yorkers' public knowledge thereof. And municipal law held liable not just the employer publishing or circulating such ads, but also anyone aiding such behavior<sup>26</sup>—so the *Times*, they argued, was liable.

However, the *Times* was generally dismissive of ACOA's written requests.<sup>27</sup> A phone call in October 1971 did no more; the head of the *Times*' Advertising Acceptability Department suggested to an ACOA staffer that if the city and state human rights agencies responsible for enforcing civil rights laws (copied on some of ACOA's correspondence) had not acted, there was no problem.<sup>28</sup> ACOA's efforts intensified when lawyers from the Lawyers' Committee for Civil Rights Under Law (LCCRUL) got involved on ACOA's behalf. The LCCRUL, founded in 1963 when the Kennedy Administration asked prominent law firms to get involved in domestic civil rights litigation, had a small Southern Africa Project that assisted lawyers in South Africa and managed litigation of Southern Africa-related matters in the United States.<sup>29</sup> Peter J. Connell, director of the LCCRUL's Southern Africa Project, wrote to *Times* publisher Arthur Ochs Sulzberger in May 1972 that agreeing to cease publication of such ads was obviously the right decision. It "would bring the New York Times' advertising practices into conformity with applicable state and municipal law; would be simple to administer; would not involve the broad imposition of value judgements in the advertisement screening process; and would obviate the need to pursue relief before the Human Rights Commission."<sup>30</sup> The *Times* declined; as David S. Tatel of the LCCRUL surmised, it was "probably on the basis that such compliance could have been misconstrued as a step toward bringing the advertising policy of the *Times*

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<sup>26</sup> *Id.* § B1-7.0(6).

<sup>27</sup> See Letter from J.J. Furey to Janet M. Hooper (July 6, 1971), in Wachholz Papers, *supra* note 24 (MSS 415, Box 3, Folder 4); Letter from J.J. Furey to Janet M. Hooper (Aug. 17, 1970), in Wachholz Papers, *supra* note 24 (MSS 415, Box 3, Folder 4).

<sup>28</sup> Notes of K.W. on Phone Conversation with J.J. Furey (Oct. 4, 1971), in Wachholz Papers, *supra* note 24 (MSS 415, Box 2, Folder 8).

<sup>29</sup> ANN GARITY CONNELL, THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW: THE MAKING OF A PUBLIC INTEREST LAW GROUP 214-20 (2003); LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, 10 YEAR REPORT 96-100 (1973); Howard Tolley, Jr., *Interest Group Litigation to Enforce Human Rights*, 105 POL. SCI. Q. 617, 620 (1990); Myra Ann Houser, *Lawyering Against Apartheid: The Southern Africa Project of the Lawyers' Committee for Civil Rights Under Law, 1967-1994* (May 2014) (unpublished Ph.D. dissertation, Howard University) (on file with author).

<sup>30</sup> Letter from Peter J. Connell, Exec. Dir., Lawyers' Comm. for Civil Rights Under Law, to Arthur Ochs Sulzberger, Publisher, N.Y. Times, at 2 (May 15, 1972), in Gay McDougall Papers, 1967-1999, Series I: Lawyers' Committee for Civil Rights Under Law Southern Africa Project, Subseries I.3: Case Files [hereinafter McDougall Papers] (on file with the Columbia University Rare Book and Manuscript Library, HR 016, Box 45, Folder 4).

into line with its editorial policy.”<sup>31</sup> This wall between advertising and editorial content was, of course, the source of activists’ concern.

ACOA and its lawyers then turned to the City Commission on Human Rights, where officials had already tried to stop South African apartheid from touching New Yorkers. In 1969 CCHR officials had met informally with SAA and South African Tourist Corporation representatives over allegations of discrimination in South African travel arrangements.<sup>32</sup> The next year, the CCHR’s General Counsel warned an employment agency against placing ads for positions in South Africa: “Although no limitation is stated in the ad, it is obvious that South Africa’s racial policies will exclude from consideration any black person, should one apply.”<sup>33</sup> And in June 1972, the CCHR filed a complaint against a handful of travel businesses promoting South African travel on the grounds that they were violating the New York City Human Rights Law by advertising segregated tourism.<sup>34</sup> CCHR chair Eleanor Holmes Norton had earlier reflected in correspondence with ACOA that since the various travel and employment ads they had flagged did not include explicitly discriminatory language, “any legal action which might be feasible will likely have to be based upon a broad and innovative interpretation of our statute.”<sup>35</sup> However, the CCHR was game. As Norton argued when filing the complaint:

I find it disgraceful that the most outright racist country in the world is allowed to peddle its wares here unchallenged. New Yorkers alone cannot force the Republic of South Africa to change her inhumane laws, but we must certainly do what we can to prevent that Republic from profiting at our expense.<sup>36</sup>

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<sup>31</sup> Memorandum from David S. Tatel to Co-Chairmen of the Lawyers’ Comm. for Civil Rights Under Law 2 (Oct. 19, 1972), in McDougall Papers, *supra* note 30 (HR 016, Box 235, Folder 1).

<sup>32</sup> Applicant’s Exhibit 11 at 2, South African Airways, C.A.B. Docket No. 24944, in Selected Docket Files, 1938–1984, Docket Section, Records of the Civil Aeronautics Board, Record Group 197 (on file with the National Archives and Records Administration, College Park, MD, Box 994). The CCHR declined to pursue this complaint.

<sup>33</sup> Letter of Franklin E. White, Gen. Counsel, CCHR, to Alan Redfield, Remer-Ribolow Emp’t Agency (Sept. 15, 1970), Case No. 5787-PA (on file with the New York City Municipal Archives, Commission on Human Rights Collection [hereinafter NYCMA], Box 7055970, Folder 1). However, the State Division of Human Rights appeared skeptical that the publication of the ad violated the State Human Rights Law. Letter from Florence V. Lucas, Assistant Comm’r, N.Y. State Div. of Human Rights, to Janet Hooper, Exec. Assistant, ACOA (n.d.) (on file with NYCMA, Box 7055970, Folder 1).

<sup>34</sup> Complaint, Kuoni Travel, Inc., No. 5627-PA (City of N.Y. Comm’n on Human Rights June 5, 1972), in McDougall Papers, *supra* note 30 (HR 016, Box 103, Folder 9); *see also* N.Y.C. ADMIN. CODE ch. 1, tit. B, § B1-7.0(2) (1972).

<sup>35</sup> Letter from Eleanor Holmes Norton, Chair, to Richard W. Leonard, Exec. Assistant, ACOA (Dec. 22, 1971), in Wachholz Papers, *supra* note 24 (MSS 415, Box 2, Folder 8).

<sup>36</sup> *Mrs. Norton Scores 8 for Travel Bigs*, N.Y. AMSTERDAM NEWS, June 17, 1972, at B8 (quotation marks omitted).

In October 1972, lawyers from LCCRUL representing ACOA, Judge William H. Booth (the former chair of the CCHR and the then-current president of ACOA), the African Heritage Studies Association, and One Hundred Black Men filed a formal complaint with the CCHR, asking the Commission to order the *Times* to cease and desist publishing such ads.<sup>37</sup> This arena made sense: “While the New York City Human Rights Commission may not have the legal authority to compel South Africa employers to desist from discrimination in their country, it certainly has the authority—and the responsibility—to assure [sic] that recruitment efforts which take place in New York City comply with the city’s civil rights laws.”<sup>38</sup> By March 1973, the tourism complaint had fizzled out, but the CCHR found probable cause that the *Times* “has engaged in or is engaging in the unlawful discriminatory practice complained of” and ordered a conciliation hearing.<sup>39</sup>

Lawyers for the *Times* moved to stop the proceedings and dismiss the complaint. Prominent First Amendment lawyer Floyd Abrams, representing the *Times*, wrote to Norton arguing that the CCHR had no authority to act, “because it would constitute both an intrusion by the city into the foreign affairs of the United States, and—more importantly to us—a violation of the First Amendment.”<sup>40</sup> On the First Amendment point, the *Times* protested the CCHR’s claim of authority to tell a newspaper what it could and could not publish. Since nothing in the text of the ads said anything explicit about preferring white applicants, the idea that a reference to “South Africa” was implicitly discriminatory placed an “unconstitutional *burden*” on the *Times* to review each ad or suffer consequences.<sup>41</sup> As the *Times* argued: “Any action of the Commission in requiring newspapers to screen employment advertisements at their peril simply cannot be squared with the First Amendment.”<sup>42</sup> During the hearing on the motion to dismiss, Abrams claimed that the words “South Africa” could not be deemed discriminatory;

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<sup>37</sup> See Complaint, Am. Comm. on Africa, No. 5787-PA (City of New York Comm’n on Human Rights Oct. 12, 1972), in McDougall Papers, *supra* note 30 (HR 016, Box 45, Folder 6).

<sup>38</sup> Background Information at 5 (n.d.), in McDougall Papers, *supra* note 30 (HR 016, Box 235, Folder 1).

<sup>39</sup> Determination and Order After Investigation, Am. Comm. on Africa, No. 5787-PA (City of N.Y. Comm’n on Human Rights Mar. 29, 1973), in McDougall Papers, *supra* note 30 (HR 016, Box 45, Folder 4). Lawyers at the CCHR also acknowledged that targeting individual advertisers only went so far; “[i]f, however, we could prevent *publishers* from publishing such ads, regardless of the source, under an aiding & abetting theory, we could have a broader effect.” Memorandum of Jane [Adams] to Bev [Gross], at 2 (Mar. 16, 1973) (on file with NYCMA, Box 7055970, Folder 5).

<sup>40</sup> Letter from Floyd Abrams to Eleanor Holmes Norton, Chair, New York City Commission on Human Rights, at 1 (May 21, 1973) (on file with NYCMA, Box 7055970, Folder 5).

<sup>41</sup> Memorandum in Support of Motion to Dismiss the Complaint at 21, Am. Comm. on Africa, No. 5787-PA (City of N.Y. Comm’n on Human Rights May 21, 1973), in McDougall Papers, *supra* note 30 (HR 016, Box 45, Folder 4).

<sup>42</sup> *Id.*

“there is simply no way that The Times or the press of this country can cope with a standard of law such as that sets forth.”<sup>43</sup> Which other countries discriminated? Against whom? And when did law on the books differ from law in practice? As Abrams explained, “surely one would have to know what in fact is the practice at this University in South Africa as to who it will hire to teach the cello. Surely this is not an acceptable burden for The New York Times to go through, or for the press to go through in general.”<sup>44</sup> Although the newspaper did already provide for some limited review of the ads, what the CCHR was demanding would, they argued, go well beyond the *Times*’ existing practices. *Times* policy excluded ads that (among other disqualifying characteristics) “fail[] to comply with its widely accepted high standards of decency and dignity” or that “discriminate on racial or religious grounds.”<sup>45</sup> Staff in the Advertising Acceptability Department reviewed those ads deemed questionable and vetted ads for “taste” (for example, the *Times* would only advertise the film “Deep Throat” as “Throat”).<sup>46</sup> Evaluating a country’s practices would require much more, however.

On the foreign affairs question, the *Times* argued that a hearing on these ads by a municipal commission would be “an unconstitutional interference by a city with the foreign policy of the United States.”<sup>47</sup> Complainants, they charged, were anti-apartheid activists who were really more concerned with South Africa’s employment discrimination than with the specific ads printed in New York City. Calling the suit a “subterfuge to avoid the South African Government’s immunity,” the *Times* argued that “the action is fundamentally an inquiry into the employment policy of the government of South Africa. Such an inquiry cannot validly be undertaken.”<sup>48</sup> And an order by the CCHR would be an act of foreign policy, something reserved to the federal government by the Constitution. The *Times* relied on *Zschernig v. Miller*, in which the Supreme Court had rejected an Oregon inheritance law that barred nonresident aliens from inheriting property unless their own country offered a reciprocal right to inherit. The Court found that this law, which required

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<sup>43</sup> Transcript of Hearing dated June 6, 1973, Jan. 14, 1974, and Jan. 31, 1974, reproduced in Record on Appeal at 68, *N.Y. Times Co. v. City of N.Y. Comm’n on Human Rights*, 374 N.Y.S.2d 9 (N.Y. App. Div. 1975) (No. 11244-1974) [hereinafter CCHR Hearing Transcript], in McDougall Papers, *supra* note 30 (HR 016, Box 187, Folder 16).

<sup>44</sup> *Id.* at 69.

<sup>45</sup> New York Times, Standards of Advertising Acceptability at 2, 5, in McDougall Papers, *supra* note 30 (HR 016, Box 187, Folder 2).

<sup>46</sup> Memorandum to File from Rod Boggs at 1 (May 1, 1973), in Wachholz Papers, *supra* note 24 (MSS 415, Box 2, Folder 8).

<sup>47</sup> Memorandum in Support of Motion to Dismiss the Complaint at 1, Am. Comm. on Africa, No. 5787-PA (City of N.Y. Comm’n on Human Rights May 21, 1973), in McDougall Papers, *supra* note 30 (HR 016, Box 45, Folder 4).

<sup>48</sup> *Id.* at 15-16 & n.\*.

Oregon courts to delve deeply into the law of foreign countries, was “an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress.”<sup>49</sup> Although simply referring to foreign law, or taking actions with “some incidental or indirect effect in foreign countries,” was acceptable,<sup>50</sup> the Oregon statute “seems to make unavoidable judicial criticism of nations established on a more authoritarian basis than our own.”<sup>51</sup> Thus, the Court held, “its great potential for disruption or embarrassment makes us hesitate to place it in the category of a diplomatic bagatelle.”<sup>52</sup> A municipal commission evaluating the employment laws and practices of South Africa, the *Times* argued, was similarly dangerous.

Not only that, they argued, the CCHR’s inquiry into South African employment law would violate the “act of state” doctrine, a pragmatic judicial rule of restraint intended to keep nations out of each other’s affairs. The Supreme Court had declared in *Underhill v. Hernandez* that “[e]very sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory.”<sup>53</sup> The Court’s subsequent decisions in this area rejected challenges in American courts to a foreign government’s actions within that government’s own territory. (These cases included claims against a Venezuelan official who refused to give an American citizen a passport to leave the city of Bolivar;<sup>54</sup> a claim to recover land in Panama seized by the Costa Rican government;<sup>55</sup> claims to recover animal hides<sup>56</sup> and lead bullion<sup>57</sup> seized by officials in Mexico; and a claim for payments for sugar expropriated by the Cuban government.<sup>58</sup>) As the Court explained in 1964, the doctrine had “constitutional’ underpinnings” based in the idea that the constitutional separation of powers meant that courts should stay out of foreign policy matters.<sup>59</sup> The judiciary had determined “that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country’s pursuit of goals both for itself and for the community of nations as a whole in the international sphere.”<sup>60</sup> By this logic, municipal commissions should also avoid judging the acts of other

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<sup>49</sup> *Zschernig v. Miller*, 389 U.S. 429, 432 (1968).

<sup>50</sup> *Id.* at 433 (quoting *Clark v. Allen*, 331 U.S. 503, 517 (1947)).

<sup>51</sup> *Id.* at 440.

<sup>52</sup> *Id.* at 435.

<sup>53</sup> *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897).

<sup>54</sup> *See generally id.*

<sup>55</sup> *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909).

<sup>56</sup> *Oetjen v. Cent. Leather Co.*, 246 U.S. 297 (1918).

<sup>57</sup> *Ricaud v. Am. Metal Co.*, 246 U.S. 304 (1918).

<sup>58</sup> *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

<sup>59</sup> *Id.* at 423.

<sup>60</sup> *Id.*

countries. Since South African law was at the heart of the CCHR complaint, the *Times* argued, the Commission had no jurisdiction to judge it.

The *Times* drew directly on the recent decision in *South African Airways v. New York Division of Human Rights*, in which ACOA had tried and failed to harness state public accommodation law and the enforcement authority of the New York State Division on Human Rights against an airline owned by the South African government. Since the South African government made it almost impossible for Black Americans to get visas to travel to South Africa, only white passengers generally flew on SAA flights. South Africa as a sovereign entity could not be sued directly, so ACOA and New York Attorney General Louis J. Lefkowitz targeted the airline (which had waived its sovereignty in exchange for permission to fly into the United States). As Lefkowitz argued, SAA's refusal to provide transportation to passengers without South African visas meant the airline was functionally barring Black passengers from its flights.<sup>61</sup> The New York Supreme Court refused to allow New York officials to explore the matter, since the discriminatory act in question was really that of the Republic of South Africa, and the airline was bound by international passenger documentation requirements. As the court explained: "Our courts and administrative agencies have no power to act when the remedy sought calls into question the sovereign power of a foreign government."<sup>62</sup> Many were critical of the decision, suggesting that the courts were quick to dismiss SAA's own liability under New York law for fear of inserting themselves into foreign affairs.<sup>63</sup> And the court's use of the act of state doctrine here would complicate ACOA's legal strategy going forward.

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<sup>61</sup> See generally Grisinger, *supra* note 22.

<sup>62</sup> *South African Airways v. N.Y. State Div. of Human Rights*, 315 N.Y.S.2d 651, 655 (Sup. Ct. 1970); see Alona E. Evans, *Judicial Decisions*, 65 AM. J. INT'L L. 398, 403 (1971) (summarizing the *South African Airways* decision).

<sup>63</sup> See Lillich, *supra* note 21, at 156 ("[T]he court misconstrued the act of state doctrine and misapplied the concept that states may not interfere in matters of foreign affairs."); Rideout, *supra* note 21, at 481 n.50 ("[T]he court failed to distinguish among the doctrines of sovereign immunity, act of state, and federal foreign relations power. The resulting confusion and uncertainty could have been avoided by basing the decision directly on sovereign immunity grounds."); William C. Whittemore III, *Recent Decisions*, 6 J. INT'L L. & ECON. 175, 182, 185 (1971) (criticizing the Division's "failure to address itself sufficiently to the international law arguments inherent in the case" and the court's narrow interpretation and arguing that "it would seem that the Division should have had jurisdiction to raise certain questions through a public hearing concerning SAA's activities in New York State which do not directly call into question the 'foreign policy' of the Government of the Republic of South Africa"); James P. Chandler, Note, 13 HARV. INT'L L.J. 132, 135 (1972) ("[W]hile visa policy is properly within the discretion of the South African Government, commercial activity in the United States collateral to that policy is illegal insofar as it results in systematic discrimination against non-white United States citizens.").

The CCHR (which had joined the complaint as a party in May 1973<sup>64</sup>) rejected the *Times*' claims that the Constitution limited its broad statutory antidiscrimination authority. The Commission itself had been created to enforce the "declared policy of combating the practice of discrimination on the basis of race, creed, color or national origin, as a threat to our democratic institutions."<sup>65</sup> The Commission (represented here by New York City's Corporation Counsel) saw no conflict with the First Amendment; in 1973, there were very few limitations on the regulation of employment ads and other commercial speech,<sup>66</sup> and, lawyers argued, banning discrimination in job ads "is a reasonable regulation of the commercial aspects of the press."<sup>67</sup> And what the Commission was asking for was not standardless or otherwise burdensome: "It should be clear that any classified advertisement for employment in South Africa is generally understood by the management of the New York Times and its readers and [sic] intended to mean that Black people are not wanted."<sup>68</sup> Barbara Hoffman, representing the CCHR at the CCHR's hearing on the motion to dismiss, pointed out that the burden on the *Times* was minimal: South Africa's discrimination was open and notorious, distinctive, and clearly known to the *Times* (evidenced by ACOA's repeated letters telling them about it).<sup>69</sup> In addition, the only liability the *Times* faced was a cease-and-desist order barring them from publishing such ads in the future.<sup>70</sup>

The CCHR also rejected the idea that the Constitution reserved this matter to the federal government. In fact, their lawyers argued, "National policy in the area of civil rights has long favored the assumption by state and local governments of primary responsibility for protecting the civil rights of their citizens"—Title VII's relationship to state and local agencies was one example—and "the United States has a direct interest in the effective functioning of agencies such as the New York City Commission on Human Rights."<sup>71</sup> If in fact foreign policy was implicated, the CCHR was acting in concert with, not in opposition to, the federal government's anti-apartheid

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<sup>64</sup> Amended Complaint, Am. Comm. on Africa, No. 5787-PA (City of N.Y. Comm'n on Human Rights May 22, 1973), in McDougall Papers, *supra* note 30 (HR 016, Box 45, Folder 6).

<sup>65</sup> Memorandum in Opposition to Respondent's Motion to Dismiss the Complaint at 5, Am. Comm. on Africa, No. 5787-PA (City of N.Y. Comm'n on Human Rights June 2, 1973) [hereinafter CCHR Opposition Memorandum], in McDougall Papers, *supra* note 30 (HR 016, Box 45, Folder 7).

<sup>66</sup> See generally *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, (1964); *Valentine v. Chrestensen*, 316 U.S. 52 (1942).

<sup>67</sup> CCHR Opposition Memorandum, *supra* note 65, at 23.

<sup>68</sup> *Id.* at 25.

<sup>69</sup> CCHR Hearing Transcript, *supra* note 43, at 75.

<sup>70</sup> CCHR Opposition Memorandum, *supra* note 65, at 26.

<sup>71</sup> *Id.* at 10.

positions. (And that position was constitutionally required: “a treaty or formal agreement or other executive action approving South Africa’s policy of apartheid and giving South Africa the right to *discriminate against citizens of the United States and more specifically against inhabitants of the city and state of New York* would be unconstitutional under the First and Fifth Amendments.”<sup>72</sup>) It was the failure of the federal government to do *more* than speak sharply against South Africa that motivated American anti-apartheid activists.

But, lawyers for the CCHR emphasized, foreign policy was *not* implicated in this inquiry into “the discriminatory effects on New York citizens in New York City” from ads in the *Times*, a New York corporation.<sup>73</sup> The task of evaluating the consequences of apartheid within New York City was, lawyers argued, squarely within the CCHR’s jurisdiction. The use of the act of state doctrine was “similarly inappropriate” given that there was no element of extraterritoriality.<sup>74</sup> The *South African Airways* case was thus inapplicable.

Lawyers for ACOA and the other complainants echoed these arguments. Here, unlike *South African Airways*, there was no challenge to a foreign government; the act of state doctrine was thus “totally irrelevant” and the *Times*’ use of it “hopelessly transparent.”<sup>75</sup> Nor was this a matter of foreign policy, they argued. This case did not require a deep dive into conditions on the ground in South Africa (especially once the complainants amended their complaint so that claims about South African “laws and practices” became claims only about South African “laws.”<sup>76</sup>) Nor did *Zschernig* prevent the CCHR from simply reading another country’s formal laws where relevant to its own inquiry. Although the Commission would need to look at South Africa’s laws, “it is inconceivable that this reference will have any consequence for U.S. foreign policy.”<sup>77</sup> The CCHR had the authority to police discriminatory activities within New York City, and that, LCCRUL lawyers argued, was what it was attempting to do.

At the end of the hearing on the motion to dismiss, Commissioners Jerome M. Becker and Frank P. Mangino rejected the *Times*’ constitutional arguments and kept jurisdiction over the case. On the foreign affairs point, the commissioners found that “the question here relates to an alleged act solely within the control of The New York Times . . . . No foreign policy is

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<sup>72</sup> *Id.* at 11.

<sup>73</sup> *Id.* at 14.

<sup>74</sup> *Id.*

<sup>75</sup> Memorandum in Opposition to Respondent’s Motion to Dismiss at 15, 16, Am. Comm. on Africa, No. 5787-PA (City of N.Y. Comm’n on Human Rights June 2, 1973) [hereinafter Complainants’ Opposition Memorandum], in McDougall Papers, *supra* note 30 (HR 016, Box 45, Folder 4).

<sup>76</sup> Motion to Amend, Am. Comm. on Africa, No. 5787-PA (City of N.Y. Comm’n on Human Rights June 6, 1973), in McDougall Papers, *supra* note 30 (HR 016, Box 45, Folder 6).

<sup>77</sup> Complainants’ Opposition Memorandum, *supra* note 75, at 3.

involved here.”<sup>78</sup> And as to the First Amendment arguments, the Commissioners explained, “We are not questioning here the practices of the editorial policy, nor the reporting practices of the newspaper, but rather the commercial business practice of its Advertising Department.”<sup>79</sup> The First Amendment did not protect the *Times* from such regulation.

The *Times* quickly turned to the New York Supreme Court, arguing on constitutional grounds that the CCHR had no jurisdiction:

What is involved here is not the question of what policy the United States should take towards South Africa. It is, instead, whether a city is entitled to establish its own foreign policy. And—even more important to the press—what is involved here is whether a city commission may presume to impose its will as to what material may be printed in the press.<sup>80</sup>

ACOA and the other complainants, moving to intervene in the proceedings, pointed out the consequences to New Yorkers of a narrow reading of the CCHR’s jurisdiction:

Movants consider the publication of advertisements for racially segregated employment in South Africa as only one of many ways in which the racially offensive policies of South Africa reach into the United States and operate within the borders of our own country. If the Act of State doctrine is converted into an immunity bath for such domestic operations, this will seriously hamper the efforts of movants to continue to invoke the aid of the courts of this country in putting an end to what movants consider to be a variety of illegal activities occurring in this country, related to the racial policies of South Africa.<sup>81</sup>

The Commission’s action—a limited proceeding that would not affect South Africa—was thus an appropriate response to South Africa’s own policy which did affect New Yorkers.

To the contrary, the *Times* argued, calling out the words “South Africa” as an expression of discrimination “would, in and of itself, violate the doctrine of federal primacy in the foreign policy sphere previously referred to.”<sup>82</sup>

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<sup>78</sup> CCHR Hearing Transcript, *supra* note 43, at 79.

<sup>79</sup> *Id.*

<sup>80</sup> Memorandum of Petitioner The New York Times Company at 32, N.Y. Times Co. v. City of N.Y. Comm’n on Human Rights, 349 N.Y.S.2d 940 (Sup. Ct. 1973) (No. 16581/73), *in* McDougall Papers, *supra* note 30 (HR 016, Box 45, Folder 6).

<sup>81</sup> Affirmation of Peter Weiss in Support of Motion to Intervene at 2, N.Y. Times Co. v. City of N.Y. Comm’n on Human Rights, 349 N.Y.S.2d 940 (Sup. Ct. 1973) (No. 16581/73), *in* McDougall Papers, *supra* note 30 (HR 016, Box 45, Folder 6).

<sup>82</sup> Reply Memorandum of Petitioner the New York Times Company at 5, N.Y. Times Co. v. City of N.Y. Comm’n on Human Rights, 349 N.Y.S.2d 940 (Sup. Ct. 1973) (No. 16581/73), *in* McDougall Papers, *supra* note 30 (HR 016, Box 45, Folder 6).

Changing foreign policy was, they charged, what complainants and the Commission wanted to do:

The hardly disguised intent of complainants is to cause economic injury to the Republic of South Africa because of the failure of the world community, including the United States, to do so. This action is no different in principle from attempts to impose a boycott on sales of goods from, services in, or travel to the Republic of South Africa.<sup>83</sup>

Any such policy “should be adopted, if at all, on the federal level. To hold otherwise[ ] could easily result in precisely the patchwork quilt of varying and possibly inconsistent local ordinances relating to foreign affairs that federal control of foreign policy is designed to avoid.”<sup>84</sup> Boycotts were not for local commissions to manage.

The New York Supreme Court rejected the *Times*’ arguments and allowed the CCHR to continue its work. Justice Samuel J. Silverman agreed that the CCHR was not empowered to investigate South African apartheid policy—but said that was not what was happening. Here the advertisement appeared in “a New York newspaper, addressed to residents of New York, and no doubt such residents, reading the advertisement against the background of general information in this country about South Africa’s racial policies, will believe that it makes a very substantial difference whether an applicant for employment is white or black.”<sup>85</sup> The court noted that there were several open questions for a CCHR hearing to address:

what, if any, effect the publication and reading of such advertisements may have in fomenting racial discord among the citizens of New York of various races; and whether that effect is such as to be more than an unavoidable incident of an area—foreign relations—which is beyond the jurisdiction of the State or any of its political subdivisions, or whether it is so independent an evil as to fall within the general power of the State and its political subdivisions to regulate acts within their territories.<sup>86</sup>

These were exactly the kinds of questions that would be answered as the Commission moved forward.

Given this go-ahead by the court, the Commission scheduled hearings in January 1974 to delve into the messages sent by the job ads. Lawyers for the CCHR and for the complainants had coordinated strategy, with the complainants (represented by LCCRUL and joined by Peter Weiss of the

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<sup>83</sup> *Id.* at 6.

<sup>84</sup> *Id.* at 7.

<sup>85</sup> *N.Y. Times Co. v. City of N.Y. Comm’n on Human Rights*, 349 N.Y.S.2d 940, 942 (Sup. Ct. 1973).

<sup>86</sup> *Id.* at 943.

Center for Constitutional Rights, who had been president of ACOA until 1972) agreeing to find witnesses, and the lawyers at the CCHR agreeing to make sure that at least one of the commissioners at the hearing was a lawyer.<sup>87</sup>

Over two days in January, commissioners Frank Mangino and Howard Thorkelson (both lawyers) heard from witnesses from academia and the business world about what they understood the ads to mean.<sup>88</sup> The witnesses agreed that they would assume these South African employers sought only white applicants, and that as Black applicants they would not bother to apply for such jobs (nor would they want them if they got them—some testimony focused on the conditions for Black employees working in South Africa, and for interracial couples). Hope Stevens, a Black lawyer and president of the Uptown Chamber of Commerce, stated that “‘South Africa’ suggests the slogan of the South African people as reported to me over the years by the New York Times, the horse and the rider. The horse being the black man in South Africa and the rider being the white man.”<sup>89</sup> Richard Clarke, a Black executive recruiter, asked if he would recommend that Black job-seekers apply to such jobs, responded “No, not under the threat of the thought of having lost my marbles, no.”<sup>90</sup> The ad posted by the “Equal Opportunity Employer” came in for particular derision. Dr. Hugh H. Smythe, a former ambassador to Syria and Malta, suggested that such language was just in there to placate the *Times* and the United States, “but I would also know, as a black looking at that, I would be out of my mind even thinking of sending an application to that advertiser.”<sup>91</sup> Stevens suggested that such language was “absolute nonsense so far as I am concerned because anyone reading this who didn’t recognize this was a joke insofar as black persons were concerned, would be barren of any understanding of the facts as published in the New York Times for the past 35 years to my certain knowledge.”<sup>92</sup>

The Commission also heard testimony that the ads caused affirmative harm within New York City—particularly relevant given that one of the CCHR’s tasks was “[t]o foster mutual understanding and respect among all racial, religious and ethnic groups in the city of New York.”<sup>93</sup> Stevens suggested that such an ad “would suggest a sarcastic and brutal reminder of the political, social and cultural attitudes and policy of the government and

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<sup>87</sup> Memorandum to File from Rod Boggs at 2 (May 1, 1973), in Wachholz Papers, *supra* note 24 (MSS 415, Box 2, Folder 8).

<sup>88</sup> See generally CCHR Hearing Transcript, *supra* note 43.

<sup>89</sup> *Id.* at 199, 203.

<sup>90</sup> *Id.* at 197.

<sup>91</sup> *Id.* at 128.

<sup>92</sup> *Id.* at 206.

<sup>93</sup> N.Y.C. ADMIN. CODE, ch. 1, tit. B, § B1-4.0(1) (1972).

businessmen in South Africa.”<sup>94</sup> More than insulting, it was dangerous: “this kind of provocative advertising adds to our burden in peacekeeping, in maintaining order, in respect for law because it incites people to violence.”<sup>95</sup> Such an ad “would be an incitement cloaked in such disgust that a person or persons of uneven temperament might be provoked to brick throwing and other expressions of hostility.”<sup>96</sup> The danger to New Yorkers was clear.

Robert P. Smith, the manager of the *Times* Advertising Acceptability Department, expressed some concern about broadening the scope of his department’s work: “[I]f we are going to refuse advertising from South Africa because of internal policies, who knows where it would lead?”<sup>97</sup> (This argument was perhaps somewhat undercut by the subsequent testimony of ACOA executive director George Houser about the multiple edits the department had required to an anti-SAA ad that ACOA had placed in 1969.<sup>98</sup>) Certain ads the department rejected out of hand: “We won’t accept advertisements for personalized horoscopes, for matrimonial offers, for medical devices that should only be used, if at all, by a licensed practitioner.”<sup>99</sup> They did not, however, look into whether “equal opportunity employer” claims were true.<sup>100</sup>

In a closing statement, complainants’ attorney Peter Weiss called arguments about foreign policy “a bogeyman” since the matter at hand was really about “an act of a New York corporation addressed to and affecting citizens of New York.”<sup>101</sup> An order against the *New York Times* would do “exactly nothing” to change foreign policy but would “underscore one of the avowed goals of our foreign policy as exemplified by many votes of the United States in the United Nations and by other declarations made by high government officials which are in opposition to precisely the same policy of discrimination.”<sup>102</sup> The CCHR made its own post-hearing argument that this exactly was the kind of local matter over which it had authority: “While South Africa is free to maintain any internal policy it pleases, the Constitution surely does not guarantee a foreign sovereign the right to publicize its intent to discriminate or to facilitate that discrimination in New York City.”<sup>103</sup> The

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<sup>94</sup> CCHR Hearing Transcript, *supra* note 43, at 203.

<sup>95</sup> *Id.* at 204.

<sup>96</sup> *Id.* at 204-05.

<sup>97</sup> *Id.* at 151-153, 155.

<sup>98</sup> *See id.* at 170, 175-180.

<sup>99</sup> *Id.* at 156.

<sup>100</sup> *Id.* at 154.

<sup>101</sup> *Id.* at 243.

<sup>102</sup> *Id.* at 243-244.

<sup>103</sup> Post-Hearing Memorandum of the City of N.Y. Comm’n on Human Rights at 14, Am. Comm. on Africa, No. 5787-PA (City of N.Y. Comm’n on Human Rights Mar. 7, 1974), in McDougall Papers, *supra* note 30 (HR 016, Box 45, Folder 5).

*Times*, by printing the ads, had aided South African discrimination in New York City in violation of the law. And the newspaper “undermines respect for the anti-discrimination laws of this City, State, and Country and acts contrary to public policy and law” by opposing apartheid in its editorial section but promoting it in its ads.<sup>104</sup>

In response to the facts gathered at the hearing, the *Times* rejected any conclusion that the geographical location “South Africa” (which they noted was “an indispensable part of an employment advertisement”) could be itself a code word for discrimination.<sup>105</sup> Such an argument was “simply a perversion of the English language” and “so extreme as to border on the ludicrous.”<sup>106</sup> The *Times* further impugned anti-apartheid activists’ sincerity about the specific harms the ads caused in New York City. Activists’ “hardly disguised” goal was “to cause economic injury to the Republic of South Africa because of the failure of the world community, including the United States, to do so.”<sup>107</sup> What complainants were asking for, the *Times* charged, was to shut down business connections between the United States and South Africa. While Congress, or the president, could do this, a municipal commission could not.

And to read New York City’s law to ban this language would either place a huge burden on the *Times* to investigate every country’s laws or require the paper to stop running such ads. Further, they suggested, the controversial nature of the ads might be relevant for First Amendment purposes. Although most job ads clearly fell within the category of commercial speech, “the advertising in this case—and, must [sic] assuredly, the objections to it—have a distinctly political character” that deserved more protection.<sup>108</sup>

The CCHR rejected the *Times*’ arguments about the act of state doctrine, since the facts of the cases were so very different. The doctrine, attorneys argued, “has never been invoked in a case involving private parties and a government agency to preclude the enforcement of human rights derived from legislation enacted in the forum in which the action is being entertained.”<sup>109</sup> ACOA’s attorneys similarly argued that the limited relevance of South African law to the inquiry did not automatically make this a foreign policy case. Instead, “New York City has a legitimate interest and absolute

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<sup>104</sup> *Id.* at 7.

<sup>105</sup> Post-Hearing Memorandum of Respondent the New York Times at 10, Am. Comm. on Africa, No. 5787-PA (City of N.Y. Comm’n on Human Rights Mar. 7, 1974), in McDougall Papers, *supra* note 30 (HR 016, Box 45, Folder 5).

<sup>106</sup> *Id.* at 9-10.

<sup>107</sup> *Id.* at 25.

<sup>108</sup> *Id.* at 30.

<sup>109</sup> Reply Memorandum of the New York City Commission on Human Rights at 12, Am. Comm. on Africa, No. 5187-PA (City of N.Y. Comm’n on Human Rights Mar. 21, 1974), in McDougall Papers, *supra* note 30 (HR 016, Box 45, Folder 5).

right to protect its citizens from the acts of New York corporations which publish discriminatory advertising. . . . Even when there is an incidental effect upon some foreign nation, this power is clear.”<sup>110</sup> To determine otherwise “would mean states and municipalities are powerless to regulate any goods or activities within their jurisdictions which originate from outside the United States regardless of their local effect.”<sup>111</sup> This would weaken the CCHR and establish a two-track system of discrimination.

In July 1974, the Commission issued its determination that the ads expressed discrimination, and the *Times* had aided discrimination by printing them; the paper was ordered to cease and desist printing such ads in the future. The Commission remained steadfast that its regulation was constitutionally permissible. On the First Amendment point, the CCHR relied on the Supreme Court’s recent decision in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, in which the Court had upheld a similar municipal commission ban on sex-segregated employment ads. Regarding the foreign policy and act of state doctrine challenges, the Commission found it was “not precluded from examining the laws of South Africa on their face and from ascertaining that they are in force and effect to determine whether the advertisements for employment in South Africa express discrimination.”<sup>112</sup> The evidence demonstrated both that South African employment was segregated, and that

among residents of New York City, and in particular Black residents, the extensive system of racial segregation and discrimination in the Republic of South Africa is well-known. (Ironically, several of Complainants’ witnesses gave credit to Respondent The New York *Times* for establishing this notoriety.) ‘South Africa’ has come to have a denotative meaning, in the common understanding, other than its geographical reference—i.e., the principle of white supremacy expressed in laws which require racial segregation in many areas of activity and in particular in employment.<sup>113</sup>

The Commission rejected the idea that it was overreaching; instead, it argued, it was in no way stepping on the foreign affairs authority reserved to the federal government. There was no act of state present, and this was not “an intrusion by this Commission into the foreign affairs of this country.”<sup>114</sup> Ads were ads, and, “when published in New York City and addressed basically

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<sup>110</sup> Reply of Complainants American Committee on Africa, et al., to Post-Hearing Memorandum of the New York Times at 33, Am. Comm. on Africa (City of N.Y. Comm’n on Human Rights Mar. 21, 1974), in McDougall Papers, *supra* note 30 (HR 016, Box 45, Folder 5).

<sup>111</sup> *Id.* at 34.

<sup>112</sup> Am. Comm. on Africa, 13 I.L.M. 962, 963 (City of N.Y. Comm’n on Human Rights 1974).

<sup>113</sup> *Id.* at 964.

<sup>114</sup> *Id.*

to New York residents,” they were subject to regulation by New York City authorities.<sup>115</sup> This the Constitution did not bar.

CCHR chair Eleanor Holmes Norton commended the decision as “precedent-setting and eminently fair”<sup>116</sup> and ACOA and its lawyers trumpeted the victory. ACOA president Judge William H. Booth and ACOA executive director George Houser, in a joint statement, called the Commission’s order “a landmark decision in protecting the people of New York City against the intrusion of the racial discrimination of South Africa’s apartheid system. No longer will the ‘Whites Only’ laws of apartheid be exported to the employment pages of the City newspapers.”<sup>117</sup> The LCCRUL similarly made the kind of broad claims they had avoided in their legal arguments, touting the decision’s “wide-ranging implications for the South African white-minority regime’s attempts to encourage immigration of whites to that racially-divided country” in order to keep white South Africans in power and Black South Africans subordinated.<sup>118</sup> Having apparently found an approach to anti-apartheid activism free from constitutional roadblocks and stubborn bureaucrats, ACOA asked “all foes of apartheid, whether of the South African or the U.S. variety, to follow up the landmark decision of the New York City Human Rights Commission by appropriate action in other cities and states.”<sup>119</sup>

*Times* attorney Floyd Abrams, by contrast, characterized the CCHR decision as “so extreme and so extraordinary as to border on the bizarre” and successfully asked the New York Supreme Court to stay the CCHR order.<sup>120</sup> The *Times* would prevail in the New York courts going forward, as judges proved wary of both the CCHR’s statutory arguments and its constitutional ones. In October 1974, the New York Supreme Court vacated the CCHR order, in a decision that mixed statutory and constitutional concerns. Justice Nathaniel T. Helman determined that “none of the advertisements make any reference to race, and . . . the *Times* can hardly be charged from the language of the advertisements themselves with evincing an intent, directly or

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<sup>115</sup> *Id.* at 965.

<sup>116</sup> Press Release, South Africa Job Ads Show Bias Against Blacks: Landmark CCHR Order Bars Ads 2 (July 24, 1974), in Wachholz Papers, *supra* note 24 (MSS 415, Box 1, Folder 3).

<sup>117</sup> Press Release, Am. Comm. on Africa, American Committee on Africa Hails Landmark Ruling Barring South African Job Advertisements in *New York Times* 2 (July 23, 1974) [hereinafter ACOA Press Release], [http://africanactivist.msu.edu/document\\_metadata.php?objectid=32-130-BFF](http://africanactivist.msu.edu/document_metadata.php?objectid=32-130-BFF) [<https://perma.cc/9P6Z-NQ9G>] (emphasis omitted).

<sup>118</sup> Press Release, Lawyers’ Comm. for Civil Rights Under Law 3 (July 22, 1974), in McDougall Papers, *supra* note 30 (HR 016, Box 187, Folder 13).

<sup>119</sup> ACOA Press Release, *supra* note 117, at 3 (emphasis omitted).

<sup>120</sup> Affidavit [of Floyd Abrams] at 4, *N.Y. Times Co. v. City of N.Y. Comm’n on Human Rights*, 362 N.Y.S.2d 321 (Sup. Ct. 1974), in Wachholz Papers, *supra* note 24 (MSS 415, Box 1, folder labeled “Pleadings IV (Sup. Ct. – Appeal #1)”); *Times Gets Stay on Order Barring South Africa Ads*, N.Y. TIMES, July 27, 1974, at 27.

indirectly, to participate in a program of discrimination.”<sup>121</sup> The newspaper could not, thus, be held liable. The court found that the First Amendment posed no problem to the Commission’s regulation,<sup>122</sup> but expressed concern about the foreign policy questions.

Reading *South African Airways* as a case that barred complainants from indirectly attacking South African policy, the court found that here “the Commission, in effect, was questioning the employment methods and practices of a foreign government.”<sup>123</sup> This was inappropriate; “[e]conomic sanctions should be adopted, wherever necessary, on a Federal level and not by a local anti-discrimination agency which at best can only become involved in international problems far removed from the scope of its limited jurisdiction.”<sup>124</sup>

No deference was given to the CCHR’s interpretation of the evidence or the statute; instead, the court was clearly worried about the potential for mischief that a broad reading of the statute might cause. Here “the present advertisements made no reference to race or color directly or indirectly. This fact, combined with the expressed reluctance of our Courts to invade the policies of other nations, supports the position of the *Times* that no discrimination statute was violated by the newspaper.”<sup>125</sup>

The court expressed concern that the Commission was trying to stretch its jurisdiction:

For the Commission to enter every foreign area where patterns of discrimination appear by imposing restraints on the solicitation of employees based in the United States, through the medium of fair advertising, involves an assumption of jurisdiction which was certainly never contemplated by the legislative body which created the Commission.<sup>126</sup>

The Commission appeared to be meddling in matters beyond its authority and expertise.

LCCRUL attorney Douglas Wachholz privately criticized the decision, writing to Booth that Justice Helman “is in error—and even shoddy. . . . Unfortunately, I do not believe he understood the issues at all.”<sup>127</sup> One commentator noted that Justice Helman’s “myopic interpretation of anti-

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<sup>121</sup> N.Y. Times Co. v. City of N.Y. Comm’n on Human Rights, 362 N.Y.S.2d 321, 324 (Sup. Ct. 1974).

<sup>122</sup> *Id.* at 327.

<sup>123</sup> *Id.* at 325.

<sup>124</sup> *Id.* at 326.

<sup>125</sup> *Id.* at 327.

<sup>126</sup> *Id.*

<sup>127</sup> Letter from Douglas P. Wachholz to the Honorable William H. Booth, Brooklyn Criminal Court, at 1 (Dec. 2, 1974), in Wachholz Papers, *supra* note 24 (MSS 415, Box 2, Folder 8).

discrimination legislation embodies a complete disregard for the strong public policy of New York.”<sup>128</sup> However, the *Times* continued to prevail on appeal. The Supreme Court, Appellate Division, in a two-sentence opinion, concluded that “[t]he language of the advertisements is not such as to indicate an intent on the part of petitioner to participate in a program of discrimination.”<sup>129</sup> The *Times* was thus not liable.

Lawyers for the CCHR and the complainants pushed back vehemently. In moving for leave to appeal to the New York Court of Appeals, Wachholz argued, “the appellate courts have an obligation to clarify the law in this important area, and, in any event, cannot allow Justice Helman’s opinion to stand as precedent since it is in conflict with the entire body of law governing judicial deference to the findings of the City of New York Commission on Human Rights.”<sup>130</sup> On appeal, the Corporation Counsel argued on behalf of the CCHR that the New York Supreme Court had misapplied the act of state doctrine and “made no distinction . . . between a local agency impermissibly attempting to direct its jurisdiction at the discriminatory employment system of a foreign government and correctly exercising its jurisdiction over the actions of a New York corporation in New York City.”<sup>131</sup> The *Times* had failed to demonstrate exactly how the CCHR’s actions ran afoul of federal interests; “the emasculation of the enforcement of the City’s anti-discrimination laws against a local corporation, because of the incidental effect on foreign employers, would appear to be inconsistent with the federal foreign affairs policy as reflected in our Constitution and the international agreements to which we are a party.”<sup>132</sup> Pointing to New York’s own constitutionally protected powers, the Commission’s lawyers argued that courts should be loath to limit local authority unless there was a demonstrable conflict with federal authority; “the powers granted to the states under the Tenth Amendment have never been held to yield to federal foreign policy under the Supremacy clause of Article VI, Section 2 of our Constitution except in the face of inconsistent treaties, international compacts or executive agreements.”<sup>133</sup> No such conflict was present here.

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<sup>128</sup> Simon, *supra* note 21, at 306.

<sup>129</sup> N.Y. Times Co. v. City of New York Comm’n on Human Rights, 374 N.Y.S.2d 9, 10 (App. Div. 1975).

<sup>130</sup> Motion for Leave to Appeal and Affidavit [of Douglas P. Wachholz] at 3, N.Y. Times Co. v. City of N.Y. Comm’n on Human Rights, 374 N.Y.S.2d 9 (App. Div. 1975) (No. 11244/74), *in* Wachholz Papers, *supra* note 24 (MSS 415, Box 1, folder labeled “Pleadings IV (Sup. Ct. – Appeal #1)”).

<sup>131</sup> Brief of Appellant City Commission on Human Rights at 25, N.Y. Times Co. v. City of N.Y. Comm’n on Human Rights, 361 N.E.2d 963, 964 (N.Y. 1977), *in* McDougall Papers, *supra* note 30 (HR 016, Box 187, Folder 18).

<sup>132</sup> *Id.* at 29.

<sup>133</sup> *Id.* at 31.

LCCRUL lawyers raised additional constitutional claims as they pointed to the way these “insulting and provocative” ads injured Black New Yorkers.<sup>134</sup> Gesturing toward the U.S. Supreme Court’s Thirteenth Amendment jurisprudence, lawyers suggested that such ads “represent the very ‘badges and incidents of slavery’ which courts have sought to extirpate from our society.”<sup>135</sup> Both the Thirteenth Amendment and Fourteenth Amendment were invoked as the LCCRUL cited *Brown v. Board of Education* and *Jones v. Alfred H. Mayer Co.* as evidence that the Court “has specifically recognized the profound effect on black persons of the constant reminder that they are considered inferior.”<sup>136</sup>

However, the New York Court of Appeals upheld the lower courts, stating that ads “which merely refer to [South Africa] as the situs of the employment and which do not recite, on the surface, any discriminatory conditions do not express discrimination within the meaning of the New York City antidiscrimination laws.”<sup>137</sup> The court declined to consider “South Africa” as code for racial discrimination, since “mere geographical reference to the situs of employment does not carry with it an expression of discrimination, directly or indirectly; nor does the reference to geographical location necessarily imply that the prospective employer engages, in New York, in practices required, approved, or condoned by the laws of South Africa.”<sup>138</sup> Distinguishing a line of cases involving code words (“deceptive tokens added to coyly and subtly communicate discriminatory criteri[a]”), the court declined to find that “South Africa”—which provided “essential employment information that the employer may legitimately communicate to a prospective employee”—was such sleight of hand.<sup>139</sup> And if the ads did not discriminate, the *Times* could not be liable for printing them.

Like the New York Supreme Court, the New York Court of Appeals seemed troubled by the fact that the complainants, and the CCHR, were fighting the job ads as part of a broader attack on apartheid, and read their actions through that lens. The Commission had gone too far “by imposing an economic boycott of the Republic of South Africa.”<sup>140</sup> A strike against apartheid policy, however local, was beyond the Commission’s authority; the CCHR “was without jurisdiction to make and enforce its own foreign

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<sup>134</sup> Brief for Respondents/Intervenors-Appellants at 38, *N.Y. Times Co. v. City of N.Y. Comm’n on Human Rights*, 361 N.E.2d 963, 964 (N.Y. 1977), in *Wachholz Papers*, *supra* note 24 (MSS 415, Box 1, Folder 12).

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* (citing *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439-40 (1968)).

<sup>137</sup> *N.Y. Times Co. v. City of N.Y. Comm’n on Human Rights*, 361 N.E.2d 963, 964 (N.Y. 1977).

<sup>138</sup> *Id.* at 967.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 969.

policy.”<sup>141</sup> Citing *Underhill* and quoting *Zschernig*, the court stated that while state courts could “read, construe and apply the laws of a foreign country in a routine fashion, they may not launch inquiries into the righteousness of foreign law, thereby affecting ‘international relations in a persistent and subtle way.’”<sup>142</sup> Neither, then, could municipal commissions.

What did it mean to affect foreign policy? The bar the court established was quite low; in *Zschernig* the Supreme Court had worried about the Oregon inheritance law’s “great potential for disruption or embarrassment,”<sup>143</sup> but here the court referred only to “an inquiry that might have been considered offensive by the Republic of South Africa and which might have been an embarrassment to those charged with the conduct of our Nation’s foreign policy.”<sup>144</sup> Apparently any potential offense, however great or small, was enough; “experience has established that real or imagined wrongs perceived by another government may create significant international disputes, perhaps even resulting in armed conflicts.”<sup>145</sup> As the court warned, “[t]he peace and security of the United States has not been left to the whim of but one State whose actions would have consequences, perhaps dire, for all the States.”<sup>146</sup> Anti-apartheid activists were thus directed back to the federal government—and to the White House—to register their concern; the local commission path, which had earlier seemed so promising, was now decisively blocked.

One judge concurred, agreeing that “there was no prohibited expression of discrimination in the advertisements printed by the Times” but declining to reach the foreign affairs question.<sup>147</sup> Two other judges dissented, seeing the issue as one of clear domestic discrimination well within the CCHR’s authority to remedy. “South Africa,” they found, was indeed sufficient to signal discrimination: “An advertisement setting forth South Africa as the location of the employment clearly connotes, as effectively as code words, that ‘Only Whites Need Apply.’”<sup>148</sup> On the factual conclusions, they argued that the evidence presented “was more than sufficient to support its determination that the advertisements were impermissibly discriminatory and that the discrimination was so pervasive that the remedial action ordered by the commission, though broad, was within its discretion.”<sup>149</sup> Since the CCHR’s

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<sup>141</sup> *Id.* at 968.

<sup>142</sup> *Id.* (quoting *Zschernig v. Miller*, 389 U.S. 429, 440 (1968)).

<sup>143</sup> *Zschernig*, 389 U.S. at 435.

<sup>144</sup> *N.Y. Times Co.*, 361 N.E.2d at 969.

<sup>145</sup> *Id.* at 968.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 970 (Jones, J., concurring).

<sup>148</sup> *Id.* at 972 (Fuchsberg & Cooke, JJ., dissenting).

<sup>149</sup> *Id.* at 970.

decision was supported by sufficient evidence, they argued, the order should have been sustained on review.<sup>150</sup>

Nor, the dissenters argued, was the Commission preempted by any foreign affairs conflict; the *New York Times*, not South Africa, was the actor in question, and the activity had occurred within New York City. Complainants' general hostility to South African policy did not bar them from pursuing this complaint; "whatever may have been the precipitating motivation of those who originally brought this matter to the official attention of the commission, the limited conduct which was the gravamen of the proceeding before the commission here simply was not a boycott."<sup>151</sup> Targeted litigation was, after all, a well-recognized strategy by groups seeking social change.

Finally, the dissenters rejected the First Amendment arguments. While the majority had not reached these issues, the dissenters argued that the Supreme Court's recent decisions in *Bigelow v. Virginia* and *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, which extended more constitutional protections to commercial speech, nonetheless contained limitations for discriminatory ads and "cannot serve to protect the publication of discriminatory material such as that before us now."<sup>152</sup>

Lawyers at the LCCRUL were disappointed by their defeat, especially since they believed that the Court of Appeals was incorrect on both the facts and the law.<sup>153</sup> They considered their next steps, if any; they sought reargument before the New York Court of Appeals but determined that review by the U.S. Supreme Court was unlikely, given that there were independent state grounds upon which the decision rested.<sup>154</sup> Others were also critical. One observer suggested that the Court of Appeals' warning that the Commission's actions could be "dire, for all the states" was "so ridiculous that respect for the judiciary inhibits further comment on it."<sup>155</sup> Another concluded that the Court of Appeals had established a practical rule that CCHR now had to give foreign businesses more leeway than domestic ones;

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<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 973.

<sup>152</sup> *Id.* (citing *Bigelow v. Virginia*, 421 U.S. 809 (1975); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976)).

<sup>153</sup> Letter from T. Michael Peay, Dir., S. Africa Project, to George Houser, Exec. Dir., ACOA (Mar. 2, 1977), in McDougall Papers, *supra* note 30 (HR 016, Box 45, Folder 10); Memorandum from JoAnn Dolan to T. Michael Peay at 2 (Mar. 18, 1977), in McDougall Papers, *supra* note 30 (HR 016, Box 235, Folder 7).

<sup>154</sup> Letter from T. Michael Peay to Intervenors-Appellants in *New York Times Case* at 2 (July 6, 1977), in McDougall Papers, *supra* note 30 (HR 016, Box 45, Folder 10).

<sup>155</sup> Reisman, *supra* note 21, at 189 (quoting *N.Y. Times Co.*, 361 N.E.2d at 968).

“the court has for all purposes rewritten the anti-discrimination provisions of the New York City Administrative Code.”<sup>156</sup>

Although thwarted by the courts’ narrow statutory and broad constitutional interpretations, the activists’ efforts perhaps had not been entirely in vain. As LCCRUL lawyer T. Michael Peay concluded to the intervenors, at least the litigation “was an invaluable contribution to the ongoing effort to heighten the awareness of Americans about the unconscionable employment and race situation existing in South Africa.”<sup>157</sup>

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Although the CCHR did not prevail in court, its constitutional strategies are worthy of study as part of a broader conversation about municipal administrative constitutionalism in action. This case study demonstrates the importance of putting administrators, not courts, at the center of the narrative, and of expanding the study of administrative constitutionalism beyond federal agencies to state and local ones. Here lawyers at the New York City Commission on Human Rights used the Constitution to defend their statutory right to fight discrimination within New York City, however it manifested itself. In a globalizing world, discrimination abroad had consequences within the United States. This meant an almost inevitable conflict between broad local antidiscrimination authority (the kind of constitutional authority that states and localities often took for granted) and (quasi-) foreign policy challenges they may not have previously encountered. When the *Times* deployed constitutional arguments to fight a complaint based on New York City’s Law on Human Rights, the Commission (alongside the LCCRUL) was required to develop its own constitutional arguments about the limited nature of First Amendment and foreign affairs restrictions on its work.

This case study also raises questions about deference to administrative expertise in the local context. Here reviewing courts extended little or no deference to administrators’ decisionmaking, even when the subject (discrimination) was generally within commissioners’ remit. Judges’ apparent concern about embarrassing South Africa, or disrupting the U.S.-South Africa relationship, meant that New York courts pushed back against the CCHR’s assertion of authority, seemingly more concerned about the activists who had initiated the complaint and the potential harms of regulation than

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<sup>156</sup> Sobel, *supra* note 21, at 190-91; *see also* Butcher, *supra* note 21, at 637 (noting that the New York Court of Appeals had gone “astray” in its consideration of this issue).

<sup>157</sup> Letter from T. Michael Peay to Intervenors-Appellants in New York Times Case at 2 (July 6, 1977), *in* McDougall Papers, *supra* note 30 (HR 016, Box 45, Folder 10).

the testimony of Black New Yorkers, the findings of the Commissioners, or the constitutional arguments developed by the Commission's lawyers.

Interesting questions remain about the relationships local and state human rights commissions have with activists, with courts, and with other state and local institutions (not least, the city's Corporation Counsel). When do these relationships resemble dynamics at the federal level, and when do they differ? As scholars continue to investigate federal administrators using constitutional arguments to define their authority, and agencies as places where both state actors and nonstate actors interpret the Constitution, state and municipal agencies should be part of the conversation.

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