

U.S. FEDERALISM AND ITS IMPACT ON ICERD COMPLIANCE
SHADOW REPORT OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
SUBMITTED TO
THE COMMITTEE ON THE ELIMINATION OF ALL FORMS OF
RACIAL DISCRIMINATION
JULY 2014

INTRODUCTION

1. The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee")¹ welcomes the United States' June 2013 report ("2013 Report") to the Committee on the Elimination of All Forms of Racial Discrimination ("the Committee"), which outlines the measures giving effect to the United States' obligations under the International Convention on the Elimination of All Forms of Racial Discrimination ("ICERD"), in accordance with article 9 thereof.²

2. The U.S. Report highlights the various measures and mechanisms that currently function to meet the United States' obligations under the ICERD in a manner consistent with the principles of the United States' federal structure. The position of the United States is that existing protections afforded by federal, state, and local law, as well as existing mechanisms to facilitate coordination between these levels, are largely adequate to fulfill the fundamental obligations of the United States under the ICERD.³ Working from the premise that there remains room for improvement, this submission focuses on providing explanatory background regarding the intersection of the United States' obligations under the ICERD with its federal structure, and aims to inform the Committee's observations on how current protections and mechanisms of implementation might be improved. The report provides an overview of the background principles of international law regarding implementation of the ICERD and the United States' position on implementation to date. It also explores general principles of federalism, then concludes with examples of measures that could be taken to improve compliance in a fashion consistent with American federalism.

BACKGROUND PRINCIPLES OF INTERNATIONAL LAW

3. The Lawyers' Committee recognizes that there is no language in the ICERD and no consistency of state practice that demands general compliance with Committee determinations as a matter of international law. However, it also recognizes that Committee determinations command great respect as products of the reasoned judgment of the independent body charged with overseeing implementation of the ICERD, and as such, carry significant persuasive authority. This is evident from 1.) the fact that national and international courts treat committee determinations as persuasive and authoritative interpretive guides as to the meaning of ambiguous treaty provisions,⁴ and 2.) the principle of Pacta Sunt Servanda (as embodied in article 26 of the

¹ The Lawyers' Committee was founded in 1963 at the request of President John Kennedy. Its principal mission is to secure, through the rule of law, equal justice under law by marshaling the pro bono resources of the private bar for litigation, public policy advocacy and other forms of service to promote the cause of civil rights. Its primary focus is to represent the interests of racial and ethnic minorities and other victims of discrimination through programs that promote economic development of minority communities, and ensure voting rights, fair housing, equal access to education and employment, and environmental justice. The Lawyers' Committee is a national organization with eight independent affiliates across the country. See www.lawyerscommittee.org.

² *Opened for signature* Dec. 21, 1965, 660 U.N.T.S 195 (*entered into force* Jan. 4, 1969).

³ See UNITED STATES OF AMERICA, PERIODIC REPORT OF THE UNITED STATES OF AMERICA TO THE U.N. COMM. ON THE ELIMINATION OF RACIAL DISCRIMINATION CONCERNING THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION ¶¶ 31-32, delivered to the U.N. Committee on the Elimination of Racial Discrimination (Jun. 2013), available at <http://www.state.gov/documents/organization/210817.pdf> (last visited Jul. 2, 2014) ("2013 Report").

⁴ See, e.g., Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo), Judgment, 2010 I.C.J. 639, 664 ("Although the Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee, it believes

Vienna Convention on the Law of Treaties (“VCLT”), “every treaty in force is binding upon the parties to it and must be performed by them in good faith”⁵). Here this principle would seem to establish that the determinations and recommendations of the committee tasked with overseeing implementation of treaty obligations cannot simply be ignored in good faith.

4. The Lawyers’ Committee recognizes that international law imposes an obligation on nations to discharge their duties under treaties that they have ratified, regardless of any difficulties posed by their federal structure. Article 27 of the VCLT⁶ is clear in this regard, as is the ICERD, which contemplates the elimination of racial discrimination at all levels, national and local.⁷ The Lawyers’ Committee also notes, however, that neither the treaty nor international law more generally mandates any particular institutional approach to compliance—the breach of obligation under the ICERD pertains to the failure to perform the obligations listed therein, not to the manner of performance chosen. Thus, federalism *cannot* be an *excuse* for non-performance, but it *can* be the *chosen means* through which to render performance.⁸

THE POSITION OF THE UNITED STATES

5. Upon ratification of the ICERD, the United States submitted an understanding that, in essence, clarifies its position that the obligations undertaken through ratification will be fulfilled in a manner consistent with its federal structure—meaning that the federal government will take responsibility for implementation to the extent that it exercises jurisdiction over the matters contained in the treaty, and when it does not, implementation will be carried out by state and local governments, with the federal government playing a supporting role.⁹ As per the rules discussed above in ¶4, this chosen means of performance and the understanding that communicates it do not, in and of themselves, violate the treaty or international law more generally. Moreover, the United States does not dispute the proposition that its federal structure cannot be used as an excuse for noncompliance with ICERD.¹⁰ Its position is that the current patchwork of protections afforded by state and local governments, in conjunction with federal protections, already ensure that “the fundamental requirements of the convention are respected and complied with at all levels of government,” and that more aggressive federal action (e.g., implementing legislation) is therefore unnecessary.¹¹ Consistent with this position, in its 2007 report to the Committee, the United States emphasized the work of state Attorney General Offices and state civil and human rights commissions (or offices) in enforcing anti-

that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty.”); *United States v. Duarte-Acero*, 208 F.3d 1282, 1287 (11th Cir. 2000) (citing the United Nations Human Rights Committee’s views, despite their nonbinding nature, as persuasive in interpreting an ambiguous provision of a treaty at issue).

⁵ Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, (*entered into force* Jan. 27, 1980). Although the United States is not a party to the VCLT, according to the Department of State the United States considers itself bound by many of its provisions as a matter of customary international law. *See* U.S. Dept. of State, *Vienna Convention on the Law of Treaties*, available at <http://www.state.gov/s/1/treaty/faqs/70139.htm> (last visited Jul. 2, 2014).

⁶ VCLT, *supra* note 54, at art. 27. (“[A] party may not invoke . . . its internal law as justification for its failure to perform a treaty”).

⁷ ICERD, *supra* note 24, at art. 2(1).

⁸ *See* Louis Henkin, *U.S. Ratification Of Human Rights Conventions: The Ghost Of Senator Bricker*, 89 AM. J. INT’L L. 341, 346 (1995) (“International law requires the United States to carry out its treaty obligations but, in the absence of special provision, does not prescribe how, or through which agencies, they shall be carried out. As a matter of international law, then, the United States could leave the implementation of any treaty provision to the states. Of course, the United States remains internationally responsible for any failure of implementation.”).

⁹ U.S. reservations, declarations, and understandings, International Convention on the Elimination of All Forms of Racial Discrimination, 140 Cong. Rec. S7634-02 (daily ed., June 24, 1994), available at <http://www1.umn.edu/humanrts/usdocs/racialres.html> (last visited Jul. 2, 2014) (“The United States understands that this Convention 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 fulfilment of this Convention.”).

¹⁰ UNITED STATES OF AMERICA, INITIAL REPORT TO THE COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION 45 (Sept. 2000), delivered to the U.N. Committee on the Elimination of Racial Discrimination, available at <http://www1.umn.edu/humanrts/usdocs/cerdinitil.html> (last visited Jul. 2, 2014) (“[T]his understanding is not a reservation. It does not condition or limit the international obligations of the United States. Nor can it serve as an excuse for any failure to comply with those obligations as a matter of domestic or international law.”).

¹¹ *Id.* at 44.

discrimination laws, as well as the existence of work sharing agreements between the Equal Employment Opportunity Commission (“EEOC”) and Department of Housing and Urban Development (“HUD”), which allow the state entities to receive, investigate and file charges that fall within federal statutes (and allow federal entities to do the same regarding charges falling within state statutes).¹²

6. In its concluding observations on the United States’ 2007 report, the Committee expressed concern at “the lack of appropriate and effective mechanisms to ensure a co-ordinated approach towards implementation...at the federal, state and local levels,” and recommended that the United States establish such mechanisms.¹³ It also recommended that the United States consider establishing an independent national human rights institution.¹⁴ In the 2013 Report, the United States responded to both of these observations by reaffirming its position that numerous mechanisms already exist to ensure adequate coordination.¹⁵ For example, it again cited enforcement agencies at the federal level and mentioned the recently established UPR Working Groups and Equality Working Group, describing them as part of its effort to further strengthen coordination and domestic implementation of human rights treaty obligations.¹⁶

BACKGROUND PRINCIPLES OF AMERICAN FEDERALISM

7. The following discussion is intended to provide an introduction to and overview of American federalism for an audience that may not already be acquainted with it. By framing its recommendations in ways that directly acknowledge and leverage the federalist structure, the Committee can best facilitate the United States’ meaningful compliance with its ICERD obligations.

8. Within the United States’ political structure, the federal government possesses only limited powers.¹⁷ The Constitution “establishes a system of dual sovereignty between the States and the Federal Government.”¹⁸ Under this system, “the States possess sovereignty concurrent with that of the Federal Government,”¹⁹ although valid federal law trumps state law when the two come into conflict.²⁰ There are no defined subject matter limits to the reach of federal power,²¹ meaning that if an act of Congress falls within the scope of its enumerated powers, it cannot be invalidated on the basis of federalism principles. Nonetheless, the U.S. Supreme Court (“Court” or “Supreme Court”) has occasionally expressed skepticism of federal laws that reach conduct deemed to fall within the purview of the states, occasionally invoking federalism in mapping the contours of Congress’ powers and distinguishing between matters that are local or national in character.²² The Court has held that Congress cannot require states in some areas to implement

¹² UNITED STATES OF AMERICA, PERIODIC REPORT OF THE UNITED STATES OF AMERICA TO THE U.N. COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION CONCERNING THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION 27 (Apr. 2007), delivered to the U.N. Committee on the Elimination of Racial Discrimination, *available at* http://www.state.gov/j/drl/rls/cerd_report/83404.htm (last visited Jul. 2, 2014).

¹³ Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination* ¶ 13, U.N. Doc CERD/C/USA/CO/6 (2008).

¹⁴ *Id.* at ¶ 12.

¹⁵ See 2013 Report, *supra* note 32, at ¶¶ 31-32.

¹⁶ *Id.* at ¶ 32. The 2013 Report provides very little detail on how these groups intend to accomplish their goals, especially regarding coordination between federal, state, and local governments. Instead, it recites their goals on a general level, without providing much explanation of their approach or actions to date.

¹⁷ *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991).

¹⁸ *Id.*

¹⁹ *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990).

²⁰ U.S. CONST. art. VI.

²¹ See *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 550 (federalism does not protect a “sacred [substantive] province of state autonomy.” (*quoting* *E.E.O.C. v. Wyoming*, 460 U.S. 226, 236 (1983))), 556 (The only federalism-based limits on federal authority are those that inhere in “[t]he political process[, which] ensures that laws that unduly burden the States will not be promulgated”), 557 (efforts to determine which state functions are immune from federal regulatory interference are “impracticable and doctrinally barren.”) (1985).

²² See, e.g., *United States v. Morrison*, 529 U.S. 598, 617-18 (2000) (“The Constitution requires a distinction between what is truly national and what is truly local.”); *United States v. Lopez*, 514 U.S. 549, 557 (federal power “must be considered in the light of our dual system of government” (*quoting* *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937))), 564 (skepticism toward laws that reach areas “where States historically have been sovereign”), 567 (Congress lacks “a general police power of the sort retained by the States”) (1995). However, “Congress[has] power to regulate purely local activities that are part of an economic “class of activities” that have a substantial effect on interstate commerce.” *Gonzales v. Raich*, 545 U.S. 1, 17 (2005).

federal policy, either by forcing state legislatures to pass laws²³ or requiring their executive officers to administer federal regulations.²⁴

9. While the U.S. Constitution has traditionally been interpreted to confer broad power upon the federal government to enact laws that implement treaties, recent doctrinal developments have cast the scope of this power into doubt, raising the possibility that treaty-implementing laws will be construed more narrowly to avoid reaching matters that fall within the purview of the states. Under the U.S. Constitution, all powers “not delegated to the United States . . . nor prohibited by it to the States, are reserved to the States respectively,” or else to the people.²⁵ In *State of Missouri v. Holland*, the Supreme Court noted that the treaty-making power is in fact “delegated expressly”²⁶ to Congress by the Constitution. Thus, it held that a federal law passed to implement a treaty is immune from federalism-based challenges.²⁷ There are limits to the treaty power—a treaty cannot contradict the Constitution²⁸ and will usually require additional legislation to implement it.²⁹ However, if the treaty itself is valid, Congress was thought to have power to enact implementing legislation.³⁰

10. Earlier this year, however, the Supreme Court cast some doubt upon the treaty power’s scope, signaling skepticism toward treaty-implementing laws that “stark[ly] intru[de] into traditional state authority.”³¹ In *Bond v. United States*,³² the Court declared that even a law that implements a treaty “must be read consistent with principles of federalism inherent in our constitutional structure.”³³ In *Bond*, the Court said it would construe a law that implemented the Chemical Weapons Convention Implementation Act of 1998 (“CWCIA”) so as to respect the “usual constitutional balance of federal and state powers.”³⁴ Thus, while the United States may enter into a treaty that pertains to “matters of the sharpest exigency for the national well being[.]”³⁵ its means of effectuating treaties are constrained by constitutional limits on federal power.

11. The Committee should understand that *Bond* did not overrule *Holland*.³⁶ *Bond* was decided on statutory grounds,³⁷ leaving *Holland*’s constitutional holding on the breadth of the treaty power undisturbed. While *Bond* expressed reluctance to read the treaty-implementing statute to reach local matters,³⁸ it did not say that such a reading would actually render the act unconstitutional. Nonetheless, it is impossible to ignore the Court’s rhetorical shift away from a broad reading of the United States’ ability to regulate local conduct through treaty-implementing laws and toward a narrower view of the treaty power through the lens of federalism and respect for state authority.³⁹

²³ *New York v. United States*, 505 U.S. 144, 162 (1992) (Cannot make states “enact or administer a federal regulatory program”).

²⁴ *Printz v. United States*, 521 U.S. 898, 935 (1997) (Cannot “command the States’ officers . . . to administer or enforce a federal regulatory program.”).

²⁵ U.S. CONST. amend. X.

²⁶ *State of Missouri v. Holland*, 252 U.S. 416, 432 (1920); see U.S. CONST. art. II, § 2.

²⁷ 252 U.S. at 432 (If a “treaty is valid there can be no dispute about the validity of the statute” that implements it).

²⁸ See *Reid v. Covert*, 354 U.S. 1, 16 (“[N]o agreement with a foreign nation can confer power on the Congress . . . which is free from the restraints of the Constitution.”), 17 (“This Court has . . . recognized the supremacy of the Constitution over a treaty.”) (1957).

²⁹ See *Medellín v. Texas*, 552 U.S. 491, 503-06 (2008) (distinction between treaties that are self-executing and thus operational without the passage of additional legislation, and those that require implementing legislation to effectuate); see also *id.* at 521 (a treaty need not expressly declare itself self-executing to be so; what matters is whether it was intended for it to have domestic effect).

³⁰ 252 U.S. at 432.

³¹ *Bond v. United States*, No. 12-158, slip op. at 21 (U.S. Jun. 2, 2014).

³² *Id.*

³³ *Id.* at 10.

³⁴ *Id.* at 21 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991)). *Bond* concerned whether “an amateur attempt by a jilted wife to injure her husband’s lover, which ended up causing only a minor thumb burn readily treated by rinsing with water,” *Bond*, slip. op. at 2, violated Section 229(a) of the CWCIA because the effort involved spreading chemicals that were non-lethal at the amounts used on the lover’s car door, mailbox, and door knob. *Id.* at 6.

³⁵ 252 U.S. at 433.

³⁶ *Bond*, slip. op. at 10 (“[W]e have no need to interpret the scope of the Convention in this case.”). Three justices—Scalia, Alito, and Thomas—stated that *Holland* should be overruled. (Scalia, J., concurring.)

³⁷ *Id.* at 21 (“There is no reason to suppose that Congress” intended that the Act reach so broadly).

³⁸ *Id.* (Rejecting an interpretation that “would mark a dramatic departure from . . . [the] constitutional structure and a serious reallocation of . . . enforcement authority between the Federal Government and the States.”).

³⁹ Compare *Holland*, 252 U.S. at 434 (while “the great body of private relations usually fall within the control of the State, . . . a treaty may override its power”), with *Bond*, No. 12-158 at 14 (it is “appropriate to refer to basic principles of federalism embodied in the Constitution to resolve ambiguity in a federal statute.”).

12. Because *Bond* expressed concern that the treaty’s application reached “*local* criminal activity[.]”⁴⁰ a treaty-implementing law may be safer if were seen to reach conduct that is national in character. Such a treaty would not implicate an analogous “intru[sion] upon the police power of the States.”⁴¹ The federal government has traditionally been recognized as having a role to play in protecting civil rights. While laws “passe[d] to remedy” racial discrimination must “speak[] to current conditions[.]” according to the Supreme Court,⁴² in its 2013 Report the United States itself “recognize[s that] . . . racial and ethnic discrimination still persists, and [that] much work remains to meet our goal of ensuring equality for all.”⁴³ However, the Supreme Court has struck down several federal civil rights laws on the grounds that they exceeded Congress’ powers vis-à-vis those of the states,⁴⁴ suggesting that a statute implementing ICERD may not be immune from close federalism scrutiny.

SUGGESTIONS FOR FRAMING RECOMMENDATIONS TO THE UNITED STATES

13. Given the United States’ perceptions of its obligations to implement ICERD consistently with its federal structure, the Committee should consider framing its recommendations in light of the principles of American federalism.

The Contemporary Scope of the Treaty Power is Unclear

14. In framing recommendations, the Committee should be aware that the extent of the United States’ ability to meet its ICERD obligations via implementing legislation is less clear now than in the past. Until recently, the Supreme Court has interpreted the Constitution to empower the federal government to enact treaty-implementing laws that reach “local” matters. However, the reach of that power is now in flux. The United States Congress undoubtedly has authority to enact laws implementing ICERD, but a broad statute may be construed narrowly by the courts to avoid reaching local conduct, or else struck down entirely. Until the Court clarifies the scope of the treaty power, uncertainty over the United States’ authority to enact far-reaching laws to implement ICERD will persist.

Coordination Across Levels and Layers of Government

15. Regarding coordination of federal, state and local government enforcement, no principle of federalism prevents the federal government from establishing either an independent agency (housed within the executive branch) to oversee implementation of human rights obligations generally or a mechanism focused more narrowly on overseeing the implementation of the ICERD. The focus of the agency or office in either scenario should be on centralizing and streamlining what coordination already occurs between federal, state and local governments, as well as encouraging further coordination where it would be advantageous—with a view toward enhancing current efforts at compliance while remaining within the bounds of federalism.

Using Spending Conditions to Incentivize State Cooperation with Federal Policy Objectives

16. Beyond direct regulation, Congress may also incentivize states to implement desired policies by placing conditions on the federal funding that states receive that require compliance with federal policy

⁴⁰ *Bond*, slip. op. at 21 (emphasis added).

⁴¹ *Id.* at 18.

⁴² *Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612, 2631 (2013).

⁴³ 2013 Report, *supra* note 32, at ¶ 2.

⁴⁴ *See, e.g., Shelby County, Ala.*, 133 S.Ct. at 2631 (striking down the Voting Rights Act’s preclearance coverage formula); *Morrison*, 529 U.S. at 627 (striking down the Violence Against Women Act’s federal civil remedy for victims of gender-motivated violence); *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (invalidating application of the Religious Freedom Restoration Act against the states as exceeding Congress’ authority under section five of the Fourteenth Amendment).

objectives.⁴⁵ Notably, Congress can even use spending incentives to achieve goals that would otherwise exceed its constitutionally-enumerated powers.⁴⁶ Spending conditions do not exceed Congress' spending power so long as they serve the general welfare, are expressed unambiguously, relate to the relevant federal interest in the program at hand, and do not require states to do things that are themselves unconstitutional.⁴⁷ A spending condition also cannot be unconstitutionally coercive.⁴⁸ However, a condition that does not involve a coercively-large amount of funding, unduly affect existing funding streams, or condition funding for one program upon entrance into another should not pose federalism concerns.

17. The United States already partners with the states to achieve compliance with federal policy objectives in several civil rights-related fields, including housing and employment, through use of spending conditions. The U.S. Equal Employment Opportunity Commission ("EEOC") works with state agencies to enforce federal employment discrimination law, contracting with them to process over 48,000 discrimination claims annually.⁴⁹ Under Worksharing Agreements, the EEOC and state agencies divide the receipt and processing of charges under certain anti-discrimination laws between them to give complainants "an efficient procedure for obtaining redress for their grievances under appropriate . . . [local, state] and Federal laws."⁵⁰ Likewise, the Department of Housing and Urban Development funds state and local agencies that "enforce fair housing laws that are substantially equivalent to the Fair Housing Act" via the Fair Housing Assistance Program.⁵¹

18. These programs and others illustrate the feasibility of using spending conditions to achieve compliance with federal policy objectives in a manner that is consistent with the principles of federalism. The Committee can recommend that the United States expand its usage of conditional spending grants to incentivize the states to take actions against racial discrimination, either by funding new programs or devoting more resources to implementing those already in existence. To the extent that the Committee is able to frame its recommendations to the United States as suggestions for the use of federal spending conditions in furtherance of anti-discrimination policies that do not unduly disturb existing funding sources, it should avoid conflict with federalism principles. Several suggestions for ways the federal government might use spending conditions to incentivize state compliance with federal policy objectives are provided below:⁵²

- With respect to **discriminatory law enforcement**, the Department of Justice ("DOJ") can attach conditions to local law enforcement funding to: 1.) discourage the use of deadly force by police departments, 2.) prohibit racial profiling, 3.) establish and implement training programs to reduce the prevalence of implicit and explicit racial bias, and 4.) encourage local/state law enforcement agencies to collect and analyze data on racial outcomes at "key decision making points in the justice system."⁵³ DOJ can also 5.) fund effective reentry programs for persons transitioning back into society.
- With respect to the **juvenile justice system**, DOJ can use its funding authority to establish and implement more effective programs to provide alternatives to incarceration and emphasize the system's rehabilitative focus, with prison being used a last resort.

⁴⁵ S. Dakota v. Dole, 483 U.S. 203, 206 (1987).

⁴⁶ *Id.* at 207 (*quoting* United States v. Butler, 297 U.S. 1, 66 (1936)).

⁴⁷ *Id.* at 207-08.

⁴⁸ *Id.* at 211. Factors relevant to determining whether a condition is coercive are its magnitude (whether it constitutes a "relatively mild encouragement[.]" Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2604 (2012) (*quoting* Dole, 483 U.S. at 211), versus a "gun to the head[.]" *id.*), the extent to which it affects preexisting funding (whether a state "stands to lose not merely "a relatively small percentage" of its existing . . . funding, but all of it." *Id.* (*quoting* Dole, 483 U.S. at 211)), and whether the condition effectively requires a state to enroll in an entirely new program, *id.* at 2605 (whether it "accomplishes a shift in kind, not merely degree.").

⁴⁹ U.S. Equal Employment Opportunity Comm., 2013 FEPA and TERO Contracts, available at http://www.eeoc.gov/eeoc/doingbusiness/contracts/fepa_tero.cfm (last visited Jun. 16, 2014).

⁵⁰ U.S. Equal Employment Opportunity Comm., FY 2012 EEOC/FEPA Model Worksharing Agreement, available at http://www.eeoc.gov/employees/fepa_wsa_2012.cfm (last visited Jul. 2, 2014).

⁵¹ U.S. Department of Housing and Urban Development, Fair Housing Assistance Program (FHAP), available at http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/partners/FHAP (last visited Jul. 2, 2014). It is authorized under § 817 of the Civil Rights Act of 1968 (Fair Housing Act), 42 U.S.C. § 3601 *et. seq.*, Pub.L. 90-284, 82 Stat. 73.

⁵² Many of these suggestions are also offered in the shadow report submitted by the Leadership Conference on Civil and Human Rights, which the Lawyers' Committee has endorsed.

⁵³ *Id.* at 40.

- With respect to **education**, the Department of Education (“DOE”) can 1.) require all states to ensure that schools in minority neighborhoods have the resources they need to ensure equitable implementation of existing Common Core State Standards⁵⁴ as a condition of their continuing receipt of Title I funding. It can also 2.) develop programs and policies to incentivize racial and socioeconomic educational integration, as well as 3.) school improvement. Meanwhile, DOJ can 4.) require school districts to collect and report enhanced discipline data disaggregated by race, ethnicity, and English Language Learner status.
- With respect to **housing segregation**, the Department of Housing and Urban Development can 1.) ramp up staffing of its Office of Fair Housing and Equal Opportunity to enhance its ability to conduct reviews of entitlement jurisdiction’s compliance with mandates to affirmatively further fair housing, and 2.) withdraw federal funding from any jurisdiction that administers that funding in a way that achieves discriminatory results and/or results in greater residential segregation.
- With respect to **voting rights**, DOJ can use funding power to incentivize states that have adopted strict voter ID requirements to 1.) expand the types of identification that will be accepted, 2.) ensure that such forms of identification are accessible in minority communities, 3.) conduct regular evaluations of their ID requirements, with an eye toward disparate racial impacts, continuing need, availability of approved ID forms for all eligible voters, and 4.) conduct educational outreach to the public, especially racial and ethnic minority voters and those of low socioeconomic status.

Exercising Existing Federal Authority

19. Beyond passing new legislation or imposing new spending conditions on the states, the United States can further compliance with ICERD through more robust oversight and enforcement pursuant to authority that the federal government already possesses, including that which it possesses under existing statutes. Suggestions for methods for ramping up enforcement under existing federal authority are as provided:

- With respect to **education**, DOE can more aggressively enforce federal requirements under Titles VI and IX of the Civil Rights Act, Section 504 of the Americans With Disabilities Act, and Title I of the Elementary and Secondary Education Act to provide 1.) equitable assignment of highly-qualified teachers to poor and minority students, 2.) equality of access to core curricular and college-preparatory classes, 3.) appropriate instruction and services for English Language Learners, and 4.) fair, effective disciplinary policies and practices.⁵⁵ It can also 5.) conduct reviews of school disciplinary practices as pertaining to race and gender for compliance with Titles VI and IX. Finally, it can 6.) audit local educational agencies to ensure that they collect current, complete, and accurate data pursuant to federal requirements.
- With respect to **immigration**, the Department of Justice, Office of Legal Counsel can 1.) issue an opinion clarifying that federal immigration law enforcement falls within the exclusive jurisdiction of the federal government, and can 2.) rescind its 2002 opinion asserting that states have “inherent authority” to enforce federal immigration law.⁵⁶
- With respect to **voting rights**, DOJ can 1.) rely on relevant provisions of federal law and the Constitution that prohibit racial and ethnic discrimination to ensure that citizenship check initiatives undertaken by the states and localities do not unduly hinder electoral participation by minority voters. DOJ can also 2.) take enforcement actions against those states that have yet to fully integrate voter registration into the protocols of covered agencies as required by Section 7 of the National Voter

⁵⁴ *Id.* at 41.

⁵⁵ *Id.*

⁵⁶ U.S. DEPT. OF JUSTICE, OFFICE OF LEGAL COUNSEL, MEMORANDUM FOR THE ATTORNEY GENERAL RE: NON-PREEMPTION OF THE AUTHORITY OF STATE AND LOCAL LAW ENFORCEMENT OFFICIALS TO ARREST ALIENS FOR IMMIGRATION VIOLATIONS (2002), *available at* <https://www.aclu.org/files/FilesPDFs/ACF27DA.pdf> (last visited Jul. 1, 2014). For a detailed refutation of the 2002 Office of Legal Counsel memo’s analysis and conclusions, *see* ACLU IMMIGRANTS’ RIGHTS PROJECT, 2002 OLC OPINION ON STATE AND LOCAL IMMIGRATION ENFORCEMENT (2009), *available at* <https://www.aclu.org/files/assets/olc-exp-ag-4.pdf> (last visited Jul. 1, 2014).

Registration Act; 3.) use the existing provisions of the Voting Rights Act to protect minority voters from discriminatory voting practices adopted by states and localities; and 4.) advise the states that state health benefit exchanges created by the Affordable Care Act, which administer public assistance applications, must offer voter registration with each covered transaction. Finally, it can 5.) investigate the disproportionate impact of felony disenfranchisement laws on racial and ethnic minority populations and issue a report on its findings.

- With respect to **criminal justice**, the Department of Justice can 1.) investigate the disproportionate use of deadly force against racial minorities by local/state law enforcement agencies, 2.) require such agencies to collect data disaggregated by race on deadly force incidents, and 3.) investigate local/state law enforcement agencies that enforce “stand your ground” policies in racially-discriminatory ways.

The Power of Persuasion

20. Finally, the United States government can use its platform to promote and encourage states and localities to adopt policies to proactively advance ICERD and anti-discrimination goals. Suggested recommendations are as follows:

- With respect to **voting rights**, DOJ can 1.) reiterate its support for automatic restoration of voting rights upon an individual’s release from incarceration, and 2.) oppose voting restrictions for those on parole, probation or who have unpaid fines or fees.

CONCLUSION

21. In conclusion, the principles of American federalism do not excuse the United States from performance of its obligations under ICERD. However, the federalist structure may impact the manner in which performance is carried out. While the scope of the power to implement legislation pursuant to treaties was traditionally understood to be broad, the extent of that power is less certain today. Nonetheless, the United States retains effective tools at its disposal to achieve state cooperation with federal efforts to combat racial discrimination beyond legislation. These include the creation of additional federal-state coordination entities; the use of spending conditions to incentivize states to act in accordance with federal policy prerogatives; the robust use of existing statutory, regulatory and constitutional authority; and persuading the states to act on their own, either through affirming its support for anti-discrimination initiatives or leading by example. Through these and other avenues, the United States can continue to make progress toward the elimination of racial discrimination in a way that is consistent with both its obligations under ICERD and its federal structure.