Executing Racial Justice

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ABSTRACT

The United States has failed to eliminate racial discrimination in the decades since ratifying the international human rights treaty that prohibits it. To its credit, the Biden administration (Administration) has attempted to center the fight for racial equity in the work of the executive branch. But President Biden’s executive orders and agency action plans on racial justice omit any reference to the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), even though the treaty imposes robust, binding duties and standards for the fight to end pervasive racism. As President Biden enters the final months of his term, facing a legislature hamstrung by partisan divide, the time is ripe for decisive executive action to implement the treaty. Writing against a background of governmental and scholarly neglect of the duty to implement even non-self-executing human rights treaties, this Essay proposes several novel strategies the Administration could pursue. These include paying careful attention (and making formal reference) to ICERD obligations in ongoing executive action on equity; updating existing executive branch nondiscrimination frameworks to take the ICERD into account; and formally requiring agency action, including rulemaking, to advance compliance with the ICERD. Such actions carry tangible benefits, including driving dialogue about the extent of U.S. compliance with international law and adding fodder to new agency and enforcement actions, particularly where the ICERD is more protective than existing domestic precedent. Decisive executive action on racial justice that honors U.S. treaty obligations would set an important precedent and leverage the utility of international standards for remedying human rights violations in the United States.

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INTRODUCTION

Last August, the United States went before a United Nations (UN) committee to defend its performance implementing the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). As a party to the convention since 1994, the United States is bound to report to the Committee on the Elimination of Racial Discrimination (Committee) on a biennial basis. At the end of last August, following hearings in Geneva, the Committee issued Concluding Observations on the United States’ compliance with the treaty. The results were mixed. Although the Committee welcomed the United States’ reengagement with the reporting process, it also pressed the United States to make dozens of substantive changes to its laws, policies, and budgeting priorities.

On one hand, as the Committee acknowledged, President Biden has made the pursuit of racial equity a centerpiece of executive branch policy. The day he took office, President Biden issued an executive order (EO) “advancing racial equity and support for underserved communities through the federal government.” Within a week, he had expanded on this commitment through additional EOs, targeting racial inequities in housing, incarceration, tribal rights,

5. Id. ¶ 2.
6. See generally id. (offering dozens of recommendations for how the United States could improve its performance in operationalizing the treaty).
7. Id. ¶ 3.

and discrimination against Asian Americans and Pacific Islanders.\textsuperscript{10} By the end of his first few months in office, he had issued several more orders aimed at ending racial discrimination in numerous areas, from health care to law enforcement.\textsuperscript{11} President Biden also quickly countermanded some of President Trump’s initiatives—such as a ban on diversity and sensitivity training—that would have undermined this renewed executive commitment to racial justice.\textsuperscript{12}

On the other hand, the United States remains racked by racial inequality and discrimination. People of color—especially Black, Latinx, and indigenous people—suffer markedly worse life outcomes than white people across myriad important metrics. People of color experience homelessness and poverty at far greater rates; have less access to health care, educational opportunities, and employment; and endure manifestly worse treatment within the criminal legal system.\textsuperscript{13} For almost thirty years, the United States has been obligated under international law to eradicate such inequities,\textsuperscript{14} and it has indisputably failed to do so.

It is therefore conspicuous that the Biden administration’s (Administration) flurry of EOs—and the public remarks that accompanied them—omit any acknowledgment that these executive actions target problems the United States is legally-bound to address under the ICERD.\textsuperscript{15} The Administration is no doubt

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\item \textsuperscript{10} See President Joseph R. Biden, Remarks by President Biden at Signing of an Executive Order on Racial Equity (Jan. 26, 2021) (transcript available at https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/01/26/remarks-by-president-biden-at-signing-of-an-executive-order-on-racial-equity/ [https://perma.cc/92JA-T86D]) (memorializing the remarks President Biden made when signing four additional executive orders on January 26, 2021, six days after his inauguration).
\item \textsuperscript{11} See infra notes 69–72 (citing the relevant executive orders).
\item \textsuperscript{12} See Biden, supra note 10.
\item \textsuperscript{13} For a recent summary of some of the data submitted to the Committee on the Elimination of Racial Discrimination (Committee) about these problems, see generally HUM. RTS. WATCH & ACLU, RACIAL DISCRIMINATION IN THE UNITED STATES (2022), https://www.hrw.org/report/2022/08/08/racial-discrimination-united-states/human-rights-watch/aclu-joint-submission [https://perma.cc/C952-X7SG].
\item \textsuperscript{14} The United States assumed a somewhat weaker cluster of obligations under the ICERD upon signing the treaty in 1966 but before ratifying it in 1994—obligations typically understood to preclude actions that would undermine the ICERD’s object and purpose. See Curtis A. Bradley, Unratified Treaties, Domestic Politics, and the U.S. Constitution, 48 HARV. INT’L L.J. 307, 314 (2007).
\item \textsuperscript{15} The Committee remarked upon this as well. See Comm. on the Elimination of Racial Discrimination, supra note 4, \textsuperscript{4} 4 (expressing the Committee’s concerns about “the absence of specific legislation implementing the provisions of the Convention in the domestic legal order,” and noting “that the Convention is absent from the main and recent policies related to the elimination of racial discrimination and the resulting equity plans”). This situation is especially remarkable because, in multilateral settings, the United States trumpets the
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aware of its human rights obligations. In fact, President Biden has publicly commemorated the International Day for the Elimination of Racial Discrimination—16—a longstanding UN observance that recognizes the urgency of implementing the ICERD and ending discrimination.17 Yet the Administration describes its interest in eliminating systemic racial disadvantage in the United States as legally optional, a matter of what “our Nation deserves” rather than a goal it is obligated by international law to achieve.18 None of its racial justice orders even acknowledge the existence of the ICERD—or any other human rights obligations, for that matter.19

President Biden deserves credit for working to place racial justice at the center of his agenda, especially after his predecessor did the opposite. But this Essay argues that the Administration is missing an important opportunity to enhance the role of the executive branch in the process. More specifically, this Essay argues that the Administration should augment its mechanisms for implementing the ICERD and subsume its numerous executive racial justice initiatives under this framework. Although the Administration has misleadingly framed executive actions as optional,20 President Biden has embraced a program...
that is both a valuable and underrated approach to the implementation of human rights treaties: targeted, unilateral, executive action.21

Perhaps in response to skepticism from the U.S. Supreme Court,22 much of the scholarship and commentary on U.S. obligations under non-self-executing treaties like the ICERD has focused on the extent to which such treaties should bind courts, or state and local officials.23 Yet the executive branch of the federal government retains underappreciated power to implement treaties unilaterally. Although executive action alone cannot rectify racial injustice in the United States,24 or bring the United States fully into compliance with the treaty, the executive branch controls numerous systems and operates many programs that bear directly on the United States’ ICERD obligations.25 (Of course, under international law, all branches and levels of government must comply with—and can put a country in breach of—binding obligations.26) Additionally, the executive’s orientation toward issues of racial justice serves communicative, symbolic, and modeling functions.27 Finally, Republicans assumed control of the U.S. House of Representatives just months ago.28 As a purely pragmatic matter,

23. See infra Part II (discussing this literature in greater detail).
24. There is a reason so many scholars focus on the enforceability of non-self-executing treaty provisions. In many cases, state and local governments assume the power to put the United States in breach of those obligations. See Justice Stevens’s concurrence in Medellín:

One consequence of our form of government is that sometimes States must shoulder the primary responsibility for protecting the honor and integrity of the Nation. Texas’ duty in this respect is all the greater since it was Texas that—by failing to provide consular notice in accordance with the Vienna Convention—ensnared the United States in the current controversy.

Medellín, 552 U.S. at 536 (Stevens, J., concurring).
25. Individual states retain authority over numerous contexts in which racial discrimination is pervasive, ranging from criminal justice to health and education. But the federal government maintains significant leverage and authority to influence states’ treatment of individual rights, whether through implementing and enforcing federal legislation, incentivizing state action through commerce or spending clause powers, or exercising control over federal programs and initiatives.
27. See infra Part IV (elaborating on how the explicit incorporation of the ICERD into federal executive action serves these functions).
executive action to implement the ICERD offers much more promise right now than federal legislation.29

Part I provides a brief overview of the ICERD and its history, noting the most significant recent recommendations of the Committee to the United States. Part II provides an overview of scholarship on limits to the enforcement of human rights treaties that are not self-executing under U.S. law, noting the limited attention paid to the potential importance of executive branch action in fostering compliance. Part III outlines several specific ways that the Administration could drastically expand the contexts in which the White House and cabinet agencies foster compliance with the ICERD. Part IV closes with a brief evaluation of the relative advantages and potential limitations of augmenting the role of the executive branch in ensuring treaty compliance as proposed.

I. ICERD—A PROMISING TOOL UNDERUTILIZED

The unanimous adoption of ICERD by the UN General Assembly in December 1965 has been called a “signal moment in international law and relations.”30 The treaty emerged amidst a wave of developments at the height of the international struggle for decolonization. It drew praise both from the United Soviet Socialist Republic, as a testament to the struggle against the “shameful and odious products of imperialism and colonialism,” and from the United States, for its “constructive humanitarian objectives.”31 Adopted just months after the Civil Rights Act of 1964, it would take the United States a year to sign the treaty, but thirty more to ratify it.32 The treaty created a new tool for domestic civil rights groups, empowering them to use international fora to “pressure the U.S. government to protect the rights of African Americans.”33

29. See generally Anita S. Krishnakumar, How Long is History’s Shadow?, 127 YALE L.J. 880, 885, 924–932 (2018) (noting among other things, that “partisanship, the polarization of the voting public, and congressional shortsightedness” practically limit Congress’ ability to robustly exercise its legislative and non-legislative powers).
31. Id. at 1–2.
32. Goldberg Says U.S. Will Sign U.N. Pact for Racial Equality, N.Y. TIMES, July 7, 1966, at 22 (quoting U.S. Permanent Representative to the U.N. as noting that “while not all our ills have been cured, we are on the march.”). For more on the legal significance of signing and ratifying a treaty, see Bradley, supra note 14.
The preamble to the ICERD makes clear that the treaty augments the thinner equality provisions of the UN Charter. The treaty has several notable legal features, including requiring parties to “pursue by all appropriate means and without delay a policy of eliminating racial discrimination.” That provision has special relevance in the United States because the Supreme Court has licensed laws that have a racially-discriminatory effect if they are unmarred by discriminatory purpose; outside of specific contexts, race-neutral measures that have racially disproportionate impacts do not automatically violate the constitution. By contrast, the ICERD prohibits both direct discrimination and indirect discrimination (discrimination in fact or effect). Further, though the treaty emphasizes the elimination of discrimination from “public life,” it obligates States parties more broadly to bring an end to “discrimination by any persons, group or organization,” including through “special measures” to “secure [the] adequate advancement” of specific racial or ethnic groups.

The ICERD’s provisions on racist propaganda also stand in tension with traditional interpretations of the First Amendment. More specifically, the treaty condemns propaganda “based on ideas or theories of superiority of one race or group of persons of one color or ethnic origin,” and it requires States to take steps “designed to eradicate all incitement” as well as effective measures aimed at promoting tolerance. The ICERD further guarantees a long list of specific rights, which States are required to fulfill without discrimination, including civil, economic, social, and cultural rights.
When the United States finally ratified the ICERD in 1995, it did so subject to a set of reservations, understandings and declarations (RUDs) adopted by the U.S. Senate. The RUDs aimed to limit the United States’ obligations under the treaty and to square some of its provisions with U.S. constitutional and federal law. For instance, the Senate noted the limit of federal authority over private life and sought to limit application of the treaty where it might conflict with the First Amendment’s broad protection of freedom of speech, association and assembly. Perhaps unsurprisingly, there has been consistent disagreement around the United States’ ICERD obligations in these areas.

The United States began reporting to the Committee on its compliance later than required, submitting its first report in 2000. August 2022 marked the Committee’s consideration of the combined tenth, eleventh and twelfth periodic reports of the United States. In its Concluding Observations, the Committee reiterated many longstanding recommendations, including that the United States create a National Human Rights Institution and a national action plan to combat systemic racism and structural discrimination. The Committee also made a range of specific recommendations on several important civil and political rights issues as well as economic, social and cultural rights issues. Additionally, for the first time, the Committee made direct recommendations on the topic of redress for legacies of the past, urging the United States to take “appropriate measures towards the establishment of [...] a commission to study and develop reparation

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42. For an articulation of the U.S. Executive Branch perspective, see generally, David P. Stewart, United States Ratification of the Convention on Civil and Political Rights: The Significance of the Reservations, Understandings, and Declarations, 42 DEPAUL L. REV. 1183 (1993).
44. See, e.g., Comm. on the Elimination of Racial Discrimination, supra note 41, ¶¶ 145–173.
45. Id.
46. Id.
47. Id.
48. See id. ¶¶ 5, 7, 11, 13, 15, 17, 19, 21, 23, 25, 28, 30, 32, 34, 36, 38, 40, 42, 44, 46, 48, 50, 52, 54, 56 (offering many of these recommendations).
proposals for people of African descent”—including by issuing an executive order.49

Overall, the Committee clearly found the United States’ performance under the treaty deficient in a range of areas—not just a general failure to implement the ICERD domestically, but also a lack of a national action plan to specifically combat racial discrimination; counter hate crimes and hate speech; prevent gun violence and racial profiling; limit government use of force; protect the right of peaceful assembly; safeguard voting rights; regulate discrimination in the criminal and juvenile legal systems; end the differential impact of the COVID-19 pandemic; protect the right to an equal education; ensure the right to health (and maternal health specifically); curb discrimination in housing and end homelessness; guarantee the right to food; advance rights in the child welfare system; address discrimination in the context of environmental protection and climate change; end violence against women; recognize the rights of indigenous peoples; ensure the protection of migrants, refugees, asylum-seekers and stateless persons; expand access to legal aid; and mandate redress for legacies of the past.50

II. THE LIMITS OF PREVIOUS RESEARCH ON EXECUTIVE TREATY IMPLEMENTATION

Thus far, scholars have focused primarily on a narrow dimension of executive treaty implementation in the context of non-self-executing treaties like the ICERD. Although the term “non-self-executing” has a long and contested history,51 it refers broadly to treaties that are perceived not to require direct judicial application as a rule of decision in some or all cases, absent relevant domestic implementing legislation.52 If a treaty is deemed non-self-executing, it has a shorter reach as a matter of U.S. domestic law than its bare text might otherwise suggest until some other action—namely, federal legislation—“executes” it (more)

49. Id. ¶ 56.
50. Id. ¶¶ 5, 7, 11, 13, 15, 17, 19, 21, 23, 25, 28, 30, 32, 34, 36, 38, 40, 42, 44, 46, 48, 50, 52, 54, 56 (respectively capturing recommendations in each of these areas).
52. See Sloss, supra note 51, at 144–52 (canvassing a substantial literature on the term and identifying and categorizing multiple meanings attributed to it). For more on the distinction between direct and indirect judicial application of a treaty, see id. at 145.
fully. As a result, the question that naturally preoccupies many scholars interested in non-self-executing treaties is when, and to what extent, the treaty binds officials outside the executive branch of the federal government—especially those who might be disinclined to adhere to it.

There is a natural resonance to such questions, given how much power judicial, legislative, and state officials have over the United States' compliance with its treaty obligations. The discretion of such officials to ignore the demands of non-self-executing treaties can seriously undermine treaty efficacy. The U.S. Supreme Court’s limited engagement with these matters only gives them greater salience. For instance, fifteen years ago, the Court held that unilateral executive action cannot stand in for federal legislation in fully executing a non-self-executing treaty.

Scholars have engaged decidedly less with softer and less direct mechanisms available to the executive branch to improve treaty compliance. One important

53. See id. at 146–47. See also Edward T. Swaine, Taking Care of Treaties, 108 COLUM. L. REV. 331, 353 (2008) (“If a treaty provision is self-executing, no legislation is necessary before it acquires domestic force of law; labeling a provision as non-self-executing is usually (though not always) intended to suggest that legislation is necessary for domestic enforcement.”).

54. See, e.g., William M. Carter, Jr., Treaties As Law and the Rule of Law: The Judicial Power to Compel Domestic Treaty Implementation, 69 MD. L. REV. 344, 347 (2010) (exploring whether “a writ of mandamus may provide a means for requiring the United States to make a [non-self-executing] treaty domestically effective”); Jean Galbraith, Making Treaty Implementation More Like Statutory Implementation, 115 MICH. L. REV. 1309, 1363 (2017) (arguing that certain non-self-executing treaties could be executed directly by administrative or Senate action); Sloss, supra note 51, at 220 (arguing that, absent implementing legislation, courts should narrowly interpret declarations that any particular treaty is non-self-executing); Swaine, supra note 53, at 353–59 (arguing that the self-executing/non-self-executing distinction is less fruitful than an executive/non-executive distinction for understanding unilateral executive authority to enforce treaties).


56. See Medellin v. Texas, 552 U.S. 491, 530 (2008). Some argue for a more nuanced reading of Medellin. See Galbraith, supra note 54, at 1314–15, 1363 (suggesting the holding of Medellin turns on the wording of the treaty in question, and that “[w]here the text of a treaty appears to authorize executive branch implementation or the Senate approves of such implementation in its resolution of advice and consent, the executive branch should be able to transform treaty provisions into court-enforceable mandates through rulemaking or other appropriate agency action”).

57. Writing before Medellin, Edward Swaine has suggested that the constitutional responsibility of the president under the Take Care Clause includes a power and duty to enforce treaty obligations and that, even if such duties might not be part of the ‘law of the land’ for Supremacy
exception is Risa Kaufman, who has mapped out different tools through which executive officials can foster—rather than compel—"subnational compliance with international human rights treaty commitments." In particular, Kaufman notes the power of the executive branch to set standards for state and local officials; collect and disseminate relevant information; and incentivize local compliance. Further, as one of us has argued elsewhere, the executive branch can also draw on its international obligations when using civil litigation to enforce fundamental domestic rights, even when those international obligations arise under non-self-executing treaties. Such action can keep the United States in compliance with its treaty obligations or avoid breach as a matter of international law, notwithstanding the doctrine of non-self-execution.

In fact, in addition to these sorts of mechanisms for the executive implementation of non-self-executing treaties, there are yet others, such as the direct incorporation of treaty language and standards into policies and procedures that fall entirely within the purview of the executive branch of the federal government. These mechanisms are especially relevant in the context of the ICERD, which sets out commitments that—as the next Part outlines—align extremely well with domestic priorities explicitly embraced to date by the Administration.

III. USING UNILATERAL EXECUTIVE AUTHORITY TO IMPLEMENT THE ICERD

President Biden issued EO 13985 on his first day in office, fostering enhanced cooperation within the federal government as it seeks to promote racial justice.
The EO directs the Domestic Policy Council (DPC) to collaborate with the National Security Council (NSC) and the National Economic Council (NEC) to “embed equity principles, policies, and approaches across the Federal Government.” It also asks the Office of Management and Budget (OMB) to examine the possibility that “agency policies or actions create or exacerbate barriers to full and equal participation” based on race or ethnicity; requires agencies carrying out the executive order to consult with underrepresented groups; and establishes a working group devoted to improving data collection so that federal databases can be analyzed along key demographic lines, such as race and ethnicity.

Pursuant to EO 13985, dozens of federal agencies “conducted equity assessments of 3–5 of their agency’s high-impact services for the American people” and used those assessments to develop “equity action plans.” Several months later, President Biden released these equity action plans to the public. He also issued a series of additional EOs focused on racial inequities or discrimination in specific spheres of government policy, including immigration, voting rights, policing, and health care. And he continues to condemn historical racial
oppression within the United States and meet with groups promoting racial justice.

These actions, among others, suggest a significant commitment to racial justice on the part of the Administration. It is therefore peculiar that none of these measures—EOs, public remarks, published statements, and agency action plans—integrate the language or standards contained in the ICERD, or even appear to acknowledge that the United States is obligated to pursue many of these same goals under the treaty. Even President Biden’s brief statement commemorating the International Day for the Elimination of Racial Discrimination omits any acknowledgement the ICERD constitutes a binding part of U.S. law. Nor does it mention international law more generally.

There are numerous ways for the United States to harmonize its obligations under the ICERD with its ongoing executive initiatives to promote racial justice.


75. See Comm. on the Elimination of Racial Discrimination, supra note 4. This lacuna is especially striking given that the United States pointed to at least one agency action plan in its periodic report to the Committee. See id.

76. See Statement by President Biden on the International Day for the Elimination of Racial Discrimination, supra note 16 (omitting reference to the ICERD).

77. Id.

78. We first developed some of these ideas with our coauthors on another project. See HUM. RTS. WATCH & ACLU, supra note 13. Many of these avenues for implementing ICERD obligations could also be employed to fulfill obligations under other human rights treaties the United States has signed or ratified. By the same token, an administration hostile to human rights—or to racial justice specifically—could effectively use executive action for harmful purposes. The Trump administration, for example, undertook numerous executive initiatives that were widely understood to be discriminatory (both in intent and effect) in some significant respect that could arguably run afoul of U.S. obligations under the ICERD. Some of those initiatives came through immigration policy, such as the various versions of President Trump’s “Muslim Ban.” See Trump v. Hawaii, 138 S. Ct. 2392, 2403–06 (2018). Others involved presidential emergency declarations that triggered dormant standby authorities in federal legislation. See Presidential Proclamation No. 9844, 84. Fed. Reg. 4949 (Feb. 15, 2019), https://www.federalregister.gov/documents/2019/02/20/2019–03011/declaring-a-national-emergency-concerning-the-southern-border-of-the-united-states [https://perma.cc/X7ZD–KYY3]. Aside from the moral difference between such measures and the ones we recommend...
A first step would be to explicitly acknowledge the ICERD as a binding legal obligation of the United States in the current Administration’s framework for executive action on racial equity. This could be initiated by revising EO 13985 to require consideration of the ICERD as a legal obligation of the United States.79 A revised EO could also direct the OMB to review ICERD and CERD jurisprudence in its efforts to develop a method to assess equity, and direct agency heads to incorporate the ICERD into agency equity plans. Perhaps most significantly, the Administration could undertake efforts to assess equity by evaluating both direct and indirect discrimination in the broader manner required by ICERD standards. Taking this step would acknowledge the United States’ human rights obligations regarding racial justice and elevate them to a position of prominence within executive branch priorities and policy.

A more ambitious step would be to revise key executive branch nondiscrimination administrative structures (dating from both before and after the ICERD’s ratification) to reflect the ICERD as an applicable legal obligation. One place to start would be to update EO 12250, a 1980 order entitled Leadership and Coordination of Nondiscrimination Laws. This EO charged the Attorney General with coordinating the implementation and enforcement of the various nondiscrimination provisions of several statutes—for example, delegating the function vested in the president by the Civil Rights Act of 1964.80 EO 12250 was issued between the United States’ signing and ratification of the ICERD, and it could be updated to identify the ICERD as a law with an applicable nondiscrimination provision. An updated EO 12250 could effectively incorporate consideration of ICERD into executive branch practice more broadly. This change would have important and specific implications as well: it would charge the Attorney General with reviewing agency action across administrative agencies, and developing uniform standards and procedures for enforcement actions for implementation of and compliance with the ICERD.81 The United States has declined to take either of these steps since ratifying the treaty even though spurring such ongoing review is, indeed, a main goal of ICERD’s Committee review below, there is a legal one: measures intended to implement the ICERD are consistent with—and possibly even compelled by—international law, whereas measures that undermine treaty objectives are likely illegal. Notably, although they hold genuine promise, the measures we propose are also far less sweeping, dramatic, and controversial than the foregoing examples of executive action undertaken by the Trump administration.

81. See, e.g., id. It may be appropriate for the Department of Justice to also implement regulations to effectuate this Executive Order (EO), such as by updating 8 C.F.R. § 0.50.
process.\textsuperscript{82} There is significant merit in finally mainstreaming consideration of the ICERD alongside other core U.S. domestic nondiscrimination laws and ensuring the Department of Justice plays a leadership role in coordinating domestic incorporation of human rights obligations.

The executive branch could also uniformly incorporate the ICERD into the process for reviewing potential agency action, ensuring that agency-level or OMB impact analyses include consideration of conflicts between U.S. treaty obligations under the ICERD and federal equity priorities. At the agency level, this could be accomplished by mandating explicit consideration of the ICERD, among other key substantive obligations, before agencies take actions, such as enacting new rules.\textsuperscript{83} The treaty could be especially useful in shaping executive action in this regard because ICERD standards would entail evaluating the discriminatory effects of new rules or actions—scrutiny beyond the level required by the constitution.\textsuperscript{84} More broadly, the Administration could update EOs 12866, Regulatory Planning and Review (October 4, 1993), and 13563, Improving Regulation and Regulatory Review (January 18, 2011), to charge the OMB with ensuring harmony between U.S. international law obligations and the Administration’s equity agenda when reviewing proposed agency action.\textsuperscript{85} Coordinating mandated compliance with U.S. treaty obligations in the regulatory agenda for each administration could be a significant mechanism for spurring executive action on racial justice, in part because it could foreground consideration of two of the ICERD’s key legal features: a prohibition of indirect discrimination, and a requirement of special measures to advance the enjoyment of human rights protections by specific racial and ethnic groups.\textsuperscript{86}

A final promising step would be to mandate that all executive agencies that enforce nondiscrimination provisions of U.S. law incorporate affirmative

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  \item \textsuperscript{82} See International Convention on the Elimination of All Forms of Racial Discrimination, \textit{supra} note 34, at art. 9.
  \item \textsuperscript{84} See International Convention on the Elimination of All Forms of Racial Discrimination, \textit{supra} note 34.
  \item \textsuperscript{85} Exec. Order No. 13,563, 76 Fed. Reg. 3,821 (Jan. 18, 2011); Exec. Order No. 12,866, 58 Fed. Reg. 51735 (Oct. 4, 1993). While each agency holds the expertise and experience and is independently responsible for ensuring the consistency of agency action with applicable law, centralizing consideration of human rights obligations at the level of review of agency regulatory agenda stands to more effectively incorporate treaty law into specific agency action.
  \item \textsuperscript{86} See \textit{supra} notes 37–38 and accompanying text.
\end{itemize}
consideration of the ICERD in administrative actions related to nondiscrimination, and in particular in enforcement actions. For example, the Department of Justice could modify its Justice Manual to add guidance on nondiscrimination under the ICERD to its section on the enforcement of civil rights statutes.87 Similarly, the Department of Homeland Security (DHS) could build coordinating ICERD compliance into the duties for the head of the Office of Civil Rights and Civil Liberties, which could lead to more scrutiny of border and interior immigration enforcement actions.88 Ensuring that international law obligations are taken into account by cabinet agencies when they are enforcing U.S. civil rights statutes would empower the executive branch to advance compliance and address areas of deficiency.89 This change could lead DHS, for example, to scrutinize the historical discriminatory intent underlying federal statutes criminalizing irregular entry or reentry into the United States.90

We anticipate several concrete impacts of these recommended actions. First, they would drive dialogue about international law obligations to eliminate racial discrimination—and the degree to which the United States is meeting those obligations. The measures we suggest should also influence a range of federal legal standards, not least by adding useful interpretive fodder to discussions about the nature and extent of legal duties—both outside the executive branch and within its agencies and departments—in enforcement actions or disputes.91 Fundamentally, both dialogue and standard-setting involving the ICERD stand to strengthen federal efforts to eliminate discrimination.

IV. Costs and Benefits of Anchoring Domestic Racial Justice Work in the ICERD

The steps outlined above are tangible, even though they flow from a softer commitment we propose under which the executive branch would embrace the ICERD in structuring and describing its racial justice initiatives. How well the United States implements the treaty is plausibly more important than how it talks about implementing the treaty, but the two are in fact closely related. For one, the ICERD provides a powerful framework for eliminating racial inequities, and it is supplemented by independent, international monitoring.92 It encompasses an effective prohibition on much overt discrimination as well as the elimination of disparate outcomes keyed to racial or ethnic differences within the populace.93 It is forceful enough that embracing it fully, and incorporating its standards into executive action, stands to improve outcomes for people of color in the United States—a goal President Biden purports to pursue anyway.94

Additionally, openly acknowledging the ICERD and its influence on domestic policy should improve U.S. compliance with its legal obligations under the treaty—and not just because doing so could help to eradicate racial discrimination. As noted above, parties to the ICERD must continuously report to the Committee on their implementation efforts.95 The United States already cites its domestic initiatives as evidence of those efforts.96 Framing treaty-implementation efforts appropriately would facilitate timely and more complete reporting by conceiving of the relevant initiatives, overtly, as part of the ongoing task of giving effect to the treaty and updating the Committee. Explicitly embracing the ICERD would also improve coordination among governmental officials in complying with the treaty and reporting on their efforts to the UN.97

Moreover, there is value in governmental transparency about the nature and effect of its legal duties. Given that the ICERD is binding on the United States, the presumption should be that the United States undertakes its racial justice work

92. See Introduction, Committee on the Elimination of Racial Discrimination, supra note 3.
93. See DUDZIÄK, supra note 33.
95. See Introduction, Committee on the Elimination of Racial Discrimination, supra note 3.
97. See Kysel, supra note 89.
pursuant to the ICERD rather than on a purely discretionary basis.\textsuperscript{98} If anything, the burden falls on the Administration to supply a justification for suppressing the applicable legal basis for undertaking laudable initiatives. We can think of no such justification, especially given that honesty about the ICERD bears pragmatic value as well. For instance, if a future presidential administration were to prove itself hostile toward racial justice, we should understand its rescission of President Biden’s current initiatives as backsliding on its legal commitments rather than merely an abandonment of certain aspirational principles. It would be easier to arrive at that understanding if President Biden frames his initiatives as legally obligatory in the first place. In addition to being more accurate objectively, recognition of the legal underpinning for executive racial justice initiatives could help to lock in progress made by forward-thinking administrations.

Finally, publicly confronting our human rights obligations serves a powerful expressive or modeling function. It signals the seriousness of the United States’ commitment to the ICERD to other countries that might be equivocal or resistant.\textsuperscript{99} It educates state and local officials about the existence and scope of their obligations under the treaty, increasing the domestic effect of the ICERD and advancing the United States’ compliance with international law.\textsuperscript{100} And it raises the profile of the treaty among members of the public.\textsuperscript{101} All these outcomes are desirable—especially in contrast to the confusing signals the U.S. government

\begin{itemize}
\item \textsuperscript{98} The notion that States must observe their international law commitments, \textit{pacta sunt servanda}, is a foundational doctrine of international law. Vienna Convention on the Law of Treaties Art. 26 1155 U.N.T.S. 331 (1969) ("Every treaty in force is binding upon the parties to it and must be performed by them in good faith").
\item \textsuperscript{100} Kaufman, \textit{supra} note 55, at 1998–2006 (discussing some advantages of "localism in international law and human rights implementation," but arguing for "a role for the federal government in providing necessary information and other resources").
\item \textsuperscript{101} \textit{See} Comm. on the Elimination of Racial Discrimination, Consideration of Reps. Submitted by States Parties under Art. 9 of the Convention: Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America, U.N. Doc. CERD/C/USA/CO/6, at ¶ 36 (2008) (encouraging the United States to "step up its efforts to make government officials, the judiciary, federal and state law enforcement officials, teachers, social workers and the public in general aware about the responsibilities of the State party under the Convention").
\end{itemize}
Executing Racial Justice sends when it purports to take seriously some of the aims of the treaty while obscuring any mention of the treaty itself.

By contrast, we see no serious risks to formally reconciling executive action with treaty commitments made under the ICERD. Perhaps some constituencies will prove especially resistant to racial equity reforms couched in the language of human rights—for instance, out of a general hostility toward international law. The Administration may therefore fear incurring political costs, should such action be construed as compromising so-called “American exceptionalism.”102 Such speculative concerns appear weak, especially in the context of targeted initiatives that fall fully within the authority of the executive branch to apply. After all, the rationale behind sole executive action (which a future administration could unwind unilaterally) should matter less to objectors than efforts to compel resistant officials at the state and local levels to buy into the human rights framework.103 Moreover, fear of political costs is not a particularly compelling reason for running from binding legal obligations assumed by the United States long ago.

Another type of concern our recommendations could trigger is that executive action may prove less stable than legislative action on the treaty would be. For instance, one might doubt the competence of the executive to implement international legal obligations alone. Others might be skeptical about the longevity of executive implementation efforts, given the relatively short lifespan of any administration.104 And there is always the possibility of legal challenges to


103. See Kaufman, supra note 55, at 2023–26 (noting the significance of concerns about “international ‘interference’ in areas traditionally within the jurisdiction of state and local government” as a factor in resistance to human rights implementation).


In a constitutional system where political leadership of the Executive is significant and change is frequent, embracing Executive implementational authority means opening the door to changing on a regular basis much (although by no means all) of the content of that part of international law that has domestic effect. Moreover, at a policy level, one can cite missteps and blunders by the Executive as evidence that international law is too important to be left in the hands of anyone other than the judiciary.
executive action\textsuperscript{105} and inconsistencies arising when executive officials encourage local implementation of human rights standards and norms.\textsuperscript{106} Yet none of these possibilities, alone or together, appear worse than the alternative—neglecting (or pretending to neglect) the international treaty obligations of the United States altogether. At worst, these objections reflect possible limitations on the efficacy of executive implementation of human rights obligations rather than genuine harms of unilateral executive action.

It is true, of course, that relying on executive action to give life to a treaty has its limitations. For one, executive action alone is no substitute for implementing legislation that creates causes of action for private parties under the treaty or that extends the treaty’s reach to programs, policies, and practices outside the executive branch.\textsuperscript{107} As a result, one might worry that executive action amounts to low-hanging fruit—an easy way to pay lip service to the treaty without making serious headway on implementation. But implementing legislation is nowhere on the horizon, so executive action is the only realistic option. Moreover, if undertaken by an administration with the right orientation, such action could be extremely effective. The Administration’s stated commitment to racial justice renders the approach defended here a plausible and genuinely promising possibility.

**CONCLUSION**

President Biden’s public embrace of racial justice is a welcome development both on the merits and because it is legally required under the ICERD. This Essay argues that President Biden should explicitly and substantively anchor his racial justice initiatives in the ICERD to raise the profile of the treaty the United States signed nearly 60 years ago and to boost the domestic efficacy of the measures he adopts. With over half its term complete, President Biden’s administration is running short on time to make good on his commitment to combat racism and racial discrimination. While the new, divided U.S. Congress all but eliminates the possibility of meaningful legislative action, President Biden’s executive authority offers a deep well of authority that remains largely untapped. The steps outlined above would constitute a promising start in deploying that authority effectively by


\textsuperscript{107} See *id.* at 2024–25.
subsuming executive racial justice initiatives under a more powerful legal framework, augmenting federal nondiscrimination standards, and driving greater dialogue about whether and when the U.S. complies with its international legal obligations.108

108. Additional research might in fact explore whether the executive branch is legally obligated as a matter of international law to unilaterally implement non-self-executing treaties like the ICERD to the maximum extent possible as an expression of *pacta sunt servanda*, the government’s good faith commitment to uphold its international agreements. For background on *pacta sunt servanda*, see generally Hans Wehberg, *Pacta Sunt Servanda*, 53 Am. J. Int’l L. 775 (1959) (providing background on *pacta sunt servanda*).