

UNMISTAKABLY CLEAR: HUMAN RIGHTS, THE RIGHT TO REPRESENTATION, AND REMEDIAL VOTING RIGHTS OF PEOPLE OF COLOR

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I. Introduction

On June 25, 2013, the U.S. Supreme Court delivered its decision in *Shelby County, Alabama v. Holder*¹ the Voting Rights Act (“VRA”)² case in which an Alabama county found to have violated the Act in 2008³ sought to avoid the Act’s application by making a facial challenge to the preclearance requirement for changes in voting that might limit the right to vote based on suspect categories.⁴ The majority opinion in the 5-4 U.S. Supreme Court decision, finding that preclearance requirement to be unconstitutional, focused on equal treatment under the Constitution, and used a disparate treatment analysis in reviewing the constitutionality of a duly passed legislative act.⁵

Unfortunately for supporters of a strong Voting Rights Act, the equal treatment sought by the Court’s majority was not of people, but of States, and the disparate treatment found problematic was the requirement that some States receive federal approval for changes to electoral rules under the 1975 review of State acts in violation of the VRA.⁶ In order to protect the equal

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¹ *Shelby Cnty., Ala. v. Holder*, 133 S.Ct. 2612 (2013).

² Voting Rights Act of 1965, 42 U.S.C. §§ 1973 to 1973aa-6 (1965).

³ *Shelby Cnty., Ala. v. Holder*, 811 F. Supp. 2d 424 (D.D.C. 2011), *aff’d*, 679 F.3d 848 (D.C. Cir. 2012).

⁴ The U.S. Department of Justice has noted that preclearance requires “proof that the proposed voting change does not deny or abridge the right to vote on account of race, color, or membership in a language minority group. If the jurisdiction is unable to prove the absence of such discrimination, the District Court denies the requested judgment, or in the case of administrative submissions, the Attorney General objects to the change, and it remains legally unenforceable.” See Dep’t of Justice, Civil Rights Division, Section 5 Resource Guide, *available at* http://www.justice.gov/crt/about/vot/sec_5/about.php, (last visited by author March 18, 2014).

⁵ *Shelby Cnty.*, 133 S.Ct. at 2623-24.

⁶ The Court points to nationwide bans on tests and devices to limit the franchise in 1970 (see Voting Rights Act Amendments of 1970, 84 Stat. 314), as well as the 1975 reauthorization that looked at voter registration and turnout as of 1972, expanded the VRA to forbid voting discrimination on the basis of membership in a language minority group, and made the discrimination on the basis of membership in a language minority group, and made the nationwide ban on tests and devices permanent. See *Shelby*, 133 S. Ct. at 2637.

***Unmistakably Clear: Human Rights, the Right to Representation,
and Remedial Voting Rights of People of Color***

sovereignty of States, therefore, the decision requires a Congressional finding that the States required to seek preclearance require greater supervision today for the limited purposes for which preclearance is needed – the protection of the franchise from blatant discrimination, discrimination of sufficient gravity that the extreme recourse to federal authority is warranted.⁷

This reading of the Voting Rights Act makes a number of tacit and explicit assumptions with regard to the choice, by the Federal Government and by the States, of whose rights governmental actors must protect. The majority does so, in part, by decontextualizing the Civil Rights movement and the Voting Rights Act from decolonization and post-World War II expressions of human rights, a time in which there was a move toward greater global recognition that the “other” has rights that are enforceable based on recognition of individual human equality.⁸

⁷ See *Shelby*, 133 S.Ct. at 2615 (“the Act imposes current burdens and must be justified by current needs,” quoting dicta from *Northwest Austin Municipal Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009)). Justice Ginsburg’s vigorous dissent in *Shelby* focused on the fact that Congress had, prior to its 2006 reauthorization of the VRA, exerted considerable effort in determining that the preclearance requirement was necessary and justified. See *Shelby*, (Ginsburg, J., dissenting), 133 S. Ct. 2612 at 2632, slip op. at 12-30.

⁸ See e.g., U.N. CHARTER, Art. 1: “The Purposes of the United Nations are: ... (2): To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace; (3) To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion...” (Oct. 24, 1945); UNIVERSAL DECLARATION OF HUMAN RIGHTS (1948), on equality of persons: <http://www.un.org/en/documents/udhr/>

Article I

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 2

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

And on voting:

Article 21

1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
2. Everyone has the right to equal access to public service in his country.
3. The will of the people shall be the basis of the authority of government; this will be expressed in periodic and genuine elections, which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

One way in which the Supreme Court has made such decontextualization easier for itself is in looking for clarity from the other branches of government before applying legal standards, which often allows for consideration of only domestic norms. This is particularly the case where standards might otherwise arise from or connect with foreign relations.⁹ The Court has recently called for Congress to clarify its reasons for adopting international norms for human rights issues—action that the Court finds extraordinary--thereby creating a limitation on the scope of rights-promoting legislation (*Shelby*) and its enforcement of rights in U.S. courts (*Medellín, Kiobel*).

By putting the Voting Rights Act into the context of human rights instruments, we can see as appropriate a call for positive rights – for the Federal Government to take positive stances to provide protections to members of groups that have, historically and through the present day, faced special challenges in having their voices heard, even as against a State that does not currently act with intent to harm that population.

In this symposium Essay, I first consider the context of the Fifteenth Amendment to the Constitution, and its work in overturning prior jurisprudence that indicated a divorcing of constitutional protections from the African-American population. I then turn to the context of the Voting Rights Act of 1965 and the connection between U.S. right-protective legislation and a global shift toward rights-protective treaties and laws. I then juxtapose the positivist stance of international law with the current Court’s jurisprudential posture of seeking congressional clarification and justification of rights above all else, even in the context of civil and human rights. Finally, I conclude that without the positivist interpretations that have permeated U.S. civil rights legislation and jurisprudence in the past, new voting rights legislation can achieve neither its domestic nor global potential.

⁹ See e.g., *Medellín v. Texas*, 552 U.S. 491, 128 S.Ct. 1346, 1373 (2008) (noting the Court’s inability to enforce a decision of the International Court of Justice based on the United States political branches having decided to “undertake” to comply with judgments of the ICJ, but effectively not being bound by decisions of the ICJ; and 128 S.Ct. at 1369 (“the terms of a non-self-executing treaty can become domestic law only in the same way as any other law—through passage of legislation by both Houses of Congress, combined with either the President’s signature or a congressional override of a Presidential veto. See Art. I, § 7.”); see also *Kiobel v. Royal Dutch Petroleum*, 133 S.Ct 1659 (2013) (“the danger of unwarranted judicial interference in the conduct of foreign policy is magnified in the context of the ATS [Alien Tort Statute], because the question is not what Congress has done but instead what courts may do.”).

Unmistakably Clear: Human Rights, the Right to Representation, and Remedial Voting Rights of People of Color

1. *The Fifteenth Amendment*

Following the Civil War, the widespread belief that the law had to shift dramatically to affirmatively protect the franchise for former slaves allowed for the passage and ratification of the Fifteenth Amendment to the Constitution. The Fifteenth Amendment gave Congress tremendous power to fashion appropriate legislation to enforce this principle: “The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”¹⁰ Read in conjunction with the 10th Amendment of the U.S. Constitution,¹¹ recognizing that powers not accorded to the Federal Government are reserved to the States, *or the people*, we recognize that the Civil War Amendments – the Thirteenth, Fourteenth, and Fifteenth amendments – recognize rights in the people, limiting the rights of the federal *and* State governments to abridge popular rights remaining to the individual citizen.¹² In recognizing the delegation of authority for the protection of peoples historically excluded from State protections, the Supreme Court stated in 1879:

It is the power of Congress which been enlarged Congress is authorized to enforce the prohibitions by appropriate legislation. Some legislation is contemplated to make the [Civil War] amendments fully effective.¹³

¹⁰ U.S. Const., Amend. XV. The Fifteenth Amendment may also be read in the context of the Fourteenth Amendment’s equal protection clause, which notes that no state may “deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const., Amend. XIV § 1.

¹¹ U.S. Const., Amend. X: “the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

¹² With regard to the Voting Rights Act, the Supreme Court specifically recognized the right of Congress to protect persons ahead of the interests of States of the Union, both as the Federal Government might act as “the ultimate *parens patriae* of every American citizen” (South Carolina v. Katzenbach, 383 U.S. 301, 324 (1966)) and through the enlargement of powers under the Civil War Amendments allowing for unequal treatment of States to remedy “local evils which have subsequently appeared” following admission of States to the Union. *Id.* at 328-29. Thus, in prohibiting state legislation that might adversely impact those previously discriminated against without requiring proof of state intent, “Congress might well decide to shift the advantage of time and inertia from the perpetrators of the evil to its victims,” when protecting individuals from state-sanctioned discrimination pursuant to the Fifteenth Amendment. *Id.* at 327-28. This was part of an expanded power extended to Congress under the Constitution to enforce the Civil War Amendments. The Supreme Court recognized that Congress could implement: “Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.” *Id.* at 326-27 (citing *Ex parte Virginia*, 100 U.S. 339, 345-46 (1879)).

¹³ *Ex parte Virginia*, 100 U.S. 339, 345 (1879).

This recognition of the right of the individual was particularly important, as it baldly rejected a persistent line of thought in some quarters, and stated by the Supreme Court, that the Constitution protected those who entered the polity through the State governments,¹⁴ and, thus, recognized the sovereign right of the State governments to exclude from citizenship those not intended by the Constitution to form part of the polity of the United States. The Fifteenth Amendment dispelled that view of the Constitution's limited protection, specifically restricting the ability of the Federal and State governments to withhold the voting franchise based their originalist interpretations of the Constitution that would exclude those of African descent from membership in the Federal and State polity, and, therefore, deprive those persons of the protections of the Constitution. To some extent, the Civil War Amendments were aspirational – that is, while they purported to afford the rights of citizenship to African-Americans, State mechanisms could be exercised to effectively prevent the exercise of the franchise, and, thereby, the enforcement of the laws, notwithstanding the prohibition on the “enforce[ment of] any law which shall abridge the privileges or immunities of

¹⁴ See *Dred Scott v. Sandford*, 60 U.S. 393, 447-48 (1857):

The principle upon which our Governments rest, and upon which alone they continue to exist, is the union of States, sovereign and independent within their own limits in their internal and domestic concerns, and bound together as one people by a General Government, possessing certain enumerated and restricted powers, delegated to it by the people of the several States, and exercising supreme authority within the scope of the powers granted to it, throughout the dominion of the United States. ... Whatever it acquires, it acquires for the benefit of the people of the several States who created it. It is their trustee acting for them, and charged with the duty of promoting the interests of the whole people of the Union in the exercise of the powers specifically granted.”

However, as noted earlier in the decision, the understanding of the make-up of the people of the Union created a limited polity:

“The words ‘people of the United States’ and ‘citizens’ are synonymous terms, and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the Government through their representatives. They are what we familiarly call the ‘sovereign people,’ and every citizen is one of this people, and a constituent member of this sovereignty. The question before us is, whether the class of persons described in the plea in abatement [those descended from slaves of African descent] compose a portion of this people, and are constituent members of this sovereignty? We think they are not, and that they are not included, and were not intended to be included, under the word ‘citizens’ in the Constitution, and can therefore claim none of the rights and privileges, which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.”

Id. at 404-05.

***Unmistakably Clear: Human Rights, the Right to Representation,
and Remedial Voting Rights of People of Color***

citizens of the United States.”¹⁵ It is for this reason that the effective protection of those rights defines not only the extent of their recognition by the Federal and State governments, but also the existence of personhood and participation in the sovereignty of the United States for those historically excluded.

The Fifteenth amendment’s perspective on protection of the previously disenfranchised was aspirational and positivist, and those aspirations were held in abeyance during a century of Jim Crow legislation and practices. It was only with the rise of a post-World War II global human rights movement that the Voting Rights Act of 1965 began the project of effectuating the promise of the Fifteenth Amendment—of recognizing African-Americans as “people of the United States.”

2. The Global Context of the Voting Rights Act of 1965

In placing the Voting Rights Act within the context of the post-World War II upheaval in response to claims of ethnic superiorities, the question of an individual protection in response to a majoritarian (or other recognized power) denial of rights becomes paramount. Put differently, the overturning of the racial stratification in the Civil War Amendments became a worldwide phenomenon in the response to Nazism in Europe, and the recognition of independence of former colonial holdings in the Middle East, Asia, and Africa, and in the question of capitalism versus socialism in the domination of South America.

The 1950’s and 1960’s were a period in which the international community worked to enumerate some of the standards and laws protecting human rights, and to move from a period of aspirational/moral obligations (which some countries recognized as binding) to legal obligations that could not be ignored, even by those less desirous of their recognition. Following conventions against discrimination in employment by the International Labour Organization in 1958¹⁶ and in education by the United Nations Educational, Scientific and Cultural Organization in 1960,¹⁷ the United Nations General Assembly passed the International Convention on the

¹⁵ See U.S. Const., Amend. XIV, § 1. The majority in *Shelby* noted that “[t]he first century of congressional enforcement of the [Fifteenth] Amendment, however, can only be regarded as a failure.” See 133 S.Ct. 2612, at 2619, citing *Northwest Austin*, 557 U.S. at 197.

¹⁶ International Labour Organization, *Discrimination (Employment and Occupation) Convention*, 1958 (No. 111).

http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C111

¹⁷ United Nations Educational, Scientific and Cultural Organization, *Convention against Discrimination in Education* (adopted December 1960), available at http://portal.unesco.org/en/ev.php-url_ID=12949&url_Do=Do_TOPIC8_url_Section=201.html.

Elimination of All Forms of Racial Discrimination (CERD) in 1965¹⁸ and the International Covenant on Civil and Political Rights (ICCPR) in 1966.¹⁹ Both these international conventions recognize the protection of *individuals* by their national governments.

CERD looks to avoid racial discrimination, defined 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.”²⁰ The ICCPR seeks to protect rights “without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”²¹ Both these provisions describe a form of equal protection of the law, similar to that provided through Section 1 of the U.S. Constitution’s 14th Amendment.²² Both CERD and the ICCPR specifically recognize a right to representation in the public sphere with certain protections based on race, ethnicity, or language, among other categories.²³ Both of these Conventions (CERD and the ICCPR) were ratified by the United States, and were to be carried out by the Federal Government where the Federal Government has jurisdiction, or by the State government.²⁴ The governmental actors might carry out the

¹⁸ UN General Assembly Resolution 2106 (adopted December 1965).

<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx>.

¹⁹ UN General Assembly Resolution 2200A (adopted December 1966), *available at*

http://portal.unesco.org/en/ev.php-url_ID=12949&url_DO-DO_TOPIC8

[url_SECTION=201.html. http://www.ohchr.org/en/professionalinterest/pages/cescr.aspx](http://www.ohchr.org/en/professionalinterest/pages/cescr.aspx).

²⁰ CERD, Art. 1(1).

²¹ ICCPR Art. 1.

²² U.S. Const., Amend. XIV, § 1: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

²³ *See e.g.*, ICCPR ARTS. 2, 3, 26, and 27; CERD ARTS. 1, 2, 3, and 5(c).

²⁴ *See* INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: Understandings of the United States, noting, as of the U.S. ratification in 1992, “(1) That the Constitution and laws of the United States guarantee all persons equal protection of the law and provide extensive protections against discrimination. The United States understands distinctions based upon race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or any other status - as those terms are used in article 2, paragraph 1 and article 26 - to be permitted when such distinctions are, at minimum, rationally related to a legitimate governmental objective.... (5) That the United States understands that this Covenant shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the state and local governments; to the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall take measures appropriate to the Federal system to the end that the competent authorities of the state or local governments may take appropriate measures for the fulfillment of the Covenant.”

***Unmistakably Clear: Human Rights, the Right to Representation,
and Remedial Voting Rights of People of Color***

obligations through new law or existing law, but, per the understanding of the United States, neither Convention was self-executing, meaning that the U.S. understanding of those Conventions was and is susceptible to judicial application and interpretation without action by the political branches.²⁵

Of course, this notion of courts finding legal obligations based on positive rights conflicts with the case and controversy reading typical of U.S. judicial practice – that our courts decide only what is before them, and look at the application of the law as provided by a legislature in the context of the particular controversy.²⁶ For that reason, recognition of certain declarations of the U.N. General Assembly as indicative of State obligations under the U.N. Charter by the U.S. Court of Appeals for the Second Circuit in 1980 suggested a change.

In *Filartiga v. Peña-Irala*, the Second Circuit noted with approval that the Universal Declaration of Human Rights,²⁷ perhaps the most celebrated

https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en . See also INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION, Reservations and Understandings at Ratification (1994), recognizing “[t]hat the Constitution and laws of the United States establish extensive protections against discrimination,” and “[t]hat the United States understands that this Convention shall be implemented by the Federal Government to the extent that it exercises jurisdiction over the matters covered therein, and otherwise by the state and local governments. To the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall, as necessary, take appropriate measures to ensure the fulfillment of this Convention.” https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en (last visited by author March 30, 2014). Thus, both the ICCPR and the CERD recognize the need of the United States government to fulfill obligations against discrimination, and that certain unspecified laws in existence at the time of ratification of the Conventions (in 1992 and 1994, respectively) speak to the United States’ fulfillment of those obligations.

²⁵ *Id.* (CERD, U.S. Reservations at Ratification, Art. III; ICCPR U.S. Declaration 1).

²⁶ See e.g., *South Carolina v. Katzenbach*, 383 U.S. at 357 (Black, J., dissenting), looking at the VRA § 5 preclearance requirement:

... it is hard for me to believe that a justiciable controversy can arise in the constitutional sense from a desire by the United States Government or some of its officials to determine in advance what legislative provisions a State may enact or what constitutional amendments it may adopt. If this dispute between the Federal Government and the States amounts to a case or controversy it is a far cry from the traditional constitutional notion of a case or controversy as a dispute over the meaning of enforceable laws or the manner in which they are applied.

²⁷ United Nations General Assembly Resolution 217A (III) (Dec. 21, 1948). The Universal Declaration of Human Rights begins with an acknowledgement of the inherent equality of all humans, see *id.* at Art. 1, and includes the right to representation as part of a guarantee of that equality:

Everyone has the right to take part in the government of his country, directly or through freely chosen representatives...The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections, which shall be

post-World War II, post-colonial statement of the aspirations of positive human rights, “no longer fits into the dichotomy of ‘binding treaty’ against ‘non-binding pronouncement,’ but is rather an authoritative statement of the international community.”²⁸ In fact, the decision viewed as persuasive commentators who “have concluded that the Universal Declaration has become, *in toto*, a part of binding, customary international law.” The Court noted that since the adoption of the U.N. Declarations on Torture and Human Rights, “[m]embers can no longer contend that they do not know what human rights they promised in the Charter to promote.”²⁹

In looking at the Universal Declaration on Human Rights, the American Convention on Human Rights,³⁰ the International Covenant on Civil and Political Rights, and the European Convention for the Protection of Human Rights and Fundamental Freedoms,³¹ the Second Circuit recognized that torture violated the Alien Tort Statute³² because it violated the law of nations.³³ Thus, an undertaking by the United States to comply with the law of nations in protecting fundamental rights would give effect to the understandings of those rights found in those specific international documents. Again, the Second Circuit’s understanding may have been supported by the later ratifications of the ICCPR and CERD that confirmed that many of the anti-discrimination principles in those treaties had already been put into place under the U.S. Constitution and laws. While *Filartiga* represented a common sense approach to the intent of Congress to support international standards, it may have stood as a high-water mark in this kind of positivist domestic interpretation of international civil rights norms.

by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

See id. at Art. 21(1), (3).

²⁸ *Filartiga v. Peña-Irala*, 630 F.2d 876, 883 (2d Cir. 1980) citing E. SCHWELB, HUMAN RIGHTS AND THE INTERNATIONAL COMMUNITY 70 (1964).

²⁹ *Id.* at 630 F.2d at 883, citing Sohn, *A Short History of the United Nations Documents on Human Rights*, in *The United Nations and Human Rights, 18th Report of the Commission* (Commission to Study the Organization of Peace ed. 1968).

³⁰ Organization of American States, *American Convention on Human Rights*, adopted Nov. 22, 1969. This Convention mirrors the protections of the Universal Declaration of Human Rights with regard to the right to vote. *See id.* at Art. 23.

³¹ European Union, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, adopted April 11, 1950 (specifically referencing the protections of the Universal Declaration of Human Rights).

³² 28 U.S.C. § 1350 (“The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”).

³³ *See Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

***Unmistakably Clear: Human Rights, the Right to Representation,
and Remedial Voting Rights of People of Color***

3. *The U.S. Supreme Court Regresses*

With much of the rest of the world, U.S. courts made definite moves in the late 20th century in acknowledging international rights norms and obligations, but the early 21st century has thus far given the impression of a significant regression. In 2004, the Supreme Court noted that an international declaration like the U.D.H.R. “does not of its own force impose obligations as a matter of international law,” citing Eleanor Roosevelt’s comment as the U.S. representative to the drafting of the U.D.H.R., calling it “a statement of principles ... setting up a common standard of achievement for all peoples and all nations ... not a treaty or international agreement impos[ing] legal obligations.”³⁴

The Supreme Court moved further from international standards in the 2008 *Medellín* decision,³⁵ in which the Court found that the United States was not bound by a decision of the International Court of Justice where a defendant Mexican national was sentenced to death without having been provided an opportunity to talk with the Mexican consulate, notwithstanding that the United States had ratified a treaty in 1969³⁶ recognizing that right. The Supreme Court found that “the U.N. Charter reads like ‘a compact between independent nations’ that ‘depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it.’”³⁷ Justice Roberts’ majority opinion in *Medellín* looks to its own understanding of the text, and eschews a “multifactor, ‘context-specific’ inquiry” that would sometimes recognize a treaty as self-executing (requiring no further legislative action by Congress to allow U.S. courts to enforce the treaty’s terms), and sometimes not.³⁸

Writing in dissent for three justices in *Medellín*, Justice Breyer explains a different treatment of treaties: “The Constitution’s Supremacy Clause provides that ‘all Treaties ... 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.’ Art. VI, cl. 2. The Clause means that the ‘courts’ must regard ‘a treaty ... as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative

³⁴ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 734-35 (2004).

³⁵ *Medellín v. Texas*, 128 S.Ct. 1346 (2008).

³⁶ See Vienna Convention on Consular Relations, Apr. 24, 1963, [1970] 21 U.S.T. 77, T.I.A.S. No. 6820 [596 U.N.T.S. 261 (1967)].

³⁷ *Medellín v. Texas*, 128 S.Ct. 1346, 1358-59, citing *Head Money Cases*, 112 U.S. 580, 598, 5 S.Ct. 247, 28 L.Ed. 798 (1884).

³⁸ *Id.*

provision.”³⁹ In the context, then, of a United States undertaking to follow a decision of the International Court of Justice pursuant to the Charter of the United Nations, Congress would have authorized recognition of a U.S. obligation, absent a clear enactment to the contrary. After explaining seven substantive reasons for that opinion, the dissent states: “The majority reaches a different conclusion because it looks for the wrong thing (explicit textual expression about self-execution) using the wrong standard (clarity) in the wrong place (the treaty language).”⁴⁰ It is this burden shifting – this requirement of clarity in the adoption of standards by Congress – that leaves plaintiffs without the ability to rely on either the tacit or, at times, explicit reasoning of Congress, as the Court requires clear and explicit textual expression to extend rights.

In *Shelby*, the same type of burden-shifting used by the conservative majority in foreign relations cases to eliminate the U.S. obligation to protect rights is used to eviscerate the preclearance requirement of the VRA. The dissent looks to frame the issue in *Shelby* differently, focusing on the more expansive view of rights that is articulated in international instruments and was evident in the reasoning in *Filartiga*. The dissent⁴¹ in *Shelby* noted that Congress had opted to continue the current reading of the Voting Rights Act, including its bail out and bail in provisions,⁴² in part because, “As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting.”⁴³ Under Justice Ginsburg’s rationale, reauthorization will typically satisfy the minimal requirements of the rational-basis test, as Congress will have both the original record and any additional material before it; that reauthorization allows for a review after a period of time; and that the record on review should be less stark if the law is working (there should be fewer successful incidents of discrimination), and would only be equally stark if the law was ineffective.⁴⁴ A major deficiency, then, with the *Shelby* majority opinion is that it focuses not on the interpretation of a human right that is part of the

³⁹ Medellín, 128 S.Ct. at 1375 (Breyer, J., dissenting) (citing *Foster v. Neilson*, 2 Pet. 253, 314, 7 L.Ed. 415 (1829) (majority opinion of Marshall, C. J.)).

⁴⁰ *Id.* at 1389.

⁴¹ Justice Ginsburg’s dissent joined by Justices Breyer, Kagan, and Sotomayor, 133 S.Ct. 2612 at 2632.

⁴² See *Shelby* (Ginsburg, J., dissenting), 133 S.Ct. 2612 at 2644, noting that “[t]he VRA permits a jurisdiction to bail out by showing that it has complied with the Act for ten years, and has engaged in efforts to eliminate intimidation and harassment of voters,” while other jurisdictions that were not previously covered might be bailed in – subjected to federal preclearance requirements – “upon finding that violations of the Fourteenth and Fifteenth Amendments have occurred there.”

⁴³ See *Shelby*, 133 S.Ct. 2612 (Ginsburg, J., dissenting) (citing *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966)).

⁴⁴ *Id.* at 2632.

***Unmistakably Clear: Human Rights, the Right to Representation,
and Remedial Voting Rights of People of Color***

treaty laws of the United States, and therefore “the supreme Law of the Land” under the Constitution,⁴⁵ but instead focuses on the appropriateness of Congressional action under the Necessary and Proper Clause following the formulation in *McCulloch v. Maryland*:⁴⁶

Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.⁴⁷

Having thus quoted Chief Justice Marshall, the majority and the dissent in *Shelby* (through the opinions of Chief Justice Roberts and Justice Ginsburg, respectively) re-engage an historical discussion on the representative purpose of government, and a return to that which is ordinary in our representative democracy in place of the extraordinary. As with its turn from an expanded recognition of human rights, the Court has also turned from an expansion of the protection of the individual at the expense of the State or those in power.⁴⁸ It is in this light that Justice Roberts’ elision of the Tenth Amendment—all powers not specifically granted to the Federal Government are reserved to the States or citizens⁴⁹—should be read. The recognition of citizenship derives, in some sense, from the State or those in power who have given authority for the individual’s recognition as a component of the polity.⁵⁰ The Tenth Amendment, therefore, protects the individual and individual freedom from Federal encroachment, but must do

⁴⁵ U.S. Const., Art. VI, par. 2. “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, anything in the Constitution or Laws of any State to the Contrary notwithstanding.” One might also look at the Constitutional guarantee that every state shall have a republican form of government (U.S. CONST., ART. IV, § 4) (*see e.g., Baker v. Carr*, 369 U.S. 186, 229-30 (1962), for the proposition that the political question of a state form of government, typically preventing justiciability, may not arise where a state government manipulates municipal boundaries to deprive a citizen of the Fifteenth Amendment right to vote (*citing* *Gomillion v. Lightfoot*, 364 U.S. 339, 344-45 (1960) (“Legislative control of municipalities, no less than other state power, lies within the scope of relevant limitations imposed by the United States Constitution.”))).

⁴⁶ 4 Wheat. 316, 421 (1819).

⁴⁷ *Id.*

⁴⁸ Justice Taney stated in the *Dred Scott* decision that those whose ancestors were “negroes of the African race ... imported into this country, and sold and held as slaves ... had no rights or privileges but such as those who held the power and the Government might choose to grant them.” *Dred Scott*, 60 U.S. 393, 403-05 (1857). The clearest reading of such a clause suggests that those holding power are the “sovereign people,” and constituents of the sovereignty of the United States; the defining of those “citizens” specifically excludes those descended from African slaves.

⁴⁹ *Shelby*, 133 S.Ct 2612.

⁵⁰ *See Dred Scott*, *supra* note 14.

so in treating each State in the same way – assuming the State is the repository of individual freedom.

Let us assume, therefore, that the right to vote was specifically incorporated through the Fifteenth Amendment to apply to all citizens; that the Constitution recognizes the particular concern for the previous disenfranchisement of those frozen out of the polity of the United States, specifically through the violation of State political mechanisms;⁵¹ and that the United States Congress has recognized a continued concern for the disenfranchisement of populations within political districts that have historically discriminated against those considered outside of the Constitution's intended polity. Under that set of assumptions, the VRA should clearly stand.

However, the Roberts majority considers legislation from the opposite perspective: in order for the Court to enter a judgment upholding the VRA, the government must show that Congress specifically provided that right to the party, and that the right is not somehow created by the Court.⁵² Congress must only grant those rights where they are constitutional – both legitimate and consistent with the letter and spirit of the Constitution.⁵³ The legislature may not grant rights that violate the constitution, including the “constitutional equality of the States ... essential to the harmonious operation of the scheme upon which the Republic was organized.”⁵⁴ To the extent, then, that Congress violates the equality of States, Congress must show why “‘legislative measures not otherwise appropriate’ could be justified

⁵¹ One might note in *South Carolina v. Katzenbach*, the Attorney General made clear that the history of voting in South Carolina was of concern specifically looking at actions taken in 1878 and 1882 (among other times) by the State to limit the rights of African-Americans to vote, 84 and 88 years prior to arguments before the Supreme Court in 1966, and that the South Carolina Constitution of 1895, whose “one object” was “[t]he elimination of the negro from politics as effectively as this could be accomplished by constitutional enactment” was 73 years before the argument in *South Carolina v. Katzenbach*. See *South Carolina v. Katzenbach*, Brief for the Defendant, 1966 WL 100406, at 16-19.

⁵² See *Sosa v. Alvarez-Machain*, 542 U.S. 692 at 725, for the proposition that recognition of international standards should not be expanded by courts in noting that Holmes explained famously in 1881 that “‘in substance the growth of the law is legislative . . . [because t]he very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned.’” *The Common Law* 31.32 (Howe ed. 1963).”

⁵³ See *McCulloch v. Maryland*, 4 Wheat. 316, 421 (1819); *South Carolina v. Katzenbach*, 383 U.S. 326 (1966) (citing *McCulloch*); *Shelby Cnty. v. Holder*, 113 S.Ct. 2612 at 2632 (Ginsberg, J., dissenting).

⁵⁴ See *Shelby* 133 S. Ct. at 2616, slip op. at 11, ignoring the *Katzenbach* decision's recognition that the doctrine of equality of States “applies only to the terms upon which States are admitted to the Union, and not to the remedies for local evils which have subsequently appeared.” *Katzenbach*, 383 U.S. at 328-29.

***Unmistakably Clear: Human Rights, the Right to Representation,
and Remedial Voting Rights of People of Color***

by ‘exceptional conditions.’”⁵⁵ In looking to the appropriateness of the Congressional response to the on-going problem of voting discrimination, the *Shelby* dissent points to the admitted continuing problem of voting discrimination;⁵⁶ the record of DOJ objections blocking 700 voting changes that were discriminatory between 1982 and 2006;⁵⁷ the determination below that in fact an “‘extensive record’ support[ed] Congress’ determination that ‘serious and widespread intentional discrimination persisted in covered jurisdictions;”⁵⁸ and that “Congress was satisfied that the VRA’s bailout mechanism provided an effective means of adjusting the VRA’s coverage over time.”⁵⁹

Notwithstanding the intent of the Voting Rights Act, the Congressional record cited by the dissent, and the reasonable inferences that might be used to enforce the Voting Rights Act as necessary and proper even without Congressional fact-finding to that effect, the dissent could likely borrow from the *Medellin* decision to note the reason for the *Shelby* majority’s disquiet: “The majority reaches a different conclusion because it looks for the wrong thing (explicit textual expression about [the continuation of first generation barriers to voting]) using the wrong standard (clarity) in the wrong place (the ... language [of the Voting Rights Act]).” The provisions of the VRA have been utilized to deal with devices to prevent the effective use of the voting franchise, as “access to the ballot” does not assure representation of individuals previously excluded.⁶⁰ The formalism of the Court creates in almost insurmountable standard preventing the application of the intent of Congress. The specificity of Congressional intent must be unmistakable; the wrong to be remedied must be extraordinary; and the constitutional right of the State to equal treatment—a right not dispositive in prior voting rights cases—may not be ignored.

⁵⁵ *Shelby*, 113 S.Ct 2612 at 2616.

⁵⁶ *Shelby*, (Ginsburg, J., dissenting), slip op. at 1, citing the majority decision, slip op. at 2.

⁵⁷ *Shelby*, (Ginsburg, J., dissenting), *Id.* at 2635.

⁵⁸ *Shelby*, (Ginsburg, J., dissenting), *Id.* at 2636, citing the D.C. Circuit Court’s determinations in *Shelby*, 679 F.3d 848, 865-73 (CA DC 2012).

⁵⁹ *Shelby*, (Ginsburg, J., dissenting), *Id.* at 2644, citing the Congressional Record, H.R. Rep. No. 109-478, at 25.

⁶⁰ See *Thornburg v. Gingles*, 478 U.S. 30, 46-47 (1982) (referencing “electoral devices, such as at-large elections” as “schemes [that] may operate to minimize or cancel out the voting strength of racial minorities in the voting population.” (internal quotations omitted)). The Voting Rights Act may have created a formula originally looking at issues such as literacy tests and access to the ballot, but the *Katzenbach* Court found it “irrelevant that the coverage formula excludes certain localities which do not employ voting tests and devices but for which there is evidence of voting discrimination by other means.” 383 U.S. at 330-31. Even assuming different treatment for various jurisdictions, “[l]egislation need not deal with all phases of a problem in the same way, so long as the distinctions drawn have some basis in practical experience.” *Id.* at 331.

The VRA has, over time, developed a multi-faceted, context-specific analysis to look to the substantive right of persons to vote, in a manner that might disturb a textualist. As in *Medellin*, one might be concerned that “a multifactor, judgment-by-judgment analysis ... would jettison relative predictability for the open-ended rough-and-tumble of factors.”⁶¹

An international analysis of voting rights calls for—in fact, requires—just such a “rough-and-tumble of factors.” There are strong arguments that the international provisions recognizing a need for the United States to protect and expand the franchise are already national law.⁶² Even if the international obligation has not been enacted through Congress, U.S. jurisprudence has long required that, where possible, Congressional enactments should be interpreted so as not to violate international law.⁶³ International agreements (*i.e.*, treaties) may recognize that the United States already meets its obligations in preventing discrimination under the Constitution and the laws of the United States; treaties recognizing a need to extend voting rights to minorities previously discriminated against effectively do just that.

Notwithstanding the confluence of international obligations and domestic legislation, Congress and the courts may recognize that treaties are not self-executing, and that courts may not enforce the terms of the treaty without an act of Congress.⁶⁴ This would prevent the judiciary’s interpretation of a treaty that is not specifically self-executing, and thus preclude the issuance of a “blank check” to the judiciary to apply what laws it will.⁶⁵ While the Senate has called for Congressional action to make the ICCPR and CERD enforceable, Congress has already acted to extend the franchise, such that no blank check is necessary. The Court has engaged in its own rough-and-tumble constitutional analysis in selecting what aspects of the Voting Rights Act are necessary, and which aspects are extraordinary, going beyond the explicit authority of Congress to craft laws necessary and proper. The *Shelby* majority has applied a clarity standard comparable to that used to limit the application of international law to limit the extent of

⁶¹ *Medellin*, 128 S.Ct. at 1362 (internal quotes omitted).

⁶² Indeed, some *amici curiae* referenced the ICCPR and CERD in seeking protection of the franchise. See *e.g.*, Brief for the National Lawyers Guild in Support of Respondents at 9-14, *Shelby Cnty v. Holder*, No. 12-96 (U.S. June 25, 2013).

⁶³ See *Murray v. The Charming Betsey*, 6 U.S. 64, 118 (1804), “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains....”

⁶⁴ See *Medellín v. Texas*, 128 S.Ct. 1346, 1362 (2008), where Chief Justice Roberts states that the Constitution allows for treaties to be enforceable not by judicial decision, but through the process of the political branches making them law as recognized by the U.S. Const., Art. 1, § 7: “that treaties could create federal law, but again through the political branches, with the President making the treaty and the Senate approving it.”

⁶⁵ *Id.*

***Unmistakably Clear: Human Rights, the Right to Representation,
and Remedial Voting Rights of People of Color***

the Voting Rights Act, noting that the dissent's reliance on "second generation barriers" in voting dilution "highlights the irrationality of continued reliance on the [VRA] § 4 coverage formula, which is based on voting tests and access to the ballot, not vote dilution."⁶⁶ However, such a test evidences an inconsistency in dismissing deference to Congressional findings under the VRA, and demanding Congressional authority for application of international standards.

II. Conclusion

The *Shelby* majority's limiting the application of the Voting Rights Act should be a disappointment to rights advocates: by creating a majoritarian right in States to decide how States allow for suffrage (until such time as Congress extends equal protection to each State government), the decision undermines the purpose of the Act, and goes against the purpose-based and rights-expanding findings in *Katzenbach* and *Gingles*. The decision also undermines past moves toward the protection of fundamental norms recognized in *Filartiga*, and violates treaty rights inuring to the individual, found in the ICCPR and CERD. However, the Court's recent trajectory evidences a consistently heightened burden of proof before extending rights guarantees at the expense of government actions. As this essay argues, the heightened burden for the provision of positive rights not only contradicts U.S. precedent, it creates an international violation of fundamental rights. Perhaps, then, the promise of "relative predictability" has shortcomings; but, absent clear Congressional statements on the protection of human rights in the face of potential majoritarian backlash, the *Shelby* decision promises such predictability for years.

⁶⁶ *Shelby*, 133 S.Ct. 2612 at 2629.