AN EXTRAORDINARY FACILITATOR: THE VOTING RIGHTS ACT AND U.S. ADHERENCE TO INTERNATIONAL HUMAN RIGHTS TREATY OBLIGATIONS

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1. INTRODUCTION

The Voting Rights Act of 1965 ("VRA")\(^1\) is often heralded as one the most effective pieces of social legislation enacted by Congress.\(^2\) Originally signed into law in 1965 at the height of the

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\(^2\) See, e.g., Miller v. Johnson, 515 U.S. 900, 927–28 (1995) (commenting that the VRA “has been of vital importance in eradicating invidious discrimination from the electoral process and enhancing the legitimacy of our political institutions”); Hugh Davis Graham, Voting Rights and the American Regulatory State, in CONTROVERSIES IN MINORITY VOTING 177, 177 (Bernard Grofman & Chandler Davidson eds., 1992) (noting that the Voting Rights Act is “one of the most effective instruments of social legislation in the modern era of American reform”).

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Civil Rights Movement, the VRA outlaws racial discrimination in voting, and has played a major role in reshaping American democracy. After nearly 100 years of Jim Crow, the VRA helped “shift the advantage of time and inertia from the perpetrators of evil to its victims,”\(^3\) adding teeth to the Fifteenth Amendment’s promise that the right to vote “shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”\(^4\) Today, after more than 40 years of implementation, the VRA has contributed to substantial increases in the rates of minority voter participation and electoral success.\(^5\) In 2006, Congress reauthorized core provisions of the VRA for twenty-five years, finding that—despite incredible gains—discrimination in voting remains a significant roadblock to full minority political participation.\(^6\)

In so doing, Congress reaffirmed a strong expression of federal legislative power, allowing the federal government to insert itself into state and local elections in order to thwart racial discrimination in voting. Nevertheless, the continuing vitality of the federal government’s power to confront racial discrimination in voting through the VRA is uncertain. The Supreme Court has shown a willingness to limit the reach of the VRA and, more generally, Congress’s power to remedy racial discrimination perpetrated by state and local governments. For example, in a series of cases in the 1990s, the Court used the Equal Protection Clause to strike down redistricting plans in which state and local governments used race as a factor in reapportionment in order to

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\(^3\) South Carolina v. Katzenbach, 383 U.S. 301, 328 (1966).

\(^4\) U.S. Const. amend. XV, § 1.


comply with the VRA and help minorities elect candidates of their choice.  

Most recently, in *Northwest Austin Municipal Utility District No. One (NAMUDNO) v. Holder*, decided in 2009, the Supreme Court cast doubt on the constitutionality of the VRA’s “preclearance” component, which requires all or part of sixteen states with particularly egregious histories of racial discrimination to acquire “preclearance” from the federal government before administering any changes in election or voting law.  

Preclearance, established by Section 4(b) and Section 5 of the VRA, is regarded as the heart of the VRA’s protections. Although ultimately passing on the constitutionality of preclearance and, instead, ruling narrowly on statutory grounds, Chief Justice Roberts’s majority opinion in *NAMUDNO* mused considerably over the constitutionality of Congress’s decision in 2006 to reauthorize preclearance for twenty-five years. The opinion questioned whether sufficient evidence of racial discrimination by state and local governments justified Congress’s decision to reauthorize preclearance, expressing

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7 See Shaw v. Hunt, 517 U.S. 899 (1996) (holding, *inter alia*, that compliance with Section 5 of the VRA is not a sufficiently compelling governmental interest to justify the use of race in districting); Miller, 515 U.S. at 917-20 (1995) (holding that strict scrutiny will be applied to analyzing the constitutionality of apportionment if voting districts are bizarrely shaped and it is proven that race was a “predominant” factor in drawing district lines); Shaw v. Reno, 509 U.S. 630 (1993) (holding that the use of race in drawing election districts is permissible only if the government can show that it is necessary to achieve a compelling governmental interest).


11 Drew S. Days III, *Section 5 and the Role of the Justice Department, in Controversies in Minority Voting*, supra note 2, at 52–53.

12 *NAMUDNO*, 129 S. Ct. at 2511–13. In the Court’s slip opinion, the majority opinion comprises just over 16 pages. Three and a half of those pages discuss “serious constitutional questions” that the VRA presents, and an additional two pages discuss why the Court avoided resolution of such constitutional questions. *Id.* See also Jeffrey Rosen, *Roberts versus Roberts: Just How Radical Is the Chief Justice?*, THE NEW REPUBLIC, Mar. 11, 2010, at 17-18, available at http://www.tnr.com/article/politics/roberts-versus-roberts?page=0,1 (noting that the Court was originally set on “issuing a sweeping 5-4 decision, striking down the Voting Rights Act on constitutional grounds” but—whether for strategic or other reasons—eventually backed off and issued a narrower decision on statutory grounds).
concern that preclearance may violate “our historic tradition that all the States enjoy ‘equal sovereignty.’”\textsuperscript{13}

Some commentators have read the opinion as “unambiguously serv[ing] notice that the Justices are prepared to invalidate the [preclearance regime].”\textsuperscript{14} Indeed, coupled with decisions issued earlier in the 2000s in which the Court chose to read narrowly core provisions of the text of the VRA,\textsuperscript{15} the Court has unmistakably charted a course toward limiting congressional power to combat state and local racial discrimination in voting.

The VRA is a critical component of civil rights enforcement in the United States and has been the subject of several Supreme Court cases. As a result, a flurry of scholarship has emerged regarding the VRA.\textsuperscript{16} Absent from such scholarship has been any

\textsuperscript{13} NAMUDNO, 129 S. Ct. at 2512. See also id. (“The statute’s coverage formula is based on data that is now more than 35 years old, and there is considerable evidence that it fails to account for current political conditions.”).


\textsuperscript{15} See, e.g., Bartlett v. Strickland, 129 S. Ct. 1231 (2009) (interpreting Section 2 of the VRA to require minority groups to constitute a numerical majority of the voting-age population in a geographically compact area before proceeding on a claim of vote dilution); Georgia v. Ashcroft, 539 U.S. 461 (2003) (reading Section 5 of the VRA to permit States and local governments to spread minority voters across many districts, which might have the effect of diluting minority voting strength, rather than requiring States and local governments to draw district lines so minority voters have an ability to elect candidates of their choice); Reno v. Bossier Parish Sch. Bd., 528 U.S. 320 (2000) (holding that the Justice Department must approve certain racially discriminatory voting changes under Section 5, even if the Justice Department determines that the discrimination was intentional).

\textsuperscript{16} Recently, commentators have been eager to write about the constitutionality of Section 5 of the VRA. See, e.g., Kristen Clarke, The Congressional Record Underlying the 2006 Voting Rights Act: How Much Discrimination Can the Constitution Tolerate?, 43 HARV. C.R.-C.L. L. REV. 385, 394–95 (2008) (arguing that the congressional record underlying the reauthorization of the VRA supports the constitutionality of the VRA); Nathaniel Persily, The Promise and Pitfalls of the New Voting Rights Act, 117 YALE L.J. 174, 189–90 (2007) (recounting how the issue of whether the Section 5 is constitutional was central to

https://scholarship.law.upenn.edu/jil/vol31/iss4/5
discussion of the role the VRA plays in helping the United States adhere to its international treaty obligations under the
International Convention on the Elimination of All Forms of Racial Discrimination17 (“CERD”) and the International Covenant on Civil
and Political Rights (“ICCPR”).18

This Comment addresses this overlooked aspect of the VRA, arguing that the extraordinary enforcement mechanism provided
by the VRA uniquely facilitates U.S. compliance with international law in ways otherwise unattainable. As an unusually strong
expression of federal power, the VRA overcomes impediments to U.S. adherence to its international human rights obligations.

The VRA represents one of the few federal statutory mechanisms in that it prohibits governmental conduct that has the
purpose and/or effect of discriminating on the basis of race.19 This standard of discrimination is binding on all jurisdictions within the
United States and can be enforced proactively by individuals and the U.S. government. Nevertheless, beginning with the Rehnquist
court, the Supreme Court has set new limitations on congressional power to combat racial discrimination.20 While these limitations
certainly affect domestic law in that national standards set by Congress are met with increased judicial scrutiny, they also
implicate U.S. capabilities to adhere to international human rights treaty obligations. Thus, the debate over Congressional power to
enforce equal protection and fundamental rights encompasses more than national interests: it touches on international law. For

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19 Apart from the VRA, Title VII remains the most notable federal effort to bar effects-based racial discrimination. See 42 U.S.C. § 2000e-2(k) (2006). Note, however, that at least one Supreme Court justice has recently questioned the constitutionality of Title VII’s disparate impact standard. See Ricci v. DeStefano, 129 S. Ct. 2658, 2682–83 (2009) (Scalia, J., concurring) (suggesting that, as applied to government employers, Title VII’s disparate impact standard may violate the Equal Protection Clause).

20 See infra text accompanying notes 87–89.
this reason, proponents of “bringing human rights home” can find in the VRA a vehicle that brings the United States into closer compliance with its international obligations. Likewise, to the extent that appeals to international law can persuade the Supreme Court and those charged with administering the VRA, advocates for a strong VRA and for providing Congress with more latitude to enforce the Reconstruction Amendments should consider the role that the VRA plays in allowing the United States to adhere to international human rights law.

After tracing the development of human rights law as part of American law, Section 2 of this Comment discusses the United States’ relatively recent adoption of the CERD and ICCPR. It then analyzes how U.S. interpretation of the CERD and ICCPR has limited the effectiveness of the United States’ ability to adhere to both treaties. Section 3 argues that, despite the United States’ failure to adhere fully to the CERD and ICCPR, the VRA has helped the United States move closer toward complying with international voting rights norms because of (i) the statute’s definition of discrimination, (ii) its unique “preclearance” component, and (iii) its granting of a private right of action. Finally, the Comment concludes in Section 4 by exploring whether this insight into the operation of the VRA can be applied to enforcing other human rights norms within the United States, and the impact that limits on congressional power to enforce the Reconstruction Amendments will have on U.S. adherence to human rights treaty obligations.

2. Bringing Human Rights Home

2.1. Past as Prologue

Human rights are central to the United States’ history. Over 200 years ago, the Declaration of Independence stated that people are endowed with inherent, inalienable rights by virtue of being human. Over 60 years ago, the United States helped end

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21 See generally Bringing Human Rights Home (Cynthia Soohoo et al. eds., 2008) (containing essays and articles by various authors on the importance of and values served by more robustly applying international human rights norms to conduct within the United States).

22 See The Declaration of Independence para. 1 (U.S. 1776) (“[A]ll men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”).
genocide during World War II and then played an instrumental role in establishing international institutions aimed at securing and protecting human rights. Franklin D. Roosevelt’s Four Freedoms speech partly inspired the drafting of the Universal Declaration of Human Rights. His wife, Eleanor Roosevelt, served as Chair of the Commission on Human Rights and drafted part of the Universal Declaration on Human Rights.

Even so, international human rights norms have played a minor role in legal efforts to pursue fundamental rights, justice, and equality within the United States. Lurking behind the Declaration of Independence stood the ugliness of slavery. While Franklin D. Roosevelt was calling for a redefinition of “security” to include human security in his Four Freedoms speech, African Americans were condemned to live in “separate but equal” societies and Japanese Americans were sent to internment camps. In the wake of World War II, while the United States played a leading role in “the founding of the United Nations and the drafting of the U.N. Declaration of Human Rights, the reality for African Americans was the complete antithesis of the principles being advanced on the international level.”

Instead of confronting this schism by bringing its own practices in line with the international norms it helped to create, the United

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23 See Johannes Morsink, The Universal Declaration of Human Rights: Origin, Drafting and Intent 1–2 (1999) (describing how Franklin and Eleanor Roosevelt helped inspire the movement to push for international human rights). See also Gunnar Myrdal, An American Dilemma: The Negro Problem and Modern Democracy 1019 (Transaction Publishers 1996) (1944) (discussing, in 1944, the leadership role that the United States will play in democratizing the world and democratizing former colonies and particularly noting that “[d]eclarations of inalienable human rights for people all over the world are now emanating from America”).

24 See Morsink, supra note 23, at 1–2 (describing Roosevelt’s State of the Union in which he addressed “four freedoms” as a catalyst for early human rights advocates).


26 McDougall, supra note 25.
States retreated from the burgeoning system of universal rights. The United States failed to join the most significant human rights treaties created in furtherance of the goals set out in the United Nations Charter and the Universal Declaration of Human Rights—two documents heavily influenced by U.S. participation. Isolationists and advocates for segregation in the name of “states’ rights” were able to find common ground in the pursuit of preventing international scrutiny of Jim Crow. The Cold War and McCarthyism intervened to shift the focus of U.S. social justice activists away from demanding economic and social rights, which were thought to have too close a resemblance to communism. Instead, U.S. advocates turned their attention to achieving civil rights that had greater appeal domestically, such as voting rights and employment discrimination.

The international institutions established after World War II presented a new opportunity for civil rights advocates in the United States. With the legacy of Nazi Germany’s doctrine of racial supremacy lingering in the background, the drafters of the U.N. Charter made clear their desire to establish the United Nations in order to attain “human rights . . . for all without distinction as to race.” In 1947, following the creation of the Human Rights Commission of the United Nations, the NAACP filed a petition under the leadership of W.E.B. Du Bois—An Appeal to the World—which called for the Human Rights Commission to investigate the conditions under which African Americans lived in

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27 See id. at 576 (describing how the U.S. distanced itself from the U.N. human rights treaty regime).
29 See Universal Declaration of Human Rights, supra note 25.
30 See Carol Anderson, A “Hollow Mockery”: African Americans, White Supremacy, and the Development of Human Rights in the United States, in 1 Brining Human Rights Home, A History of Human Rights in the United States 90 (Cynthia Soohoo et al. eds., 2008) (explaining that an “evil combination’ of GOP and Dixiecrats, as the NAACP called it, charged that the U.S. Constitution and America were under attack by human rights, human rights proponents, and the United Nations, as that foreigner-dominated organization set out to subvert American values with socialistic, even communistic, ideas about freedom and democracy”).
32 U.N. Charter, supra note 28, art. 1, para. 3.
the United States.33 Although the petition was defeated (and opposed by the United States) in a U.N. Sub-Commission, the petition was well-publicized and helped influence the U.S. government.34

The efforts of Du Bois and others seeking to leverage international human rights law as a tool for reform within the United States met considerable resistance in the early 1950s from Senator John W. Bricker of Ohio, who led a movement to amend the Constitution to alter the treaty approval process. In 1920, the Supreme Court held in Missouri v. Holland that an act of Congress pursuant to a validly executed treaty could go beyond Congress’s otherwise enumerated powers and still remain constitutional pursuant to the Tenth Amendment, provided that such an act of Congress did not violate an express provision of the Constitution.35 Thus, under Holland, when enforcing the mandate of a treaty, Congress can enact legislation that binds states through the Supremacy Clause in ways that otherwise might run afoul of federalism constraints.36 For Senator Bricker and his followers, Holland was a threat to state sovereignty and, if coupled with emerging human rights treaties, could enable a serious disruption of segregation and the Cold War.37

Senator Bricker’s amendment—commonly referred to as “the Bricker Amendment” — was introduced in many forms. At its core, it aimed to make U.S. accession to any international human rights treaty nearly impossible. Various versions of the treaty would have required Senate ratification of executive agreements in addition to treaties, that both types of agreements (executive

33 See Anderson, supra note 30, at 89 (discussing the strength of the NAACP’s petition).
36 See id.
37 See Halpin, supra note 34, at 8; see also United States Policy Regarding the Draft United Nations on Human Rights: The 1953 Change, in 3 FOREIGN RELATIONS OF THE UNITED STATES 1952-1954, at 1550–51 (1952) (“Covenants would be a source of propaganda attack on positions taken by the United States and on conditions within this country. The Covenants might contain provisions on economic self-determination and the right of nationalization which would be detrimental to United States interests in certain areas abroad.”).
agreements and treaties) pass through both houses of Congress with enabling legislation, and that such agreements gain approval in all 48 state legislatures. The Bricker Amendment would have effectively overruled *Holland*, leaving all treaties as non-self-executing (i.e., not enforceable in U.S. courts) without enabling legislation. Senator Bricker clearly stated his purpose as it related to what would eventually become the ICCPR. He wanted “‘to bury the so-called Covenant on Human Rights so deep that no one holding high public office will ever attempt its resurrection.’”

Ultimately, vigorous lobbying by the Eisenhower Administration succeeded in derailing the Bricker Amendment by promising that the United States would not agree to any future human rights treaties. As a result of Eisenhower’s pledge, the United States did not participate in the development and drafting of CERD and ICCPR, and neither treaty was ratified by the United States until the Clinton Administration.

2.2. Ratification and General Obligations of the CERD and ICCPR

The International Convention on the Elimination of All forms of Racial Discrimination was adopted by the U.N. General Assembly and opened for signature in late 1965. The International Covenant on Civil and Political Rights was adopted and opened for signature the next year. Yet, neither treaty was submitted to the Senate for ratification until the Carter Administration, and both treaties lingered in the Senate until the Clinton Administration. The Senate ratified the ICCPR in 1992 and two years later ratified the CERD. Under the Supremacy Clause of the U.S. Constitution, both treaties are the law of the

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38 See Anderson, *supra* note 30, at 91 (discussing the requirements under the Bricker amendment).


40 See *id*.

41 See McDougall, *supra* note 25, at 576.

42 CERD, *supra* note 17.

43 ICCPR, *supra* note 18.


46 See 140 CONG. REC. 14,326–27 (1994) (ratifying the CERD).
United States, having the same effect as an act of Congress. The CERD attacks racial discrimination across a broad array of rights. Meanwhile, the ICCPR requires its signatories to protect a more defined set of civil and political rights. In addition, unlike the CERD, the ICCPR mandates that State signatories protect citizens and non-citizens alike.

Together, the ICCPR and the CERD firmly establish the fundamental human right to political participation, regardless of race, color, national origin, and ethnic origin. The ICCPR contains a general statement of nondiscrimination, elaborating in Article 2(1) that each party to the ICCPR must guarantee “rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

Article 1 of the CERD bans racial discrimination, which it defines as:

[A]ny distinction . . . based on race . . . which has the purpose or effect of . . . nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

The ICCPR and the CERD collectively prohibit governmental conduct that has the purpose or effect of racial discrimination.

Both treaties confer affirmative obligations upon their signatories to pursue policies in furtherance of guaranteeing the right to political participation free from racial discrimination. Under the CERD, States are required to refrain from engaging in racial discrimination and to act affirmatively “to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination . . . .” Article 2 of the

47 U.S. CONST. art. VI, cl. 2. (“[A]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . .”)

48 Compare CERD, supra note 17, art. 1(2) (“This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens.”), with ICCPR, supra note 18, art. 2(1) (establishing that each party to the covenant must ensure equal rights to all individuals within its territory).

49 ICCPR, supra note 18, art. 2(1).

50 CERD, supra note 17, art. 1(1).

51 Id. art. 2(1)(c).
ICCPR contains a similar provision.\textsuperscript{52} Whereas Article 1 of the CERD exempts affirmative action programs from the definition of discrimination, Article 2 of the CERD—in addition to Article 2 of the ICCPR—mandates State parties to engage in affirmative action when necessary. That is, States are not only permitted to engage in affirmative action programs, but—in some instances—required to do so.

Moreover, signatories of the CERD agree not only to comply with the treaty’s terms at the national level, but at all levels of government.\textsuperscript{53} The CERD specifically contemplates that States have an obligation to implement its terms at all levels of government—in the United States’ case, at state and local levels. In less specific language, the ICCPR also requires implementation of its terms at all levels of government, requiring that each State Party to the ICCPR “undertake[] to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the [ICCPR].”\textsuperscript{54}

The mandates not to discriminate laid out in the CERD and ICCPR apply to the right to free political participation. The CERD generally guarantees equal protection under the law and enumerates specific civil, political and social rights that States are prohibited from interfering with through discriminatory conduct.\textsuperscript{55} Specifically, Article 5(c) of the CERD requires State Parties to “undertake to prohibit and to eliminate racial discrimination . . . to guarantee . . . the enjoyment of . . . the right[] to participate in elections—to vote and to stand for election—on the basis of universal and equal suffrage.”\textsuperscript{56} Likewise, Article 25 of the ICCPR guarantees the right to vote without “distinctions” and “unreasonable restrictions.”\textsuperscript{57}

\textsuperscript{52} See ICCPR, supra note 18, art. 2(2) (“[E]ach State Party . . . undertakes . . . to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.”).

\textsuperscript{53} See id. art. 2(3)(c) (“Each State Party . . . undertakes . . . to ensure that the competent authorities shall enforce such remedies when granted.”).

\textsuperscript{54} Id. art. 2(1).

\textsuperscript{55} See CERD, supra note 17, art. 5 (obliging states to prohibit and eliminate discrimination as to race, color, ethnic, and national origin).

\textsuperscript{56} Id. art. 5(c).

\textsuperscript{57} ICCPR, supra note 18, art. 25.
Under international law, the United States is bound to carry out treaty obligations to which it has assented.\textsuperscript{58} International enforcement of both treaties is left to a combination of monitoring bodies that rely on periodic reporting by State Parties, complaints by States Parties, and—upon a State Party’s consent—individual complaints.\textsuperscript{59} However, under the ICCPR, a State Party is not subject to the \textit{State Party complaint mechanism} unless it separately declares the competence of the Human Rights Commission to receive and consider complaints.\textsuperscript{60} Likewise, a State Party is not subject to the ICCPR’s \textit{individual complaint mechanism} unless it assents to the ICCPR’s First Optional Protocol. The United States has declared the Human Rights Commission competent to hear State Party complaints\textsuperscript{61} but has not ratified the ICCPR’s First


\textsuperscript{59} See CERD, supra note 17, arts. 8–9 (establishing a Committee on the Elimination of Racial Discrimination to monitor compliance with the CERD and requiring States Parties to submit periodic reports on laws and other measures that have been adopted in furtherance of the provisions of the CERD); \textit{id.} art. 11 (allowing a State Party to file a complaint if such a State Party believes that another State Party is failing to give effect to provisions of the CERD); \textit{id.} art. 14 (allowing individual complaints from a State Party if such a Party has “recogniz[ed] the competence of the Committee to receive and consider communications from individuals or groups of individuals within its jurisdiction”); ICCPR, supra note 17, arts. 28, 40 (establishing a Human Rights Committee to monitor compliance with the ICCPR and require State Parties to submit periodic reports); \textit{id.} art. 41 (allowing a State Party to file a complaint that another State Party is not fulfilling its obligations under the ICCPR); Optional Protocol to the International Covenant on Civil and Political Rights, \textit{opened for signature} Dec. 16, 1966, art. 2, 999 U.N.T.S. 302 (entered into force Mar. 23, 1976) (permitting individuals who have exhausted all available domestic remedies and who have asserted violation of their rights under the ICCPR to submit a written communication to the Human Rights Committee on the condition that the written communication concerns a State Party which is a party to the Optional Protocol).

\textsuperscript{60} See ICCPR, supra note 18, art. 41(1) (giving State Parties recourse to the Human Rights Committee in situations where a State Party feels that “another State is not fulfilling its obligations under the present Covenant”).

\textsuperscript{61} See U.S. Ratification of the International Covenant on Civil and Political Rights, June 8, 1992, 1676 U.N.T.S. 543, 545, \textit{available at} http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en#EndDec [hereinafter ICCPR RUDs] (“The United States declares that it accepts the competence of the Human Rights Committee to receive and consider communications under article 41 in which a State party claims that another State party is not fulfilling its obligations under the Covenant.”).
Optional Protocol, thereby disallowing individual complaints under the ICCPR.

Unlike the ICCPR, States automatically recognize the competence of the CERD monitoring body—the Committee on the Elimination of Racial Discrimination—to consider complaints by other State Parties, and the International Court of Justice maintains a form of appellate jurisdiction over disputes before the CERD’s monitoring body. However, the United States has unilaterally declared that it is not subject to the International Court of Justice without consent. In addition, to date, no State Party has attempted to avail itself of this procedure. Furthermore, the CERD’s individual complaint mechanism hinges on whether a State Party has recognized the competence of the monitoring body to hear complaints related to that State’s conduct, and the U.S. has not made such recognition.

As a result of the United States’ maneuvers related to the respective monitoring bodies and complaint mechanisms of the ICCPR and CERD, the United States is subject to little international enforcement of its obligations under both treaties. For the United States, what is left of the international enforcement mechanisms provided by the ICCPR and CERD amount to each treaty’s reporting requirements, which initiate a healthy process of

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63 See CERD, supra note 17, art. 11 (governing recourse to the Committee when other State Parties are not “giving effect to the provisions of [the] Convention”); id. art. 22 (granting the ICJ jurisdiction to hear appeals).


66 See CERD, supra note 17, art. 14 (“A State Party may at any time declare that it recognizes the competence of the committee to consider communications from individuals . . . claiming to be victims of a violation by that State Party of . . . rights set forth in this Convention.”).

67 See CERD RUDs, supra note 64.
introspection by the United States and potential criticism by the international community, but remain void of any threat of sanctions.

2.3. Roadblocks to Implementation

In part, robustly applying human rights norms within the United States serves America’s legacy of support for inalienable rights around the globe. The ability of the United States to hold other States accountable for their human rights abuses is affected by its own commitment to enforcing human rights norms. By promoting a principled human rights policy within its borders, the United States can gain credibility abroad when it criticizes the human rights policies of other countries. Yet, as discussed, the United States has been wary of holding its own policies to international human rights standards.

When the Senate ratified both the CERD and ICCPR, it issued an accompanying “package” of reservations, understandings, and declarations (“RUDs”) that constrain the capacity for U.S. adherence to both treaties. Thus, although the Supremacy Clause states that “all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby . . . .,” the Constitution is seemingly clear language is obscured by the RUDs attached to both the CERD and ICCPR. Although the terms of the right to political participation guaranteed by the CERD and ICCPR may be broader than current U.S. policies, the RUDs

68 See President Barack Obama, Remarks at the Acceptance of the Nobel Peace Prize (Dec. 10, 2009) available at http://www.whitehouse.gov/the-press-office/remarks-president-acceptance-nobel-peace-prize (“America—in fact, no nation—can insist that others follow the rules of the road if we refuse to follow them ourselves. For when we don’t, our actions can appear arbitrary, and undercut the legitimacy of future interventions, no matter how justified.”). See also WILLIAM F. SCHULZ, Introduction to THE FUTURE OF HUMAN RIGHTS: U.S. POLICY FOR A NEW ERA 13–14 (William F. Schulz ed., 2008) (recommending that the new administration conform its practices to international standards on human rights, otherwise the “United States will never reclaim its reputation for human rights leadership . . . ”).

69 See ICCPR RUDs, supra note 61, at 543–45 (laying out the U.S. reservations, declarations, and understandings with respect to the International Covenant on Civil and Political Rights).

70 U.S. CONST. art. VI, cl. 2 (emphasis added); see also JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 99–105, 120 (2d ed. 2003) (discussing the clash between treaty law and U.S. domestic law and examining the various judicially created doctrines to deal with the problem).
asserted by the United States with respect to both treaties work to limit any obligation by the United States to bring domestic policies in line with international standards.\textsuperscript{71}

With respect to both treaties, the United States issued a proviso that states that neither treaty requires the United States to enact any legislation or take action that would violate the U.S. Constitution as interpreted by the United States.\textsuperscript{72} Although the validity of these provisos under international law has been questioned,\textsuperscript{73} they have had great import concerning the interpretation and steps taken in pursuit of compliance with the CERD. Certainly, under U.S. law, treaties are subject to constitutional limitations and the government should not enforce treaty provisions that are inconsistent with the Constitution.\textsuperscript{74} Nevertheless, the U.S. government remains responsible for adhering to the terms and conditions of both the ICCPR and CERD to the extent that the Constitution permits. While the Constitution may restrict the government from engaging in some programs aimed at adhering to the CERD, the government is still required to find ways to “undertake to prohibit and to eliminate racial discrimination.”\textsuperscript{75}

\textsuperscript{71} See Henkin, supra note 39, at 342 (describing the United States’ obligation to enter reservations in international treaties whose effect could be in conflict with the Constitution); McDougall, supra note 25, at 584 (noting “points of divergence” between existing U.S. law and the definition of racial discrimination under the CERD).

\textsuperscript{72} See 140 CONG. REC. 14,326 (1994) (“Nothing in this Convention requires or authorizes legislation, or other action, by the United States of America prohibited by the Constitution of the United States as interpreted by the United States.”); 138 CONG. REC. 8,071 (1992) (including exactly the same proviso).


\textsuperscript{74} See Henkin, supra note 39, at 342 (citing Reid v. Covert, 354 U.S. 1, 16 (1957) and RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 111(2) (1987)) (proposing that cases arising under international law or international agreements of the United States are subject to Constitutional and statutory limitations).

\textsuperscript{75} CERD, supra note 17, art. 5.
The U.S. Supreme Court has reduced the scope of government conduct that constitutes impermissible discrimination under the U.S. Constitution. In order for a law or practice to be deemed impermissibly discriminatory under the U.S. Constitution, the Supreme Court has interpreted the Equal Protection Clause of the U.S. Constitution to require that such a law or practice have been enacted or administered with a discriminatory purpose. Accordingly, in order for an individual or group to petition the judiciary for relief from a law or practice that has the effect of discriminating on the basis of race, that individual or group must also show discriminatory intent. This interpretation clearly limits the definition of "racial discrimination" within the CERD, which includes "any distinction, exclusion, restriction or preference based on race . . . which has the purpose or effect of nullifying or impairing . . . human rights and fundamental freedom." U.S. reliance on the Supreme Court's interpretation of unconstitutional discrimination severely limits U.S. compliance with the CERD and ICCPR. As an NGO response organized by the U.S. Human Rights Network to the most recent U.S. report to the Committee on the Elimination of All Forms of Racial Discrimination points out, requiring that a plaintiff prove discriminatory intent "understate[s] the cumulative impact of discrimination." Discrimination that results from institutional interactions and cumulative events may not be intentional, and yet still have a serious disparate impact on racial and ethnic minorities.

76 See McClesky v. Kemp, 481 U.S. 279 (1987) (holding that proof of discriminatory impact of the administration of the death penalty in Georgia was insufficient by itself to show the existence of a policy that violates the Equal Protection clause); Washington v. Davis, 426 U.S. 229 (1976) (holding that proof of discriminatory impact of an applicant examination on African Americans was insufficient by itself to show the existence of a policy that violates the Equal Protection Clause).

77 CERD, supra note 17, art. 1 (emphasis added). Note, however, that Article 4 of the CERD does restrict the enactment and implementation of "special measures" that create permanent separate rights for a group. Id. art. 4; see also ICCPR, supra note 18, art. 26. (declaring in international law the equality of all members of a country and that they should not be discriminated against).


79 Id.
The Supreme Court’s interpretation of the Equal Protection Clause also curtails the government’s ability to enact and engage in affirmative action programs, which—by design—involve intentional discrimination. Although the Supreme Court has not banned affirmative action programs altogether, current doctrine allows for such programs only in limited circumstances. A governmental affirmative action program must pass the test of “strict scrutiny.” In reviewing affirmative action programs with strict scrutiny, the Supreme Court has held that affirmative action programs violate the Equal Protection Clause unless the governmental program is narrowly tailored to meet a compelling governmental interest. The Court currently recognizes two compelling interests that justify affirmative action programs: the attainment of a diverse learning environment in education; and, efforts aimed at remedying specific instances of past discrimination in the context of government contracting and employment. In contrast, the standards laid out in the ICCPR and CERD do not submit race-based affirmative action programs to an analysis under the tiers of scrutiny. The CERD specifically exempts from its definition of discrimination any governmental actions taken that “may be necessary in order to ensure . . . equal enjoyment or exercise of human rights and fundamental freedoms . . . .” Similarly, the U.N. Human Rights Committee interprets the ICCPR to permit affirmative action programs that have a legitimate end

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80 See Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 291 (1978) (holding that strict scrutiny should apply to affirmative action programs and that “[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination”).

81 See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 783 (2007) (Kennedy, J. concurring) (affirming in the controlling opinion that “[i]t is well established that when a governmental policy is subjected to strict scrutiny, ‘the government has the burden of proving that racial classifications ‘are narrowly tailored measures that further compelling governmental interests’”).

82 See id. ("Diversity, depending on its meaning and definition, is a compelling educational goal a school district may pursue.").

83 See Richmond v. J. A. Croson Co., 488 U.S. 469 (1989) (holding that a compelling interest exists to remedy past discrimination only if the governmental entity employing the affirmative action program can identify past discrimination within its jurisdiction against the racial minority it seeks to benefit).

84 See Halpin, supra note 34, at 33. ("In international human rights law, analysis of discrimination does not formally use tiers of scrutiny as practiced by U.S. courts.").

85 CERD, supra note 17, art. 1(4).
and reasonable means—similar to the less-demanding rational basis standard applied in U.S. courts.\(^8\)

Furthermore, the U.S. Supreme Court has reshaped Congress’s power under Section 5 of the Fourteenth Amendment to enact legislation that prohibits discriminatory conduct by State and local governments and governmental actors. As a general matter, Rehnquist Court precedents established that Congress may only outlaw governmental conduct that is intentionally designed to discriminate on the basis of race. More specifically, under a line of cases beginning with *City of Boerne v. Flores*, Congress may prohibit governmental conduct that has only the effect—and not necessarily the purpose—of discriminating on the basis of race if the means adopted by Congress to prohibit effects-based discrimination is “congruent and proportional” to the evil it seeks to remedy.\(^8\)

Thus, Section 5 grants Congress broad power to remedy and deter constitutional violations, even if the underlying conduct it prohibits is not itself unconstitutional. In 2006, Congress exercised its power under Section 5 of the Fourteenth Amendment when reauthorizing the Voting Rights Act—thereby renewing a statutory scheme that generally prohibits conduct and activity that has the purpose or effect of denying the right to vote on the basis of race.\(^8\)

As discussed, the Court in *NAMUDNO* upheld the preclearance component of the VRA, but signaled a willingness to invalidate the component in a future case.\(^8\) Thus, if given the opportunity in a future case, the Roberts Court may further limit the extent to which Congress can proscribe effects-based racial discrimination perpetrated by state and local governments.

In addition to the aforementioned proviso with respect to both treaties, the U.S. attached to both the ICCPR and CERD an understanding that qualifies the federal government’s obligation to

\(^8\) See Halpin, *supra* note 34, at 35 (“[T]he U.N. Human Rights Committee interprets the ICCPR as requiring a ‘legitimate’ end and a ‘reasonable’ means, which parallels low-level equal-protection scrutiny in American constitutional law.”).

\(^8\) See, e.g., *City of Boerne v. Flores*, 521 U.S. 507 (1997) (holding that Congress may only provide remedies for rights recognized by the judiciary branch and that Congress may only enact statutory schemes to enforce such rights that are “congruent and proportional” to preventing and remedying the violation of such court-defined rights).

\(^8\) See *infra* Section 3.

\(^8\) See *infra* text accompanying notes 8–13 (discussing the holding and reasoning of the Court in *NAMUDNO*).
adhere to both treaties only to the extent that the federal government may exercise jurisdiction over state and local governments.\footnote{The Senate ratified both the ICCPR and CERD with the same “Understanding,” which states in relevant part that each treaty “shall be implemented by the Federal Government to the extent that it exercises jurisdiction over the matters covered therein, and otherwise by the state and local governments. To the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall, as necessary, take appropriate measures to ensure the fulfillment of [each treaty].” See CERD RUDs, supra note 64 (laying out the U.S. reservations, declarations, and understandings with respect to the International Convention on the Elimination of All Forms of Racial Discrimination); ICCPR RUDs, supra note 61 (laying out the U.S. reservations, declarations, and understandings with respect to the International Covenant on Civil and Political Rights).} Article 2(1) of the CERD specifically requires that State Parties facilitate and coordinate compliance with the CERD at state and local levels.\footnote{See CERD, supra note 17, art. 2(1)(a) (“Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure [sic] that all public authorities and public institutions, national and local, shall act in conformity with this obligation.”).} The ICCPR similarly binds all State Parties to ensure compliance at all levels of government.\footnote{See ICCPR, supra note 18, art. 2(1) (declaring that each State Party agrees “to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the [ICCPR]”).} Effectively, the U.S.’s “federalism understanding” (i.e., the formal understanding asserted by the U.S.) significantly exempts the national government from compelling state and local governments—which are responsible for adopting and executing a considerable portion of laws, policies, and practices that affect individuals in the U.S.—to adhere to both treaties. Perhaps as a result of this understanding, the U.S. has done little to implement the ICCPR and CERD at state and local levels.\footnote{See, e.g., Comm. on the Elimination of Racial Discrimination, 72nd Sess., Concluding Observations of the Comm. on the Elimination of Racial Discrimination: United States of America, para. 13, U.N. Doc. CERD/C/USA/CO/6 (May 8, 2008) (recommending “that the State party establish appropriate mechanisms to ensure a co-ordinated approach towards the implementation of the Convention at the federal, state and local levels”).} Although President Clinton established an Interagency Working Group on Human Rights that coordinated federal agency adherence to international human rights treaties, the Working Group remained limited to federal compliance with international law.\footnote{See Exec. Order No. 13107, 63 Fed. Reg. 68,991, 68,991–92 (Dec. 10, 1998).} Moreover, President George W. Bush largely abandoned the order, and it remains to be seen the
extent to which President Obama will further the order’s goals. Accordingly, no institution exists within the U.S. to monitor compliance with the ICCPR and CERD at state and local governments.

The United States’ federalism understanding is not necessarily compelled by the Constitution. Although the Supreme Court’s recent jurisprudence has constrained the power of the federal government to regulate states and local governments, the federal government’s jurisdiction over state and local governments remains broad. Moreover, under Holland, the Tenth Amendment hardly limits Congressional efforts to compel states to adhere to international treaties. Given the powers available to Congress under the Commerce Clause, Fourteenth Amendment, and its treaty power, the federal government likely could coordinate and compel more robust state and local compliance with the CERD and ICCPR.

Finally, the United States attached a declaration to the ratification of both treaties stating that the substantive terms of the treaties are not self-executing. This non-self-executing declaration restricts the use of U.S. judicial power from enforcing violations of both treaties. As a result of the non-self-executing declaration, individuals lack an independent, private cause of

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96 See, e.g., United States v. Morrison, 529 U.S. 598 (2000) (holding that Congress exceeded its power under the Commerce Clause in passing the Violence Against Women Act); City of Boerne v. Flores, 521 U.S. 507 (1997) (holding that Congress exceeded its power to enforce the Fourteenth Amendment by allowing for a civil suit provision against states when enacting the Religious Freedom and Restoration Act); United States v. Lopez, 514 U.S. 549 (1995) (invalidating, for the first time since the Great Depression, congressional action pursuant to the Commerce Clause).

97 See, e.g., Gonzales v. Raich, 545 U.S. 1 (2005) (upholding Congress’s power to ban the use of marijuana even when States permit its use inside their own border); Nevada Dep’t of Human Res. v. Hibbs, 538 U.S. 721 (2003) (finding that Congress did not exceed its enforcement powers under the Fourteenth Amendment when enacting the Family and Medical Leave Act of 1993).

98 See generally Missouri v. Holland, 252 U.S. 416 (1920) (finding Congress unrestrained by its enumerated powers, specifically the Tenth Amendment, when working to effectuate the terms of a treaty).

99 See CERD RUDs, supra note 65 (declaring the U.S. acceptance of the treaty to be not self-executing); ICCPR RUDs, supra note 69 (declaring the U.S. acceptance of the treaty to be not self-executing).
action to enforce either human rights treaty.\textsuperscript{100} The U.S. non-self-executing declaration effectively precludes U.S. courts from providing judicial relief for violations of the rights established by both treaties. Rather, in order for either treaty to have any legal effect in U.S. courts, Congress must pass separate “implementing legislation.”\textsuperscript{101}

In sum, through a combination of RUDs and a proviso, the U.S. has weakened the force with which the CERD and ICCPR apply.

3. BRINGING HUMAN RIGHTS HOME THROUGH THE VOTING RIGHTS ACT

3.1. A Unique Mechanism

The Voting Rights Act has altered American democracy by creating a robust mechanism to enforce the promise of the Fifteenth Amendment. Principally, the VRA enforces the right to vote through three mechanisms. First, Section 2 of the VRA allows aggrieved individuals and the federal government to enforce the VRA’s prohibition of voting practices or procedures that have the purpose or effect of denying or abridging the right to vote on account of race or ethnicity.\textsuperscript{102} Section 2 applies nationwide. Second, when enacted in 1965, Section 4 of the VRA contained a formula that identified state and local jurisdictions with particularly egregious histories of denying the right vote on the basis of race and, within those jurisdictions, suspended the use of certain “tests or devices” that determine the eligibility of the right to vote (such as literacy tests and tests for “moral character”).\textsuperscript{103} Third, Section 5 provides that the jurisdictions covered by Section 4 must obtain “preclearance” from the federal government before making changes in voting practices or procedures.\textsuperscript{104}

\textsuperscript{100}See Henkin, \textit{supra} note 39 at 346–47 (noting that the non-self-executing declaration is “designed to keep its own judges from judging the human rights conditions in the [United States] by international standards.”); Sosa v. Alvarez-Machain, 542 U.S. 692, 734 (2004) (holding that “although the [ICCPR] does bind the United States as a matter of international law, the United States ratified the Covenant on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts”).

\textsuperscript{101}McDouggall, \textit{Toward a Meaningful International Regime}, \textit{supra} note 26, at 588.


\textsuperscript{103}Id.

\textsuperscript{104}Id. §§ 1973b–1973c (2006).
preclearance from the federal government, a covered jurisdiction must show that a proposed change in election law has neither a discriminatory purpose nor discriminatory effect.\textsuperscript{105}

Together, these provisions of the VRA aim to destroy barriers to full exercise of the right to vote. For nearly one hundred years under Jim Crow, African-American suffrage in the South was nearly eradicated through a combination of state-sponsored laws, intimidation, fraud, and violence.\textsuperscript{106} For all intents and purposes, the Fourteenth and Fifteenth Amendments were a “dead letter” in the South.\textsuperscript{107} Prior to enacting the VRA, Congress attempted to facilitate case-by-case litigation by the Attorney General against intransigent southern jurisdictions to force compliance with the Fourteenth and Fifteenth Amendments through the Civil Rights Acts of 1957, 1960, and 1964. Through the Civil Rights Act of 1957, Congress authorized the Attorney General to enjoin public and private practices that interfered with the right to vote on the basis of race.\textsuperscript{108} The Civil Rights Act of 1960 allowed federal authorities to inspect local voter rolls and impose penalties upon individuals and jurisdictions that impeded access to registration.\textsuperscript{109} Finally, Title I of the Civil Rights Act of 1964 further attempted to remedy discrimination in voting by requiring equal application of voting requirements and providing expedited judicial procedures for cases involving the right to vote.\textsuperscript{110}

The litigation brought by the Justice Department under the Civil Rights Acts of 1957, 1960, and 1964 to remedy discrimination in voting resulted in only piecemeal gains. The Supreme Court noted the problems inherent in relying solely on litigation initiated by the Attorney General, observing that:

\textsuperscript{105} Id.
\textsuperscript{107} Id. at 21–22.
Voting suits are unusually onerous to prepare, sometimes requiring as many as 6,000 man-hours spent combing through registration records in preparation for trial. Litigation has been exceedingly slow, in part because of the ample opportunities for delay afforded voting officials and others involved in the proceedings. Even when favorable decisions have finally been obtained, some of the States affected have merely switched to discriminatory devices not covered by the federal decrees or have enacted difficult new tests designed to prolong the existing disparity between white and Negro registration. Alternatively, certain local officials have defied and evaded court orders or have simply closed their registration offices to freeze the voting rolls.\footnote{South Carolina v. Katzenbach, 383 U.S. 301, 314 (1966) (internal citations omitted).}

Thus, by enacting a comprehensive scheme to attack discrimination through the VRA, Congress dramatically changed course in attempting to remedy almost a century of intransigent state actors who defied federal court orders.

Congress determined that “the unsuccessful remedies which it had prescribed in the past would have to be replaced by sterner and more elaborate measures in order to satisfy the commands of the Fifteenth Amendment.”\footnote{Id. at 309.} Congress opted for a strong enforcement mechanism that, as noted, allowed for enforcement by private individuals and suspension of discriminatory tests. By providing for private enforcement of the VRA’s prohibitions through Section 2, the framers of the VRA opted not to rely solely on the Attorney General to deter, enforce, and remedy racial discrimination in voting. Instead, Congress decided to enlist a cadre of private attorneys general. With knowledge that jurisdictions were keen to replace banned voting practices with new, more creatively discriminatory practices, Congress included the “strong medicine”\footnote{Voting Rights: Hearings on H.R. 6400 Before the Subcomm. No. 5 of the H. Comm. on the Judiciary, 89th Cong. 110–11 (1965) (statement of Rep. Chelf, Member, House Comm. on the Judiciary).} of Section 5, which shifts the burden onto covered states and their political subdivisions to prove to the federal government that their voting practices and procedure are
not discriminatory. As such, Section 5 “stands alone in American history in its alteration of the authority between the federal government and the states and the unique procedures it requires of states and localities that want to change their laws.”

Having endured for over 40 years of judicial interpretation and through five congressional reauthorizations, the VRA’s core provisions remain largely intact. Although the Supreme Court has tangled over the meaning of the reach of the VRA’s prohibitions, Congress has made clear that both Section 2 and Section 5 prohibit governmental practices and procedures that have the purpose and effect of discriminating on the basis of race. The VRA’s definition of discrimination, Section 2’s granting of a private right of action, and Section 5’s mandate that local jurisdictions must adhere to federal standards all combine to provide not only an extraordinary response to discrimination in voting in the United States, but also a vehicle for the United States to comply with its international obligation not to discriminate in voting on the basis of race.

3.2. The VRA as a Mechanism for Compliance

The “strong medicine” prescribed by the framers of the VRA helps the United States comply with its international obligation not to discriminate in voting based on race in ways that would otherwise be unattainable. The VRA largely overcomes the roadblocks of federalism understandings, non-self-execution declarations, and a refusal to comply with the international definition of discrimination.

114 Persily, supra note 16, at 177.

115 In 1982, Congress amended Section 2 of the VRA to affirm its intention that Section 2 allows a plaintiff to sustain her burden of showing discrimination in voting if she can show that a “voting qualification or prerequisite to voting or standard, practice, or procedure shall [is] imposed or applied . . . in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color.” Pub. L. No. 97–205, 96 Stat. 131, 134 (codified at 42 U.S.C. § 1973 (2006)) (emphasis added). Note, however, that “calling section 2’s test a ‘results test’ is somewhat of a misnomer because the test does not look for mere disproportionality in electoral results. Rather, plaintiffs must establish that under the totality of the circumstances, the challenged procedure prevents minorities from effectively participating in the political process.” United States v. Blaine County, 363 F.3d 897, 909 (9th Cir. 2004). In 2006, Congress amended Section 5 of the VRA to affirm its intention that changes in voting practice or procedure by a jurisdiction covered by Section 5 shall be approved only if they “neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color.” Pub. L. No. 109–246, §§4–5, 120 Stat. 577, 580–81 (codified at 42 U.S.C. §1973c (2006)) (emphasis added).
First, unlike most other federal civil rights statutes that only outlaw intentional discriminatory conduct, both Section 2 and Section 5 of the VRA prohibit conduct that has the purpose or effect of discriminating on the basis of race. Thus, the definition of discrimination contained under both Section 2 and Section 5 of the VRA comports closely with the definitions of discrimination in the CERD and ICCPR. Combined, the ICCPR and CERD require State parties not to engage in and to eliminate governmental and private conduct that has the purpose or effect of discrimination in voting on the basis of race. Yet, in assenting to both the ICCPR and CERD, the United States issued a proviso limiting its compliance to both treaties to the extent that the U.S. Constitution permits. The Supreme Court has read the Constitution only to prohibit governmental conduct that was enacted or administered with a discriminatory purpose.

The Committee on the Elimination of Racial Discrimination responded to the United States’ most recent CERD report by:

> Reiterat[ing] the concern . . . that the definition of racial discrimination used in the federal and state legislation and in court practice is not always in line with that contained in [the CERD], which requires States parties to prohibit and eliminate racial discrimination in all its forms, including practices and legislation that may not be discriminatory in purpose, but in effect.

By adhering to a limited definition of discrimination, the United States fails to adhere to the full reach of the international requirement for nondiscrimination.

Given the extraordinary mechanism that Congress sought fit to employ to attack racial discrimination in voting, the VRA’s definition of discriminatory conduct allows the U.S. to facilitate compliance with its international obligations. In 1980, the Supreme Court held in *Mobile v. Bolden* that a violation of Section 2 of the

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116 See *supra* text accompanying notes 49–50 (explaining the salient terms of the ICCPR and CERD).

117 See *supra* note 72 (noting the limits on the application of the ICCPR and CERD).

118 See *supra* text accompanying notes 76–86 (detailing the nuances of the Supreme Court’s approach to “impermissible discrimination”).

119 Comm. on the Elimination of Racial Discrimination, *supra* note 93, para. 10.
VRA can only be proven by showing that a voting practice or procedure was adopted or applied with an intent to discriminate on the basis of race.\textsuperscript{120} In amending the VRA in 1982, Congress explicitly responded to \textit{Bolden} and clarified the language of the VRA so that a plaintiff need not show that a voting practice or procedure was adopted or maintained with intent to discriminate against minority voters.\textsuperscript{121} Instead, Congress affirmed that a voting law or procedure that \textit{results} in the denial or abridgment of the right of any citizen to vote on account of race violates Section 2 of the VRA.\textsuperscript{122} Similarly, Section 5 of the VRA holds that a proposed change in voting practice or procedure submitted to the federal government can only be approved if it “neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color.”\textsuperscript{123}

Second, Section 5 provides a tool for the federal government to enforce its international-like standard of discrimination upon states and local jurisdictions in a way unlike any other federal statute and in a way that aids the federal government in ensuring that all jurisdictions for which it is responsible are in compliance with international law. Both the ICCPR and CERD require that State Parties facilitate compliance with international standards at state and local levels.\textsuperscript{124} Yet, the United States’ “federalism understanding” attempts to qualify U.S. compliance with both treaties by exempting any requirement from compelling states to comply with the terms of assented-to treaties.\textsuperscript{125} The Committee on the Elimination of Racial Discrimination responded to the U.S.

\textsuperscript{120} Mobile v. Bolden, 446 U.S. 55, 60 (1980).

\textsuperscript{121} Voting Rights Act Amendments of 1982, 97 Pub. L. No. 205, 96 Stat. 131 (1982). \textit{See also} Thornburg v. Gingles, 478 U.S. 30, 35 (1986) (construing the Voting Rights Act Amendments of 1982 and observing that “[Section 2] was largely a response to [the Supreme Court’s] plurality opinion in Mobile v. Bolden . . . which had declared that, in order to establish a violation either of § 2 or of the Fourteenth or Fifteenth Amendments, minority voters must prove that a contested electoral mechanism was intentionally adopted or maintained by state officials for a discriminatory purpose”).

\textsuperscript{122} \textit{See Gingles}, 478 U.S. at 35 (1986) (noting that in passing the Voting Rights Act Amendments of 1982, “Congress substantially revised § 2 to make clear that a violation could be proved by showing discriminatory effect alone”).


\textsuperscript{124} \textit{See supra} text accompanying notes 51–53 (discussing the requirements of these treaties).

\textsuperscript{125} \textit{See supra} text accompanying notes 92–100 (detailing how this exemption functions).
government’s most recent report by noting that each “State party is bound to apply the Convention throughout its territory and to ensure its effective application at all levels, federal, state, and local, regardless of the federal structure of its Government.”126 The Committee lamented the lack of a coordinated effort within the United States to ensure thorough compliance with the terms of the CERD.127

In Section 5 and, to a lesser extent, Section 2, the federal government has tools to coordinate widespread adherence to international voting norms. As noted, Section 5 is unique among federal legislation in that it implants the federal government directly inside of the lawmaking process of state and local governments. In states and political subdivisions covered by Section 5, the federal government—acting through the Department of Justice—has authority over local voting practice and procedures. In addition, where Section 5 does not apply, the federal government can maintain a say over state and local voting practices and procedures by bringing suit through Section 2 of the VRA. Although the avenues for proving discrimination in Section 2 and Section 5 differ, the VRA largely provides the federal government with the ability to shape a national voting rights policy.128 Coupled with the definition of nondiscrimination of the VRA to which states and local governments must adhere, this ability to influence state and local voting policy critically helps the United States comply with international law.

127 See id. (“The Committee recommends that the State party establish appropriate mechanisms to ensure a coordinated approach towards the implementation of the Convention at the federal, state and local levels.”).
128 Unlike Section 5, Section 2 applies nationwide and places the burden on the plaintiff (i.e., the voter) to establish a statutory violation. While a full exposition of the differences in governmental conduct prohibited by Section 2 versus Section 5 is beyond the scope of this Comment, the conduct banned by each Section slightly differs. Thus, a state or local jurisdiction’s violation of Section 2 does not necessarily provide grounds for the DOJ to deny preclearance under Section 5; and a state or local jurisdiction’s compliance with Section 2 does not necessarily guard against a violation of Section 5. See, e.g., Georgia v. Ashcroft, 539 U.S. 461, 477–79 (2003) (denying Georgia’s claim that its redistricting plan should have been precleared under § 5 simply because it may have satisfied § 2 of VRA); Reno v. Bossier Parish Sch. Bd., 520 U.S. 471, 477 (1997) (Bossier Parish I) (denying the government’s assertion that “a violation of § 2 is an independent reason to deny preclearance under § 5”).
Third, Section 2 allows individuals to enforce the VRA’s definition of discrimination in U.S. Courts, helping litigants overcome the United States’ declarations that the CERD and ICCPR are non-self-executing. Section 2 importantly provides individuals with access to judicial relief for discriminatory harm. While both the ICCPR and CERD bind the United States as a matter of international law, the obligations that each treaty confers upon the U.S are not enforceable in federal courts, since the United States attached an understanding to ratification of both treaties stating that neither treaty is self-executing. While Section 2 certainly does not allow individuals to avail themselves of federal jurisdiction solely for violations of international nondiscrimination norms in the context of voting, it does allow individuals an avenue toward relief for the harm that results from practices and procedures that would nonetheless probably violate international norms. Moreover, Section 2 provides individuals with relief from such discriminatory conduct. In contrast, governmental conduct that violates international norms set out in the ICCPR and CERD cannot be met with federal judicial relief.

3.3. The Uncertainty of Facilitated Compliance

The continued utility of the VRA as a facilitator of U.S. compliance with international voting rights norms is uncertain. Future success of the VRA will be tied to the vigor with which the Act is enforced and interpreted. The Civil Rights Division at the Department of Justice, which enforces Section 5 of the VRA and can enforce Section 2 of the VRA through litigation, was accused of under-enforcing the VRA and allowing politics to influence legal judgments during the Bush administration. For example, in 2003, political appointees at the Department of Justice overruled a recommendation made by career attorneys to reject under Section 5 a Georgia law that would have required voters to show a photo-identification when voting. A federal district court subsequently


131 See Dan Eggen, Staff Opinions Banned in Voting Rights Cases, WASH. POST, Dec. 10, 2005, at A3 (discussing the Justice Department barring staff attorneys
found a substantial likelihood that the voter-identification law violated the Constitution.\textsuperscript{132} In addition, an internal investigation by the Department of Justice recently found that Civil Rights Division appointees violated federal law and Department of Justice policies by considering the political affiliations of career attorneys when making personnel decisions.\textsuperscript{133}

Under the Obama Administration, Attorney General Eric Holder has pledged to depoliticize the Civil Rights Division, committing to return the Division “back to doing what it has traditionally done” by increasing enforcement of statutes like the VRA.\textsuperscript{134} However, as an Obama Transition Team report noted, morale among career attorneys in the Civil Rights Division plummeted during the Bush Administration, leading to a substantial exodus of career civil rights attorneys who were “‘inexperienced or poorly qualified.’”\textsuperscript{135} The Report predicted the Obama Administration would face barriers to effective enforcement of civil rights laws, noting that the net effect of the politicized hiring process and the brain drain is an attorney workforce largely ill equipped to handle the complex, big-impact litigation that should comprise a significant part of the Division’s work.\textsuperscript{136} Without vigorous enforcement of the VRA, the statute’s ability to help the United States comply with international law is limited.

More lasting and significant limitations on the ability of the VRA to facilitate U.S. adherence to international voting rights from offering recommendations in major Voting Rights Act cases, including the Georgia photo-identification law).


\textsuperscript{133} See U.S. DEP’T OF JUSTICE OFFICE OF THE INSPECTOR GENERAL & OFFICE OF PROFESSIONAL RESPONSIBILITY, AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING AND OTHER IMPROPER PERSONNEL ACTIONS IN THE CIVIL RIGHTS DIVISION 65 (2008), http://www.justice.gov/opr/oig-opr-iaph-crd.pdf (finding that former Assistant Attorney General for Civil Rights Bradley Schlozman illegally considered the political affiliation of attorneys and applicants to the Department of Justice when making personnel decisions).

\textsuperscript{134} See Charlie Savage, White House to Shift Efforts on Civil Rights, N.Y. TIMES, Sep. 1, 2009, at A1, A14 (discussing how the Obama administration is planning a major revival of high-impact civil rights enforcement, which had been discouraged under the Bush administration).

\textsuperscript{135} Id.

\textsuperscript{136} Id.
standards may yet come from the Supreme Court. In NAMUDNO, eight Justices endorsed an opinion authored by Chief Justice Roberts that expressed “serious constitutional questions” over the VRA’s requirement in Section 5 that all or part of sixteen States seek preclearance from the federal government before implementing changes in voting procedure. The case was brought by a small municipal utility district (“MUD”) in Travis County, Texas, which had no demonstrated history of racial discrimination in voting, but is subject to the VRA’s preclearance requirements because it is located within Texas, a covered jurisdiction. Section 4(a) of the VRA allows “political subdivisions” of covered jurisdictions to bailout from Section 5’s requirements if certain statutory requirements—mainly that a jurisdiction has no recent history of racial discrimination in voting—are met.

A separate section, defines “political subdivision” as “any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts a registration for voting.”

The MUD, which does not register voters and is governed by a five-member board chosen through elections administered by Travis County, sought “bailout” from Section 5’s preclearance requirement and asserted, in the alternative, that Section 5 was unconstitutional. At its core, the MUD’s “primary argument” was that “there [was] no warrant for continuing to presume that jurisdictions first identified four decades ago as needing extraordinary federal oversight through §5 remain uniformly incapable or unwilling to fulfill their obligations to faithfully protect the voting rights of all citizens in those parts of the country.” That is, the MUD argued that the conditions that justified Congress in providing the VRA’s extraordinary remedy in 1965 and in subsequent reauthorizations, no longer existed.

The Supreme Court held that the definition of “political subdivision” in Section 14(c)(2) did not govern bailout eligibility. Instead, according to Chief Justice Roberts’ majority opinion, “all political subdivisions—not only those described in § 14(c)(2)—are eligible to file a bailout suit.” Despite the otherwise clear meaning of § 14(c)(2)—i.e., that jurisdictions like the MUD, which are not parishes or counties and do not register voters, cannot bailout—the Court ruled that the MUD could, in fact, bailout from preclearance. As such, the Court remanded the MUD’s claim for determination of whether the MUD, as a “political subdivision,” was eligible for bailout and avoided issuing a ruling on the constitutional question raised by the MUD.

However, in so doing, the Court expressed “serious misgivings” that Section 5 “imposes substantial federalism costs” by authorizing federal participation into state and local decisions related to voting and elections. The Chief Justice questioned whether “adequate justification to retain the preclearance requirements” remained, observing that “[t]hings have changed in the [jurisdictions covered by Section 5]. Voter turnout and registration rates [for African-American and white voters] approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels.”

Commentators have interpreted such language—no doubt irrelevant to the Court’s actual holding that the MUD was eligible to bailout from coverage—as a warning that the Court is prepared to invalidate preclearance in a future case.

Future rulings that constrain the VRA may further hinder the ability of the United States to adhere to its international human rights treaty obligations. A future ruling that modifies or limits Congress’s ability to proscribe effects-based discrimination—i.e., mandating that Congress can only proscribe what the Constitution already prohibits and not what is congruent and proportional to the Constitution’s prohibitions—will further remove the United States...
States from compliance with the CERD and ICCPR as both treaties pertain to the right to vote. But even a future ruling that leaves the effects-based definition of discrimination intact while invalidating Section 5 would still gravely harm both the domestic and international impact of the VRA. The Act’s ability to enforce the effects-based definition of discrimination at all levels of government through preclearance would be hampered. In turn, U.S. implementation of its obligation to enforce the CERD and ICCPR at the state and local level would suffer. Enforcement of the VRA’s prohibition on racial discrimination in voting at the state and local level would be left entirely to Section 2. But during the last twenty years the Court has routinely interpreted Section 2 narrowly, and there is no reason to think the Court will not continue to limit Section 2.147

Undoubtedly, there are steps the United States can take that would decrease the role that the VRA plays in facilitating U.S. compliance with international voting rights standards. The United States can increase its adherence to international voting rights standards by reconsidering the RUDs it attached to both the CERD and ICCPR and declaring each treaty to be self-executing. Congress could enact implementing legislation for each treaty, or use its treaty power to bind states to adhere to international standards. Similarly, the executive branch could establish federal monitoring and implementation bodies that would ensure U.S. compliance with both treaties across the federal government and down to state and local governments.148

Until the United States takes steps to impose international standards onto U.S. policies and practices from the outside, the VRA must not be forgotten as a vehicle for ushering in compliance with international voting rights standards from the inside. The VRA has served as, and can continue to be, a tool for achieving and

147 See, e.g., Bartlett v. Strickland, 129 S. Ct. 1231 (2009) (interpreting Section 2 of the VRA to require minority groups to constitute a numerical majority of the voting-age population in a geographically compact area before proceeding on a claim of vote dilution).

protecting the universal right to vote. Those interested in “bringing human rights home” are right to focus on applying international law to the United States from the outside; but they must also recognize that which can be lost if the VRA is under-enforced or interpreted so that it is impotent as a tool for implementing a national voting rights policy. In short, the harm that may result from a weakened VRA will impact more than domestic policy. An ineffective or less-effective VRA will also limit the ability of the United States to adhere to its international human rights obligations.

4. Conclusion

By assenting to the CERD and ICCPR, the United States undertook an obligation to take positive steps to hold itself to an international standard of human rights. The United States bound itself to protect and uphold the fundamental human right to political participation, regardless of race, color, descent, nationality or ethnic origin. Yet, the U.S. government has also taken steps to avoid compliance with the international human rights framework to which it assented. Despite its role in the creation of the modern human rights framework, the human rights ideals espoused by the United States often conflict with its actual practice.

This “gap” between ideals and practices exists, in part, because the United States has impeded, through the use of RUDs, full implementation of its international obligations. The United States has failed to adopt a definition of impermissible racial discrimination that encompasses neutral governmental conduct that has the effect of discrimination. The United States has hid behind the notion of federalism to abstain from implementation of human rights norms. Finally, the United States has failed to provide judicial or other remedies that sanction violators of international human rights or compensate victims.

At least within the sphere of voting rights, the VRA facilitates U.S. compliance with the international human rights standards to which it has assented. As an extraordinary remedy to the evils of racial discrimination in voting, the VRA goes beyond the floor set by the Constitution to employ a definition of discrimination that closely tracks the definition of discrimination in the CERD and ICCPR. Moreover, through Section 5 and Section 2, the VRA allows the United States to overcome federalism barriers and impose a national voting rights standard of nondiscrimination.
And, through Section 2, the VRA allows judicial remedies to investigate and punish violators of the VRA while compensating victims.

By no means is the VRA a panacea to the United States’ lackluster compliance by the United States with international human rights obligations, let alone more limited international voting rights obligations. Indeed, the VRA has proven an inept vehicle to remedy at least two of the United States’ more blatant violations of international voting rights treaty obligations: the lack of federal representation for residents of the District of Columbia; and, the various state laws and policies that disenfranchise felons.149

Furthermore, to the extent that the VRA successfully facilitates U.S. compliance with international human rights standards, its usefulness as a model that Congress can replicate in other areas of international human rights is doubtful. Congressional power may be at its zenith when enforcing nondiscrimination in voting and not transferable to the protection of other human rights through domestic law.150 In enacting the VRA, Congress acted pursuant to at least two sources of Constitutional power: the Elections Clause151 and Congress’s enforcement powers in the Fourteenth

149 Challenges to felony disenfranchisement laws through the VRA have been met with mixed results. Compare Farrakhan v. Gregoire, 590 F.3d 989 (9th Cir. 2010) (holding that Washington State’s felon disenfranchisement law is racially discriminatory and in violation of the VRA) with Simmons v. Galvin, 575 F.3d 24 (1st Cir. 2009) (denying relief through Section 2 of the VRA to those challenging Massachusetts’ ban on felon voting), Hayden v. Pataki, 449 F.3d 305 (2d Cir. 2006) (en banc) (denying relief through Section 2 of the VRA on grounds that Congress did not intend felon disenfranchisement laws to fall within the Voting Rights Act’s scope) and Johnson v. Bush, 405 F.3d 1214 (11th Cir. 2005) (holding that the racist intent with which Florida’s ban on felon voting was originally instituted was “cleansed” by Florida’s most recent revision to its Constitution, since that revision lacked any racist intent). The Author is aware of no case in which residents of the District of Columbia have challenged the lack of political representation in Congress by alleging a violation of the VRA.

150 See Karlan, supra note 16, at 17 (“[C]ongressional power is at its apogee when Congress acts to protect fundamental rights, to protect suspect or quasi-suspect classes, to regulate electoral processes that involve the selection of members of Congress, to deal with issues relating to politics and political value judgments that are relatively unamenable to judicial resolution under the Constitution alone, and does so through mechanisms that ‘require the exercise of political responsibility’ by the federal government.”).

151 See U.S. CONST. art. I, § 4, cl. 1 (“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators.”).
and Fifteenth Amendments.152 There are few, if any, other areas in which Congress can define discrimination beyond the floor set by the Constitution, interfere directly with local lawmakers, and provide individuals with the authority to enforce such norms through private litigation.

That the VRA represents such a seismic exertion of Congressional power to enforce a human right underscores the serious impediments that must be overcome in order to facilitate compliance with international human rights norms. Given that the ghost of Senator Bricker lives on in the form of RUDs that extinguish congressional enforcement of U.S. international human rights obligations through the use of the Treaty Power, the protection of civil and human rights remains subject to other grants of congressional authority. In particular, U.S. declarations that the CERD and ICCPR are non-self-executing place greater importance on congressional authority to protect human rights through the use of its Reconstruction Amendments enforcement powers.

Yet the Supreme Court’s decision in NAMUDNO reveals hostility towards Congress’ power under the Reconstruction Amendments, perhaps signaling the eventual demise of the VRA as a tool for facilitating U.S. adherence to the CERD and ICCPR in the area of voting. Although the Court in NAMUDNO avoided a ruling that directly limited the extent to which Congress can constitutionally provide a federal remedy for state and local racial discrimination in voting, Chief Justice Roberts’ opinion expresses serious misgivings about the VRA. A future Supreme Court ruling that restricts the power of Congress to address violations of equal protection and fundamental rights will harm U.S. fulfillment of its international human rights obligations. A critical tool for “bringing human rights home” will be blunted.

The VRA has changed the composition of American democracy. The extent to which the VRA can continue to affect change and facilitate U.S. adherence to its international voting rights obligations remains to be seen.

152 See supra text accompanying notes 88–90 (discussing their application in NAMUDNO).