The Intent Doctrine and CERD: How the United States Fails to Meet its International Obligations in Racial Discrimination Jurisprudence

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Introduction

The United States ratified the International Convention on the Elimination of All Forms of Racial Discrimination, (hereinafter “CERD” or “the Convention”) but does not prioritize furthering its human rights objectives. Specifically, the Intent Doctrine, which requires that a plaintiff prove a perpetrator’s intent to discriminate to win an equal protection claim, violates CERD’s very definition of discrimination. Utilizing a disparate impact standard of discrimination, CERD offers broad protections against modern forms of discrimination such as implicit bias and structural racism. The Intent Doctrine, in comparison, is unequipped to combat these latent, yet incredibly pervasive types of racial discrimination. Because of this substantial disconnect between Supreme Court precedent and the United Nations treaty, the United States is in violation of its commitment to the Convention and to the ideals set forth therein. While other party states maintain progressive standards similar to those laid out by CERD, the United States refuses to modify its laws to comply with the Convention and continues to implement a doctrine that is ill-equipped to remediate contemporary manifestations of race-based discrimination. This article will explore in detail how the Intent Doctrine violates the very fundamentals of CERD’s human rights objectives, and provide suggestions for how civil and human rights advocates can leverage CERD’s language and international mandate to advance anti-discrimination law in the United States.

Central to this article is the distinction between an “intent”-based standard and a disparate impact standard. With respect to claims of race-based discrimination, the United States’ “Intent Doctrine” requires that a plaintiff prove that the alleged discriminatory action was done with the specific intention to discriminate based on race. This standard has proven almost insurmountable with respect to contemporary race-discrimination claims. It has hindered United States discrimination jurisprudence since its inception in 1976, as it is incapable of addressing modern discrimination, which is less likely to be overt or based on explicit racial animus, but is more often subtle, indirect or even unconscious. On the other hand, the disparate impact analysis utilized in CERD focuses on the effect of an alleged discriminatory act. This broader standard, (referred to herein as “disparate impact,” “effects-based,” and “indirect discrimination”) refocuses the inquiry towards whether an action actually resulted in discrimination, instead of whether an actor

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1 This article was written in conjunction with Equal Justice Society, an organization founded to overturn Washington v. Davis. Special thanks to my family, Damien Jovel, Sara Jackson, Brando Starkey, Fabian Renteria, Reggie Shuford and Eva Paterson for their outstanding input and support.


4 See infra, Part II.B.
intended to discriminate. As illustrated by modern social science, most discrimination today functions at a subconscious and structural level, which creates discriminatory effects even absent any “intent” to discriminate. Consequently, an effects-based standard is better equipped than the Intent Doctrine to address contemporary discrimination. The international community has embraced a disparate impact standard, in large part to take an effective and proactive stance against racial discrimination. The United States, however, refuses to comply with its obligation as a CERD party to declare a similarly firm stance. Consequently, the United States fails to effectively address contemporary racial discrimination.

This article argues that the United States’ insistence on preserving the Intent Doctrine causes it to lag behind the international community in the area of racial discrimination jurisprudence. First, the United States does not meet its international human rights obligations, as evidenced by the failure of the Intent Doctrine to provide the broad discrimination protections at the root of CERD. Second, the United States disregards both the CERD Committee’s recommendations that the Intent Doctrine be revisited, as well as the disparate impact standards implemented by other CERD party states in compliance with CERD’s standard.

Part I of this article describes CERD in depth, concluding that the United States’ commitment to CERD was and remains largely symbolic. With specific attention to the disparate impact standard and how it operates, the article discusses the history and structure of the Convention, as well as the limiting stipulations the United States attached at ratification. In Part II, the article argues that the Intent Doctrine is not only inadequate to remedy modern discrimination, but also violates the provisions of CERD. It explores Washington v. Davis, the 1976 Supreme Court case that established the Intent Doctrine precedent, and discusses two types of modern discrimination -- implicit bias and structural racism -- to demonstrate how the Intent Doctrine fails to effectively address racial discrimination in the United States. The article then focuses on the conflict between the intent and disparate impact standards, discussing the interaction between CERD’s enforcement Committee and the United States bodies charged with effectuating the Convention. Part III highlights the domestic discrimination standards of other CERD party states with a focus on the United Kingdom, Canada and South Africa. This section shows that other party states not only comply with CERD’s anti-discrimination obligations, but that they have explicitly rejected the Intent Doctrine in favor of broader, more effective discrimination protections. Finally, Part IV discusses actions that the legal community and the public can take to enforce CERD’s disparate impact standard within the United States. Specifically, it explores working towards either overturning Washington v. Davis, or calling for legislation to effectively implement the provisions of CERD. Overall, this article will demonstrate that through the Intent Doctrine, the United States does not take its international obligations against racial discrimination seriously, as opposed to other party states that maintain far more progressive and effective standards that do comply with CERD.

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5 These countries were chosen because they are all party states to CERD, and have considered the intent requirement in their discrimination jurisprudence but rejected it for the more effective disparate impact standard of CERD.
Part I: CERD

The International Convention on the Elimination of All Forms of Racial Discrimination is one of the most celebrated and embraced international human rights treaties. Originally drafted in 1965, this treaty has been described by a leading scholar on the topic as “the most comprehensive and unambiguous codification in treaty form of the idea of the equality of the races.” This section will discuss the history of CERD, the structure of its language with special attention to its standard for discrimination and its corresponding enforcement mechanisms, and the outpouring of support for CERD from the international community. It will then analyze the limitations set forth by the United States upon ratification, concluding that they are so broad that the United States’ commitment to CERD and its purpose was largely a symbolic gesture to the international community.

A. History of CERD

In the winter of 1959 to 1960, a sudden surge of anti-Semitic incidents worldwide created demand for an international convention aimed at eliminating discrimination. In response, the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities (hereinafter “the Sub-Commission”) adopted a resolution declaring that such events violated the Universal Declaration of Human Rights and recommending specific actions to combat these and similar occurrences. The resolution, entitled “Manifestation of Racial Prejudice and National and Religious Intolerance”, became the precursor to CERD.

After considering input from various delegations, the General Assembly’s Third Committee concluded that two separate conventions would be prepared: one dealing with the epidemic of religious intolerance and the other with racial prejudice. Because various delegations asserted that issues of race were more urgent than religious intolerance, the General Assembly agreed to prioritize the instrument dealing with racial discrimination.

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8 Schwelb, supra, note 3 at 997-998.
9 Id.
11 Schwelb, supra, note 3 at 999.
12 Id. explaining, “The decision to separate the problem of ‘religious intolerance’ from that of ‘racial discrimination’ had been brought about by political undercurrents which had very little to do with the merits of the problem. The opposition to coverage of religious as well as racial discrimination had come from some of the Arab delegations; it reflected the Arab-Israeli conflict. In addition, many delegations,
In 1964, the Sub-Commission began formulating the language of the Convention, which “embodied the world community’s declaration of an international standard against racial discrimination and ‘drew its primary impetus from the desire of the United Nations to put an immediate end to discrimination against black and other nonwhite persons.’”13 With rapid speed that reflected the sense of urgency to create it, the General Assembly unanimously adopted CERD on December 21, 1965.14 The final version was later depicted as “the international community’s only tool for combating racial discrimination which is at one and the same time universal in reach, comprehensive in scope, legally binding in character, and equipped with built-in measures of implementation.”15 As a mechanism to promote international human rights, the United Nations created CERD to promote and enforce broad racial discrimination protections within each signatory state.

Once the language of CERD was finalized, it gained instant support. Opened for signature in March of 1966, there were already twenty-two signatories by the end of June of that year.16 Signatory states, by signing the Convention, indicated their intention to take steps towards ratification, during which the state is obligated to refrain from any acts that would defeat CERD’s purpose.17 Today, out of the 192 United Nation Member States, 173 are parties to the Convention.18 Each party state has ratified the Convention, consenting to be bound by its terms.19 In addition, there are currently six states that have signed but not yet ratified CERD.20 CERD clearly receives broad support for its human rights objectives, as evidenced by the fact that the vast majority of the United Nations Member States have become parties and undertaken to implement its anti-discrimination provisions.

**B. Structure of CERD**

The Convention is composed of a Preamble, setting out the international concerns and ideals that led to its formation, and twenty-five articles, broken down into three parts.21 First, Articles 1 through 7 define racial discrimination and affirmatively impose an obligation on states to take steps towards the elimination of all forms of such

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14 Leeuw, supra, note 10 at 342.
15 Meron, supra, note 13 at 283.
16 Schwelb, supra, note 3, at 997.
19 United Nations Treaty Collection, Glossary, supra, note 17.
discrimination within their jurisdiction. Next, Articles 8 through 16 establish a reporting and monitoring mechanism designed to ensure states’ compliance with CERD. Lastly, Articles 17 through 25 govern the manner by which CERD is ratified, entered into force, and amended. The main focus of inquiry here will be Article 1, specifically CERD’s definition of “racial discrimination.” In addition, CERD’s established enforcement mechanisms will be explored and analyzed with respect to the United States’ compliance.

i. “Racial Discrimination” Defined

The very first sentence of Article 1 of CERD defines “racial discrimination” as

… any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin 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.

Especially relevant in this definition for purposes of this article is the explicit inclusion of a disparate impact standard, signified by the phrase “or effect.” This standard focuses not on the discriminatory motives of a state actor, but rather on the discriminatory effects of a law or policy without regard to the purposes behind it. In other words, if a state maintains a law or policy that was enacted for an entirely non-discriminatory purpose, it still may be in violation of CERD if it creates a racially disparate impact.

Article 1’s drafting history demonstrates that the inclusion of an effects-based standard was intentional and generally unopposed. In the initial drafting phase, three versions of Article 1 were submitted to the Sub-Commission. Only one definition explicitly specified that discriminatory effects would also constitute violations of the Convention; the other two were silent on the issue. These latter two definitions could very well have been construed to include such an analysis, as they substituted the language “purpose or effect” with the more ambiguous “based on.” The three submissions were considered, and a working group produced a version that included the discriminatory impact standard, and was almost identical to the definition eventually adopted by CERD. The proposed text made its way through the Sub-Commission, the Commission and finally

22 Id., Articles 1-7.
23 Id., Articles 8-16.
24 Id., Articles 17-25.
25 Id., Article 1 (emphasis added).
26 Id.
29 Id.
30 Id. (“The text proposed by Mr. Abram included in the term ‘racial discrimination’ any ‘distinction, exclusion or preference made on the basis of race, colour or ethnic origin, and in the case of States composed of different nationalities or persons of different national origin, discrimination based on such differences.’ The text proposed by Mr. Calvocoressi added to the words, ‘distinction’, ‘exclusion’ or ‘preference’ the word ‘limitation.’”)
31 Id.
the Third Committee before receiving unanimous approval. During that process, “purpose or effect” remained unchanged while other aspects of the definition were debated. The intent of the drafters is made clear by the explicit inclusion of an effects-based inquiry in the language, and strengthened by the lack of debate on the issue. Thus, from its inception, CERD was broadly designed to protect against racially discriminatory acts and impacts.

After announciating the meaning of racial discrimination, CERD discusses the obligations imposed upon states with regard to that definition. Not only do states have a fundamental obligation to refrain from supporting or participating in acts of discrimination, they also have affirmative duties to “take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists.” States must also “prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization”. In this manner, CERD requires the party states to take measures to review its policies in light of the disparate impact definition, as well as affirmatively take steps to eradicate racial discrimination within the state.

ii. Enforcement Mechanisms

In addition to laying out anti-discrimination obligations that party states must strive to achieve, the Convention establishes four enforcement mechanisms designed to ensure that signatory states comply with these obligations. First, Article 8 creates a Committee on the Elimination of Racial Discrimination (hereinafter “the Committee”), made up of human rights experts who are tasked with monitoring CERD’s implementation. The Committee ensures compliance through mandatory reporting procedures, and provides states with feedback on how to better further CERD’s goals. Also, Articles 11 through 13 establish a dispute-resolution mechanism, in cases where one party feels that another party is not in compliance with CERD’s obligations. In addition, Article 14 allows parties to recognize the competence of the Committee to hear complaints from individuals or groups within the jurisdiction. Finally, Article 22 permits parties to recognize the jurisdiction of the International Court of Justice to hear disputes between parties over the interpretation or application of CERD. The main procedures utilized in practice to implement CERD’s obligations are the reporting procedures outlined in

32 Id.
33 Id. at 25-28. For instance, a highly contested element of the definition was the inclusion of protections based on national origin. Members pointed out that different translations of national origin signified citizenship while many did not, so this was clarified in the text. See CERD, Article 1.
34 CERD, Art. 2.
35 Id.
36 Id.
37 Id. CERD, Art. 5 also lists specific rights that should be guaranteed to all without distinction.
38 CERD, Art. 8.
39 Id.
40 Id. Art. 11-13.
41 Id. Art. 14.
42 Id. Art. 22.
Article 8, discussed in detail below, and the individual complaint mechanism of Article 14.\textsuperscript{43} While signing and ratifying the Convention implies a commitment to fulfilling its obligations, many states decline from enforcement through failing to recognize the competence of the Committee to hear complaints, and instead submitting only to the mandatory reporting procedures. Those states that do allow for strong enforcement of CERD are reinforcing their commitment to its goals within their jurisdictions and, in doing so, are promoting human rights and anti-discrimination ideals more broadly. Much to its detriment, the United States has resisted recognizing or implementing many of CERD’s established enforcement mechanisms.

\textbf{C. United States’ Reservations, Declarations and Understandings}

In signing and ratifying CERD, the United States attached numerous stipulations and declarations to limit the ability to bring discrimination claims based the anti-discrimination standards set forth in CERD. This section will discuss each in turn. Collectively, these restrictions lead the enforcement mechanisms set forth in CERD to have little to no effect in the United States, and its non-self-executing status disallows enforcing it as domestic law.\textsuperscript{44} Thus, should a United States policy, such as the Intent Doctrine, violate CERD, there are few, if any, avenues for remediation due to the extensive restrictions annunciated at ratification.

In 1966, President Johnson signed CERD, but the official ratification process did not begin until 1978.\textsuperscript{45} At that point, President Carter submitted CERD to the Senate for review, and included a list of reservations, understandings, and declarations to accompany it.\textsuperscript{46} Even then, the limitations proposed would serve to undermine CERD because they essentially exempted the United States from any requirement that did not already conform to United States law.\textsuperscript{47} The Senate did not ratify CERD, and it was not again proposed until the Clinton Administration.\textsuperscript{48} Finally, in 1994, President Clinton presented CERD to the Senate, along with limitations similar to President Carter’s, and it was ratified.\textsuperscript{49} The political atmosphere in both the Carter and Clinton administrations


\textsuperscript{44} The interstate complaint procedures outlined in Articles 11-13 have never been utilized, and thus will not be discussed in detail here, see Office of the United Nations High Commissioner for Human Rights: Human Rights Bodies – Complaints Procedures, supra, note 43.


\textsuperscript{46} Id.


\textsuperscript{48} Id.

\textsuperscript{49} Id.
was such that both Presidents deemed it necessary to assure the Senate that ratifying any human rights treaty would not have a restrictive effect on domestic laws. Thus, the
limitations set forth in CERD ensured that there could be no effective enforcement of its provisions. Having taken almost three decades to ratify one of the leading human rights
treaties, the United States did so only by including broad limitations that essentially exempt it from requirements of any proactive efforts to eliminate racial discrimination,
such as eliminating the Intent Doctrine. In this manner, the United States ensured that its
citizens do not have an avenue to challenge discrimination, or inadequate standards such
as the Intent Doctrine, through the application of international human rights law.

i. Non-Self-Execution

A key declaration accompanying CERD’s ratification and limiting its impact from the outset was “[t]hat the provisions of the Convention are not self-executing.” This
limitation means that unless the United States creates implementing legislation, the provisions of the Convention do not allow for a private right of action in domestic
courts. Because Congress has not created any implementing legislation, no individual or organization may bring a claim in a domestic court to enforce the provisions of CERD.
Despite Article VI of the United States Constitution, which states that treaties are the
supreme law of the land, by ratifying CERD as non-self-executing the Senate stripped it
of any domestic legal effect. In essence, including this declaration allows the United
States to effectively opt out of CERD entirely.

50 David Sloss, The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties, 24 YALE J. INT’L L. 129, 174-175 (1999)(“[W]hen President Carter did finally advocate U.S. adherence to several major human rights treaties, he felt that it was a political necessity to assure the Senate that the treaty power would not be used to change domestic law. No subsequent administration has challenged the inherited political wisdom that such an assurance is the price that must be paid to obtain Senate consent to ratification of human rights treaties.” (citation omitted)).
53 See Johnson v. Quander, 370 F.Supp.2d 79, 101 (Dist. DC 2005) (“Only two courts have reviewed the CERD for the purpose of determining whether it is self-executing and therefore permits a private right of action, both concluding that it did not. Both the United States District Court for the District of Connecticut in United States v. Perez, No. 03-02, 2004 WL 935260, at *17 (D.Conn. April 29, 2004), and the United States District Court for the Southern District of New York in Hayden v. Pataki, No. 00-8586, 2004 WL 1335921, at *7 (S.D.N.Y. June 14, 2004), concluded that the CERD was not self-executing and thus did not create a private right of action. Thus, both courts concluded that they did not have authority to hear claims brought pursuant to the treaty. This Court agrees.”)
54 U.S. Const. art. VI, § 2. Article VI of the U.S. Constitution states: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every state shall be bound thereby, any thing in the Constitution or Laws of any state to the Contrary notwithstanding.”
At the Senate Foreign Relations Committee Hearing regarding CERD’s ratification, a number of human rights organizations spoke out against ratifying the Convention as non-self-executing.\(^{56}\) Many found that this declaration essentially nullified CERD’s purpose as applied to the United States, that it undermined Article VI of the United States Constitution, and that it sent a message that the United States is not committed to CERD’s objectives.\(^{57}\) First, the National Association for the Advancement of Colored People urged the Senate not to include the declaration, stating, “[T]his device if accepted will deny large sections of the American people ‘the protection of international human rights law as a supplement and backstop to constitutional protections.’”\(^ {58}\) Similarly, Amnesty International USA compared the declaration to a shield preventing United States citizens from fully enjoying those rights guaranteed in the international human rights treaty.\(^ {59}\) It also stated that non-self-execution is unnecessary if United States law is in fact consistent with CERD, and that it gives the impression that the United States is unwilling to give its citizens all available avenues to challenge discrimination in domestic courts.\(^ {60}\) In addition, the American Civil Liberties Union opposed non-self-execution, stating that the Convention’s protections should be immediately enforceable in United States courts in order to not undermine Article VI of the United States Constitution.\(^ {61}\) The Lawyers Committee for Human Rights agreed, stating: “It would undermine one of the principal reasons why the Constitution made treaties the law of the land . . . Incorporation of this declaration will unnecessarily delay U.S. compliance with some provisions and set up unnecessary political obstacles to U.S. compliance generally.” Also, the International Human Rights Group pointed out that the United States generally urges the enforceability of international human rights standards in domestic courts in order to strengthen democracy, and, yet, this declaration suggests that the United States is “afraid to practice what it preaches.”\(^ {62}\) Similarly, The World Federalist Association opposed the declaration, arguing that the United States should take a lead in emphasizing rule of law as a means of peaceful dispute resolution.\(^ {63}\) Finally, the Minority Rights Group stated, “The effect would be to dilute the force of the Convention as ratified by the Senate and to call into question, on an international level, the commitment of the United States to the elimination of racial discrimination within its own borders.”\(^ {64}\) Despite the urging of these and other human rights groups, the Senate included this declaration so that the provisions of CERD are not enforceable in United States courts. Consequently, claims of racially disparate impact that do not meet the high-level Intent Doctrine standard, unless other specific statutes apply, will not be heard in the courts of the United States.\(^ {65}\)

\(^{56}\) International Convention on the Elimination of All Forms of Racial Discrimination (Ex. C, 95-2), Hearing Before the Committee on Foreign Relations, United States Senate, S. Hrg. 103-659 (1994).

\(^{57}\) Id.

\(^{58}\) Id., at 51.

\(^{59}\) Id., at 65.

\(^{60}\) Id.

\(^{61}\) Id., at 62.

\(^{62}\) Id. at 52.

\(^{63}\) Id. at 80.

\(^{64}\) Id. at 76.

\(^{65}\) Certain statutes provide for a disparate impact standard and therefore claims based on these statutes would be heard in domestic courts. However, these claims must fall within certain areas of the law such as voting rights, leaving other types of racial discrimination to satisfy the requirements of the Intent Doctrine.
ii. Individual Complaint Mechanism

Another broad limitation set out in the United States’ ratification was the refusal to recognize the competence of the Committee to receive and consider individuals’ or organizations’ complaints that they are victims of CERD violations by the United States. Thus, an individual or organization in the United States is not only precluded from bringing a CERD claim within United States courts, but is also prevented from bringing that claim to the Committee. While Committee recognition is voluntary, committing entirely to the Convention, including all of its enforcement procedures, manifests a state’s willingness to fully address any violation within the state, thereby furthering CERD’s objectives. The Office of the United Nations High Commissioner for Human Rights declared that “[t]he ability of individuals to complain about the violation of their rights in an international arena brings real meaning to the rights contained in the human rights treaties.” Fifty-three states have recognized the competence of the Committee to hear complaints, demonstrating that those states are fully dedicated to addressing any internal violations of CERD. However, the United States has declined to recognize its competence, and thus the Committee cannot hear claims from individuals or organizations in the United States alleging a disparate impact, or any other, violation of CERD.

iii. Competence of the International Court of Justice

Another reservation limiting the effect of the United States’ CERD ratification is the requirement that it consent to jurisdiction in order to be party to any claim before the International Court of Justice under CERD. Article 22 allows for disputes between state parties to be heard by the International Court of Justice, should they not be resolved by negotiation or by the Committee. Thus, while states may bring claims against the United States to the Committee, a practice which has never been used, it can only be finally resolved by the International Court of Justice should the United States consent. In the Foreign Relations Committee Hearing, the Legal Advisor of the United States Department of State explained that this reservation was necessary to protect the United States from claims brought for frivolous or political reasons. The Minority Rights Group addressed that concern in the Hearing record, asserting:

66 United Nation Treaty Collection, July 28, 2010, supra at note 18, (listing those nations that recognize the Committee’s competence, which does not include the United States).
68 Id.
69 Id.
71 CERD, Art. 22.
73 Hearing Before the Committee on Foreign Relations, supra, note 56.
Threats or fear of frivolous complaints should not subvert the United States' greater interests in supporting and encouraging international human rights standards and enforcement mechanisms.

A reservation to Article 22 will raise international concern regarding the United States' commitment to the Race Convention, suggesting to parties already having ratified the Convention that the United States will not take its obligation to enforce the Convention's provisions seriously. In making a reservation to Article 22, the U.S. puts itself in the company of states such as Libya, Syria, Cuba, and China, who also have reservations to Article 22 currently in force. Support has been shown both at home and abroad for international dispute resolution through the ICJ.  

Similar to the arguments against ratifying the Convention as non-self-executing, organizations voiced that this reservation would undermine the commitment to eliminating racial discrimination and send the message to the international community that the United States does not consider this a serious obligation. However, these arguments have not deterred the United States from insisting on its limitations. The result is that while the United States considers itself at the forefront of progressive civil rights policy, there are very few avenues to enforce CERD’s anti-discrimination obligations against the United States.

iv. Symbolic Nature of United States' Ratification

Through its broad limitations of the established enforcement procedures, the United States has made clear that discrimination claims, as defined by CERD, will not be enforced within its borders. In order to ratify, it was deemed necessary to convince the Senate that no United States law would be amended based on the Convention, despite, as demonstrated by the discrepancy in the very definition of discrimination, the fact that the United States continues to be in violation of the Convention. Thus, these restrictive provisions were put into place so that no individual, group or state could compel the United States to comply with CERD.  

Waiting almost thirty years to ratify the Convention, combined with the demonstrated lack of commitment to its enforcement and goals, has revealed to the international community and to its own inhabitants that the United States’ commitment to CERD was largely a symbolic gesture.

By ratifying CERD, the United States did not intend to amend any of its policies, such as the Intent Doctrine, to conform to CERD’s obligations. Through its limiting reservations, declarations and understandings, it ensured that no domestic policy would be scrutinized by the international community, nor enforced through domestic courts. While Article 2 of the Convention requires that each state party make a proactive effort to combat racial discrimination within its jurisdiction, the United States has refused to address a basic

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74 Id. at 75.
75 Sloss, supra, note 50, at 174-175.
76 Id.
difference in the very definitions of racial discrimination.77 The enforcement mechanisms, the reporting procedures, the competence of the Committee to hear individual and organization’s complaints, the interstate complaint process, and the International Court of Justice have been limited so drastically that there is little possibility that the United States will feel compelled to address the troublesome Intent Doctrine.

The United States refuses to allow even its own citizens to bring complaints to the Committee, so that people within its borders with legitimate CERD claims will not be heard by the international community.78 Further, while the interstate complaint process is permitted, it has never been utilized by any state, and if a dispute were not resolved therein it would be brought to the International Court of Justice, where the United States would only be a party with its consent.79 Given its unwillingness to submit to other enforcement procedures, and its allegation that claims against the United States would be brought for frivolous or political reasons, it can be assumed that the United States would rarely, if ever, consent to jurisdiction.80 Thus, the United States has ensured that the international community will not hear claims from within the United States, nor from other states. Moreover, to further ensure that the provisions of CERD will not be binding, the United States insists that domestic courts lack jurisdiction to hear CERD-based claims.81 Thus, not only is pressure from the international community to amend the restrictive Intent Doctrine ineffective, CERD has no legal effect within United States courts to address this discrepancy. Hence, especially with respect to the Intent Doctrine, the United States has unmistakably ratified CERD with no intention of honoring its obligations or goals.

Based on the fact that the Senate ratified CERD relying on the notion that it would in no way affect domestic policy, and incorporated limiting language to blunt its available recourse for violations, the only way to explain the United States ratification of CERD is as a symbolic gesture. Not intending to actually comply with CERD’s obligations, such as imposing a disparate impact standard for racial discrimination claims, the United States could only have ratified the Convention as a hollow attempt to assert its human rights commitment. However, it is abundantly clear that the United States’ dedication to CERD’s central purpose is lacking, as the Intent Doctrine continues to limit the United States’ ability to remediate racial discrimination claims in accordance with the basic objectives of CERD.

**Part II: The Intent Doctrine**

The United States maintains a basic understanding of the nature of racial discrimination that is anachronistic and far narrower than that espoused by CERD. As discussed above, the definition of racial discrimination adopted by the Convention allows for a broad,

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77 CERD, Art. 2, and see infra, Part II.C.
78 See supra, Part II.B.ii.
79 See supra, Part II.B.iii.
80 See supra, Part II.B.iii.
81 See supra, Part II.B.i.
effects-based disparate impact inquiry as a basis to assert a claim. The United States, however, requires a party to prove that a law or policy was enacted with the *intent* to discriminate, or that an individual’s action was motivated by explicit racial animus, in order to succeed in a constitutional claim of racial discrimination.\(^{82}\) This latter method, established pursuant to the Intent Doctrine, not only closes the courthouse doors to numerous claims of racial discrimination, but also disregards the character of modern discrimination. The following section will discuss the history of the Intent Doctrine, exploring reasons and examples of why it is unsuited to address modern discrimination in the United States. It will then address the CERD Committee’s alarming reaction to the Intent Doctrine, as well as the United States’ refusal to recognize its inadequacies in addressing racial discrimination.

**A. Washington v. Davis**

The Supreme Court of the United States first announced the Intent Doctrine in 1976, in the landmark case *Washington v. Davis*.\(^ {83}\) There, a group of black applicants to become Washington D.C. police officers alleged that certain recruitment procedures were racially discriminatory, thereby violating the Fifth Amendment’s Due Process Clause.\(^ {84}\) Specifically, the respondents offered evidence that a written personnel test designed to measure verbal skills disproportionately excluded black applicants, and that it bore no relationship to job performance.\(^ {85}\) Thus, the relevant issue for the Court was whether the racially disproportionate *effect* of the test, without regard to the police department’s intent, constituted a violation of equal protection.\(^ {86}\)

The case came before the Court as an appeal from a D.C. Court of Appeals’ ruling, which invalidated the test.\(^ {87}\) The personnel test at issue evaluated whether an applicant to the police force had acquired a specified level of verbal skills.\(^ {88}\) The evidence showed that 57% of black applicants to the police force failed the test, barring them from the force, whereas only 13% of white applicants failed.\(^ {89}\) Challenging the rationale behind the test, which resulted in whites passing at four times the rate of blacks, the court explained that “absent evidence revealing some other reason for the lopsided failure rates appearing here, it is difficult to imagine how disproportionate effect could ever be better demonstrated.”\(^ {90}\) The court also noted that the disproportionate impact of generalized intelligence tests is “the result of the long history of educational deprivation, primarily due to segregated schools, for blacks.”\(^ {91}\) After a finding of disparate impact, the burden

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\(^{82}\) See *Washington v. Davis*, supra, note 2.

\(^{83}\) Id.

\(^{84}\) Id. at 229. (Because the action took place in Washington D.C., the respondents sued based on a Fifth Amendment claim and not the Fourteenth Amendment’s Equal Protection Clause, which applied only to the states. However, this did not change the equal protection analysis as applied to the Fifth Amendment and the ruling applies to Fourteenth Amendment claims.)

\(^{85}\) Id.

\(^{86}\) Id., see note 84.

\(^{87}\) *Davis v. Washington*, 512 F.2d 956 (D.C. Cir. 1975).

\(^{88}\) Id., at 958.

\(^{89}\) Id., at 958-959.

\(^{90}\) Id., at 960.

\(^{91}\) Id., at 961.
shifted, requiring the police department to show that the test bore a demonstrable relationship to successful performance in the department. The court deemed any effort of the department to recruit black officers irrelevant as an explanation for the lopsided figures, and held that the “benevolent intent” of the department was an insufficient response to the discriminatory effects of the test. Because the department, focusing mainly on its minority-recruitment efforts, could not adequately prove the test’s job-relatedness, the Court of Appeals invalidated the test based on its clear discriminatory impact.

After granting certiorari, the Supreme Court refocused the analysis from the test’s job-relatedness to the intent of the department with respect to the creation and administration of the test. The effects-based standard used by the Court of Appeals had been borrowed from Title VII of the Civil Rights Act of 1964, which the Supreme Court argued does not extend to the Constitution. Despite the fact that the Court had previously established a disparate impact standard to assess Title VII claims of employment discrimination, it now refused to extend those standards to equal protection claims identical in nature. Rather, the Court created a new framework for evaluating constitutional claims of racial discrimination: the Intent Doctrine.

As noted by the Court of Appeals, this case perfectly exemplified a policy yielding racially disproportionate effects in violation of the Constitution. However, the Supreme Court added a virtually insurmountable requirement that resulted in the black police officers losing the case. The Supreme Court did not focus on the fact that the result of administering this test was that more white applicants were hired to the police force than black applicants. If the effects-based inquiry were employed, the Court argued, it could invalidate an entire range of statutes that are burdensome to black people and not to whites. Instead, the Court shifted its analysis to the state actor’s frame of mind,

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92 Id., at 961. (This burden-shifting analysis was based on the “Griggs Standard” announced in Griggs v. Duke Power Co., 401 U.S. 424 (1971).)
93 Id., at 960-961. “The employer's lack of discriminatory intent was deemed irrelevant by the Supreme Court in Griggs; “Congress directed the thrust of the (Civil Rights) Act to the consequences of employment practices,” the Court admonished, “not simply the motivation.” Other courts have held that an employee challenging an employment practice as discriminatory need not prove a purpose on the employer's part to discriminate; the only intent requirement is that the employer consciously perform the allegedly discriminatory act. Thus it has been expressly held, and we agree, that efforts to recruit minority members have no bearing on a showing that an employment practice has a racially disproportionate impact. Although the Department, quite commendably, has succeeded in increasing the proportion of black officers through vigorous efforts, it is self-evident that use of selection procedures that do not have a disparate effect on blacks would have resulted in an even greater percentage of black police officers than exists today.” (Citations omitted).
94 Id. at 965.
95 Washington v. Davis, supra, note 2, at 238-239.
96 Id.
97 See Griggs, supra, note 92.
99 Id. at 248. “A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far-reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service,
imposing the additional requirement that the test be administered with the purpose of discriminating against black applicants in order to prove discrimination. Because the black applicants could not prove that the test was designed and administered with the specific intention of discriminating against them based on their race, the Court found in favor of the police department. This would become the first instance of the Intent Doctrine barring a claim of discrimination that would have otherwise been held valid under a discriminatory impact framework. It likewise marked the beginning of a new era of retrenchment with respect to anti-discrimination law in the United States.

**B. Perils of the Intent Doctrine**

Thus far, this article has examined both the disparate impact standard for a finding of discrimination utilized by the international community in CERD, and the Intent Doctrine employed by the United States, as established in *Washington v. Davis*. The former, effects-based inquiry is better suited to remedy the types of present-day discrimination prevalent in the United States. Specifically, the Intent Doctrine is unequipped to combat either implicit bias or structural racism, both of which social scientists have found contribute to vast disparities based on race. These latent forms of discrimination manifest as echoes of the United States’ deeply embedded history of race-based discrimination. However, conspicuously absent from the operation of both implicit bias and structural racism is the element of intent. Thus, despite their pervasiveness, neither form of discrimination is subject to claims of unconstitutional racism.

**i. Implicit Bias**

Implicit bias, one of the most pervasive forms of racial discrimination in the United States today, manifests itself in nearly every aspect of society and yet is largely unintentional. Social scientists have studied the process by which people categorize others, and in doing so attach certain biases and stereotypes based on these categories. This mental process is a means to efficiently interpret one’s otherwise cognitively overwhelming surroundings without having to take the time to deliberate. Thus, people are completely unaware that this “categorization” process is even taking place.

In a social context, social scientists refer to the process of an individual learning to categorize others based on embedded societal opinions as assimilation. Children perceive very early the dominant cultural attitudes towards specific races but are too young to separate their own beliefs from those of the people around them. Children not only pick up on attitudes that may be implicit and manifested only through subtle action, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.”

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100 Id.
101 Id.
103 Id.
104 Id. at 337. “Assimilation entails learning and internalizing preferences and evaluations.”
105 Id. at 337-338.
they are also too young to disconnect these feelings from facts.\textsuperscript{106} Thus, the child inherits strong attitudes and beliefs about racial categories without the child or anybody else consciously participating. Throughout life, every instance that supports these learned, and generally implicit, beliefs will only serve to strengthen them. At the same time, a person’s unconscious will resist interpreting situations that challenge their ingrained categories unless forced to do so.\textsuperscript{107} Thus, in order to interpret their surroundings, people generally make quick judgments by categorizing people based on race, attaching everything they have learned about that specific race, while remaining largely unaware that this cognitive process is taking place.

The study of implicit bias has gained prominence as the United States has moved towards rejecting explicit manifestations of racism, despite continuing to be plagued with its effects. While many allege that the United States is now “post-racial,” clear racial distinctions persist in almost every measure of social welfare, including education, housing, employment, criminal justice, health care, and transportation.\textsuperscript{108} In order to understand how and whether our subconscious beliefs and behaviors could perpetuate such discrepancies, social scientists have developed numerous tests to measure the extent and nature of implicit bias. The Implicit Association Test (hereinafter “IAT”), hosted by Project Implicit at Harvard University, measures positive and negative associations with specific races based on response time.\textsuperscript{109} For instance, the subject will be asked to connect certain positive notions, such as laughter or peace, with white people, and negative concepts, such as evil or agony, with black people.\textsuperscript{110} While most respond quickly to this relatively simple task, response time is almost always increased when the subject is asked to then connect the positive concepts with black people and the negative ones with white people.\textsuperscript{111} This slower response time reflects people’s unconscious reluctance to challenge implicit biases about race.\textsuperscript{112} Available online since 1998, the IAT has compiled extensive data about racial preferences, all indicating that implicit bias is very much prevalent in today’s society.\textsuperscript{113} In fact, more than two-thirds of test takers register bias towards stigmatized groups.\textsuperscript{114} Of whites and Asians who take the test, 75-80% demonstrate an implicit preference for whites over blacks.\textsuperscript{115}

\textsuperscript{106} Id. at 338.
\textsuperscript{107} Id.
\textsuperscript{108} For more information, see Reginald Shuford, Why Affirmative Action Remains Essential in the Age of Obama, 31 Campbell L. Rev. 503 (2009), and Eva Paterson, Kimberly Thomas-Rapp, & Sara Jackson, Id, the Ego and Equal Protection in the 21st Century: Building Upon Charles Lawrence’s Vision to Mount a Contemporary Challenge to the Intent Doctrine, 40 Conn. L. Rev. 1175 (2008).
\textsuperscript{109} The Implicit Association Test is hosted at Project Implicit and functions as an ongoing virtual research project, found at https://implicit.harvard.edu/implicit (last visited August 16, 2010).
\textsuperscript{110} Id.
\textsuperscript{112} Id.
\textsuperscript{113} General Information on the Implicit Association Test can be found at http://www.projectimplicit.net/generalinfo.php (last visited August 16, 2010).
\textsuperscript{114} Greenwald and Krieger, supra, note 111, at 957-958.
\textsuperscript{115} General Information, supra, see note 113.
A 2004 study regarding implicit bias in hiring processes illustrates the practical effects of these findings.\textsuperscript{116} In this study, fictitious resumes were sent in response to help-wanted ads in Boston and Chicago, and each was randomly assigned a stereotypical white or black name.\textsuperscript{117} Across industry, occupation and employer size, the white-sounding names received fifty percent more callbacks despite otherwise identical resumes.\textsuperscript{118} It is fair to assume that most, if not all, of those employers did not consciously make the decision to respond to white applicants and not black applicants.\textsuperscript{119} Rather, their implicit negative biases towards the black applicants guided their actions.

It is clear from the Implicit Association Test that implicit bias is powerful and widespread, and it has also been shown to guide people’s actions and perpetuate the racial disparities present in the United States today. In fact, the IAT demonstrates that implicit bias measures are significantly better at predicting people’s actual behavior than explicit bias measures (\textit{i.e.}, whether or not someone considers themselves to be prejudiced towards particular groups).\textsuperscript{120} However, because people are not making intentional decisions based on explicit racial animus, but rather based on learned, unconscious stereotypes, the Intent Doctrine is powerless to combat implicit bias.

\textbf{ii. Structural Racism}

Structural racism is yet another framework for understanding modern racism and examining how racism is woven into the very fabric of our society. Studies on structural racism examine how entire systems can function to discriminate through institutionalized practices and procedures, often built in over generations.\textsuperscript{121} Here, a discriminatory effect is not traced back to a single, specific action but rather is understood to result from the \textit{cumulative impact} of interactions within a discriminatory system or set of systems.\textsuperscript{122} For instance, housing discrimination, itself a product of deeply embedded structural racism, is not an isolated phenomenon of residential segregation, but is also connected to discrimination in other systems, such as education and criminal justice.\textsuperscript{123} A child who is geographically isolated from a decent school system may not only receive a sub par education, but is also more likely to get arrested and become part of the criminal justice system.\textsuperscript{124} These interactions between systems perpetuate a vicious cycle of discrimination, though they do not depend on a single, intentional act to initiate the injustice.\textsuperscript{125} Because this type of embedded racism does not focus on direct causation, but

\begin{thebibliography}{99}
\bibitem{117} Id.
\bibitem{118} Id.
\bibitem{119} Greenwald and Krieger, supra, note 110, at 966.
\bibitem{120} Id.
\bibitem{121} john a. powell, Structural Racism: Building Upon the Insights of John Calmore, 86 N.C. L. Rev. 791, 796 (2008).
\bibitem{122} Id. at 796-797.
\bibitem{123} Id.
\bibitem{124} Id. at 797.
\bibitem{125} Id.
\end{thebibliography}
rather results from circumstances that cumulatively cause racial disparities, the remedy cannot rely on a finding of fault.\textsuperscript{126}

A systems approach changes the focus from assigning culpability to solving a problem and redressing a harm. Parties may be called upon to address harms they may not have directly caused or intended to cause. In many cases, these harms were predictable or foreseeable, even if they were unforeseen in fact.\textsuperscript{127}

Addressing the causes and effects of racial disparities is a preferable approach to the Intent Doctrine, as discrimination results in an appreciable harm whether intended or not. The Court of Appeals in\textit{Washington v. Davis} alluded to this concept when it discussed how the history of educational segregation was affecting the test scores, and in turn affecting employment.\textsuperscript{128} While invalidating the written personnel test alone would not have alleviated the entrenched cycle of racial disparity, ruling that the disparate impacts of the test constituted discrimination could have retarded the cycle and contributed to an overall less racially imbalanced system. The police department would have been tasked with creating a fairer test, despite not necessarily having intended to cause the disparity, which would ultimately have contributed to a more diverse system of employment opportunity. In turn, this outcome would retard a cycle of structural exclusion by resulting in greater opportunity for members of historically marginalized groups, which would in turn extend to others within these classes. Thus, utilizing an effects-based inquiry would enable the courts to address systemic racial disparities closer to their root, whereas focusing on the intent of the actor leaves the discriminatory system fully intact.

iii.\textit{McCleskey v. Kemp}

Perhaps most illustrative of the devastating effects of the Intent Doctrine is the Supreme Court case\textit{McCleskey v. Kemp}\textsuperscript{129}. In this case, the Court held that despite clear evidence of vast racial disparities in capital sentencing, suggesting both implicit bias and structural racism, a death row inmate must demonstrate that his or her sentence was issued with the intent to discriminate based on race.\textsuperscript{130}

Warren McCleskey, a black death row inmate, alleged that his Equal Protection rights were violated during sentencing.\textsuperscript{131} In support of his claim, McCleskey presented the Court with a study on the link between race and capital sentencing, which incorporated two sophisticated statistical inquiries based on over 2,000 murder cases in Georgia during

\textsuperscript{126} Id. at 798.
\textsuperscript{127} Id.
\textsuperscript{128} Davis v. Washington, supra, note 87.
\textsuperscript{129} See McCleskey v. Kemp, supra, note 3.
\textsuperscript{130} Id.
\textsuperscript{131} Id. (McCleskey had been found guilty of two counts of armed robbery and one count of murder of a white police officer in 1978. He was then sentenced to death based on the murder charge. In addition to his 14\textsuperscript{th} Amendment claim, he also brought an 8\textsuperscript{th} Amendment claim.)
the 1970s.\textsuperscript{132} Among other findings, the study demonstrated that the death penalty was assessed in 22\% of cases involving black defendants and white victims, and just 1\% of those involving black defendants and black victims.\textsuperscript{133} It also found that defendants charged with killing white victims were 4.3 times more likely to receive the death penalty than those charged with killing black victims.\textsuperscript{134} The Court, however, stated that in order to prevail on his Equal Protection claim, McCleskey must prove that during his own sentencing, the decision-makers intended to discriminate against him based on his race.\textsuperscript{135} Also, in response to McCleskey’s claim that the state violated the Equal Protection Clause by enacting and implementing this capital punishment scheme, the Court declared that “[f]or this claim to prevail, McCleskey would have to prove that the Georgia Legislature enacted or maintained the death penalty statute because of an anticipated racially discriminatory effect.”\textsuperscript{136} Requiring McCleskey to prove that those involved in the process sentenced him to death because of his race effectively created an insurmountable barrier to his claim. Furthermore, the court defended its ruling by pointing out that allowing McCleskey’s claim to proceed would open a floodgate of Equal Protection claims based on discriminatory impact in the criminal justice system.\textsuperscript{137} Ultimately, McCleskey was not able to prove that the state created or implemented its death penalty statute with the purpose of racially discriminating against him, and his claim was denied.

\textit{McCleskey} demonstrates the disconnect between the United States’ approach to evaluating discrimination and the manner by which discrimination actually operates. The study relied upon in \textit{McCleskey} was a disturbing evaluation of the implementation of the death penalty in 1970s Georgia, which relied upon disparate impact evidence to demonstrate the clear existence of implicit bias and structural racism within Georgia’s criminal justice system. The stark disparities in the capital system reflected the implicit biases of the juries, prosecutors, lawmakers, and society as a whole, as well as the ingrained institutional racism of 1970s Georgia. In his dissent, Justice Brennan, joined by Justices Marshall, Blackmun and Stevens, opines:

\begin{quote}
[I]t would be unrealistic to ignore the influence of history in assessing the plausible implications of McCleskey’s evidence. ‘[A]mericans share a historical experience that has resulted in individuals within the culture ubiquitously attaching a significance to race that is irrational and often outside their awareness.’… The Georgia sentencing system… provides considerable opportunity for racial considerations, however subtle and unconscious, to influence charging and sentencing decisions. History and
\end{quote}

\textsuperscript{132} Id. at 286-287. (The Baldus study, named after Professor David Baldus, took into account 230 nonracial variables that could otherwise explain the disparities. The Court accepted the validity of the study.)

\textsuperscript{133} Id. at 286. (The state argued that McCleskey did not have standing to sue based on the race of the victim. The Court, however, found that the nature of his claim was not was not asserting some right of the victim, but rather the application of a racially discriminatory criminal sentencing structure to him. Thus, he had standing to sue. See note 8.)

\textsuperscript{134} Id. at 287.

\textsuperscript{135} Id. at 292.

\textsuperscript{136} Id. at 298.

\textsuperscript{137} Id. at 315-316.
its continuing legacy thus buttress the probative force of McCleskey’s statistics. Formal dual criminal laws may no longer be in effect, and intentional discrimination may no longer be prominent. Nonetheless, as we acknowledged in Turner, “subtle, less consciously held racial attitudes” continue to be of concern, and the Georgia system gives such attitudes considerable room to operate. The conclusions drawn from McCleskey’s statistical evidence are therefore consistent with the lessons of social experience.\(^{138}\)

Despite the repercussions of Georgia’s historical discrimination, however, the Court challenged McCleskey to find some type of “smoking gun” evidence demonstrating the state’s intent to discriminate against him. In all likelihood, this evidence never existed.

Reinforcing the Intent Doctrine, the Supreme Court would not allow for broad constitutional discrimination protections but instead denied McCleskey’s claim, effectively denying any similar claim regarding the discriminatory implementation of criminal justice.\(^{139}\) The consensus of the international community is that evidence of disparate impact, such as in McCleskey, should trigger a violation of equal protection. The Intent Doctrine alone does not offer broad enough protections against more subtle, yet incredibly pervasive forms of contemporary racial discrimination.\(^{140}\)

C: The Conflict Between CERD and the Intent Doctrine

As discussed previously, the international community has embraced a broad, effects-based standard for evaluating discrimination claims, while the United States continues to implement a narrower, intent-focused discrimination standard. Despite being a party state to CERD, the United States does not recognize this conflict.\(^{141}\) Nor has it fulfilled its obligation to address this discrepancy, even after the Committee recommended that it do so.\(^{142}\) Instead, the United States claims that the Intent Doctrine is virtually the same as the disparate impact standard used in CERD, essentially refusing to respond to the Committee’s concern.\(^{143}\)

The United States first acknowledged the potential conflict between CERD’s disparate impact standard and the Intent Doctrine upon ratification.\(^{144}\) On May 11, 1994, the Senate Committee on Foreign Relations held a hearing to discuss the potential ratification of

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\(^{139}\) Gise, supra, note 52, at n. 114: “See, e.g., Davis v. Greer, 13 F.3d 1134 (7th Cir.), cert. denied, 513 U.S. 933 (1994) (relying on McCleskey to reject death row inmate's constitutional challenge of Illinois death penalty statute); see also Fuller v. Georgia State Bd. of Pardons and Paroles, 851 F.2d 1307 (11th Cir. 1988) (relying on McCleskey to reject inmate's claim of discrimination based on statistics that white rapists were granted parole more often than black rapists).”

\(^{140}\) See infra, Part II.B.

\(^{141}\) See infra, Part I.C.

\(^{142}\) See infra, Part I.C.

\(^{143}\) See infra, Part I.C.

\(^{144}\) See, Hearing Before the Committee on Foreign Relations, supra, note 56.
CERD. There, the Acting Secretary of the Department of State inserted into the record an official analysis of CERD in support of ratification, much of which was later adopted in reporting to the CERD Committee. In this lengthy memorandum, the Secretary recognizes the obligation in Article 2 that requires state parties to “amend, rescind or nullify any laws and regulations” that have the effect of “creating or perpetuating racial discrimination.” In response, he discusses certain federal civil rights statutes that have broader protections than those offered by the Intent Doctrine. However, the statutes mentioned only deal with discrimination in specific situations, such as voting, and thus do not offer the broad disparate impact protections in all instances of discrimination as laid out in CERD. He then goes on to discuss the Intent Doctrine, citing Washington v. Davis and pointing out that only intentional discrimination is prohibited under the Fifth and Fourteenth Amendments, as well as 42 U.S.C. §§1981 and 1982. In order to reconcile CERD’s obligations with the United States’ existing discrimination standards, the Secretary simply states that disparate impact is taken into consideration when evaluating intent. In explaining this, however, he concedes that in most cases adverse effect is not determinative, but rather the court will consider statistical disparities along with other evidence that may collectively demonstrate intent. He proceeds essentially to equate the Intent Doctrine with CERD’s effects-based standard, as explained in the Committee’s General Recommendation. There, the Committee attempted to elaborate on the definition of discrimination as laid out in CERD’s Article 1, and referred to in Article 2 and throughout. The excerpt cited by the Secretary states: “In seeking to determine whether an action has an effect contrary to the Convention, it will look to see whether that action has an unjustifiable disparate impact upon a group distinguished by race, colour, descent, or ethnic origin.” The Secretary interprets this statement to mean that prohibited discrimination, as applied to race-neutral practices, is that which creates

145 Id.
146 Id. at 22-35 (statement of Strobe Talbott, Acting Secretary of the Dept. of State).
147 Id. at 33 (citing CERD, Art. II).
148 Id., (specifically the memorandum mentions the disparate impact standard in the Voting Rights Act, Title VII of the Civil Rights Act of 1964, the federal regulations implementing Title VI of the Civil Rights Act of 1964, and the Fair Housing Act).
149 Id.
150 Id. “Determining whether discriminatory purpose exists "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 266 (1977). Disparate impact "may provide an important starting point" for that inquiry. Id. Indeed, where racial disparities arising out of a seemingly race-neutral practice are especially stark, and there is no credible justification for the imbalance, discriminatory intent may be inferred. See Casteneda v. Partida, 430 U.S. 482 (1977). In most cases, however, adverse effect alone is not deterministic, and courts will analyze statistical disparities in conjunction with other evidence that may be probative of discriminatory intent. Arlington Heights, 429 U.S. at 266-67. If the totality of the evidence suggests that discriminatory intent underpins the race-neutral practice, the burden shifts to the defendant to justify that practice. Id. at 270-71 n.21 (citing Mt. Healthy City School Bd. of Education v. Doyle. 429 U.S. 274 (1977)).”
151 Id.
153 General Recommendation 14, supra, note 148.
154 Hearing Before the Committee on Foreign Relations, supra, at 56. (General Recommendation 14 was later revised to add “national [origin]” to the distinguished groups, however this was not included in the Hearing’s record.)
statistically significant racial disparities and is also unnecessary.\textsuperscript{155} He then concludes that given such an explanation for CERD’s definition of discrimination, CERD does not impose any obligations on the United States that are contrary to existing law.\textsuperscript{156}

In short, the United States reasoned that it was actually in compliance with CERD given its interpretation that actions having an “unjustifiable disparate impact” meant those causing significant statistical disparities and that are unnecessary, which the Secretary concluded were encompassed by the Intent Doctrine. Essentially, this leap of logic alleges that showings of disparate impact are only unjustifiable if they are intentional. While not entirely sound, the United States later put forth this same reasoning in response to the Committee’s recommendations to eliminate the Intent Doctrine.

According to protocol, each state party must submit regular reports to the Committee regarding its compliance, and the Committee then issues observations based on these reports.\textsuperscript{157} In its initial report submitted in 2000, the United States discussed the history of the Fifth and Fourteenth Amendment, focusing on the Equal Protection Clause.\textsuperscript{158} For over a page, the report discusses the Equal Protection Clause from its inception through present day, citing a total of twelve decisive cases but failing to mention \textit{Washington v. Davis} or the Intent Doctrine.\textsuperscript{159} The majority of the cited cases demonstrate strong protections against racial discrimination, and yet one of the most damaging rulings to those protections is conspicuously absent.\textsuperscript{160} Later in the report, however, the Intent Doctrine is addressed, and the United States offers almost an identical response to the Secretary’s reasoning discussed above.\textsuperscript{161} Similar to the Secretary’s analysis, this initial report concludes that the Intent Doctrine is consistent with the obligations imposed by CERD.\textsuperscript{162}

Despite these assurances made by the United States, in the Committee’s response to the initial report it annunciates its concern with the Intent Doctrine:

\begin{quote}
The Committee draws the attention of the State party to its obligations under the Convention and, in particular, to article 1, paragraph 1, and general recommendation XIV, to undertake to prohibit and to eliminate racial discrimination in all its forms, including practices and legislation that may not be discriminatory in purpose, but in effect. The Committee recommends that the State party take all appropriate measures to review
\end{quote}

\begin{footnotes}
\footnotetext[155]{Id.}
\footnotetext[156]{Id., at 33-34.}
\footnotetext[157]{See, CERD, Art. 9.}
\footnotetext[159]{Id.}
\footnotetext[160]{Id.}
\footnotetext[161]{Id. at 58.}
\footnotetext[162]{Id.}
\end{footnotes}
existing legislation and federal, State and local policies to ensure effective protection against any form of racial discrimination and any unjustifiably disparate impact.  

Here, the Committee is essentially rejecting the United States’ argument that it is in compliance with the obligations relating to CERD’s definition of racial discrimination. The Committee explicitly recommends that the United States take action towards prohibiting and eliminating not only intentional racial discrimination, but also discrimination based on an unjustifiably disparate impact. In order to do so, the Committee recommends that the United States eliminate the requirement of showing intent to prove discrimination under the Equal Protection Clause so that disparate impact claims may be addressed. Thus, to be in compliance with the obligations imposed by CERD, the Intent Doctrine must be overturned.

In its next report in 2007, the United States again argues that based on the “unjustifiable disparate impact” language of General Recommendation 14, the Intent Doctrine is in compliance with the obligations imposed by CERD’s definition of racial discrimination. This report states that the United States will address the Committee’s concerns about the initial report, yet it essentially presents the same exact reasoning about which the Committee previously had raised concern. Though the argument in the 2007 report is almost verbatim to the initial report, this report also comments that General Recommendation 14, elaborating on CERD’s definition of discrimination, is recommendatory in nature. While this may be true, Recommendation 14 does not relieve the obligations imposed on the United States as a party state to the Convention. The General Recommendations are a guide to specific aspects of CERD’s language and implementation, and the fact that they are not mandatory in nature is inconsequential to the obligations set forth in the language of CERD itself. Thus, the 2007 report in no way furthers the argument that the Intent Doctrine is consistent with the obligations set forth in CERD.

Not surprisingly, the Committee’s response, the most recent to date, emphasized the very same concern over the Intent Doctrine. However, this time the Committee was even more explicit than previously and listed intent as its first concern:

163 Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America, U.N. Doc A/56/18, paras. 380-407, at para. 393 (2001). (This document also alludes to the existence of implicit bias and structural racism as residual effects of United States’ history: “Factors and difficulties impeding the implementation of the Convention... The Committee notes the persistence of the discriminatory effects of the legacy of slavery, segregation, and destructive policies with regard to Native Americans.”)

164 Id.


166 Id. at 121 (“This report... addresses the points raised in the Committee's observations concerning the Initial U.S. Report.”)

167 Id. at 106.
The Committee reiterates the concern expressed in paragraph 393 of its previous concluding observations of 2001 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 article 1, paragraph 1, of the Convention, 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. In this regard, the Committee notes that indirect - or de facto- discrimination occurs where an apparently neutral provision, criterion or practice would put persons of a particular racial, ethnic or national origin at a disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary (art.1 (1)).

The Committee recommends that the State party review the definition of racial discrimination used in the federal and state legislation and in court practice, so as to ensure - in light of the definition of racial discrimination provided for in article 1, paragraph 1, of the Convention – that it prohibits racial discrimination in all its forms, including practices and legislation that may not be discriminatory in purpose, but in effect.

Here, it is clear that the Committee again rejected the United States’ argument that it is in compliance with CERD. Not only did the Committee reiterate its concern regarding the Intent Doctrine, it went into even greater detail explaining specifically how CERD’s definitions of discrimination differ from those applied by United State’s courts. By characterizing de facto discrimination specifically, the Committee emphasizes that the United States is failing to meet its obligation to prohibit such discrimination. Again, the Committee is explicitly calling attention to the insufficiencies of the Intent Doctrine, both as it applies to the United States’ party state obligations, and to its protections against discrimination, generally.

This reporting process demonstrates not only that the international human rights community has grave concerns over the United States’ implementation of the Intent Doctrine, but also that the United States does not take those concerns seriously. The fact that the Committee raised this issue multiple times shows that the Intent Doctrine poses a severe threat to the implementation of CERD in the United States. However, repeatedly offering the same erroneous argument that the Intent Doctrine complies with CERD, as opposed to taking steps to actually comply, demonstrates a conscious unwillingness on the part of the United States to meet its treaty obligations. In order to reconcile this conflict, the United States must recognize that the Intent Doctrine can not and does not comply with the internationally accepted definition of racial discrimination set forth in CERD.


Part III: The International Community

At this point, this article has discussed how the United States has not taken its obligations as a party state to CERD seriously, specifically with respect to the Intent Doctrine. While other party states are by no means free from racial discrimination, their broad discrimination standards resemble the disparate impact standard espoused by CERD and therefore provide broader protections against discrimination. In contrast, the Intent Doctrine not only fails to live up to the international standard set forth in CERD, but also fails to provide the broad discrimination protections that other states do through their own domestic laws. This section will explore the disparate impact standards of the United Kingdom, Canada, and South Africa, focusing particularly on how they relate to and offer broader protections than the United State’s Intent Doctrine.

A. The United Kingdom

As a member of the European Union, the United Kingdom is required to comply with its Racial Equality Directive, which applies a disparate impact standard broadly to the areas of employment, education, social protection including social security and healthcare, and in access to and the supply of goods and services, including housing. The language in this directive reads:

For the purposes of this Directive, the principle of equal treatment shall mean that there shall be no direct or indirect discrimination based on racial or ethnic origin…indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

Explicit inclusion of an indirect discrimination standard mandates that each European Union member, including the United Kingdom, also implement such a standard. The United Kingdom has complied with this obligation through its Race Relations Act. The United Kingdom’s Race Relations Act sets out a broad disparate impact standard, pursuant to the European Unions Racial Equality Directive. Enacted the same year that Washington v. Davis was decided, the Act protects from indirect discrimination in areas

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169 See infra, Part III.A-C.
172 Sleeper, supra, note 166.
174 Id.
such as employment, the provision of goods and services, education and public functions.\textsuperscript{175} These areas are interpreted broadly, so that the CERD’s mandate of implementing a uniform disparate impact standard is met.\textsuperscript{176} Regarding the relative competence of these standards, one scholar argues: “Britain has developed a new approach that incorporates theories of unconscious and institutional discrimination. American policymakers should recognize the wisdom of the British example and authorize courts to adjudicate claims of discrimination employing the insights provided by these theories.”\textsuperscript{177} Thus, the United Kingdom has met the requirements of both CERD and the Racial Equality Directive with respect to its disparate impact standard, and is therefore better equipped than the United States to combat contemporary forms of racial discrimination.

The Race Relations Act also applies a model of anti-subordination aimed at eliminating racial discrimination in general, as opposed to the United States’ anti-discrimination model that seeks to only remedy specific instances of discrimination.\textsuperscript{178} This progressive shift is evidenced by the Act’s mandate that certain public bodies monitor their own discriminatory impact even before any claim has been brought.\textsuperscript{179} Public bodies are required to regularly self-evaluate their racial impacts, and if statistically significant imbalances are found, to address them.\textsuperscript{180} This self-evaluation was put into place to ensure that latent discrimination, such as implicit bias and structural racism, do not proceed simply because a victim has not filed suit.\textsuperscript{181} This approach, aimed at preventing discrimination within the system, is far better equipped to impede and eventually eliminate racism than is the Intent Doctrine.

Given the United Kingdom’s disparate impact standard, combined with the self-evaluation requirement, the United Kingdom is far more dedicated to CERD’s goal of eliminating racism than the United States. In the United Kingdom, public bodies monitor themselves to ensure there is no racially disparate impact of their actions, and address them if they exist. In the United States, however, a victim must not only allege discrimination, but also must meet a far higher burden that does not account for implicit or structural forms of bias and discrimination. This creates difficulty not only because many victims of discrimination do not have the means to bring suit, but also if they do the standard bars them from accessing a remedy in most cases. The United Kingdom, on the other hand, has exceeded its European and international obligations by instituting this self-evaluation in furtherance of its anti-subordination goals. Thus, the United States

\begin{itemize}
  \item \textsuperscript{175} Id.
  \item \textsuperscript{176} See Concluding Observations of the Committee on the Elimination of Racial Discrimination: United Kingdom of Great Britain and Northern Ireland, U.N. Doc. CERD/A/58/18 (2003). (The Committee’s most recent Concluding Observations did not make any mention that it was dissatisfied with the disparate impact standard as it is applied there. Thus, it can be inferred that the broad application of the standard is in compliance with the obligations of CERD.)
  \item \textsuperscript{177} Leland Ware, A Comparative Analysis of Unconscious and Institutional Discrimination in the United States and Britain, 36 Ga. J. Int’l & Comp. L. 89, 156 (2007).
  \item \textsuperscript{178} Id., at 150.
  \item \textsuperscript{179} Id.
  \item \textsuperscript{180} Id.
  \item \textsuperscript{181} Id.
\end{itemize}
should take guidance from these broad discrimination protections offered by the United Kingdom.

**B. Canada**

Canada has also passed a number of anti-discrimination measures, including section 15 of the Canadian Charter of Rights and Freedoms, the section of the Constitution dealing with equality rights in the application and operation of federal law. To protect against private discrimination, Canada also passed a Human Rights Act that applies to all federally regulated industries, such as airlines and banks. Also, each province has passed its own legislation to protect against discrimination therein, in order to supplement the federal acts that cover only the federal government and federally regulated industries. The Supreme Court of Canada has imposed a broad, disparate impact standard for all discrimination jurisprudence, thus applying the effects-based standard to both private and governmental discrimination at all levels.

The Canadian Constitution guarantees equality rights in the application or operation of the law, and was interpreted by the Supreme Court of Canada to evaluate discrimination using a disparate impact standard. The Canadian Charter of Rights and Freedoms’ section 15, the section of Canada’s Constitution dealing with equality rights, states: “Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.” Tasked with interpreting how discrimination under this provision of the Constitution should be defined, the Supreme Court of Canada explicitly rejected the Intent Doctrine standard for the more inclusive effects-based standard.

The Supreme Court of Canada contemplated the definition of discrimination in *Andrews v. Law Society of British Columbia*. Andrews, a British subject with a law degree from Oxford who was permanently residing in Canada, was prohibited from practicing law because he was not a Canadian citizen. The Court was tasked with deciding whether this restriction violated the Canadian Charter of Rights and Freedoms. The Court looked to its own interpretation of the federal and provincial human rights acts: “What

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183 Human Rights Act, 1976, (Can.)
186 Id.
187 Canadian Charter, supra, note 178.
188 Andrews, supra, note 181.
189 Id.
190 Id. at para. 2.
191 Id.
does discrimination mean? The question has arisen most commonly in a consideration of the Human Rights Acts and the general concept of discrimination under those enactments has been fairly well settled. There is little difficulty, drawing upon the cases in this court, in isolating an acceptable definition.\textsuperscript{192} The Court explains that intent is not required because anti-discrimination jurisprudence should focus on providing relief for victims, and not on punishing the discriminator.\textsuperscript{193} Further justifying the use of the effects-based standard, the Court goes on to discuss the need to address systemic discrimination.\textsuperscript{194} Therefore, the inquiry focused on the effects of the law prohibiting non-citizens from practicing law.\textsuperscript{195} The Court, then, found that despite the lack of evidence that this restriction was imposed intentionally to discriminate, it violated the equality rights of Andrews under the Canadian Constitution because of its effect alone.\textsuperscript{196} Thus, the Supreme Court of Canada here applied a disparate impact analysis to the governmental discrimination section of its Constitution, which was borrowed from its analysis of the federal and provincial human rights acts.\textsuperscript{197} The disparate impact analysis, as demonstrated by the Supreme Court of Canada’s indication that the standard is well-established, is widespread as it applies to both the Constitution and the human rights acts.

Through the disparate impact standard imposed on its various governing bodies, Canada has substantial protections that comply with its CERD anti-discrimination obligations.\textsuperscript{198} Likewise, in its analysis of an ideal definition of discrimination, Canada explicitly discusses the shortfalls of the Intent Doctrine, arguing that it is inappropriately aimed at punishing the discriminator instead of remedying the discriminated.\textsuperscript{199} Drawing on the more progressive aims of addressing structural racism and remedying victims, Canada’s discrimination definition is better equipped than the Intent Doctrine to further the goals of CERD.

C. South Africa

Following its oppressive apartheid era, South Africa adopted a new Constitution in 1996.\textsuperscript{200} The Bill of Rights of this new Constitution reads:

\textsuperscript{192} Id. at para. 19.
\textsuperscript{193} Id., citing Ont. Human Rights Comm. v. Simpsons-Sears Ltd., [1985] 2 S.C.R. 536, 551: “The Code aims at the removal of discrimination. This is to state the obvious. Its main approach, however, is not to punish the discriminator, but rather to provide relief for the victims of discrimination. It is the result or the effect of the action complained of which is significant. If it does, in fact, cause discrimination; if its effect is to impose on one person or group of persons obligations, penalties, or restrictive conditions not imposed on other members of the community, it is discriminatory.”
\textsuperscript{194} Id.
\textsuperscript{195} Id., generally.
\textsuperscript{196} Id.
\textsuperscript{197} Id.
\textsuperscript{198} See Concluding Observations of the Committee on the Elimination of Racial Discrimination: Canada, U.N. Doc. CERD/C/CAN/CO/18 (2007). (The Committee’s most recent Concluding Observations did not make any mention that it was dissatisfied with the disparate impact standard as it is applied there. Thus, it can be inferred that the broad application of the standard is in compliance with the obligations of CERD.)
\textsuperscript{199} Andrews, supra, at 181. See also, supra, note 189.
\textsuperscript{200} S. Afr. Const. 1996.
The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth...No person may unfairly discriminate directly or indirectly against anyone on one or more grounds [above].

This broad equality standard includes language prohibiting indirect discrimination, which is shown through disparate impact evidence, and does not require evidence of intent. As it transitioned from a system of legally enforced racial exclusion to a constitutional democracy with an express equal protection mandate, South Africa sought to take every precaution against racial discrimination and thus included the effects-based standard to ensure that all discrimination would be addressed. This broader standard not only provides far more protection from discrimination than does the Intent Doctrine, but is also in compliance with the definition of discrimination set out by CERD.

The Chief Justice of the Supreme Court of South Africa has discussed the deliberate use of this more protective standard, and why it is better equipped to combat discrimination than is the Intent Doctrine. He stated that similar to the 14th Amendment of the United States Constitution being enacted as a response to slavery, the equality provision, quoted in part above, was enacted as a response to apartheid. However, unlike the drafters of the 14th Amendment, the South African Constitutional Court had the benefit of evaluating international law as well as other nations’ domestic laws when drafting this provision. The 14th Amendment was written in such as way that it was eventually interpreted to require proof of intent for a claim of discrimination, and so the South African Constitutional Court made explicit in the language that indirect discrimination, which does not require proof of intent, would be considered a violation. In drafting this provision, the Constitutional Court specifically considered the Intent Doctrine, and compared it to other standards, and decided to model their Constitution after other countries’ examples. Regarding this decision, the Chief Justice stated: “It did so because it regarded the purpose of the prohibition against indirect discrimination to be the protection of vulnerable groups and not the punishment of those responsible for the discrimination.”

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201 Id., at ch. 2, art. IX, § 3, 4.
203 Id.
204 See Concluding Observations of the Committee on the Elimination of Racial Discrimination: South Africa, U.N. Doc. CERD/C/ZAf/CO/3 (2006). (The Committee’s most recent Concluding Observations did not make any mention that it was dissatisfied with the disparate impact standard as it is applied there. Thus, it can be inferred that the broad application of the standard is in compliance with the obligations of CERD.)
205 Chaskalson, supra, note 198.
206 Id. at 508.
207 Id. at 509-510.
208 Id. at 510-511.
209 Id. at 511.
210 Id.
century following the decision in Brown v. Board of Ed.: “Despite the decision in Brown, neither the legislature nor the courts have provided effective responses to issues of race-based poverty and the segregation and discrimination associated with it, which remain part of life in the U.S.” Further expanding on such failures, the Chief Justice explains how unintentional, structural racism persists in the United States as a result of past discrimination, because it does not take the remedial approach that other nations take. The Constitutional Court decided to follow that remedial approach to addressing discrimination, which it found necessary because “[a]bsent a positive commitment progressively to eradicate socially constructed barriers to equality and to root out systematic or institutionalised under-privilege, the constitutional promise of equality before the law, and its equal protection and benefit must, in the context of our country, ring hollow.”

So, after having considered numerous versions, including the Intent Doctrine, South Africa enacted a progressive disparate impact standard in order to fully address the lasting effects of such discrimination. This explicit inclusion of indirect discrimination into the South African Constitution not only furthers the purposes of CERD, but is also a direct response to the failures of the Intent Doctrine.

**Part IV: Practical Applications**

In order to advance the human rights ideals of CERD, advocates in the United States should take action promoting a disparate impact standard for racial discrimination claims. While the ratification of CERD was designed to limit its impact on domestic policy, as discussed above, there are a variety of ways that it can be utilized to advocate for eliminating this anachronistic and ineffective policy. This section will briefly explore methods of using the United States’ commitment to CERD, however symbolic, to advocate for the elimination of the Intent Doctrine.

First, attorneys could refer to CERD’s disparate impact standard in their pleadings, urging that it be implemented as set forth by CERD. While the precedent of the Intent Doctrine must be followed, citing the international example would contribute to the movement to overturn *Washington v. Davis* through educating and invigorating the legal community. This persuasive authority would call attention to the United States’ deficiencies in discrimination law, so that the legal community is fully educated on this issue. Once attorneys, judges, clerks and the legal community as a whole thoroughly grasp that United States discrimination law is not only ineffective, but also that it does not live up to our international obligations, it will be far more open to overturning *Washington v. Davis*.

The United States Supreme Court Justices have relied on international law as persuasive authority, demonstrating that citing CERD in pleadings could contribute greatly to

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211 Id. at 505, referring to Brown v. Board of Ed. of Topeka, 347 U.S. 483 (1954).
212 Id. at 507.
213 Minister of Fin. v. Van Heerden, 2004 (6) SA 121 (CC), para. 31.
eventually overturning the Intent Doctrine. Discussing consideration of international law in United States Supreme Court decisions, Justice Ginsberg remarked, “comparative analysis emphatically is relevant to the task of interpreting constitutions and enforcing human rights. We are the losers if we neglect what others can tell us about endeavors to eradicate bias against women, minorities, and other disadvantaged groups. For irrational prejudice and rank discrimination are infectious in our world.” If enough of the legal community is invigorated by the idea that we should honor our international human rights obligations, the Intent Doctrine could reach the Supreme Court and be overturned.

Alternately, legislators could also pursue action to implement a disparate impact standard in place of the Intent Doctrine. If the United States Congress were pressured to keep pace with the international community on this issue, it could effectively overturn the precedent through legislative means. This could be accomplished simply by passing legislation setting the constitutional discrimination standard as disparate impact, or indirectly through adopting implementing legislation for CERD. The latter option, as described above, would mean that the provisions of CERD would be enforceable as domestic law, and thus individuals would be able to bring claims of CERD violations based on its disparate impact standard. President Clinton declared through an Executive Order that:

It shall be the policy and practice of the Government of the United States, being committed to the protection and promotion of human rights and fundamental freedoms, fully to respect and implement its obligations under the international human rights treaties to which it is a party, including …CERD.

The public should enforce this “policy and practice” by urging for implementing legislation for CERD. Through legislative means, Congress should establish a cause of action for racial discrimination that can be proved through evidence of racially disparate statistics. In order to achieve this goal, the legal community, and the public as a whole, must pressure representatives to make this a priority. This would require a major public education effort, so that the people of the United States understand the dire need to address the Intent Doctrine. Should this become a grave enough concern for its constituents, the issue will become one that Congress will feel compelled to address. Creating such legislation is a viable alternative to overturning Washington v. Davis.

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214 See, e.g., Roper v. Simmons, 543 U.S. 551 (2005), (repeatedly citing international law and foreign sources to explain why the imposition of the death penalty on juveniles was unconstitutional under the 8th Amendment’s evolving standards of decency).


through the judiciary, but requires the public to urge Congress to address the deficiencies of the Intent Doctrine, and to act to redress them.

Thus, though CERD’s ratification was designed to limit its implementation in the United States, there are still methods to compel CERD’s disparate impact standard through judicial or legislative means. The legal community, as well as the general public, must be made aware of the threat the Intent Doctrine poses to international human rights ideals, and take action to address this issue. Without such action, the United States will fall further behind the rest of the world by not living up to its CERD obligations or providing adequate discrimination remedies for its residents.

**Conclusion**

The United States’ narrow Intent Doctrine is not only incapable of combating latent forms of modern discrimination, but is also well out of compliance with CERD’s definition of discrimination. The international convention offers broad protections aimed at eventually eliminating racial discrimination worldwide, and yet the United States refuses to comply with its very definition. Instead, the United States ratified the convention as a symbolic gesture to the international community with no intention of amending the Intent Doctrine through CERD’s established enforcement mechanisms. Thus, the United States is currently a party state to the Convention but fails to further its human rights mission.

Until the Intent Doctrine is eliminated, United States anti-discrimination law will be increasingly outdated and incapable of addressing the epidemic of racial discrimination. The international community no longer looks to the United States for guidance on discrimination jurisprudence, as it fails to live up to its human rights obligations to effectively combat racial discrimination. Given its sordid history of discrimination and exclusion based on race, the United States should carefully reconsider its ongoing application of the Intent Doctrine – particularly in light of its incapacity to address contemporary racial discrimination, its inadequacy to promote the human rights ideals promoted in CERD, and its continuing blight on the United States’ reputation as a nation of equal protection under the law.