

ENFORCING HUMAN RIGHTS IN THE UNITED STATES: WHICH TRIBUNALS ARE BEST SUITED TO ADJUDICATE TREATY-BASED HUMAN RIGHTS CLAIMS?

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ABSTRACT

The U.S. Supreme Court's 2013 opinion *Kiobel v. Royal Dutch Petroleum* seriously limits U.S. courts' ability to hear human rights cases through the Alien Tort Statute. In the aftermath of *Kiobel*, it is thus critical to fully explore other methods of adjudicating human rights claims domestically. In my 2011 article, *Making Human Rights Treaty Law Actionable in the United States: The Case for Universal Implementing Legislation*, I proposed one such course of action. I argued that human rights law can only truly be viable in the United States if Congress enacts universal implementing legislation giving force to all human rights treaties ratified by the United States. Envisioning a landscape where Congress has passed my proposed statute, this Article demonstrates that we already have the judicial infrastructure to enforce treaties domestically. There are already multiple fora that are fully equipped to adjudicate human rights complaints, making at least the *process* of resolving human rights disputes ministerial. This Article evaluates, compares, and contrasts a number of

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these existing fora. It examines the pros and cons of adjudicating human rights violations in Article I administrative courts and specialized “hybrid” Article I/Article III federal courts (similar to the bankruptcy courts). This Article then weighs the merits of those fora against traditional Article III federal courts and specialized Article III courts (like the U.S. Court of International Trade). After concluding that traditional federal courts are best suited for adjudicating human rights cases, it discusses different models within the Article III system to ensure that human rights claims are resolved in the most efficient, effective, and consistent manner possible.

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I. INTRODUCTION

To date, the judiciary has been the only branch of the U.S. government that has been receptive to applying international human rights law in the United States. Through thirty years of interpreting the Alien Tort Statute (ATS),¹ federal courts have created common law human rights jurisprudence that defines the parameters of our most fundamental rights.² That jurisprudence interpreted “customary international law,” legal principles that are so universal in their acceptance by “civilized nations” that they need not be codified in treaties to be binding.³

¹ Alien Tort Claims Act (ACTA), 28 U.S.C. § 1350 (2006).

² In this Article, I use the term ATS because that is the statutory name favored by the U.S. Supreme Court. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). Before *Sosa* was decided, however, federal courts almost exclusively used the term Alien Tort Claims Act, or ATCA, to refer to the statute. That may be because the U.S. Court of Appeals for the Second Circuit used the name Alien Tort Claims Act in its landmark opinion *Filártiga v. Peña-Irala*, 630 F. 2d 876 (2d Cir. 1980), which ushered in human rights lawsuits in U.S. courts.

³ See *Sosa*, 542 U.S. at 728, 733–34.

The federal courts' development of human rights law through the ATS, however, has run its course, for all intents and purposes. There is no doubt that the U.S. Supreme Court's 2013 opinion *Kiobel v. Royal Dutch Petroleum*⁴ has seriously curtailed U.S. courts' ability to hear human rights cases.⁵

⁴ *Kiobel v. Royal Dutch Petroleum*, 133 S. Ct. 1659 (2013).

⁵ *Kiobel* was decided by the Supreme Court on April 17, 2013. Since then, federal courts have decided thirty-six cases brought under the ATS. Twenty-four of those cases were dismissed, citing *Kiobel*.

See *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014); *Chowhurdy v. Worldtel Bangladesh Holding, Ltd.*, No. 09-4483-cv, 2014 WL 503037 (2d Cir. Feb. 10, 2014); *Ben-Haim v. Neeman*, No. 13-1522, 2013 WL 5878913 (3d Cir. Nov. 4, 2013); *Balintulo v. Daimler AG*, 727 F.3d 174 (2d Cir. Aug. 21, 2013); *Adhikari v. Daoud & Partners*, No. 4:09-CV-1237, 2013 WL 1983305 (S.D. Tex. Jan. 15, 2014); *In re South African Apartheid Litigation*, No. 02 MDL 1499(SAS), 2013 WL 6813877 (S.D.N.Y. Dec. 26, 2013); *Chen Gang v. Zhao Zhizhen*, No. 3:04CV1146 RNC, 2013 WL 5313411 (D. Conn. Sept. 20, 2013); *Tymoshenko v. Firtash*, No. 11-CV-2794 (KMW), 2013 WL 4564646 (S.D.N.Y. Aug. 28, 2013); *Kaplan v. Cent. Bank of Islamic Republic of Iran*, No. 10-483(RCL), 2013 WL 4427943 (D.D.C. Aug. 20, 2013); *Ahmed-Al-Khalifa v. Al-Assad*, No. 1:13-cv-48-RV-GRJ, 2013 WL 4401831 (N.D. Fla. Aug. 13, 2013); *Ahmed v. Comm'r for Educ. Lagos State*, No. 1:13-cv-00050-MP-GRJ, 2013 WL 4001194 (N.D. Fla. Aug. 6, 2013); *Ahmed-Al-Khalifa v. Minister of Interior, Fed. Republic of Nigeria*, No. 5:13-cv-172-RS-GRJ, 2013 WL 3991961 (N.D. Fla. Aug. 2, 2013); *Hua Chen v. Honghui Shi*, No. 09 Civ. 8920(RJS), 2013 WL 3963735 (S.D.N.Y. Aug. 1, 2013); *Giraldo v. Drummond Co., Inc.*, No. 2:09-CV-1041-RDP, 2013 WL 3873965 (N.D. Ala. July 25, 2013); *Ahmed-Al-Khalifa v. Obama*, No. 1:13-cv-49-MW/GRJ, 2013 WL 3797287 (N.D. Fla. July 19, 2013); *Ezekiel v. B.S.S. Steel Rolling Mills*, No. 3:13cv167/MCR/CJK, 2013 WL 3339161 (N.D. Fla. July 2, 2013); *Ahmed-Al-Khalifa v. Trayers*, No. 3:13-CV-00869 (CSH), 2013 WL 3326212 (D. Conn. July 1, 2013); *Al Shimari v. CACI Int'l Inc.*, 951 F. Supp. 2d 857 (E.D. Va. June 25, 2013); *Mwangi v. Bush*, No. 5:12-373-KKC, 2013 WL 3155018 (E.D. Ky. June 18, 2013); *Fotso v. Republic of Cameroon*, No. 6:12 CV 1415-TC, 2013 WL 3006338 (D. Or. June 11, 2013); *Ahmed-Al-Khalifa v. Salvation Army*, No. 3:13cv289-WS, 2013 WL 2432947 (N.D. Fla. June 3, 2013); *Mohammadi v. Islamic Republic of Iran*, 947 F. Supp. 2d 48 (D.D.C. May 31, 2013); *Ahmed-Al-Khalifa v. Queen Elizabeth II*, No. 5:13-cv-103-RS-CJK, 2013 WL 2242459 (N.D. Fla. May 21, 2013); *Murillo v. Bain*, No. H-11-2373, 2013 WL 1718915 (S.D. Tex. April 19, 2013).

Seven ATS cases were dismissed on other grounds, without courts reaching the ATS claims raised in those suits. *See* *Aldana v. Del Monte Fresh Produce N.A., Inc.*, No. 12-16143, 2014 WL 463663 (11th Cir. Feb. 6, 2014); *Sikhs for Justice v. Badal*, 736 F.3d 743 (7th Cir. Nov. 26, 2013); *Johnson v. City of New York*, No. 12 Civ. 9242(RA), 2014 WL 323595 (S.D.N.Y. Jan. 28, 2014); *Janko v. Gates*, No. 12-5017, 2014 WL 184729 (D.D.C. Jan. 17, 2014); *Rosenberg v. Lashkar-e-Taiba*, No. 10-CV-5381(DLI)(CLP), 2013 WL 5502851 (E.D.N.Y. Sept. 30, 2013); *Bey v. New York*, No. 11-CV-3296(JS)(WDW), 2013 WL 3282277 (E.D.N.Y. June 25, 2013); *Ameur v. Gates*, 950 F. Supp. 2d 905 (E.D. Va. June 20, 2013).

Three cases were remanded for further consideration in light of *Kiobel*. *See* *Doe I v. Nestle USA, Inc.*, 738 F.3d 1048 (9th Cir. Dec. 19, 2013); *Licci ex rel. Licci v. Lebanese Canadian Bank*, 732 F.3d 161 (2d Cir. Oct. 18, 2013); *Doe v. Exxon Mobil Corp.*, 527 F. App'x. 7 (D.D.C. July 26, 2013).

Only two ATS cases were upheld after *Kiobel*. *See* *Sexual Minorities Uganda v. Lively*, No. 12-cv-300051-MAP, 2013 WL 4130756 (D. Mass. Aug. 14, 2013) (upholding the claim because

Five Justices held that federal courts do not have jurisdiction to hear cases under the ATS where abuses occur extra-territorially.⁶ Two concurring opinions by Justices Anthony M. Kennedy and Stephen G. Breyer (Justices Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan joined in Justice Breyer's concurrence) imply that the majority's opinion does not completely foreclose all future extra-territorial ATS claims and that there is some wiggle room in the majority's opinion.⁷ Those concurring opinions, however, give no real guidelines about what an acceptable future case might look like.

Even though all nine Justices in *Kiobel* agreed that the ATS's legislative history allows for future claims where human rights abuses are committed on U.S. soil, they gave no indication of what would be required for such a suit to succeed.⁸ But, the Justices' rejection of the *Kiobel* plaintiffs' claim as inadequate does not bode well for human rights victims. If the *Kiobel* plaintiffs, who live in the United States (after being granted political asylum for the abuses described in their ATS suit), were not sufficiently strong plaintiffs, then who would be? As such, there is no doubt that *Kiobel* has severely limited the development of human rights law in the United States.

In the aftermath of *Kiobel*, it is critical to move beyond the ATS, which allows only non-U.S. citizens to avail themselves of human rights law protection,⁹ in favor of a more comprehensive and permanent method of enforcing human rights in the United States. In my 2011 article, *Making Human Rights Treaty Law Actionable in the United States: The Case for Universal Implementing Legislation*, I argued that in order for human rights law to truly be viable in the United States, advocates and lawmakers should focus their efforts on enacting universal implementing legislation to give force to all human rights treaties ratified by the United States.¹⁰

the abuses committed by defendant took place to a substantial degree within the United States); *Mwani v. Laden*, 947 F. Supp. 2d 1 (D.D.C. May 29, 2013) (holding that the claims touched and concerned the United States with sufficient force to overcome the presumption against extraterritorial application of the ATS).

⁶ *Kiobel*, 133 S. Ct. at 1669.

⁷ *Id.* (Kennedy, J., concurring); *Id.* at 1673 (Breyer, J., concurring).

⁸ *Id.* at 1669 (Kennedy, J., concurring); *Id.* at 1673 (Breyer, J., concurring) (The majority "leaves for another day the determination of just when the presumption against extraterritoriality might be 'overcome.'"). To date, with the exception of one case, all successful ATS cases have dealt with human rights abuses committed abroad. See *Jama v. INS*, 334 F. Supp. 2d 662, 665 (D.N.J. 2004) (undocumented alien plaintiffs detained at INS facility in New Jersey).

⁹ Alien Tort Claims Act (ATCA), 28 U.S.C. § 1350 (2006).

¹⁰ Penny M. Venetis, *Making Human Rights Treaty Law Actionable in the United States: The Case for Universal Implementing Legislation*, 63 ALA. L. REV. 97, 99 (2011) [hereinafter

This is the preferable course of action because treaties protect U.S. citizens as well as non-U.S. citizens within the United States' jurisdiction.

I proposed straightforward universal implementing legislation, where Congress need only enact a single statute that would make all human rights treaties ratified by the United States actionable in U.S. courts.¹¹ Universal implementing legislation is superior to treaty-specific implementing legislation because it would apply to all treaties in perpetuity. Moreover, in the only two instances where Congress enacted treaty-specific enabling legislation, Congress watered down key treaty provisions, radically reducing those treaties' strengths.¹²

As international law Professor William Schabas has stated: "The United States has come kicking and screaming into the modern world of international human rights treaties."¹³ This was demonstrated recently when Congress failed to ratify the Convention on the Rights of Persons with Disabilities,¹⁴ which has been ratified by 141 countries.¹⁵ Even though the treaty was modeled after the United States' Americans with Disabilities Act of 1990 (ADA)¹⁶ and was supported by Republican

Venetis, *Making Human Rights*].

¹¹ *Id.*

¹² *Id.* at 121–30 (discussing the many material ways that Congress watered down the Genocide Convention and Torture Convention).

¹³ William A. Schabas, *Spare the RUD or Spoil the Treaty: The United States Challenges the Human Rights Committee on Reservations*, in *THE UNITED STATES AND HUMAN RIGHTS: LOOKING INWARD AND OUTWARD* 110 (David P. Forsythe ed., 2000). Then Secretary of State John Foster Dulles told the Senate Judiciary Committee on April 6, 1953, that the Eisenhower administration would not "become a party to any [human rights] covenant or present it as a treaty for consideration by the Senate." *Hearings On S.J. Res. 1 and S.J. Res. 43 Before a Subcomm. of the Senate Comm. on the Judiciary*, 83d Cong., 1st Sess. 10–11 (1953), quoted in William Korey, *Human Rights Treaties: Why is the U.S. Stalling?*, 45 *FOREIGN AFF.* 414, 418 (1967). This was largely in response to Senator John W. Bricker of Ohio, who sponsored numerous constitutional amendments in the 1950s seeking to restrict the scope of treaties and other international executive agreements. See Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 *AM. J. INT'L L.* 341, 347 (1995).

¹⁴ Convention on the Rights of Persons with Disabilities, May 3, 2008, 2515 U.N.T.S. 3, available at <https://treaties.un.org/doc/Publication/UNTS/Volume%202515/v2515.pdf>.

¹⁵ *US: Senate Misses Opportunity on Disability Convention*, HUM. RTS. WATCH (Dec. 4, 2012), <http://www.hrw.org/news/2012/12/04/us-senate-misses-opportunity-disability-convention>. As of February 8, 2014, the Convention on the Rights of Persons with Disabilities has 158 signatories and 141 parties. *Convention on the Rights of Persons with Disabilities*, UNITED NATIONS TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&lang=en (last visited Feb. 8, 2014).

¹⁶ *US: Ratify Disability Rights Treaty*, HUM. RTS. WATCH (July 26, 2013), <http://www.hrw.org/news/2013/07/26/us-ratify-disability-rights-treaty>; see Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101–12213 (2000).

stalwarts like former Senate Majority Leader Bob Dole, the Senate rejected the treaty by a vote of 61 to 38.¹⁷ The United States has ratified only four of seven foundational international human rights treaties: the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention);¹⁸ the International Covenant on Civil and Political Rights;¹⁹ the International Convention on the Elimination of All Forms of Racial Discrimination;²⁰ and the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment.²¹ The United States has not ratified the International Covenant on Economic, Social, and Cultural Rights that went into effect globally in 1976;²² the Convention on the Elimination of All Forms of Discrimination Against Women, which went into effect globally in 1980;²³ or the Convention on the Rights of the Child, which went into effect globally in 1990.²⁴ This

¹⁷ The measure failed by five votes, as it required a two-thirds majority to pass. Jennifer Steinhauer, *Dole Appears, but G.O.P Rejects a Disabilities Treaty*, N.Y. TIMES (Dec. 4, 2012), <http://www.nytimes.com/2012/12/05/us/despite-doles-wish-gop-rejects-disabilities-treaty.html>.

¹⁸ Convention on the Prevention and Punishment of the Crime of Genocide, *opened for signature* Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951), *available at* <https://treaties.un.org/doc/Publication/UNTS/Volume%2078/v78.pdf> (United States ratified on November 25, 1988); *see also* Genocide Convention Implementation Act of 1987, Pub. L. No. 100-606, 102 Stat. 3045 (1988) (codified at 18 U.S.C. § 1091–1093 (2006)). It took the United States nearly forty years to ratify the uncontroversial Convention on the Prevention and Punishment of the Crime of Genocide. Steven V. Roberts, *Reagan Signs Bill Ratifying U.N. Genocide Pact*, N.Y. TIMES (Nov. 5, 1988), <http://www.nytimes.com/1988/11/05/opinion/reagan-signs-bill-ratifying-un-genocide-pact.html>.

¹⁹ International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976), *available at* <https://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf> (United States ratified on June 8, 1992).

²⁰ International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969), *available at* <https://treaties.un.org/doc/Publication/UNTS/Volume%20660/v660.pdf> (United States ratified on Oct. 21, 1994).

²¹ Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987), *available at* <https://treaties.un.org/doc/Publication/UNTS/Volume%201465/v1465.pdf> (United States ratified on Oct. 21, 1994).

²² International Covenant on Economic, Social, and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976), *available at* <https://treaties.un.org/doc/Publication/UNTS/Volume%20993/v993.pdf>.

²³ Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Mar. 1, 1980, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981), *available at* <https://treaties.un.org/doc/Publication/UNTS/Volume%201249/v1249.pdf>.

²⁴ Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990), *available at* <https://treaties.un.org/doc/Publication/UNTS/Volume%201577/v1577.pdf>.

record is sparse compared to other Western nations.²⁵

Moreover, the four human rights treaties that the United States has ratified are unenforceable in the United States because Congress has saddled them with RUDs, or “reservations, understandings, and declarations.”²⁶ The most extreme type of RUD is the “non-self executing” RUD, which stays treaty enforcement indefinitely, unless Congress passes enabling legislation to enforce that specific treaty.²⁷

Many scholars have harshly criticized the United States’ excessive use of non-self-executing RUDs, calling into question their constitutionality.²⁸ Other scholars have argued that the very language in human rights treaties prohibits the unilateral enactment of non-self-executing RUDs.²⁹ Those critiques, while valid and legally sound, do not move us closer to making human rights law enforceable in U.S. courts.

This Article moves beyond those debates. It de-mystifies human rights treaties. Part of that de-mystification is showing that we already have the infrastructure in place to enforce human rights treaties. This Article

²⁵ *Human Rights Explained: Fact Sheet 7: Australia and Human Rights Treaties*, AUSTRALIAN HUM. RTS. COMMISSION, <http://www.humanrights.gov.au/human-rights-explained-fact-sheet-7australia-and-human-rights-treaties> (last visited Feb. 8, 2014); *Ratification of International Human Rights Treaties—France*, UNIV. MINN. HUM. RTS. LIBR., <http://www.umn.edu/humanrts/research/ratification-france.html> (last visited Feb. 8, 2014); *Ratification of International Human Rights Treaties—Germany*, UNIV. MINN. HUM. RTS. LIBR., <http://www.umn.edu/humanrts/research/ratification-germany.html> (last visited Feb. 8, 2014); *Ratification of International Human Rights Treaties—United Kingdom of Great Britain and Northern Ireland*, UNIV. MINN. HUM. RTS. LIBR., <http://www.umn.edu/humanrts/research/ratification-greatbritain.html> (last visited Feb. 8, 2014). It should be noted that the United States is not the only country that has not fully integrated treaty obligations into its domestic law. For example, although Australia has ratified key treaties, those same treaties may “not form part of Australia’s domestic law unless the treaties have been specifically incorporated into Australian law through legislation.” *Human Rights Explained: Fact Sheet 7: Australia and Human Rights Treaties*, *supra*. Also, in the United Kingdom, further legislative activity is typically necessary for a treaty to come into full effect. FOREIGN & COMMONWEALTH OFFICE, TREATIES AND MOUS: GUIDANCE ON PRACTICE AND PROCEDURES (2014), available at <https://www.gov.uk/government/publications/treaties-and-mous-guidance-on-practice-and-procedures>.

²⁶ CONG. RESEARCH SERV., STUDY ON TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 11, 124–26 (2001).

²⁷ *Id.* at 200, 287.

²⁸ See generally David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 YALE J. INT’L L. 129 (1999) (discussing non-self-executing declarations and proposing a way to ensure that the United States complies with its treaty obligations).

²⁹ See, e.g., Stefan A. Riesenfeld & Frederick M. Abbott, *The Scope of U.S. Senate Control over the Conclusion and Operation of Treaties*, 67 CHI.-KENT L. REV. 571, 608–09 (1991); Henkin, *supra* note 13, at 346.

envisions a landscape where Congress has passed universal enabling legislation and discusses and evaluates different ways of adjudicating human rights claims in the United States using various existing bodies. It demonstrates that there are already multiple fora for litigating human rights abuses domestically. This shows that enforcing human rights treaties can be accomplished seamlessly and is not radical at all—as portrayed by some members of the U.S. Congress³⁰ and certain state legislators.³¹

Part III examines the possibility of adjudicating human rights violations through administrative courts by evaluating existing Article I administrative courts, like the Social Security Administration, the Veterans Administration, and Immigration and Customs Enforcement. Ultimately, it concludes that these courts fall short because, in practice, administrative courts are inefficient and inaccurate. Indeed, in researching this Article, I could not find a single publication that discussed administrative courts in any positive light. This Article demonstrates the many ways that administrative courts, which were established to assist those most in need, are broken and would not serve as effective tribunals for protecting our most fundamental rights.

Part IV explores whether specialized “hybrid” Article I/Article III federal courts, similar to the bankruptcy courts and the U.S. Court of Federal Claims, would serve human rights victims well. Although technically Article I courts, these tribunals have more in common with Article III courts, particularly in the development of case law and the consistency of judicial decisions. These hybrid courts would be able to create a solid and accurate body of jurisprudence in fairly short order. But, because these hybrid courts are subject to congressional funding (and thus, by definition, political whims), their neutrality is not necessarily guaranteed.

Part V analyzes traditional Article III federal courts,³² as well as specialized Article III courts, like the U.S. Court of International Trade, as

³⁰ Jack Goldsmith points out the United States’ double standard for international human rights law and argues that the United States’ resistance to this doctrine stems, in part, from its distrust of international institutions. See Jack Goldsmith, *International Human Rights Law & the United States Double Standard*, 1 GREEN BAG 2D 365, 373 (1998).

³¹ See generally Penny M. Venetis, *The Unconstitutionality of Oklahoma’s SQ 755 and Other Provisions Like It That Bar State Courts from Considering International Law*, 59 CLEV. ST. L. REV. 189 (2011) (arguing that prohibiting Oklahoma judges from considering international treaties is unconstitutional).

³² Traditional Article III trial courts hear human rights law claims in the first instance. See Curtis A. Bradley, *Alien Tort Statute and Article III*, 42 VA. J. INT’L L. 587, 589 (2002).

possible models for adjudicating human rights claims. Part V discusses why federal district courts are best suited for adjudicating human rights cases and posits different models within the Article III system that would help adjudicate human rights claims in an efficient, effective, and consistent manner. Along these same lines, Part V explores different potential appellate processes for human rights claims.³³

Finally, Part VI explores ways to make newly minted human rights courts operate the most effectively and efficiently. It discusses using Article III judges who are on “senior status,” as well as special masters, court-appointed experts, and magistrate judges for adjudicating human rights claims. It also discusses the important role that law clerks will play in the process.

II. DISCUSSION

In reading this Article, it is critical to remember that human rights treaties are essentially contracts between nations to enforce human rights.³⁴ Some treaties define relationships between countries, while others promise that a country will enforce the human rights enumerated in that treaty domestically. An example of this second kind of treaty is the International Covenant on Civil and Political Rights, which the United States ratified in 1992.³⁵ That treaty enumerates basic rights, which every signatory country promises to both recognize and protect, including: the right not to be “subjected to torture or to cruel, inhuman or degrading treatment or punishment,”³⁶ the right to be free from slavery,³⁷ and the rights to “freedom of thought,”³⁸ religion,³⁹ and peaceful assembly.⁴⁰

It is well settled that once a country ratifies a human rights treaty, it is

³³ In the wake of *Kiobel*, there is emerging literature and advocacy on the topic of bringing *common law* human rights claims in state courts. See Paul Hoffman & Beth Stephens, *International Human Rights Cases Under State Law and in State Courts*, 3 U.C. IRVINE LAW REV. 9 (2013). Due to the complicated nature of the issue, this Article does not address the merits of any of those arguments.

³⁴ Venetis, *Making Human Rights*, *supra* note 10, at 103–04; see also *Whitney v. Robertson*, 124 U.S. 190, 194 (1888); *Head Money Cases*, 112 U.S. 580, 598 (1884); *Foster v. Neilson*, 27 U.S. 253, 254 (1829).

³⁵ International Covenant on Civil and Political Rights, *supra* note 19.

³⁶ *Id.* at art. 7.

³⁷ *Id.* at art. 8, ¶ 1.

³⁸ *Id.* at art. 18, ¶ 1.

³⁹ *Id.*

⁴⁰ *Id.* at art. 21.

obligated to enforce that treaty at every level of government. The United States fully understands this obligation. Indeed, in 2010, then U.S. State Department's Legal Advisor, Harold Koh, who was charged with, among other things, reporting to the United Nations on the United States' compliance with its obligations under international treaties, sent two letters to state officials taking precisely this position. In a May 3, 2010 letter sent to State and Local Human Rights Commissions, Koh, in pertinent part, states:

I am writing concerning three human rights reports that the United States will be submitting to the United Nations (UN) in 2010 and 2011. These reports concern implementation of U.S. obligations under the International Covenant on Civil and Political Rights (ICCPR), the International Convention on the Elimination of All forms of Racial Discrimination (CERD), and International Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT). . . .

As you may be aware, implementation of U.S. human rights treaty obligations is carried out not only by the federal government, but also by state and local governments, through work such as that done by your commissions. The UN committees to which these reports will be submitted are interested in receiving information on programs and activities undertaken by states, counties and other local jurisdictions in the human rights area. Thus, we are reaching out to you for information on your programs and activities relevant to these three reports.⁴¹

Additionally, a January 20, 2010 memorandum that Koh sent to all state governors states, in pertinent part:

This electronic communication contains information on several human rights treaties to which the United States is a party, and which are implemented through existing laws at all levels of government (federal, state, insular and local). To promote knowledge of these treaties in the United States, we would appreciate your forwarding this communication to your Attorney General's office, and to the departments and offices that deal with human rights, civil rights, housing, employment and related issues in your administration. . . .

. . . .

. . . Because implementation of these treaties may be carried out by officials at all levels of government (federal, state, insular, and local)

⁴¹ Letter from Harold Hongju Koh, Legal Adviser, U.S. Dep't of State, to State and Local Human Rights Commissions (May 3, 2010), *available at* http://www.iaohra.org/storage/pdf/human-rights-campaign/Letter_from_HaroldKoh_to_Stateand%20LocalCommissions.pdf.

under existing laws applicable in their jurisdictions, we want to make sure that the substance of these treaties and their relevance to the United States is known to appropriate governmental officials and to members of the public.⁴²

Many human rights experts disagree with Koh's message that treaty obligations can be met with existing law.⁴³ They believe that the United States must take special, affirmative steps to implement treaties, particularly when U.S. laws do not offer protections that are as broad as international human rights treaties. But, Koh's letters are instructive in that they state, unequivocally, that human rights treaties must be enforced at every level of government.

This means that individuals within the United States who sue to enforce their treaty rights will essentially be taking "the government to court," or suing government officials to enforce their human rights. Such actions are already familiar to the public and the judiciary. Congress approved similar lawsuits against state officials who violate the Constitution when it enacted 42 U.S.C. § 1983.⁴⁴ Thus, any time someone sues a city and its police officers for excessive force, or sues to be given

⁴² Memorandum from Harold Hongju Koh, Legal Adviser, U.S. Dep't of State to State Governors (January 20, 2010), *available at* <http://www.state.gov/documents/organization/137292.pdf>.

⁴³ Indeed, as David Sloss points out:

Many international[] law scholars agree that the scope of substantive rights protected under international human rights treaties is broader, in certain respects, than the scope of substantive rights protected by federal constitutional and statutory law.

David Sloss, *Ex Parte Young and Federal Remedies for Human Rights Treaty Violations*, 75 WASH. L. REV. 1103, 1112 (2000).

In support, Sloss cites how some have argued that the International Covenant on Civil and Political Rights has stronger protections for religious freedom than those guaranteed by the U.S. Constitution, as applied and interpreted by the U.S. Supreme Court. *Id.* (citing Daniel O. Conkle, *Congressional Alternatives in the Wake of City of Boerne v. Flores: The (Limited) Role of Congress in Protecting Religious Freedom from State and Local Infringement*, 20 U. ARK. LITTLE ROCK L.J. 633, 661 (1998); Gerald L. Neuman, *The Global Dimension of RFRA*, 14 CONST. COMMENT. 33, 43 (1997) (stating that Article 18 of the International Covenant on Civil and Political Rights "expresses a broader conception of religious liberty than the [U.S. Supreme Court's] interpretation of free exercise."). Additionally, Risa Kaufman argues, in response to Koh, that even if treaty obligations may be met with existing law, "[m]any state and local officials . . . lack the necessary information regarding their ability to implement human rights obligations." Risa E. Kaufman, *"By Some Other Means": Considering the Executive's Role in Fostering Subnational Human Rights Compliance*, 33 CARDOZO L. REV. 1971, 1983 (2012).

⁴⁴ Also known as the Ku Klux Klan Act, § 1983 was enacted in the aftermath of the Civil War to ensure that newly freed slaves could enforce the Constitution in federal courts, because state law enforcement officials and state courts did not protect former slaves. *Monroe v. Pape*, 365 U.S. 167, 185 (1961).

the right to march in a parade or distribute leaflets, he or she invokes § 1983. In 1971, the U.S. Supreme Court in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics* found that, even absent statutory authority (akin to § 1983), federal officials could also be sued in federal court for violating the Constitution.⁴⁵

Human rights treaty enforcement should be viewed through the lens of § 1983 and *Bivens*. When done so, it becomes clear that treaty enforcement requiring governments and government officials to respect our most fundamental rights is not a new or even remotely radical idea. Rather, as discussed in various parts of this Article, the types of rights enumerated in human rights treaties very much resemble (and are sometimes identical to) the rights guaranteed by our Constitution.

Similar to § 1983, human rights treaties should be enforceable against federal, state, and local officials who violate rights enumerated in those treaties. This Article demonstrates that we already have multiple ways to enforce treaties through our existing legal system.

This Article evaluates various existing judicial fora and discusses the best ways that treaty enforcement suits can be, and ultimately should be, adjudicated in the United States. As discussed above, this Article evaluates administrative courts, “hybrid” Article I/Article III courts, traditional and specialized Article III courts, and various types of appellate courts. In evaluating these fora, I applied criteria that I believe all would agree are essential for tribunals to be considered legitimate and respected. They are: neutrality (whether the tribunal is independent of public opinion, political whim); consistency in evaluating matters and applying the law; and judicial expertise (the ability and knowledge to create law). I also examined, to a slightly lesser degree, each tribunal’s efficiency. Given the need to develop a body of treaty-based law in short order and to ensure that human rights victims are made whole, it is important for any tribunal hearing such important cases to be able to act as quickly as possible. Efficiency is slightly subordinate to the other factors that I examined, however, because it is preferable to have a neutral, consistent, and knowledgeable tribunal that may take more time to process claims, than an efficient tribunal that is less capable.

⁴⁵ *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397–98 (1971).

III. ADMINISTRATIVE COURTS: A POTENTIAL FORUM FOR HUMAN RIGHTS ENFORCEMENT

Administrative courts are one potential forum for adjudicating violations of human rights treaties. Administrative courts adjudicate the claims of individuals who believe that the government owes them or has denied them entitlement. Administrative agencies and their adjudicative branches have existed since the inception of the nation.⁴⁶ The first administrative agency was established by the Act of July 31, 1789 and was tasked to estimate import duties.⁴⁷ The second, established by the Act of September 29, 1789, was charged with administering “pensions for invalids who were wounded and disabled during the [Revolutionary] war.”⁴⁸

As part of the executive branch of government, administrative courts are created by Congress pursuant to its legislative powers under Article I of the U.S. Constitution.⁴⁹ At the federal level, administrative agencies and their decision-making processes are governed by the Administrative Procedure Act (APA).⁵⁰ As such, administrative courts are a different kind of tribunal than those that are generally considered “federal courts.”

Federal courts, also known as Article III courts (after the section of the Constitution providing for their establishment),⁵¹ consist of district courts, courts of appeals for the twelve geographic circuits, and various specialized courts.⁵² Article III courts have judges who are tenured for life and whose salaries are guaranteed not to decrease during their time in office.⁵³ These courts possess original jurisdiction over “all Cases, in Law

⁴⁶ See Jerry L. Mashaw, *Federal Administration and Administrative Law in the Gilded Age*, 119 *YALE L.J.* 1362, 1366 (2010).

⁴⁷ 1 RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* 8 (4th ed. 2002).

⁴⁸ *Id.*

⁴⁹ U.S. CONST. art. I, § 1.

⁵⁰ Administrative Procedure Act (APA), Pub. L. No. 79-404, 60 Stat. 237 (2006) (codified as amended in scattered sections of 5 U.S.C.).

⁵¹ U.S. CONST. art. III.

⁵² The U.S. Court of Appeals for the Federal Circuit is a specialized court founded under Article III that largely deals with patent law cases and appeals from various other Article I and Article III courts, based upon the subject matter of the case rather than its geographic location. *Court Jurisdiction*, U.S. CT. APPEALS FOR FED. CIRCUIT, <http://www.cafc.uscourts.gov/the-court/court-jurisdiction.html> (last visited Feb. 8, 2014). The U.S. Court of International Trade was founded under Article I, but later declared established under Article III. *About the Court*, U.S. CT. INT’L TRADE, <http://www.cit.uscourts.gov/AboutTheCourt.html> (last visited Feb. 8, 2014).

⁵³ U.S. CONST. art. III, § 1.

and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority[.]”⁵⁴

One of the fundamental differences between Article I and Article III courts sparked the first major case involving an administrative agency, *Hayburn’s Case*.⁵⁵ In 1792, Congress established a procedure for dispensing benefits to disabled veterans.⁵⁶ The process required that the circuit courts adjudicate veterans’ claims.⁵⁷ The circuit courts’ decisions were then subject to review and override by the secretary of war and by Congress, who could undo the courts’ decisions and deny benefits.⁵⁸ The circuit courts, therefore, were not the final authority and their decisions were essentially advisory opinions.⁵⁹

The Supreme Court expressed grave doubts as to whether Congress could assign such duties to the Article III courts.⁶⁰ Before the Court issued a final ruling, Congress removed these duties from the federal courts and the case was rendered moot.⁶¹ The *Hayburn* litigation and Congress’s reaction to it established that some seemingly adjudicative functions are effectively executive in nature. As such, the executive branch has some

⁵⁴ U.S. CONST. art. III, § 2. Despite this language, for much of U.S. history, the lower federal courts lacked jurisdiction over many such cases. Now, federal statute ensures this “federal question” jurisdiction: “The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.” 28 U.S.C. § 1331 (2006).

⁵⁵ *Hayburn’s Case*, 2 U.S. 408 (1792).

⁵⁶ LEONARD W. LEVY, *SEASONED JUDGMENTS: THE AMERICAN CONSTITUTION, RIGHTS, AND HISTORY* 324 (1997).

⁵⁷ *Id.*

⁵⁸ *Id.* The title “circuit courts” refers to what were formerly the federal appeals courts. *History of the Federal Judiciary*, FED. JUD. CENTER, http://www.fjc.gov/history/home.nsf/page/courts_circuit.html (last visited Feb. 9, 2014). The secretary of war was formerly the title of what is now the secretary of defense, following the consolidation of the Army, Navy, and Air Force secretaries. *About the Department of Defense*, U.S. DEPARTMENT DEF., <http://www.defense.gov/about/> (last visited Feb. 9, 2014).

⁵⁹ LEVY, *supra* note 56. Note that as the Supreme Court itself delivered no opinion in the case, the Justices of the Supreme Court, in their roles as circuit court panel judges, had issued opinions in the lower courts and the Supreme Court decision cites these decisions *seriatim*. However, subsequent courts have treated these dicta as representing the likely holding of the Supreme Court at the time. See generally William Michael Treanor, *Judicial Review Before Marbury*, 58 STAN. L. REV. 455, 533–540 (2005) (discussing *Hayburn’s Case* and how the Invalid Pensions Act affected the judicial role).

⁶⁰ *Hayburn’s Case*, 2 U.S. at 410 n*.

⁶¹ At the time of the decision in *Hayburn’s Case*, the circuit courts were composed of two Supreme Court Justices and the district judge of the district. While the Supreme Court itself never ruled in *Hayburn’s Case*, five of the six Supreme Court Justices, in their roles as circuit court judges, had already ruled it unconstitutional. See *id.*

discretionary power to administer statutory schemes using tribunal-like bodies.⁶²

Administrative courts truly came into their own and proliferated during the second half of the twentieth century. There are now hundreds of federal agencies with some power to adjudicate under administrative law⁶³ and administrative law cases now outnumber cases tried in federal courts.⁶⁴ The title “administrative law judge,” abbreviated “ALJ,” is a relatively recent development,⁶⁵ reflecting the important role that these decision makers play in administering federal laws.

A. THE ROLE OF ADMINISTRATIVE COURTS AND THEIR INTENDED ADVANTAGES

The premise of administrative law has been for an agency created by Congress to “issue[] regulations in its quasi-legislative function pursuant to a mission established by Congress and within the constraints of the organic act of the agency.”⁶⁶ Additionally, “[c]oncomitant with these quasi-legislative functions are quasi-executive functions for implementing administrative rules and regulations, and quasi-judicial functions to adjudicate the rights and interests of parties involved in the administrative process.”⁶⁷ Administrative agencies across the United States make millions of adjudicative determinations each year.⁶⁸ As such, the

⁶² See *Auer v. Robbins*, 519 U.S. 452, 462–63 (1997) (recognizing the broad power of an administrative agency in resolving ambiguities in the agency’s own regulations, including the form of the agency’s interpretation).

⁶³ See *A–Z Index of U.S. Government Departments and Agencies*, USA.GOV, <http://www.usa.gov/directory/federal/index.shtml> (last visited Feb. 9, 2014) (listing the numerous government agencies).

⁶⁴ PIERCE, *supra* note 47, at 116.

⁶⁵ Hon. Henry J. Friendly, “*Some Kind of Hearing*,” 123 U. PA. L. REV. 1267, 1269 n.8 (1975). The term was adopted in 1972 for some classes of “hearing examiners” by regulation. Comm. on Comm. & Media Law of the Ass’n of the Bar of the City of N.Y., “*If it Walks, Talks and Squawks . . .*” *The First Amendment Right of Access to Administrative Adjudications: A Position Paper*, 23 CARDOZO ARTS & ENT. L.J. 21, 29 n.30 (2005). In 1978, the APA was revised to include the term. *Id.* The term ALJ, while often used generically to refer to all administrative adjudicators, is also a category within the APA. Twice as many “administrative judges” act outside the APA as within it as ALJs. Michael Asimow, *The Influence of the Federal Administrative Procedure Act on California’s New Administrative Procedure Act*, 32 TULSA L.J. 297, 305 n.40 (1996).

⁶⁶ Rodolphe J.A. de Seife, *Administrative Law Reform: A Focus on the Administrative Law Judge*, 13 VAL. U. L. REV. 229, 231 (1979), available at <http://scholar.valpo.edu/cgi/viewcontent.cgi?article=1629&context=vulr>.

⁶⁷ *Id.* at 230.

⁶⁸ For example, within Social Security alone, a total of 421,020 adjudicative decisions were

administrative process was intended to offer a number of advantages over the judicial process.⁶⁹

For one, the system is set up to provide claimants with greater accessibility to the claims process. Whereas individuals seeking relief through the judicial system must secure lawyers who must adhere to strict guidelines in preparing court documents, claimants seeking relief through the administrative process, in theory, can do so on their own.⁷⁰ For example, an appeal to the Department of Veterans Affairs requires only a simple written statement declaring the claimant's disagreement and intention to appeal the decision.⁷¹

The administrative process was also designed to be more expedient than the judicial process, as claimants would not be subject to judicial delays and the many necessary formalities of a traditional lawsuit. As such, the administrative process provides claimants with a less expensive method of resolution than the judicial process.⁷²

Finally, it was believed that the public would benefit from rulings by ALJs, who could become "experts" in their particular policy area.⁷³ Because ALJs apply the same body of law to all of the cases they review, they have the ability to master their agency's rules and regulations and

made in fiscal year 2012. See *ALJ Disposition Data: FY 2012*, SOC. SECURITY, http://www.ssa.gov/appeals/DataSets/archive/03_FY2012/03_September_ALJ_Disposition_Data.pdf (last visited July 11, 2012). The agency receives over a million claims a year. *Id.*

⁶⁹ As the Supreme Court of Louisiana has said of its state administrative process:

[The administrative process] enables the parties to resolve their disputes in a less cumbersome and expensive manner than normally encountered at a trial in court. At the same time, the courts are relieved of the time-consuming task of hearing the evidence. It further permits the administrative agency to weigh and evaluate the evidence with proper respect being given to its expertise in the matter. Additionally, it promotes the uniform application of the statute under which the agency operates.

Buras v. Board of Trustees of Police Pension Fund of New Orleans, 367 So. 2d 849, 853 (La. 1979).

⁷⁰ See, e.g., *How Do I Appeal?*, BOARD VETERANS' APPEALS (2002), <http://www.bva.va.gov/docs/Pamphlets/010202A.pdf>. However, "[e]mpirical studies demonstrate that litigants in court and agency proceedings have a significantly greater chance of success when they are represented by counsel." Louis S. Rulli, *On the Road to Civil Gideon: Five Lessons from the Enactment of a Right to Counsel for Indigent Homeowners in Federal Civil Forfeiture Proceedings*, 19 J.L. & POL'Y 683, 743 (2011).

⁷¹ *How Do I Appeal?*, *supra* note 70.

⁷² *But see* de Seife, *supra* note 66, at 237 (stating that administrative law cases are "more expensive, cumbersome and lengthy than regular trials").

⁷³ See *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 651–52 (1990).

thus can, in theory, process claims more effectively and efficiently.⁷⁴ This ability to specialize was lauded in the early years of modern administrative law, when there was strong belief that such “expert agencies would act in the public interest.”⁷⁵

B. WHY ADMINISTRATIVE COURTS ARE NOT SUITABLE FOR ADJUDICATING TREATY-BASED HUMAN RIGHTS CLAIMS

The advantages of administrative courts—accessibility, expediency, affordability, and specialization—make them seem like good models for adjudicating human rights violations. Unfortunately, as evidenced by the overwhelmingly critical literature of administrative courts, they do not work well.⁷⁶ In researching this Article, I conducted an exhaustive search of articles and books on the administrative process. In particular, I looked for publications discussing what works well in the administrative process to determine whether those aspects of administrative courts could be used to adjudicate human rights abuses. Surprisingly, no such material exists.

There are many reasons that make administrative courts particularly not well-suited for the difficult task of adjudicating violations of human rights treaties. Notably, limited resources and crushing caseloads often

⁷⁴ See Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 247 (1987), available at <http://classwebs.spea.indiana.edu/kenricha/Oxford/Archives/Oxford%202006/Courses/Governance/Articles/McCubbins%20-%20Administrative%20Procedures.pdf>; Joshua D. Wright & Angela M. Diveley, *Do Expert Agencies Outperform Generalist Judges?*, REG BLOG (April 30, 2012), <http://www.law.upenn.edu/blogs/regblog/2012/04/do-expert-agencies-outperform-generalist-judges.html>. But see Richard E. Levy & Robert L. Glicksman, *Agency-Specific Precedents*, 89 TEX. L. REV. 499, 511 (2011). Also known as the “silos effect,” while an ALJ may specialize in a particular agency’s rules, the result is “[t]he tendency of administrative agencies to develop their own bureaucratic imperatives that create obstacles to information sharing and other forms of cooperation [between agencies].” *Id.*

⁷⁵ M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1417 (2004).

⁷⁶ See, e.g., James O. Freedman, *Crisis and Legitimacy in the Administrative Process*, 27 STAN. L. REV. 1041, 1044 (1975); Richard A. Epstein, *Why the Modern Administrative State is Inconsistent with the Rule of Law*, 3 N.Y.U. J.L. & LIBERTY 491, 508–15 (2008) (arguing that the deference given to administrative agencies is inconsistent with our concept of the rule of law); Murray J. Horn & Kenneth A. Shepsle, *Commentary on ‘Administrative Arrangements and the Political Control of Agencies’: Administrative Process and Organizational Form as Legislative Responses to Agency Costs*, 75 VA. L. REV. 499, 499, 503–04 (1989) (noting the problem of political influence in administrative agencies); Jonathan R. Macey, *Separated Powers and Positive Political Theory: The Tug of War over Administrative Agencies*, 80 GEO. L.J. 671, 673–75, 697 (1992) (discussing the influence that our political process, Congress, and the President have over administrative agencies).

result in long waits for a hearing.⁷⁷ Administrative courts are tasked with distributing or dividing finite resources among a pool of eligible people, usually pursuant to an act of Congress.⁷⁸ The large number of cases these agencies must decide can present a “mass justice problem” when cases need to be decided quickly.⁷⁹ The unique nature of each human rights case renders it difficult for adjudication by a body, which specializes in deciding many cases, very quickly, often employing the same straightforward analytical pattern. While the administrative process is efficient when cases can be resolved in a single brief hearing, if a complex case requires multiple hearings, there may be lengthy waits between each hearing. Another related problem is that some administrative bodies may not have any or enough enforcement power. Ultimately, however, all administrative decisions are reviewable by Article III courts.⁸⁰ Given the severe nature of human rights violations, adding an extra layer of review to the resolution process is unwise from a policy perspective. Finally, the due process protections in administrative hearings do not sufficiently protect fundamental rights under the law.⁸¹

1. Complex Administrative Proceedings Are Lengthy and Protracted

Advantages administrative courts may have in resolving a vast number of similar cases are outweighed by considerations that are critical in the human rights context. Most important among these considerations is the issue of time. An effective administrative law process efficiently resolves an enormous number of cases, often sharing similar fact patterns and legal issues. However, when administrative agencies are tasked with adjudicating complex questions of fact, such as in the processes of the Social Security Administration or the Department of Veterans Affairs, there is often protracted and inefficient multi-year litigation, with multiple appeals.⁸²

⁷⁷ See, e.g., Statement of Michael J. Astrue, Comm’r, Soc. Sec. Admin., before Comm. on Ways and Means Subcomm. on Soc. Sec. (June 27, 2012), http://www.ssa.gov/legislation/testimony_062712.html.

⁷⁸ See *id.*

⁷⁹ See generally 2 PIERCE, *supra* note 47, at 820–21 (discussing how mass agencies, such as the Social Security Administration and the Veterans’ Administration, face challenges in that there are so many cases decided every year that it is difficult to read and reconcile prior decisions in a timely manner).

⁸⁰ Administrative Procedure Act (APA), 5 U.S.C. § 702 (2014).

⁸¹ See *infra* Part III.C.

⁸² See DENNIS M. SWEENEY & JAMES J. LYKO, PRACTICE MANUAL FOR SOCIAL SECURITY CLAIMS 129–37 (1980) (describing the four stages of administrative adjudication in Social

The Social Security Administration (SSA) has an administrative court system that decides hundreds of thousands of claims a year and that may be the largest court system in the world.⁸³ The SSA does this by engaging in an abbreviated fact-finding process, without strict rules of evidence, and by focusing on whether a disability claimant falls within one of the explicitly listed impairments.⁸⁴ If the claimant falls neatly within one of the SSA's defined categories, the case is simple.⁸⁵

Effectively, each administrative claimant receives the same kind of initial hearing as every other: an abbreviated, informal process often less than an hour in length, with relaxed rules of evidence, in which a claimant presents evidence and arguments, usually through counsel.⁸⁶ Since each ALJ may hear many cases every day, there is generally little flexibility in the process to expand or contract the procedures in relation to the needs of the individual case. Thus, if the claimant makes a complex argument using medical, scientific, or other evidence, there may not be sufficient time to produce a complete factual record.

Indeed, when administrative cases are reviewed by federal courts, these cases are often reversed⁸⁷ or remanded⁸⁸ because of inadequate fact-finding by the administrative agency, such as for lack of vocational expert testimony or an incomplete medical record.⁸⁹ Some cases are remanded

Security cases, which terminates in a final Appeals Council decision).

⁸³ Robert E. Rains, *Professional Responsibility and Social Security Representation: The Myth of the State-Bar Bar to Compliance with Federal Rules on Production of Adverse Evidence*, 92 CORNELL L. REV. 363, 364 (2007).

⁸⁴ See *id.* at 366–72.

⁸⁵ Specifically, the SSA has an official “Listing of Impairments,” any of which, if established by objective medical evidence, entitles a claimant to benefits. *Disability Evaluation Under Social Security: Listing of Impairments—Adult Listings (Part A)*, SOC. SECURITY ADMIN., <http://www.ssa.gov/disability/professionals/bluebook/AdultListings.htm> (last visited Feb. 9, 2014).

⁸⁶ See, e.g., *Mattern v. Mathews*, 582 F.2d 248, 259 (3d Cir. 1978) (finding that due process only requires an informal oral hearing); *Pope v. Weinberger*, 397 F. Supp. 856, 861 (E.D. Pa. 1975) (citing *Wallace Corp. v. NLRB*, 323 U.S. 248, 253 (1944)) (ruling that “administrative hearings are not governed by strict rules of evidence”).

⁸⁷ Statistics indicate that courts reverse administrative determinations approximately one-third of the time. David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135, 140–41 (2010). This reversal rate is fairly consistent across different areas of administrative law, even when using nominally different standards of review. See *id.*

⁸⁸ See generally Emily Hammond Meazell, *Deference and Dialogue in Administrative Law*, 111 COLUM. L. REV. 1722 (2011) (discussing serial litigation in administrative law).

⁸⁹ While the federal courts, in theory, are supposed to apply a highly deferential “substantial evidence” test in reviewing the decisions of administrative agencies, the sorts of lengthy, fact-finding opinions often written by federal judges reversing administrative agencies are more similar to those seen in cases of *de novo* review. See generally Morton Denlow, *Substantial*

multiple times before there is an adequate factual record to review.⁹⁰ Due to the extremely busy dockets of ALJs, it is generally months between each stage of the process.⁹¹ If these problems occur in disability cases, which share a common nucleus of fairly basic law, they could only be worse in complex human rights cases based on a body of treaty law that would have to be developed from scratch. Thus, lengthy delays could be the norm.

Because of the significant interests at stake in human rights litigation and the grave harms that result from an erroneous deprivation of fundamental rights, prolonged, repetitious administrative hearing processes threaten the right to due process. Human rights victims at the mercy of such a system might see their cases languish for years while their rights continue to be violated.

2. Administrative Exhaustion: A “Kafkaesque Pursuit of Justice”⁹²

Another serious problem with using administrative courts to adjudicate human rights claims is the principle aptly called “administrative exhaustion.” Administrative exhaustion requires that a litigant first pursue all non-judicial remedies available before taking his claim to an administrative tribunal.⁹³ Only after exhausting these options within an administrative tribunal may the litigant file a federal case in a district court.⁹⁴ Even when the case is heard in federal court, the result is often a remand back to the administrative agency itself, with directives to repeat

Evidence Review in Social Security Cases as an Issue of Fact, 2 FED. CTS. L. REV. 99 (2007).

⁹⁰ *E.g.*, *Marnell v. Barnhart*, 253 F. Supp. 2d 1052, 1080 (N.D. Iowa 2003) (ruling that the ALJ has already “delayed this matter far beyond what is reasonable or acceptable” where the case had been in litigation for nearly nineteen years and remanded three times); *see also* 2 BARBARA SAMUELS, *SOCIAL SECURITY DISABILITY CLAIMS: PRACTICE & PROCEDURE* § 19:59 (2d ed. 2013) (noting that the “[f]utility of such further administrative proceedings may be evidenced by repeated remands”).

⁹¹ *E.g.*, *AHA Urges CMA to Address a Growing Delay in Hearing RAC-Related Appeals*, AHANEWS.COM (January 24, 2014), http://www.ahanews.com/ahanews/jsp/display.jsp?dcrpath=AHANEWS/AHANewsArticle/data/AHA_News_012414_rac (discussing the two-year backlog for ALJ appeals for Medicare denials). ALJs have extremely busy dockets and often see more cases in a year than the federal courts. Judith Resnik, *Rereading “The Federal Courts:” Revising the Domain of Federal Courts Jurisprudence at the End of the Twentieth Century*, 47 VAND. L. REV. 1021, 1026 (1994).

⁹² *Pettyjohn v. Sullivan*, 776 F. Supp. 1482, 1485 (D. Colo. 1991).

⁹³ *Woodford v. Ngo*, 548 U.S. 81, 101–02 (2006).

⁹⁴ *See, e.g., The Appeals Process*, SOC. SECURITY ADMIN. (2008), <http://ssa.gov/pubs/10041.html#Reconsideration=&a0=1> (in order to appeal an SSA decision in federal court, a plaintiff must first go through multiple layers of administrative appeals).

and remedy the fact-finding process.⁹⁵ This sometimes includes instructions to consult an expert witness. Much has been written about how the exhaustion requirement results in serious delays and the denial of rights of claimants.⁹⁶

For example, social security claimants whose claims are denied must navigate a bewildering, four-layered appeal process, waiting months between hearings and often enduring multiple remands for further fact-finding due to the brevity of ALJ hearings.⁹⁷ Often impoverished and with few resources at their disposal, these claimants must await a final administrative decision, sometimes for years, before they may finally sue in federal court.⁹⁸

One striking example is that of Jim Thompson, who first applied for disability in 1987 and then endured more than fifteen years of legal blunders by the SSA.⁹⁹ Thompson went through five ALJ hearings, five administrative appeals, and litigated three federal court cases, prevailing in each.¹⁰⁰ However, even the last federal court decision, in 2003, did not resolve his case.¹⁰¹ Instead, the Article III court remanded the case yet again to the SSA.¹⁰²

Many jurists have criticized this labyrinthine process, including Colorado District Court Judge John L. Kane, who described the arduous process many disability claimants face as a “Kafkaesque pursuit of justice.”¹⁰³ Judge Richard A. Posner of the U.S. Court of Appeals for the Seventh Circuit has also discussed the deficiencies of the Social Security system in several of his opinions.¹⁰⁴ He is particularly critical of ALJs’

⁹⁵ See *Byam v. Barnhart*, 336 F.3d 172, 184 (2d Cir. 2003) (vacating the district court’s grant of summary judgment for the SSA and remanding the case back to the SSA for an agency hearing rather than to the district court for trial).

⁹⁶ See, e.g., Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635 (2010); Michael Morley, *The Case Against a Specialized Court for Federal Benefits Appeals*, 17 FED. CIR. B.J. 379 (2008); Jacob B. Natwick, *Unreasonable Delay at the VA: Why Federal District Courts Should Intervene and Remedy Five-Year Delays in Veterans’ Mental-Health Benefits Appeals*, 95 IOWA L. REV. 723 (2010).

⁹⁷ SWEENEY & LYKO, *supra* note 82 (describing the four layers of internal review).

⁹⁸ See Morley, *supra* note 96, at 379.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Pettyjohn v. Sullivan*, 776 F. Supp. 1482, 1485 (D. Colo. 1991).

¹⁰⁴ See generally Barbara A. Sheehy, *An Analysis of the Honorable Richard A. Posner’s Social Security Law*, 7 CONN. INS. L.J. 103 (2001) (discussing and analyzing Judge Posner’s social security jurisprudence and criticism of the SSA’s appeals process). As discussed below in

use of template opinions, referring to one as “a piece of opaque boilerplate” that the court “stubbed [its] toe on.”¹⁰⁵

Another example of the harms of delay is veterans’ appeals in the Department of Veterans Affairs (VA). VA adjudications remain an arcane and complex body of law, with often lengthy delays before veterans are granted a proper result. In one extreme case, a Vietnam-era veteran with post-traumatic stress disorder waited thirty-four years between his original claim of trauma due to combat duty and the favorable resolution of his claim.¹⁰⁶ Various presidential administrations throughout the thirty-four years refused to acknowledge that the veteran had seen combat in Vietnam, despite numerous testimonial letters from fellow soldiers and the Army’s own after-action reports from battles.¹⁰⁷ This is the sort of factual dispute that federal trial courts resolve every day, but which the adjudicative processes of the Veterans Administration were incapable of resolving in decades. Granted, while this specific example is extreme even by the standards of Veterans Administration adjudications, it is extreme only in degree.

The adjudicative process of the VA is infamous for its technical complexity and the intricate nature of its bureaucracy. The very first form a veteran encounters is a twenty-three-page application so trying that the VA spends three years training new employees simply on how to read it.¹⁰⁸ (By comparison, it also takes three years for a law student to earn a J.D.) While the VA recently hired thousands of new claims adjudicators to process the claims of veterans of the Iraq and Afghanistan wars,¹⁰⁹ as of January 2012, the VA still reported that more than 900,000 veterans are awaiting decisions; 67.6 percent of which are pending 125 days or

relation to immigration cases, Judge Posner has often criticized administrative agency decision-making processes as inadequate and often erroneous.

¹⁰⁵ *Bjornson v. Astrue*, 671 F.3d 640, 644 (7th Cir. 2012).

¹⁰⁶ John McChesney, *Disabled Veterans Face a Faceless Bureaucracy*, NPR.ORG (May 11, 2010), <http://www.npr.org/templates/story/story.php?storyId=126676864>.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*; see also James Dao, *Veterans Wait for Benefits as Claims Pile Up*, N.Y. TIMES (Sep. 27, 2012), http://www.nytimes.com/2012/09/28/us/veterans-wait-for-us-aid-amid-growing-backlog-of-claims.html?pagewanted=all&_r=0 (current employees describing “inadequate training” and “an excessively complicated process” as the source of dysfunction in the VA).

¹⁰⁹ John R. Davis, Dir. of Legislative Programs, Fleet Reserve Ass’n, Witness Testimony before Joint Hearing of the House and Senate Veterans’ Affairs Comms. (March 22, 2012), available at <http://veterans.house.gov/witness-testimony/john-r-davis-director-of-legislative-programs-fleet-reserve-association>.

more.¹¹⁰ Furthermore, 2012 inspections by the VA Inspector General's Regional Office found that the VA staff does "not accurately process disability claims."¹¹¹

Delay and inaccuracy like that in the VA are unacceptable under any circumstance. Unfortunately, it occurs often in benefits cases. The remedy when the case is finally resolved, however, is simple: provide needed medical assistance, pay the claimant his or her past due benefits, and make sure they receive future benefits.

This remedy, however, is not available to human rights victims. An administrative court cannot go back and undo the suffering of the victim or order that human rights abuses cease. Indeed, some human rights violations may ultimately result in death or permanent, serious physical and psychological harm to the victim. These are not cases that should wade through the sometimes nightmarish administrative exhaustion process.

3. Administrative Rulings Are Not Consistent

Another reason administrative courts are ill-suited to adjudicate human rights cases is that administrative claimants often get inconsistent results. Sometimes results are based on little more than the beliefs, at times unsubstantiated, of a particular ALJ. For example, in a single Miami immigration court, asylum applicants from Colombia assigned to one ALJ have only a 5 percent chance of success.¹¹² If their case is overseen by another ALJ in the same building, the same applicant has an 88 percent chance of success.¹¹³ While there have been some efforts to make decisions within some agencies more consistent, these measures are met with limited success.¹¹⁴

¹¹⁰ *VA Claims Backlog Milestone*, MILITARY.COM (Jan. 7, 2013), <http://www.military.com/veterans-report/va-claims-backlog-milestone>.

¹¹¹ John R. Davis, *supra* note 109. Also, in his testimony before a joint hearing of the House and Senate Veterans Affairs Committees, Arthur Cooper of the Retired Enlisted Association reported that at least 14 percent of the VA's decisions were wrong. Arthur Cooper, Nat'l President, Retired Enlisted Ass'n, Testimony before Joint Hearing of the House and Senate Veterans' Affairs Comms. 4 (March 21, 2012), *available at* <http://www.trea.org/Legislative/Testimony/20120321Cooper.pdf>.

¹¹² Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schra, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN L. REV. 295, 296 (2007).

¹¹³ *Id.*

¹¹⁴ For example, the SSA itself has started to issue "Social Security Rulings" about recurring issues in an attempt to establish greater consistency. 2 PIERCE, *supra* note 47, at 821.

Federal courts—including the U.S. Supreme Court—have long wrestled with the problem of inconsistency in administrative decision-making and its impact on basic issues of fairness and due process.¹¹⁵ The Supreme Court has vacillated over the years over what standard of review federal courts should apply in reviewing agency decisions that are inconsistent with previous agency decisions. In *Immigration and Naturalization Service v. Cardoza-Fonseca*, the Court stated that an “agency interpretation of a relevant provision which conflicts with the agency’s earlier interpretation is ‘entitled to considerably less deference’ than a consistently held view.”¹¹⁶ Since then, the Court has gone back and forth on the issue of agency interpretive inconsistency.¹¹⁷ Regardless of how the Supreme Court and lower federal courts ultimately resolve this matter, the fact still remains that inconsistency is an endemic problem in administrative tribunals.

When devising a system from scratch to adjudicate claims related to our most fundamental rights, nobody benefits by using an adjudicatory system that is so seriously plagued by inconsistency. It would be a disservice to the litigants and to the public in general to adopt a system that does not set clear and definite guidelines for future litigants. This is particularly true given that the United States has obligations to enforce treaties not only to its citizens, but to the rest of the world as well.

4. Administrative Decisions Have a High Error Rate

Administrative decision-making processes make a calculated sacrifice of some degree of accuracy in order to resolve cases more quickly and the result is often a much higher reversal rate. Many of these cases end up on appeal to Article III courts.¹¹⁸

Immigration courts are a particularly egregious example of bad decision making by administrative agencies. All too often, immigration courts reach erroneous decisions. These deficiencies have attracted many critics, prominent among them is Judge Posner. Judge Posner noted in one opinion, *Benslimane v. Gonzales*, that the circuit courts reversed

¹¹⁵ Yehonatan Givati & Matthew C. Stephenson, *Judicial Deference to Inconsistent Agency Statutory Interpretations*, 40 J. LEGAL STUD. 85 (2011).

¹¹⁶ *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987) (citing *Watt v. Alaska*, 451 U.S. 259, 273 (1981)).

¹¹⁷ The most recent decision by the Court was in *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005), in which the Court reaffirmed the irrelevance of agency inconsistency when reviewing an administrative decision.

¹¹⁸ Zaring, *supra* note 87.

immigration cases from the Board of Immigration Appeals at a “staggering” rate of 40 percent, compared to an 18 percent reversal rate in civil appeals.¹¹⁹

Judge Posner has also criticized the reliability of administrative courts. For example, in *Niam v. Ashcroft*, Judge Posner delivered a particularly caustic rebuke to immigration courts.¹²⁰ Judge Posner was especially concerned with the immigration judge’s factual findings, stating that “[t]he immigration judge’s analysis was so inadequate as to raise questions of adjudicative competence.”¹²¹ Indeed, the factual findings were startlingly erroneous. Particularly glaring was the immigration judge’s finding that “there had been a regime change since Niam’s being fired, arrested, detained, and beaten, so Niam has nothing to fear should he return to Sudan.”¹²² In fact, there had been no regime change; Omar al-Bashir was, and still is, in power.¹²³ The Seventh Circuit, in remanding the cases, assigned them to different immigration judges in light of the original judge’s unacceptably poor performance.¹²⁴

Unfortunately, given the general deficiencies evident in all administrative courts, it is hardly surprising that administrative courts tasked with adjudicating asylum cases fail. Immigration ALJs’ consistent failure to correctly adjudicate asylum cases and cases under the Convention Against Torture indicates that they are not well-suited to evaluate evidence to determine whether state or local governments or officials are violating their human rights obligations.¹²⁵ In fact, Article I immigration courts are so dysfunctional that the American Bar Association, heeding pleas from immigration judges and lawyers, called on Congress to create an independent court specifically for immigration cases that would be similar to the federal Tax Court.¹²⁶ One immigration judge described her experience in hearing asylum cases as “like holding

¹¹⁹ *Benslimane v. Gonzales*, 430 F.3d 828, 829 (7th Cir. 2005).

¹²⁰ *Niam v. Ashcroft*, 354 F.3d 652 (7th Cir. 2004).

¹²¹ *Id.* at 654.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.* at 660–61. *Niam* is a consolidated case concerning two separate petitions for review.

¹²⁵ See generally Margaret H. Taylor, *Refugee Roulette in an Administrative Law Context: the Déjà Vu of Decisional Disparities in Agency Adjudication*, 28 J. NAT’L ASS’N ADMIN. L. JUDICIARY 158, 165–66 (2008) (describing the tension and deficiencies within administrative agencies that preclude accurate outcomes).

¹²⁶ Julia Preston, *Lawyers Back Creating New Immigration Courts*, N.Y. TIMES (Feb. 8, 2010), <http://www.nytimes.com/2010/02/09/us/09immig.html>.

death penalty cases in traffic court.”¹²⁷

5. Administrative Courts Are Not Able to Protect Human Rights Victims While Their Cases Are Being Decided

A victim of human rights violations will likely require immediate relief from the unlawful actions of a government actor while the victim pursues his or her case through an adjudicative process. This implies that any entity that adjudicates human rights claims, in order to be effective, must have the power to issue injunctive relief. As in civil cases, injunctive relief is necessary to protect the plaintiff from ongoing harm while the case is being litigated. However, it is unclear whether administrative tribunals are empowered to issue injunctions, let alone enforce them.

The powers and duties of an ALJ are defined in the APA¹²⁸ and throughout the Code of Federal Regulations (CFR).¹²⁹ In some sections, the CFR explicitly authorizes ALJs to exercise “all appropriate powers necessary to conduct fair and impartial hearings.”¹³⁰ Meanwhile, although the APA does not explicitly state whether an ALJ is authorized to grant injunctive relief, it does provide ALJs with the authority to “take other action authorized by agency rule,” thus essentially deferring to the relevant provisions of the CFR.¹³¹

Federal courts have considered the scope of an ALJ’s powers, duties, and status on several occasions.¹³² In *Butz v. Economou*, the Supreme Court stated:

There can be little doubt that the role of the modern federal hearing examiner or administrative law judge within this framework is “functionally comparable” to that of a judge. His powers are often, if not generally, comparable to those of a trial judge: He may issue subpoenas, rule on proffers of evidence, regulate the course of hearing, and make or

¹²⁷ *Id.*

¹²⁸ Administrative Procedure Act (APA), 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 5372, 7521 (2006).

¹²⁹ For example, rules governing ALJs in the Telecommunications Bureau are codified in 47 C.F.R. § 0.341. Rules governing ALJs in cases “Involving Allegations of Unlawful Employment of Aliens, Unfair Immigration-Related Employment Practices, and Document Fraud” are governed under 28 C.F.R. § 68.26.

¹³⁰ 28 C.F.R. § 68.28(a).

¹³¹ 5 U.S.C. § 556 (2012).

¹³² See *Butz v. Economou*, 438 U.S. 478 (1978); *Ramspeck v. Fed. Trial Exam’rs Conference*, 345 U.S. 128 (1953); *Tunik v. Merit Sys. Prot. Bd.*, 407 F.3d 1326 (Fed. Cir. 2005); *Mullen v. Bowen*, 800 F.2d 535 (6th Cir. 1986).

recommend decisions.¹³³

However, the courts have said little on whether such powers include the power to grant injunctive relief. One ALJ of the Executive Office for Immigration Review wrote:

The statute and the regulations governing these proceedings are silent on the issue of preliminary injunctive relief, and I am not aware of any other statute, executive order, or regulation which “controls” my decision-making authority on this question. In this regard, it is my view that I “shall” apply the Federal Rules of Civil Procedure to Complainants’ Motion for Preliminary Injunction, including Rule 65 which sets out the requirements for injunctive relief.¹³⁴

As such, absent an express grant of authority from Congress, ALJs have relied on implied authority under the APA and the CFR when making their decisions.¹³⁵

A corollary to the issue of whether an ALJ has the power to grant injunctive relief is the issue of enforcement. Without the power to enforce its injunctions, administrative agencies must resort to the federal court system and rely on a federal court’s power to enforce the administrative decrees upon a party’s appeal.¹³⁶ In the case of human rights remedies, delay could be extremely harmful, if not fatal, to a human rights victim.

6. Administrative Judges Face Political Pressure and Have Less Job Security than Article III Judges

ALJs “acknowledge that they enjoy less prestige than do federal judges.”¹³⁷ One reason for this is that while agencies generally offer competitive compensation for lower- or moderately-skilled positions, compensation for positions requiring more advanced training or

¹³³ *Butz*, 438 U.S. at 513.

¹³⁴ *Banuelos v. Transportation Leasing Co.*, O.C.A.H.O. Case No. 89200314, 1990 WL 512097, at *3 (April 2, 1990).

¹³⁵ *Id.* Such injunctive power may be one that these ALJs do not regularly exercise.

¹³⁶ See 8 U.S.C. § 1324b(f)(2), which requires resort to court action when the agency cannot enforce a case. *But see Banuelos*, 1990 WL 512097, at *4 (“[T]he issuance of an order is commonly distinguishable from the enforcement of the order in all instances, and should not preclude the granting, in appropriate circumstances, of equitable relief in the form of a temporary injunction. For example, OCAHO does not have the authority to enforce subpoenas or even final orders, but they are issued with the expectation that such enforcement decrees are achieved by appealing to the federal courts.”).

¹³⁷ Paul R. Verkuil, *Reflections upon the Federal Administrative Judiciary*, 39 UCLA L. REV. 1341, 1344 (1992).

experience is generally less than in the private market.¹³⁸ For example, a newly hired agency lawyer is likely to be paid less than half of what a lawyer in the private sector would earn.¹³⁹ This presents a challenge to attracting highly qualified individuals.¹⁴⁰

By comparison, while Article III judges are not compensated as generously as members of the private bar, the life tenure and high level of prestige associated with the limited number of federal judgeships tends to attract the most qualified lawyers in the country.¹⁴¹ These judges are also viewed as more independent from political forces than ALJs, who lack tenure and may be replaced.¹⁴² Article III judges are granted life tenure, with the intent that this job security shields them from pressure exerted by the political branches of government.¹⁴³ There is some evidence that Article I judges are, presumably due to the lack of tenure, more apt to make decisions in line with the political preferences of the administrators they serve and the political powers that control their agencies.¹⁴⁴

For example, in the immigration context, an applicant applying for asylum must make an affirmative application for asylum within one year of entering the United States.¹⁴⁵ The Bureau of Citizenship and Immigration Services at some point assigns the case to an immigration judge, an ALJ who specializes in immigration cases. After hearing the

¹³⁸ See *id.* at 1345.

¹³⁹ See *Entry Level Attorneys: Attorney Salaries, Promotions, and Benefits*, U.S. DEPARTMENT JUST., <http://www.justice.gov/careers/legal/entry-salary.html> (last visited Feb. 10, 2014) (2014 General Scale Pay for a new attorney in the Department of Justice is \$50,287, without locality pay); *Private Sector Salaries*, NALP, <http://www.nalp.org/privatesectorsalaries> (last visited Feb. 10, 2014) (“first year associate salaries of \$160,000” are fairly common).

¹⁴⁰ See *Recommendations of the Administrative Conference Regarding Administrative Practice and Procedure*, 56 Fed. Reg. 67139-01, at *67144 (Dec. 30, 1991) (to be codified at 1 C.F.R. pt. 305) (noting that specialized courts may attract lower caliber judges).

¹⁴¹ See Judith Resnik, “*Uncle Sam Modernizes His Justice*”: *Inventing the Federal District Courts of the Twentieth Century for the District of Columbia and the Nation*, 90 GEO. L.J. 607, 647 (2002).

¹⁴² Lawrence Baum, *Judicial Specialization and the Adjudication of Immigration Cases*, 59 DUKE L.J. 1501, 1526 (2010).

¹⁴³ THE FEDERALIST NO. 78 (Alexander Hamilton).

¹⁴⁴ Baum, *supra* note 142.

¹⁴⁵ The affirmative asylum process involves several phases. The applicant must have been in the United States for less than one year to apply. Once the application process has begun, fingerprints and background checks are conducted. The applicant will then be scheduled for an interview with an asylum officer. This officer will then determine whether the applicant meets the criteria for asylum in the United States. *The Affirmative Asylum Process*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Nov. 27, 2013), <http://www.uscis.gov/humanitarian/refugees-asylum/asylum/affirmative-asylum-process>.

case, the immigration judge issues a decision, along with findings of fact and conclusions of law justifying the decision. The asylum seeker may then appeal an adverse decision to the Board of Immigration Appeals.¹⁴⁶ Only after exhaustion of all administrative remedies may the asylum seeker petition for review to the court of appeals for the circuit where they are physically located.¹⁴⁷

This is a highly adversarial process. The asylum seeker is not entitled to a presumption of credibility and the determination of credibility is incredibly subjective.¹⁴⁸ Worse, the immigration judge makes a decision after listening to arguments made by lawyers who work for the very agency that is the source of that judge's income and which may or may not reappoint the judge at the end of his or her term.¹⁴⁹ Needless to say, this puts tremendous pressure on the immigration judge and may compromise that ALJ's objectivity.

In enforcing our most fundamental rights, those reviewing claims should be independent from and not influenced by the particular party in power or feel so insecure about their future careers that they compromise their neutrality.

C. DUE PROCESS ISSUES

As discussed above, administrative law courts suffer from a number

¹⁴⁶ BOARD IMMIGR. APPEALS, PRACTICE MANUAL 5–6, available at <http://www.justice.gov/eoir/v11/qapracmanual/BIAPracticeManual.pdf>.

¹⁴⁷ 8 U.S.C. § 1252(d)(1) (2006) (“A court may review a final order of removal only if . . . the alien has exhausted all administrative remedies available to the alien as of right . . .”).

¹⁴⁸ Credibility determinations are incredibly fact-specific and discretionary:

Considering the totality of the circumstances, and all relevant factors, a trier of fact may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor. There is no presumption of credibility, however, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal.

8 U.S.C. § 1158 (B)(iii).

¹⁴⁹ Baum, *supra* note 142.

of deficiencies that render them a particularly poor match for protecting treaty-based human rights. These factors include the insufficiency of the administrative process at fact-finding, the inconsistency of rulings from different decision makers within agencies, the difficulty in attracting both skilled adjudicators and attorneys, and the often lengthy delays in administrative proceedings. With administrative adjudicative processes, Congress has deemed it acceptable to sacrifice some degree of accuracy in return for an ability to resolve a vast number of cases efficiently. Fundamental human rights, however, should not be balanced against mere efficiency.

Administrative hearings are brief and informal, but due to case volume, often require lengthy waits before a hearing or re-hearing. They lack adequate fact-finding procedures and strict rules of evidence designed to ensure the fairness of the proceedings. There are often many layers of administrative appeals and processes that must be exhausted before a litigant can make a claim for legal or equitable remedies in a judicial court, which may be the only court able to offer actual relief.

Therefore, adjudicating human rights cases in administrative proceedings presents a fundamental due process concern. The specific issue is how much process is due. Early thinking was that benefits from administrative agencies were mere “privileges” that could be given or taken away at will by the government.¹⁵⁰ Thus, the only “hearing” necessary was a decision by a bureaucrat.¹⁵¹ Unlike rights, which could not be curtailed without due process, benefits were not “property” and their recipients were not entitled to challenge their denial.¹⁵²

This line of reasoning was shot down four decades ago in *Goldberg v. Kelly*, where the Supreme Court recognized a property interest in government entitlements for the first time.¹⁵³ Recipients of benefits are therefore entitled to “some kind of hearing” before the deprivation of benefits.¹⁵⁴ The Court further refined the contours of administrative due process in *Mathews v. Eldridge*.¹⁵⁵ The balancing test prescribed by *Eldridge* has three parts:

¹⁵⁰ 2 PIERCE, *supra* note 47, at 614.

¹⁵¹ *Id.* This outmoded “privileges/rights” dichotomy has since been abandoned by the courts. Friendly, *supra* note 65, at 1295–97.

¹⁵² Friendly, *supra* note 65, at 1295–97.

¹⁵³ *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970).

¹⁵⁴ Friendly, *supra* note 65, at 1267.

¹⁵⁵ *Mathews v. Eldridge*, 424 U.S. 319 (1976).

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.¹⁵⁶

In short, the balancing test that courts apply for administrative courts to expend resources efficiently is that the procedures used are commensurate to the harm which would result from incorrect decisions.

This model of efficiency, however, does not and should not encompass our most fundamental rights. The *Eldridge* balancing test, applied on its own terms, removes human rights litigation from the proper subject matter of administrative law. First, the "private interest that will be affected"¹⁵⁷—the human rights of a plaintiff—are of paramount concern. These rights flow from one's very identity as a human being.¹⁵⁸

The second factor in *Eldridge* is inextricably intertwined with the first: "the risk of an erroneous deprivation."¹⁵⁹ This risk takes two forms: the likelihood of erroneous decisions and how damaging these errors are when they occur. As the immigration courts show, when administrative agencies make human rights decisions, they are wrong much more often than full-fledged courts.¹⁶⁰ Because the interests at stake are so fundamental to what it means to be human, exchanging a small amount of theoretical efficiency for a huge risk of erroneous human rights decisions is unconscionable.¹⁶¹

Third, the benefits from added procedural safeguards in human rights cases are enormous. Article III courts, as judicial bodies, have a powerful institutional memory in the form of common law. The principle of *stare decisis* operates in federal courts, which binds these courts to follow decided principles of law from higher courts, and these courts often

¹⁵⁶ *Id.* at 335.

¹⁵⁷ *Id.*

¹⁵⁸ See Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948), available at http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf.

¹⁵⁹ *Eldridge*, 424 U.S. at 335.

¹⁶⁰ *Benslimane v. Gonzales*, 430 F.3d 828 (7th Cir. 2005) (appeals to federal courts from the immigration courts are reversed at a "staggering" rate of 40 percent). By comparison, the Court of Appeals for the Federal Circuit, when reviewing district court opinions, had a reversal rate of only 16.88 percent between 1997 and 2006. Morley, *supra* note 96, at 383–84.

¹⁶¹ The 40 percent reversal rate in immigration appeals is suggestive that even the presumed efficiency benefit may be illusory. If errors necessitate even more litigation at such an extreme rate, resources are being squandered.

consider, as persuasive, cases which they are not compelled to follow.¹⁶² Thus, a human rights decision by a federal court establishes a rule of decision that can be applied in future cases. As a result, while an individual lawsuit may vindicate a private right, the outcome of the case creates a public good that benefits all of society.

By comparison, administrative agencies do not generally operate by precedent.¹⁶³ Thus, administrative agencies do not “learn” from case law. As discussed earlier, this generates inconsistent results based on the individual biases of administrative decision makers. There is no effective means within administrative agencies to foster institutional memory.¹⁶⁴ The specific difficulty of developing a body of precedent from administrative decisions is that a body of millions of decisions is too vast for any person, or even any institution, to read and reconcile into a coherent whole.¹⁶⁵

The adjudication of human rights cases by the federal courts would create a body of case law that can be used in future cases to ensure consistent protection of human rights and to maintain compliance with international treaty obligations. An administrative process would essentially force each new victim to reinvent the wheel.

The interests vindicated by human rights litigation are fundamental, and the violation of these rights is harm of the most serious nature. The additional procedural safeguards available in the full trial process of Article III courts or hybrid Article I/Article III courts provide an enormous benefit, both to the individual litigant and to society, through the evolution of common law. While the costs of full civil litigation are greater than those in administrative procedures, the benefits from adopting these procedures in human rights litigation are enormous. Therefore, Article III courts are much better suited for adjudicating human rights claims.

* * * *

Even though the administrative agency model, in practice, appears ill-suited for treaty-based human rights litigation, in determining the best possible model for adjudicating human rights claims, it would not be sufficient to simply say that Article III federal courts should be used to

¹⁶² See Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011, 1052 n.160 (2003) (noting that a circuit court may consider decisions from another circuit as persuasive).

¹⁶³ 2 PIERCE, *supra* note 47, at 819–20.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 820–21.

adjudicate those claims. There are a number of different models within the federal court system that should be examined to determine which is the best and most effective forum for adjudicating human rights claims. In doing so, a number of questions need to be answered, including:

- Should there be a specialized Article I “hybrid” court, similar to the bankruptcy courts and the Court of Federal Claims, designated to hear human rights claims?
- Should all federal courts, as part of their general dockets, hear human rights cases? What should the appeals process look like?
- Should there be a specialized Article III court, like the U.S. Court of International Trade, that hears human rights claims exclusively?

Parts IV and V of this Article explore all of these options in turn, and discuss the pros and cons of each adjudicatory system and appeals process. The best system should provide the swiftest adjudication of each claim, while also developing consistent and uniform jurisprudence in this emerging area of the law.

IV. ADJUDICATING HUMAN RIGHTS CASES USING “HYBRID” ARTICLE I COURTS

There are several types of Article I courts that I have named “hybrid” courts because even though they are technically Article I courts, they have more in common with Article III courts than with the administrative Article I tribunals discussed above. Among these courts are the bankruptcy courts, the Court of Federal Claims, and the Tax Court.¹⁶⁶ This part evaluates the different hybrid courts, discusses the advantages and disadvantages of each, and examines the role hybrid courts would play if tasked with adjudicating human rights violations.

Congress does not have unfettered power to create specialized Article I courts. Rather, Article III requires that the judicial power of the United States be vested in Article III courts,¹⁶⁷ subject to narrow exceptions.¹⁶⁸ The Supreme Court has devised several tests for determining when Article

¹⁶⁶ Other “hybrids” include military courts and territorial courts. Ellen E. Sward, *Legislative Courts, Article III, and the Seventh Amendment*, 77 N.C. L. REV. 1037, 1047–49 (1999).

¹⁶⁷ U.S. CONST. art. III, § 1 (“The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.”).

¹⁶⁸ *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 58–59 (1982) (plurality opinion).

I courts are permissible. The decisions in this area are not particularly clear, however. First, Congress may create Article I courts where it exercises the general power of our government, such as in the territories and the District of Columbia.¹⁶⁹ Second, Congress may create courts martial under the Article I military clauses and as a matter of historical practice.¹⁷⁰ Third, Congress may create Article I courts to adjudicate public rights.¹⁷¹

Public rights are legal claims that do not exist at “common law, or in equity, or admiralty,”¹⁷² and which only continue to exist at the sufferance of the government.¹⁷³ The Supreme Court analogizes these claims to waivers of sovereign immunity, which may be conditioned or revoked at-will.¹⁷⁴ While the Court did not define the precise contours of public rights, it did hold that “a matter of public rights must at a minimum arise ‘between the government and others.’”¹⁷⁵ In contrast, legal liability between private individuals is a matter of private rights, which Congress may not normally adjudicate through Article I courts.¹⁷⁶ Given that human rights treaties codify obligations that governments at every level have toward their people, it would be consistent with Supreme Court

¹⁶⁹ *Id.* at 64–65; *Am. Ins. Co. v. 356 Bales of Cotton*, 26 U.S. 511, 511–12 (1828).

¹⁷⁰ *N. Pipeline Constr. Co.*, 458 U.S. at 66 (quoting *Dynes v. Hoover*, 20 How. 65, 79, 15 L.Ed. 838 (1857)) (“Article I, § 8, cls. 13, 14, confer upon Congress the power ‘[t]o provide and maintain a Navy,’ and ‘[t]o make Rules for the Government and Regulation of the land and naval Forces.’ . . . ‘These provisions show that Congress has the power to provide for the trial and punishment of military and naval offences . . . and that the power to do so is given without any connection between it and the 3d article of the Constitution defining the judicial power of the United States; indeed, that the two powers are entirely independent of each other.’”).

¹⁷¹ *Id.* at 67.

¹⁷² *Id.* (quoting *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272, 15 L.Ed. 372 (1856)).

¹⁷³ *See id.* at 67–68.

¹⁷⁴ *Id.* at 67.

¹⁷⁵ *Id.* at 69 (quoting *Ex parte Bakelite Corp.*, 279 U.S. 438, 451 (1929)). The Court gave examples of recognized subject matter where the public rights doctrine applied: “interstate and foreign commerce, taxation, immigration, the public lands, public health, the facilities of the post office, pensions and payments to veterans.” *Id.* at 69 n.22 (quoting *Crowell v. Benson*, 285 U.S. 22, 51 (1932)). Criminal matters are expressly excluded from the public rights doctrine. *Id.* at 70 n.24 (citing *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955)).

¹⁷⁶ *Id.* at 69–70. The public and private rights distinction has been criticized for turning the purpose of Article III on its head. Erwin Chemerinsky, *Ending the Marathon: It’s Time to Overrule Northern Pipeline*, 65 AM. BANKR. L.J. 311, 314 (1991) (“Article I courts are allowed where the independence of federal judges is perhaps most needed, in disputes between individuals and the federal government; but Article I courts are not allowed where the independence of federal judges is least important, in routine disputes between private litigants.”).

jurisprudence to have human rights claims adjudicated by Article I courts.

Congress ran afoul of the rules governing Article I courts in enacting the Bankruptcy Act of 1978. The Supreme Court held that those courts violated Article III.¹⁷⁷ The Court declined to carve out a new exception premised on Article I's Bankruptcy Clause.¹⁷⁸ This approach would have allowed Congress to create Article I bankruptcy courts under the authority of Article I's Bankruptcy Clause (similar to congressional power under its military and territory clauses). Finally, the Court rejected the argument that the bankruptcy courts were merely "adjunct" to valid Article III district courts,¹⁷⁹ reasoning that the bankruptcy courts had been granted broad powers, including the ability to issue final judgments, which usurped the "'the essential attributes' of Article III judicial power."¹⁸⁰ While *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*'s plurality opinion has never been expressly overruled, it has been narrowed. Some scholars argue that it has been largely supplanted with a balancing test that weighs the effects of an Article I court against the purposes of Article III protections.¹⁸¹

The Supreme Court returned to the question of when Article III limits congressional power to establish Article I courts in *Thomas v. Union Carbide Agriculture Products Co.*¹⁸² In *Thomas*, the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) required chemical manufacturers to submit research data to the Environmental Protection Agency (EPA), which would then be shared with other manufacturers.¹⁸³ The costs of data generation were to be shared among the companies with value determined by the EPA if the parties were unable to agree on a value.¹⁸⁴ The EPA was soon overwhelmed with cost disputes, and Congress responded in 1978 by

¹⁷⁷ *N. Pipeline Constr. Co.*, 458 U.S. at 71–72.

¹⁷⁸ *Id.* at 72–74. "The Congress shall have power . . . [t]o establish . . . uniform laws on the subject of bankruptcies throughout the United States." U.S. CONST. art. I, § 8, cl. 4. Mere mention in Article I was insufficient, the Court reasoned, because it lacked any limiting principle. Congress could effectively eviscerate Article III under its broad powers, such as the Commerce Clause. *Id.*

¹⁷⁹ *Id.* at 76–77.

¹⁸⁰ *Id.* at 80–86. While Congress may assign limited judicial functions to a non-Article III official when it creates a federal right, an Article III court must retain "'the essential attributes' of judicial power" including the power to exercise final judgment and to review any facts on appeal under a non-deferential standard. *Id.*

¹⁸¹ See, e.g., Chemerinsky, *supra* note 176, at 317–20.

¹⁸² *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568 (1985).

¹⁸³ *Id.* at 571–72.

¹⁸⁴ *Id.*

amending FIFRA to require disputants to use binding arbitration, subject to appeal to an Article III court only for “fraud, misrepresentation, or other misconduct.”¹⁸⁵ A number of companies subject to FIFRA challenged the binding arbitration provision. They argued that it violated Article III because it did not qualify for any of the categorical exceptions outlined in *Northern Pipeline*.¹⁸⁶

Justice Sandra Day O’Connor, writing for the majority, confined the *Northern Pipeline* holding to its essential facts: “Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, without consent of the litigants, and subject only to ordinary appellate review.”¹⁸⁷ After noting that the categorical approach adopted in *Northern Pipeline* had garnered only plurality support,¹⁸⁸ the Court determined that “practical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III.”¹⁸⁹

While never explicitly adopting a balancing test, the Court reviewed the purpose and structure of the challenged binding arbitration provisions in light of the purpose and protections of Article III. The Court noted that the data-sharing and binding arbitration provisions were part of a complex regulatory scheme that touched on both public and private rights,¹⁹⁰ that participation in the regulatory framework was ultimately voluntary,¹⁹¹ that use of arbitration would not result in partial or political decision making,¹⁹² and that review of arbitrator decisions by Article III courts was limited, but not impossible.¹⁹³ With these factors in mind, the Court upheld FIFRA’s binding arbitration provision as a reasonable departure from Article III.¹⁹⁴

Thomas thus endorsed a functional approach, weighing the merits of

¹⁸⁵ *Id.* at 573–74 (quoting 7 U.S.C. § 136a(c)(1)(D)(ii)).

¹⁸⁶ *Id.* at 575–76.

¹⁸⁷ *Id.* at 584.

¹⁸⁸ *Id.* at 585–86.

¹⁸⁹ *Id.* at 587 (citing *Glidden Co. v. Zdanok*, 370 U.S. 530, 547–48 (1962)).

¹⁹⁰ *Id.* at 589–90.

¹⁹¹ *Id.* at 589, 591–92. While the Court insists that participation in the program is voluntary, it appears to be using voluntary in a more technical than realistic sense. FIFRA companies can avoid the binding arbitration provision by simply agreeing on a value for the subject data.

¹⁹² *Id.* at 590.

¹⁹³ *Id.* at 592–93. “FIFRA at a minimum allows private parties to secure Article III review of the arbitrator’s ‘findings and determination’ for fraud, misconduct, or misrepresentation.” *Id.* at 592.

¹⁹⁴ *Id.* at 593–94.

an Article I forum against the costs of forgoing Article III's protections against political interference.¹⁹⁵ Critical factors appear to include: the scope of any congressional regulatory scheme and the Article I tribunal's fit with that scheme; whether the tribunal's jurisdiction is voluntary or compulsive; the risk of partial decision making and political influence; and whether there is sufficient due process, particularly through review of tribunal decisions by Article III courts. Thus, human rights claims could be sent to "hybrid" Article I courts as long as the decision could be appealed to Article III courts.

Dean Erwin Chemerinsky has suggested examining four major factors before assigning matters to Article I or Article III courts: (1) potential public reaction to decisions; (2) potential pressure on the court from the legislative or executive branches; (3) the benefits of applying judicial interpretation and precedent; and (4) the benefits of specialization.¹⁹⁶ Specialization has both advantages and disadvantages. Specialized courts enable recruitment of judges with relevant backgrounds and allow judges to develop expertise in their practice area.¹⁹⁷ These factors become increasingly valuable in complex areas of law.¹⁹⁸ However, specialization narrows the range of potential judicial candidates, limits the pool of talent the courts can draw upon, and deprives courts of the benefits of judicial cross-training, where insights and experience from one area of law apply in others.¹⁹⁹

¹⁹⁵ Chemerinsky, *supra* note 176, at 319.

¹⁹⁶ Erwin Chemerinsky, *Decision-Makers: In Defense of Courts*, 71 AM. BANKR. L.J. 109, 117 (1997). A fifth factor, concern for federalism, was proposed but ultimately rejected later in the article for lack of substantive differences between Article I and III federal courts in regard to deference to state sovereignty. *Id.* at 123–24.

¹⁹⁷ *See id.* at 115.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

A. BANKRUPTCY COURTS²⁰⁰

Today, the post-*Northern Pipeline* bankruptcy law is codified in Title 11 of the United States Code, and Congress has created a bankruptcy court in each federal district court district.²⁰¹ The district courts have original and exclusive jurisdiction of all bankruptcy cases,²⁰² but may (and in practice do) refer all bankruptcy cases to the bankruptcy court for the district.²⁰³ Bankruptcy proceedings are governed by the Federal Rules of Bankruptcy Procedure.²⁰⁴

The final judgments, orders, and decrees of a bankruptcy court may be appealed to the district court that the bankruptcy court serves.²⁰⁵ Additionally, some circuit courts of appeals have created bankruptcy appellate panels, comprised exclusively of bankruptcy judges, who may hear appeals from a bankruptcy court with the consent of the parties.²⁰⁶ The decisions may then be appealed to the appropriate circuit court.²⁰⁷

Unlike Article III judges, bankruptcy court judges are not nominated by the President or confirmed by the Senate and do not serve on the bench for life. Rather, the National Judicial Conference makes nominee recommendations to each circuit court of appeals.²⁰⁸ The circuit court judges then select bankruptcy judges by majority vote for the districts

²⁰⁰ Bankruptcy, a settlement between debtor and creditor that discharges past debts, has been part of English common law since the sixteenth century. See Thomas E. Plank, *The Constitutional Limits of Bankruptcy*, 63 TENN. L. REV. 487, 500 (1996). The American colonies inherited this legal tradition. *Id.* at 518–525. Under the Articles of Confederation, state legislatures regularly discharged debt obligations for favored constituents while undermining foreign investment in the young nation. *Id.* at 529; Todd J. Zywicki, *The Past, Present, and Future of Bankruptcy Law in America*, 101 MICH. L. REV. 2016, 2018 (2003) (reviewing DAVID A. SKEEL, JR., *DEBT'S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA* (2001)). In response, the Constitution gave Congress express authority to enact uniform bankruptcy laws and barred the states from impairing contracts. U.S. CONST. art 1, § 8, cl. 4, § 10, cl. 1. In concert, these provisions give the federal government near exclusive power over bankruptcy.

²⁰¹ 28 U.S.C. § 151 (2006).

²⁰² 28 U.S.C. § 1334(a) (2006).

²⁰³ 28 U.S.C. § 157(a) (2006) *invalidated by In re Int'l Auction & Appraisal Servs. LLC*, 493 B.R. 460 (Bankr. M.D. Penn. 2013).

²⁰⁴ ADMIN. OFFICE OF THE U.S. COURTS, *BANKRUPTCY BASICS 5* (2011), available at <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/FederalCourts/BankruptcyResources/bankbasics2011.pdf>.

²⁰⁵ 28 U.S.C. § 158(a) (2006).

²⁰⁶ 28 U.S.C. § 157(b)(1).

²⁰⁷ 28 U.S.C. § 157(d)(1).

²⁰⁸ 28 U.S.C. § 152(a)(1) (2006).

within their circuit.²⁰⁹ A bankruptcy judge serves for a fourteen-year term,²¹⁰ but may be removed from office early for cause—including incompetence, misconduct, or disability—by a majority vote of the Judicial Council of the circuit in which the bankruptcy judge sits.²¹¹ Moreover, bankruptcy judges' salaries are statutorily fixed at ninety-two percent the salary of a district court judge.²¹² Bankruptcy judges do not enjoy Article III protection against reductions of salary like Article III district court judges.²¹³

Unlike many other areas governed by comprehensive federal law, bankruptcy law is not interpreted and enforced by an executive agency with a staff of hundreds or thousands. Rather, bankruptcy law's interpretation and application occurs in the federal courts. As a result, bankruptcy law

has developed in much the same way as the common law develops—more or less piecemeal and ad hoc, without much pressure for an overarching policy or theory. Issues have been addressed as cases have arisen, not necessarily in a rational or ideal order, and they have been resolved within the confines of the facts of the cases at bar.²¹⁴

Development of bankruptcy law is similar to the way that jurisprudence is developed in other federal courts and it is superior to the non-binding decisions issued by Article I ALJs.

B. U.S. COURT OF FEDERAL CLAIMS

The U.S. Court of Federal Claims is a specialized Article I federal court²¹⁵ created by Congress to hear non-tort claims for money damages against the United States in particular areas identified by statute.²¹⁶ The court sits in Washington, D.C., but has national jurisdiction and hears claims that arise across the United States.²¹⁷ The court's subject matter

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ 28 U.S.C. § 152(e).

²¹² 28 U.S.C. § 153 (2006).

²¹³ U.S. CONST. art. III, § 1.

²¹⁴ Lee Dembart & Bruce A. Markell, *Alive at 25? A Short Review of the Supreme Court's Bankruptcy Jurisprudence, 1979–2004*, 78 AM. BANKR. L.J. 373, 373 (2004).

²¹⁵ 28 U.S.C. § 171 (2006).

²¹⁶ 28 U.S.C. § 1491(a)(1) (2006). For example, breach of contract cases. 28 U.S.C. § 1491(a)(2) (2006) (amended 2011).

²¹⁷ U.S. CT. FED. CLAIMS, UNITED STATES COURT OF FEDERAL CLAIMS: THE PEOPLE'S COURT 4, 6 [hereinafter FEDERAL CLAIMS: THE PEOPLE'S COURT], *available at*

jurisdiction is specifically limited to claims based on the Constitution, federal law, executive regulations, or any express or implied contract with the United States, and excludes all tort claims.²¹⁸ In practice, many of the claims the court hears regard just compensation for Fifth Amendment takings, pay disputes, breach of contract, patent and copyright infringement, and vaccine injuries.²¹⁹ In 2006, the court had 8724 cases on its docket,²²⁰ rendered judgment in over 900 cases, and awarded \$1.8 billion in damages.²²¹

Initially, there was some uncertainty over whether the court was an Article I or Article III court. The Supreme Court resolved that uncertainty in 1933, when it held that the U.S. Court of Claims was an Article I court.²²² In response, Congress amended 28 U.S.C. § 171 in 1953 to turn the U.S. Court of Claims into an Article III court.²²³ The Supreme Court recognized and endorsed the change in 1962.²²⁴ Subsequently, in 1982, Congress again amended § 171, turning the U.S. Court of Claims back into an Article I court²²⁵ and making its judgments subject to appeal to the newly created Article III court, the U.S. Court of Appeals for the Federal Circuit.²²⁶ While the Court of Claims' judges originally enjoyed life tenure and the salary protections of Article III,²²⁷ those benefits were revoked by the 1982 amendments.²²⁸ The court was renamed the U.S. Court of Federal Claims in 1992.²²⁹

http://www.uscfc.uscourts.gov/sites/default/files/court_info/Court_History_Brochure.pdf (last visited Feb. 12, 2014).

²¹⁸ 28 U.S.C. § 1491.

²¹⁹ FEDERAL CLAIMS: THE PEOPLE'S COURT, *supra* note 217, at 13.

²²⁰ *Id.* ("Of these, 3,091 cases involve the court's general jurisdiction, while 5,633 are vaccine cases handled, in the first instance, by the court's special masters." Thus, "in 2006, the Court of Federal Claims had 193 cases for each of its 16 authorized judgeships (taking into account only the general jurisdiction docket).")

²²¹ *Id.*

²²² *Williams v. United States*, 289 U.S. 553, 580–81 (1933).

²²³ Act of July 28, 1953, ch. 253, 67 Stat. 226 (codified as amended at 28 U.S.C. § 171).

²²⁴ *Glidden Co. v. Zdanok*, 370 U.S. 530, 584 (1962).

²²⁵ Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (codified as amended in scattered sections of 28 U.S.C.).

²²⁶ 28 U.S.C. § 1295 (2006).

²²⁷ *Glidden Co.*, 370 U.S. at 584; see Gregory C. Sisk, *The Tapestry Unravels: Statutory Waivers of Sovereign Immunity and Money Claims Against the United States*, 71 GEO. WASH. L. REV. 602, 609–10 (2003).

²²⁸ 28 U.S.C. § 171 (1982).

²²⁹ Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 902, 106 Stat. 4506, 4516.

The sixteen judges serving on the Article I U.S. Court of Federal Claims²³⁰ are appointed by the President, with the advice and consent of the Senate,²³¹ and serve for a term of fifteen years.²³² Their salary is fixed by statute at the same rate as judges of the district courts.²³³ A judge may be removed during his or her term only for cause, such as incompetence, misconduct, or disability, and only by a majority vote of the judges of the U.S. Court of Appeals for the Federal Circuit.²³⁴

The court sits in Washington, D.C., but may hold court anywhere it deems appropriate “with a view to securing reasonable opportunity to citizens to appear before the U.S. Court of Federal Claims with as little inconvenience and expense to citizens as is practicable.”²³⁵ Despite my numerous requests for further information, the court could not provide any information about how often it changes venue, or how frequently, if at all, its judges travel.

The court’s subject matter jurisdiction is limited to claims against the United States based on “the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.”²³⁶ The court’s modern jurisdiction remains largely premised on the Tucker Act of 1887,²³⁷ as well as contract bidding disputes²³⁸ and vaccine injuries.²³⁹ Additionally, the district courts exercise concurrent jurisdiction with the U.S. Court of Federal Claims when the claim is under \$10,000.²⁴⁰

Interestingly, the court has retained its historical jurisdiction over Congressional Reference Cases.²⁴¹ When a claimant petitions Congress

²³⁰ 28 U.S.C. § 171 (2006).

²³¹ *Id.*

²³² 28 U.S.C. § 172 (2006).

²³³ *Id.*

²³⁴ 28 U.S.C. § 176 (2006).

²³⁵ 28 U.S.C. § 173 (2006).

²³⁶ 28 U.S.C. § 1491(a)(1) (2006).

²³⁷ “The Tucker Act, passed in 1887, waives the government’s sovereign immunity in cases involving contracts as well as certain constitutional claims.” *High Court Asked to Clear up Limitations Issue in Takings Case: John R. Sand & Gravel Co. v. United States*, 27 No. 17 ANDREWS ENVTL. LITIG. REP. 8, *1 (2007).

²³⁸ See Sisk, *supra* note 227, at 608–09.

²³⁹ 42 U.S.C. § 300aa-12 (2006).

²⁴⁰ 28 U.S.C. § 1346(a)(2) (2006).

²⁴¹ FEDERAL CLAIMS: THE PEOPLE’S COURT, *supra* note 217; see Matthew G. Bisanz, *The Honor of a Nation and the Mysterious Evolution of 28 U.S.C. § 2509 Jurisprudence*, 24 GEO. J.

directly for a private bill to remedy an alleged harm, Congress may refer the bill to the U.S. Court of Federal Claims for review.²⁴² A judge of the court is assigned as a hearing officer for the particular case and is granted broad inquest-like powers to investigate,²⁴³ to determine if there is any legal or equitable basis for the claim,²⁴⁴ and to establish what remedy, if any, is appropriate.²⁴⁵ These findings and conclusions are then submitted to a three-judge review panel,²⁴⁶ which may adopt or modify the report by a majority vote.²⁴⁷ The court then submits the final report to Congress for its consideration.²⁴⁸

While the court's remedies were originally limited to money damages, the court has since been given the power to issue limited equitable remedies "incident of and collateral to" money damages, such as restoration of office, status, or records,²⁴⁹ or any declaratory or injunctive relief the court determines proper in contract bid disputes.²⁵⁰ The judgments of the U.S. Court of Federal Claims may be appealed to the U.S. Court of Appeals for the Federal Circuit.²⁵¹

C. ADVANTAGES AND DISADVANTAGES OF HYBRID ARTICLE I COURTS

The U.S. Court of Federal Claims and the various bankruptcy courts are successful and effective. As such, they present one potential model for adjudicating human rights disputes in a specialized federal forum.

LEGAL ETHICS 461, 462–64 (2011).

²⁴² 28 U.S.C. § 2509(a) (2006).

²⁴³ 28 U.S.C. § 2509(b) ("Each hearing officer and each review panel shall have authority to do and perform any acts which may be necessary or proper for the efficient performance of their duties, including the power of subpoena [sic] and the power to administer oaths and affirmations.").

²⁴⁴ 28 U.S.C. § 2509(c).

²⁴⁵ *Id.*

²⁴⁶ FEDERAL CLAIMS: THE PEOPLE'S COURT, *supra* note 217.

²⁴⁷ 28 U.S.C. § 2509(d).

²⁴⁸ 28 U.S.C. § 2509(e); FEDERAL CLAIMS: THE PEOPLE'S COURT, *supra* note 217. In effect, this is an advisory opinion that Congress can accept or reject at its discretion. There is no problem with the Case or Controversy Clause because the dispute is conceptualized as being moral and political, rather than legal. "[T]he 'facts and circumstances of each case must be weighted to determine whether the conscience and honor of the sovereign dictate that the plaintiff should receive compensation that is not recoverable under a legal cause of action.'" Bisanz, *supra* note 241, at 469 (quoting *Fass v. United States*, Cong. Ref. No. 1-76, slip op. at 19 n.13 (Ct. Cl. Jan. 5, 1978)).

²⁴⁹ 28 U.S.C. § 1491(a)(2) (2006).

²⁵⁰ 28 U.S.C. § 1491(b)(1)–(2).

²⁵¹ 28 U.S.C. § 1295(a)(3) (2006).

Advantages of adopting such a model include specialization and political accountability. Hybrid courts should have legitimacy; so care should be taken to choose the most qualified individuals, rather than individuals for their particular ideology.

One advantage of having specialized Article I courts to adjudicate treaty-based claims is that the courts could be staffed with human rights experts, including scholars and human rights litigators. These experts would be best qualified to help develop jurisprudence in this emerging area of the law with well-written and well-reasoned opinions. Human rights law would get a “jump start” if professionals, who are experts in the field, are crafting opinions on how U.S. treaties should be implemented. These experts would have knowledge of how the same or similar treaties have been interpreted by regional human rights tribunals, like the African Court on Human and People’s Rights, the European Court for Human Rights, and the Inter-American Commission on Human Rights. This would decrease training time, enable judges to direct cases in an efficient and effective manner, and foster more legally accurate and sophisticated opinions.

Having judges serve for a specified period of time, rather than for life, increases the probability of such a court being created by Congress. Many members of the American public and Congress are deeply skeptical of “anything international” and will balk at anything resembling its application within the United States, even though Article VI of the Constitution clearly states that treaties are the “Law of the Land.”²⁵² A measure of political accountability would defuse criticism of a detached legal global elite imposing their will on the American people.

However, political accountability could undermine meaningful enforcement of human rights. Human rights claims can be intensely controversial and produce immense political pressure on judges who do not have life tenure. After all, human rights claims would be brought against the government for failing to enforce its treaty obligations. Judges would be able to order local and state governments to expand public resources to bring the “system” into compliance with human rights treaties. As a result of the human rights courts’ rulings, every taxpayer would be footing the bill for remedying human rights violations. As such, political pressure could invade the judiciary’s impartiality. Judges may be hesitant to make legally correct, but politically unpopular decisions. The fear that Congress can hold the judges’ salaries hostage or that the public

²⁵² U.S. CONST. art. VI.

can start campaigns to have a judge removed may cripple a specialized human rights court in its nascent stages.

Worse yet is the potential for overt bias in favor of the government. One does not have to look far to see allegations of bias in favor of the government in existing “hybrid” courts. The U.S. Tax Court, another hybrid court established under Article I,²⁵³ is under constant criticism for being biased in favor of the government.²⁵⁴ Until the passage of the Tax Reform Act of 1969, the Tax Court was classified as an agency of the executive branch.²⁵⁵ “When the Commissioner of Internal Revenue has determined a tax deficiency, the taxpayer may dispute the deficiency in the Tax Court before paying any disputed amount.”²⁵⁶ The court consists of nineteen presidentially appointed judges, including a chief judge, who sit for a term of fifteen years, as well as a variety of other senior judges and special trial judges.²⁵⁷ Like Article III courts, decisions by the Tax Court may be appealed to the court of appeals in the circuit that the taxpayer resides.²⁵⁸

The chief judge of the Tax Court has authority to hire special trial judges. These judges are not appointed by the President and play limited roles. For example, they may issue declaratory judgments, hear disputes for less than \$50,000, and preside over hearings before a lien or levy is imposed.²⁵⁹ Special trial judges were intended to help expedite cases through the Tax Court system and to assist Tax Court judges appointed by the President.²⁶⁰

Some critics of the Tax Court argue that it is biased in favor of the government.²⁶¹ Professor Deborah Geier argues that “the bias may be so insidious as to be indiscernible to both the judges themselves as well as to the public.”²⁶² Scholars posit that, like other specialized Article I judges,

²⁵³ 26 U.S.C. § 7441 (2006).

²⁵⁴ See *infra* notes 261–66.

²⁵⁵ Christopher M. Pietruszkiewicz, *Conflating Standards of Review in the Tax Court: A Lesson in Ambiguity*, 44 HOUS. L. REV. 1337, 1342–43 (2008).

²⁵⁶ *About the Court*, U.S. TAX CT. (May 25, 2011), <http://www.ustaxcourt.gov/about.htm>.

²⁵⁷ 26 U.S.C. §§ 7443–7443A (2006).

²⁵⁸ 26 U.S.C. § 7482 (2006); *Ballard v. C.I.R.*, 544 U.S. 40, 51 (2005); Tax Ct. R. 190(a).

²⁵⁹ 26 U.S.C. § 7443A.

²⁶⁰ Pietruszkiewicz, *supra* note 255, at 1353–54.

²⁶¹ Deborah A. Geier, *The Tax Court, Article III, and the Proposal Advanced by the Federal Courts Study Committee: A Study in Applied Constitutional Theory*, 76 CORNELL L. REV. 985, 999 (1991).

²⁶² *Id.*

Tax Court judges “may be biased during their tenure because of concerns about post-judicial positions.”²⁶³

Alternatively, Associate Professor Andre Smith explains that bias in the Tax Court may be the result of over-familiarity between the government lawyers and Tax Court judges.²⁶⁴ He says that “any court which hears the government as a litigant in every case before it will eventually gain a familiarity with the government’s attorneys, and, thereby decide cases in their favor based on that familiarity.”²⁶⁵ While other scholars have rejected accusations of bias, even they acknowledge that the “statistics show that the government generally prevails in the Tax Court.”²⁶⁶

Given the potential for bias in hybrid courts, in formulating human rights hybrid courts, certain safeguards would have to be built. For example, one way to circumvent bias is to create term limits for human rights judges of a maximum of one or two appointments. This way, judges serving on this specialized court will know that during their time on the bench, they can act impartially without worrying about being the target of removal campaigns by those who oppose the court or disagree with their opinions. Similarly, the public will know when a judge’s term is up. This might dissuade them from starting removal campaigns for judges they do not like. Additionally, care must be taken to make appointments as apolitical as possible. Human rights law should not be a ping-pong match with new judges undermining jurisprudence developed by their predecessors.

The U.S. Federal Court of Claims and bankruptcy court models present an interesting hybrid approach that combines a degree of political insulation and accountability with specialization. Given the effectiveness of the bankruptcy courts and the Federal Court of Claims and the knowledge of the suspicions of bias generated by the Tax Court, it would seem that (with the proper protections in place) a hybrid system would be a viable forum for adjudicating treaty-based human rights claims.

²⁶³ Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111, 1171 n.173 (1990).

²⁶⁴ Andre L. Smith, *Deferential Review of Tax Court Decisions of Law: Promoting Expertise, Uniformity, and Impartiality*, 58 TAX LAW. 361, 380 (2005).

²⁶⁵ *Id.*

²⁶⁶ David Laro, *The Evolution of the Tax Court as an Independent Tribunal*, 1995 U. ILL. L. REV. 17, 25 (1995).

V. ADJUDICATING HUMAN RIGHTS CASES IN TRADITIONAL ARTICLE III COURTS

Although, with proper safeguards, the “hybrid” courts described above would process human rights claims effectively, ultimately, only Article III courts provide the right mix of political legitimacy (through Presidential appointment and Senate confirmation) and political insulation (life tenure) that is needed to truly remedy human rights violations.

Article III of the U.S. Constitution specifically states that Article III courts should adjudicate treaty-related claims: “[T]he judicial Power [of the United States] shall extend to all Cases . . . arising under this Constitution, the Laws of the United States, *and Treaties made, or which shall be made*, under their Authority.”²⁶⁷ Although Article III federal courts have limited jurisdiction (as compared to state courts),²⁶⁸ they are in a much better position to interpret, apply, and adjudicate matters arising from treaties than Article I administrative courts. To effectively enforce human rights treaties, “the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues”²⁶⁹ are needed.

Notably, history supports adjudication of human rights treaty violations in the federal court system rather than in fifty separate state court systems. From the inception of the United States under the Articles of Confederation to the formation of the U.S. Constitution, history shows that the federal court system was, in part, created to enforce national prerogatives over state interests.

Under the Articles of Confederation, John Jay, America’s second Secretary of Foreign Affairs, dealt with a continuous stream of British complaints about the newly-formed states’ non-compliance with the 1783 Treaty of Paris, which ended the American Revolutionary War with Great Britain.²⁷⁰ Many states enacted laws that conflicted with the peace treaty, which were impeding the United States’ efforts to enter into commercial agreements with Britain, France, and Spain.²⁷¹ Jay expressed his displeasure with Congress and offered a three-part proposal: “(1) National

²⁶⁷ U.S. CONST. art. III, § 2 (emphasis added).

²⁶⁸ Brooke L. Myers, *Treaties and Federal Question Jurisdiction: Enforcing Treaty-Based Rights in Federal Court*, 40 LOY. L.A. L. REV. 1449, 1478 (2007).

²⁶⁹ *Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg.*, 545 U.S. 308, 312 (2005) (citing A.L.I., *STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS* 164–66 (1968)).

²⁷⁰ John Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUMBIA L. REV. 1955, 2018–19 (1999).

²⁷¹ *Id.* at 2017–18.

sovereignty was vested in Congress, not the states; (2) state laws inconsistent with national treaties were invalid; [and] (3) state courts were to arrest the operation of state laws that were in conflict with treaties.”²⁷²

The Continental Congress adopted Jay’s request as three separate resolutions and asked the states to comply.²⁷³ Some states repealed laws that conflicted with the Treaty of Paris, while others refused to do so.²⁷⁴ The federal government was too weak to force the issue with recalcitrant states.²⁷⁵ This inability to enforce treaties contributed to the calling of the Constitutional Convention, where the foundations of the federal court system were created.²⁷⁶

The weakness of the federal government’s ability to enforce treaties under the Articles of Confederation was ameliorated by the ratification of the U.S. Constitution. Alexander Hamilton, in making the case for the new Constitution, in Federalist Paper No. 81, advocated for the need of a federal court system:

[T]he most discerning cannot foresee how far the prevalency of a local spirit may be found to disqualify the local tribunals for the jurisdiction of national causes; whilst every man may discover, that courts constituted like those of some of the States would be improper channels of the judicial authority of the Union. State judges, holding their offices during pleasure, or from year to year, will be too little independent to be relied upon for an inflexible execution of the national laws. And if there was a necessity for confiding the original cognizance of causes arising under those laws to them, there would be a correspondent necessity for leaving the door of appeal as wide as possible. In proportion to the grounds of confidence in, or distrust of, the subordinate tribunals, ought to be the facility or difficulty of appeals. And well satisfied as I am of the propriety of the appellate jurisdiction, in the several classes of causes to which it is extended by the plan of the convention, I should consider everything calculated to give, in practice, an *unrestrained course* to appeals, as a source of public and private inconvenience.²⁷⁷

Hamilton also argued in Federalist Paper No. 80 that a federal court

²⁷² *Id.* at 2019.

²⁷³ *Id.*

²⁷⁴ *Id.* (“Seven states did pass such laws, all but one of them from the North, which had the most to gain from a more centralized treaty power. All but one of the Southern states that had opposed the change in Jay’s negotiating instructions refused.”).

²⁷⁵ *Id.* at 2019–20.

²⁷⁶ *Id.*

²⁷⁷ THE FEDERALIST NO. 81 (Alexander Hamilton); *see also* Yoo, *supra* note 270, at 2018 (These views were also shared by John Jay.).

system would be better equipped to interpret national laws in a uniform manner:

The mere necessity of uniformity in the interpretation of the national laws, decides the question. Thirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government from which nothing but contradiction and confusion can proceed.²⁷⁸

The history necessitating the formation of federal courts, in part to enforce treaties and to interpret them uniformly, still applies today. Human rights treaties not only lay out the federal government's obligations to its citizens to protect their most basic human needs, but they also serve American interests in the international sphere. Human rights treaties show that the United States does not consider itself above the law and that it abides by the same principles as other signatories of human rights treaties. As a signatory of a human rights treaty, the United States signals to the world its intentions for harmonious international relations.²⁷⁹

This international relationship is particularly important at this point in our nation's history, where the United States is still trying to recover its global standing as a defender of human rights in the aftermath of revelations of torture committed in conjunction with the U.S. wars in Afghanistan and Iraq, as well as with the use of lethal drone strikes against both American citizens and foreign nationals who have neither been accused nor convicted of any crime.²⁸⁰ Philip Bobbitt, a constitutional law and national security scholar, notes that strengthening human rights is critical for the security of the democratic nations in the fight against global terrorism.

[W]e are beginning to see . . . that the security of democratic societies, the centrality of human rights, and the vitality of consensual international institutions are critical to combating terror. None can flourish in an

²⁷⁸ THE FEDERALIST NO. 80 (Alexander Hamilton); see also *Baldwin v. Franks*, 120 U.S. 678, 682–83 (1887) (“That the treaty-making power has been surrendered by the states, and given to the United States, is unquestionable. It is true, also, that the treaties made by the United States, and in force, are part of the supreme law of the land, and that they are as binding within the territorial limits of the states as they are elsewhere throughout the dominion of the United States.”).

²⁷⁹ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 703 (1987) (“A state party to an international human rights agreement has, as against any other state party violating the agreement, the remedies generally available for violation of an international agreement, as well as any special remedies provided by the agreement.”).

²⁸⁰ Jo Becker & Scott Shane, *Secret 'Kill List' Proves a Test of Obama's Principles and Will*, N.Y. TIMES (May 29, 2009), <http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html?pagewanted=all>.

atmosphere of terror, and each has a critical role in defeating this threat to governments that are based on consent. Robust democracies that enforce human rights guarantees and vigorous global institutions that support human rights will not of themselves assure victory in the Wars against Terror. Without them, however, we will surely lose that conflict.²⁸¹

Certainly, international human rights, as embodied by enforceable human rights treaties, would play an important role toward securing these goals.

The federal courts are better equipped to handle the subject matter and nature of human rights treaties because they have a long history of interpreting the Constitution, enforcing civil rights violations, and adjudicating claims under the ATS.

A. FEDERAL CIVIL RIGHTS ADJUDICATION IS SIMILAR TO ADJUDICATING VIOLATIONS OF HUMAN RIGHTS TREATIES

Federal courts are best suited to handle human rights treaty violations because the subject matter of human rights treaties is similar to that of civil rights. Although claims alleging violations of the U.S. Constitution can be brought in state court,²⁸² litigants preferred to use the federal courts during the Civil Rights Era of the 1960s and 1970s because Article III federal courts were more receptive to civil rights claims than state courts. Since the inception of modern civil rights litigation under § 1983 in the Supreme Court case of *Monroe v. Pape*,²⁸³ federal courts have heard thousands of civil rights cases and interpreted the scope of rights enumerated in the Constitution. Those civil rights are similar in importance and scope to the rights codified in human rights treaties.

For example, the Universal Declaration of Human Rights guarantees “freedom of opinion and expression,” as well as “the right to freedom of thought, conscience and religion.”²⁸⁴ These rights are similar to the free speech and religious liberties protected by the First Amendment of the U.S. Constitution.²⁸⁵ Along the same lines, the International Convention on the Elimination of All Forms of Racial Discrimination aims to

²⁸¹ PHILIP BOBBITT, *TERROR AND CONSENT: THE WARS FOR THE TWENTY-FIRST CENTURY 20* (Alfred A. Knopf, Random House, Inc. 2008) (2009).

²⁸² *See, e.g., Danforth v. Minnesota*, 552 U.S. 264 (2008) (holding that state courts can impose remedies for violations of federal constitutional rights that are greater than those imposed by the U.S. Supreme Court).

²⁸³ *Monroe v. Pape*, 365 U.S. 167 (1961).

²⁸⁴ Universal Declaration of Human Rights, *supra* note 158, at art. 18–19.

²⁸⁵ U.S. CONST. amend. I.

eradicate racial discrimination, sharing the goal of the Equal Protection Clause of the Fourteenth Amendment.²⁸⁶ The International Covenant on Civil and Political Rights guarantees a broad array of rights. For example, Article 8 prohibits slavery and other forms of forced labor, paralleling the Thirteenth Amendment to the U.S. Constitution.²⁸⁷ Article 26 of the International Covenant on Civil and Political Rights (like the International Convention on the Elimination of All Forms of Racial Discrimination) guarantees all persons the “equal protection of the law,” just like the Equal Protection Clause.²⁸⁸ The Convention Against Torture prohibits “cruel, inhuman or degrading treatment or punishment,”²⁸⁹ just as the Eighth Amendment and the International Covenant on Civil and Political Rights²⁹⁰ both prohibit “cruel and unusual punishment.”²⁹¹ While the rights guaranteed by human rights treaties ratified by the United States do not always mirror civil rights, both sets of rights are similar enough in scope that federal judges would feel that they are on familiar footing in interpreting human rights treaties.²⁹²

The ease with which federal courts would be able to interpret human rights treaties is underscored by the Supreme Court’s recent interest in international law and its relationship to constitutional interpretation. In *Lawrence v. Texas*, the Court struck down a Texas sodomy law by relying

²⁸⁶ International Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 20; U.S. CONST. amend. XIV, § 1, cl. 2.

²⁸⁷ International Covenant on Civil and Political Rights, *supra* note 19.

²⁸⁸ *Id.*

²⁸⁹ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art. 16, June 26, 1987, available at <http://www2.ohchr.org/english/law/cat.htm>.

²⁹⁰ International Covenant on Civil and Political Rights, *supra* note 19.

²⁹¹ U.S. CONST. amend. VIII.

²⁹² While the scope of various civil and human rights may be similar, Kimberlianne Podlas notes that:

As opposed to the state and federal constitutional provisions, the Human Rights Law appears to grant positive rights rather than merely negative rights. Negative rights restrict a state from acting in a certain manner.

American jurisprudence has traditionally been concerned with negative rights. Many civil liberties are negative rights.

By contrast, positive or affirmative rights create an obligation on the part of the state and entitle individuals to demand such obligations from the state.

Kimberlianne Podlas, *A New Sword to Slay the Dragon: Using New York Law to Combat Environmental Racism*, 23 FORDHAM URB. L.J. 1283, 1307–08 (1996). Compare, e.g., U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech”), with Universal Declaration of Human Rights, *supra* note 158 (“human beings shall enjoy freedom of speech”).

in part on a decision of the European Court of Human Rights.²⁹³ Justice Kennedy, writing for the majority, noted that *Bowers v. Hardwick*,²⁹⁴ a previous Supreme Court decision that upheld the constitutionality of Georgia sodomy laws, was at odds with the European Court of Human Rights decision in *Dudgeon v. United Kingdom*.²⁹⁵ Justice Kennedy pointed out that, along with the many American states that had already repealed laws proscribing sodomy, the forty-five European nations subscribing to the European Court of Human Rights also proscribe laws making sodomy illegal.²⁹⁶ This international law, in part, persuaded Justice Kennedy to conclude that “*Bowers* was not correct when it was decided, and it is not correct today. . . . *Bowers v. Hardwick* should be and now is overruled” as violating the Constitution.²⁹⁷ As Justice Breyer has stated, when an international or foreign court “writes an opinion on the subject, why not read it. It doesn’t bind me, but maybe I’ll learn something.”²⁹⁸

Referencing international law and the laws of other nations, the Supreme Court, in *Atkins v. Virginia*²⁹⁹ and *Roper v. Simmons*,³⁰⁰ did away with capital punishment sentences for crimes committed by the mentally ill and children under the age of eighteen. Even more recently, the Supreme Court in *Graham v. Florida* found that minors (who did not

²⁹³ *Lawrence v. Texas*, 539 U.S. 558, 576–77 (2003).

²⁹⁴ *Bowers v. Hardwick*, 478 U.S. 186 (1986).

²⁹⁵ *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (1981).

²⁹⁶ *Lawrence*, 539 U.S. at 573.

²⁹⁷ *Id.* at 578.

²⁹⁸ *Due Process—Justice Breyer: On Democracy Part II (Aired 6/19/11)*, YOUTUBE (uploaded Nov. 7, 2011), <http://www.youtube.com/watch?v=Adwm7JiEsPM>.

²⁹⁹ *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (“Moreover, within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved. Finally, polling data shows a widespread consensus among Americans, even those who support the death penalty, that executing the mentally retarded is wrong. Although these factors are by no means dispositive, their consistency with the legislative evidence lends further support to our conclusion that there is a consensus among those who have addressed the issue.”) (internal citations omitted).

³⁰⁰ *Roper v. Simmons*, 543 U.S. 551, 576 (2005) (citing Article 37 of the United Nations Convention on the Rights of the Child even though the United States has not ratified it). Of note, the petitioner’s argument that an American reservation to the International Covenant on Civil and Political Rights preserving the government’s pursuit of capital punishment for juveniles failed. “This reservation at best provides only faint support for petitioner’s argument. First, the reservation was passed in 1992; since then, five States have abandoned capital punishment for juveniles. Second, Congress considered the issue when enacting the Federal Death Penalty Act in 1994, and determined that the death penalty should not extend to juveniles.” *Id.* at 567.

commit murder) could not be sentenced to life in jail.³⁰¹ In all three cases, the Supreme Court looked to international law and the consensus of other nations in interpreting the Eighth Amendment's "cruel and unusual punishment" clause.³⁰²

B. SINCE 1980, FEDERAL COURTS HAVE INTERPRETED CUSTOMARY INTERNATIONAL HUMAN RIGHTS NORMS, MANY OF WHICH ARE CODIFIED IN HUMAN RIGHTS TREATIES

Federal courts are best suited for interpreting human rights treaties because they have experience interpreting human rights norms akin to those enumerated in human rights treaties. For over thirty years, since the first human rights case *Filártiga v. Peña-Irala*³⁰³ was brought under the ATS,³⁰⁴ federal courts (including the Supreme Court in *Sosa v. Alvarez-Machain*³⁰⁵) identified and interpreted the meaning of customary international human rights norms. As such, a body of law already exists from which federal courts can draw in interpreting treaty obligations.

Even though the Supreme Court found in *Kiobel* that human rights abuses that occur extraterritorially, except in rare instances, can no longer be litigated in federal courts under the ATS,³⁰⁶ the body of jurisprudence

³⁰¹ *Graham v. Florida*, 560 U.S. 48, 81–82 (2010) ("Thus, as petitioner contends and respondent does not contest, the United States is the only Nation that imposes life without parole sentences on juvenile nonhomicide offenders. We also note, as petitioner and his amici emphasize, that Article 37(a) of the United Nations Convention on the Rights of the Child, ratified by every nation except the United States and Somalia, prohibits the imposition of 'life imprisonment without possibility of release . . . for offences committed by persons below eighteen years of age.'") (internal citations omitted).

³⁰² *Atkins*, 536 U.S. at 316, n.21 ("within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved"); *Roper*, 543 U.S. at 575 ("the laws of other countries and to international authorities [are] instructive for [the Court's] interpretation of the Eighth Amendment's prohibition of 'cruel and unusual punishments'"); *Graham*, 130 S. Ct. at 2034 ("the Court has treated the laws and practices of other nations and international agreements as relevant to the Eighth Amendment . . . because the judgment of the world's nations that a particular sentencing practice is inconsistent with basic principles of decency demonstrates that the Court's rationale has respected reasoning to support it").

³⁰³ *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980).

³⁰⁴ Alien Tort Claims Act (ACTA), 28 U.S.C. § 1350 (2006) ("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."). Because the ATCA allows only aliens to sue for human rights violations, it is not an effective tool for domestic enforcement of human rights for citizens.

³⁰⁵ *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

³⁰⁶ *Kiobel v. Royal Dutch Petroleum*, 133 S. Ct. 1659, 1699 (2013).

that has developed around the ATS, interpreting the parameters of substantive human rights norms, is still good law and will be instrumental in litigating treaty-related cases domestically. That is because customary international human rights norms, while not derived directly from treaties, are often identical to rights created by treaties.

Indeed, treaty law plays a significant role in establishing customary law: it may influence or facilitate the creation of new customary law.³⁰⁷ Treaty law often codifies existing customary international law norms.³⁰⁸ This does not mean, however, that all customary international norms are embodied in treaties.³⁰⁹ But, it does mean that when treaties universally condemn an action, there is strong evidence that the action being condemned violates a norm of customary international law.³¹⁰ Customary international law comprises rules that are “evidence of a general practice accepted as law.”³¹¹ According to the *Restatement (Third) of Foreign Relations Law*, customary international law “results from a general and consistent practice of states [which is] followed by them from a sense of legal obligation.”³¹² “The customary international law of human

³⁰⁷ See *Filártiga*, 630 F.2d at 883 (noting that the “international consensus surrounding torture has found expression in numerous international treaties”).

³⁰⁸ Timothy F. Malloy, *Disentangling Treaty and Customary International Law*, 81 AM. SOC'Y INT'L L. PROC. 157, 157 (1987).

³⁰⁹ *Id.*

³¹⁰ See generally Memorandum for the United States as Amicus Curiae at 589–90, *Filártiga v. Peña-Irala*, 630 F.2d 876 (1980) (No. 79-6090), 1980 WL 115519 (asserting that provisions in charters and international customs are representative of a general sentiment).

³¹¹ Statute of the International Court of Justice art. 38(1)(b), June 26, 1945, 59 State. 1055, 1060 (1945), available at <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0&>. The International Court of Justice (ICJ), also known as the “World Court,” was established in 1945 by the Charter of the United Nations. It is the judicial organ of the United Nations and it sits permanently at the Hague. The ICJ hears cases between states and/or intergovernmental organizations. (Individuals or non-governmental organizations may not bring cases before the ICJ.) *The Court*, INT'L CT. JUST., <http://www.icj-cij.org/court/index.php?p1=1> (last visited Feb. 14, 2014). The jurisdiction of the ICJ “comprises all cases which the parties refer to it and all matters specifically provided for in the Charter of the United Nations or in treaties and conventions in force.” Statute of the International Court of Justice, *supra*, at art. 36(1). These cases range from human rights violations such as genocide, to law of the sea disputes. One of the cases adjudicated by the ICJ includes *Nicaragua v. United States*, 1984 I.C.J. 392, reprinted in 24 I.L.M. 59 (1985).

Each member state to the U.N. Charter agrees to comply with ICJ decisions. The court may award damages and provide other forms of relief. HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT* 637 (1996). The judgment of the ICJ is binding on litigants. If any party defies the ICJ's judgment, the winning party may seek recourse before the U.N. Security Council. U.N. Charter art. 94, reprinted in STEINER & ALSTON, *supra*, 1148, 1155.

³¹² RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102(2) (1987).

rights . . . creates obligations by each state to all other states (*erga omnes*), so that a violation by a state of the rights of persons subject to its jurisdiction is a breach of obligation to all other states.”³¹³ A state is bound by a customary international law norm when quantitative and qualitative conditions are met: the state (through its practice) adopts the norm and the state has a legal obligation to follow the norm (“*opinio juris sive necessitatis*”).³¹⁴ Thus, customary international law has the same binding effect on countries as treaty law. Countries are bound by customary international law regardless of the presence of a treaty codifying a particular international law norm.³¹⁵

Norms of customary international law, such as the right to be free from cruel, inhuman, or degrading treatment, that have been interpreted by U.S. federal courts³¹⁶ also appear in human rights treaties ratified by the United States.³¹⁷ Thus, courts can draw upon this ATS jurisprudence in interpreting treaties.

Additionally, just as the Supreme Court has done recently in *Lawrence, Atkins, and Graham*, federal courts can draw from the jurisprudence of international tribunals to interpret treaty provisions.³¹⁸

C. FEDERAL COURTS ARE MORE LIKELY TO INTERPRET HUMAN RIGHTS TREATIES IN A UNIFORM MANNER

Federal courts are better suited for interpreting human rights treaties because they are more likely to interpret treaties in a uniform way. This stems from their experience balancing individual states’ concerns with federal concerns. Furthermore, with only twelve federal circuits—as opposed to fifty separate state court systems—uniformity would be easier to achieve.

In the landmark decision *Martin v. Hunter’s Lessee*, the Supreme Court held that it had ultimate authority over state courts in matters of federal law.³¹⁹ In its reasoning, the Supreme Court stated “the importance, and even necessity of *uniformity* of decisions throughout the whole United

³¹³ *Id.* § 701 n.3.

³¹⁴ Arthur M. Weisburd, *Customary International Law: The Problem of Treaties*, 21 VAND. J. TRANSNAT’L L. 1, 6 (1988).

³¹⁵ *Filártiga v. Peña-Irala*, 630 F.2d 876, 877 (2d Cir. 1980).

³¹⁶ *See, e.g., Jama v. INS*, 334 F. Supp. 2d 662 (D.N.J. 2004).

³¹⁷ International Covenant on Civil and Political Rights, *supra* note 19.

³¹⁸ *See, e.g., Filártiga*, 630 F.2d at 884 n.16.

³¹⁹ *Martin v. Hunter’s Lessee*, 14 U.S. 304 (1816).

States, upon all subjects within the purview of the constitution.”³²⁰ Although *Martin* is notable for establishing federal judicial review over state supreme court decisions, the decision makes clear that without uniformity, the laws of the United States can become ineffectual if they are interpreted in a conflicting and inconsistent manner from region to region.³²¹ Because human rights treaties are doctrines of international consensus demanding the enforcement of individual rights, inconsistent adjudication is not a risk worth taking. More importantly, the United States would endeavor to have a unified position in foreign affairs.

In 1920, the Supreme Court was very conscious of this issue. In *Missouri v. Holland*, the Court dealt with a treaty signed by the United States and Great Britain to protect migratory birds traveling through the United States and Canada.³²² The Supreme Court in *Holland* held that treaty provisions could not be opposed by the states because of their great importance to the federal government.³²³

[A] national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power. The subject matter is only transitorily within the State and has no permanent habitat therein. But for the treaty and the statute there soon might be no birds for any powers to deal with. We see nothing in the Constitution that compels the Government to sit by while a food supply is cut off and the protectors of our forests and our crops are destroyed. It is not sufficient to rely upon the States. The reliance is vain, and were it otherwise, the question is whether the United States is forbidden to act. We are of opinion that the treaty and statute must be upheld.³²⁴

In short, there must be coordination between the states and the federal government in enforcing the United States' treaty obligations as expected by other nations.

In seeking enforcement of human rights treaties, plaintiffs will allege that the states and counties in which they live are not providing protections or benefits in accordance with the requirements laid out in the human rights treaties. The government defendants, in turn, will have to defend against those allegations. It seems that state courts may be disinclined or unwilling to adjudicate such serious allegations, particularly because of their international dimension. This is precisely why federal courts are best

³²⁰ *Id.* at 347–48.

³²¹ *Id.* at 348.

³²² *Missouri v. Holland*, 252 U.S. 416 (1920).

³²³ *Id.* at 435.

³²⁴ *Id.*

sued to hear claims of treaty violations.

Furthermore, the uniformity of federal court decisions will help to overcome the traditional fears “that state courts would be more hostile to the adjudication of federal interests.”³²⁵ In a dissenting opinion to *Merrell Dow Pharmaceuticals Inc. v. Thompson*, Justice William J. Brennan discussed how Congress sought to confer original federal question jurisdiction on the district courts because of “its belief that state courts are hostile to assertions of federal rights.”³²⁶ This is especially important when dealing with human rights treaties, given the outright hostility expressed toward international law by state and federal legislatures. In the face of this opposition, to truly cement human rights law into our national consciousness, courts must speak as uniformly as possible in creating treaty-based human rights jurisprudence.

Because a treaty imposes international obligations on the federal government, the federal court system is best positioned to interpret these obligations consistent with both United States and international law. This will not only help domestic litigants who are trying to vindicate their rights, but it will also calm the fears of other nation signatories. Without uniform judgments, the diplomatic relations between the federal government and the other signatories can be adversely affected.

D. ADJUDICATING HUMAN RIGHTS CASES THROUGH SPECIALIZED ARTICLE III COURTS

Although Article III courts are more likely than Article I courts to yield consistent results in adjudicating treaty-based human rights claims, there is still a possibility of non-uniformity. To ensure the highest level of uniformity for human rights decisions, Congress could model an international human rights court on the U.S. Court of International Trade (USCIT). Created in 1980, the USCIT is the only national trial court

³²⁵ Myers, *supra* note 268, at 1479; see also Alan D. Hornstein, *Federalism, Judicial Power and the “Arising Under” Jurisdiction of the Federal Courts: A Hierarchical Analysis*, 56 IND. L.J. 563, 564–65 (1981), available at <http://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=3551&context=ilj>.

³²⁶ *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, 826–27 n.6 (1986) (Brennan, J., dissenting) (“Although this concern may be less compelling today than it once was, the American Law Institute reported as recently as 1969 that ‘it is difficult to avoid concluding that federal courts are more likely to apply federal law sympathetically and understandingly than are state courts.’ In any event, this rationale is, like the rationale based on the expertise of the federal courts, simply an expression of Congress’ belief that federal courts are more likely to interpret federal law correctly.”) (internal citations omitted); see also *Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg.*, 545 U.S. 308, 313 (2005).

established under Article III.³²⁷ Congress created the USCIT to handle increasing complex international trade issues and to fix the jurisdictional problems of the USCIT's precursor—the U.S. Customs Court.³²⁸ The USCIT has subject matter jurisdiction over civil suits that arise out of agency actions on import transactions.³²⁹ Although it ordinarily sits in New York City, it has geographical jurisdiction throughout the United States and the authority to sit anywhere in the United States, as well as to hold hearings in foreign countries.³³⁰

The court consists of nine judges who are nominated by the President and confirmed by the Senate.³³¹ Interestingly, Congress “required that no more than five of them be of the same political party affiliation.”³³² The Chief Justice of the U.S. Supreme Court can temporarily assign any USCIT judge to perform judicial duties in a court of appeals or a district court.³³³ Decisions of the USCIT can be appealed to the U.S. Court of Appeals for the Federal Circuit and, from there, to the Supreme Court.³³⁴

The main benefits of having such a specialized court that hears all human rights cases is that a clear and consistent jurisprudence will develop. This is particularly important in the early stages of treaty interpretation. Litigants—both the victims and the governments they sue—will benefit tremendously from having a clear sense of the government's treaty obligations.

But, specialization is not without its problems, as demonstrated by the USCIT itself. Although Congress sought to rectify the jurisdictional headaches caused by the piecemeal authorization legislation of the Customs Court,³³⁵ the USCIT still has problems fitting into the

³²⁷ *About the Court*, U.S. CT. INT'L TRADE (Dec. 3, 2013), <http://www.cit.uscourts.gov/AboutTheCourt.html>.

³²⁸ *Id.*

³²⁹ *Id.*

³³⁰ *Id.*

³³¹ *Id.*

³³² *History of the Federal Judiciary: U.S. Court of International Trade, 1980–*, FED. JUD. CENTER, http://www.fjc.gov/history/home.nsf/page/courts_special_cit.html (last visited Feb. 14, 2014).

³³³ *About the Court*, *supra* note 327.

³³⁴ *Id.*

³³⁵ Former USCIT Judge, Gregory W. Carman, points out the reason for the necessary change:

Many lawsuits involving international trade issues were commenced in the federal district court instead of the United States Customs Court because it was difficult to determine in advance whether a particular case fell within

infrastructure of the Article III judiciary. Gregory W. Carman, a former USCIT judge remarked six years after that court's reorganization that

there continues to be considerable jurisdictional confusion between the Court of International Trade and the federal district courts. This confusion has impeded the availability of judicial review in the field of international trade where the goals of national uniformity and expeditious resolution of disputes, although worthy objectives, appear to be evanescent.³³⁶

These problems likely stem from having dueling jurisdictional statutes. For example, the USCIT has sole jurisdiction over federal government claims to recover customs duties,³³⁷ while the federal district courts are entitled to hear suits against the government.³³⁸ Thus, if Congress were to create a special Article III human rights court modeled after the USCIT, the statute would need to make clear that all claims based on international human rights treaties must be heard solely by the designated special Article III court. This jurisdiction problem is minor, however, compared to the benefit of consistency that a specialized Article III human rights court would offer.

Having a singular judicial seat poses other challenges for a human rights court. Human rights treaties, unfortunately, are likely to be violated throughout the United States. Forming a specialized court, stationed in a single locality, would burden human rights victims. Many human rights victims would find it difficult, if not impossible, to present their case in a

the jurisdictional scope of the Customs Court and because powers of the Customs Court were limited. Most district courts refused to entertain such suits, citing the constitutional mandate requiring that duties be uniform throughout the United States, thus endeavoring to preserve the congressional grant of exclusive jurisdiction to the United States Customs Court for judicial review of all matters relating to imports. The result was inconsistent judicial decisions, with litigants proceeding with caution when choosing a forum for judicial review. Furthermore, the type of relief available was greatly dependent upon the plaintiff's ability to persuade a court that it possessed jurisdiction over a particular case. Some individuals obtained relief, while others, who by chance selected the wrong forum, were denied relief.

Gregory W. Carman, *Jurisdiction and the Court of International Trade: Remarks of the Honorable Gregory W. Carman at the Conference on International Business Practice Presented by the Center for Dispute Resolution on February 27–28, 1992*, 13 NW. J. INT'L L. & BUS. 245, 247–48 (1992), available at <http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1357&context=njilb>.

³³⁶ *Id.* at 250.

³³⁷ Customs Courts Act of 1980, 28 U.S.C. § 1581 (2006).

³³⁸ See False Claims Act of 1986 (FCA), 31 U.S.C. §§ 3729–3732 (2006).

centralized location. Even if the human rights court has the ability to move around, the logistics of moving the court to hear every new case in its geographic location would be impossible. Very few qualified individuals would volunteer to sit on the court if it is itinerant. Likewise, having every litigant and witness travel to one part of the country where the human rights court sits is highly problematic.

Not surprisingly, the policy rationales behind both venue and *forum non-conveniens* requests make sense. In determining proper venue for a federal case, one factor to be considered is where the cause of action arose or accrued.³³⁹ This keeps costs down and is far more convenient for parties to the case as all factually relevant evidence is nearby. Because treaty-based human rights violations will most likely occur in multiple districts across the United States, it seems much more practical to employ the broad blanket of the federal court system. Human rights issues are likely to be linked to local issues that are regularly handled by the federal district courts in the particular locales. Moreover, treaty-based human rights claims will be brought in an effort to get state and local governments to comply with their treaty obligations. Given that these judicial decisions may be very controversial, it makes more sense for Article III judges that are already a part of the fabric of a particular locale to authorize orders ending human rights violations.

E. THE HUMAN RIGHTS APPEALS PROCESS IN THE ARTICLE III COURT CONTEXT

Traditional Article III trial courts hear human rights violation claims in the first instance. There must also be an appeals process to correct errors and establish uniform interpretations of law. There are two alternative models for appeals: first, the federal circuit courts of appeals could be employed just as they would be in any other Article III litigation; second, a single court of appeals, similar to the Court of Appeals for the Federal Circuit, could handle all human rights appeals from the district courts around the country. The advantages and disadvantages of these contrasting models are discussed below.

³³⁹ 28 U.S.C. § 1391(b)(2) (2006).

1. Using the Current System: Regional Circuit Courts of Appeals

Under the standard Article III model, the nation is divided into twelve geographic circuits.³⁴⁰ All district court judgments within the circuit may be appealed to the court of appeals for that circuit.³⁴¹ The 179 court of appeals judges³⁴² wield tremendous power to shape the law and only a small percentage of their opinions are reviewed by the Supreme Court.

One advantage of this model is the ability to hear many different kinds of appeals. Because there are twelve separate circuits and 179 appellate judges,³⁴³ an appeal brought in any given circuit has a greater chance of being heard than if it were brought under a national appellate system with a single court.³⁴⁴ As long as human rights claims are few and far between, there is no need for a broader appeals system; but if such claims become common, a unified national system could find itself overwhelmed and forced into denying appeals that have merit.

Additionally, this model enables each circuit to develop its own jurisprudence consistent with regional interests and concerns, while also taking into consideration the experience and decisions of other circuits. This more traditional appeals process allows for extended time for evaluation and communication between the circuits. Arguments are heard by a wide array of judges from different parts of the country, each whose perspective is formed, in part, by the customs and flavors of his or her region. This marketplace of ideas allows legal theories to be tried and tested for years or decades before a national rule is adopted by consensus of the circuits or by a Supreme Court decision. While this process can be

³⁴⁰ *Federal Courts' Structure*, U.S. CTS., <http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/FederalCourtsStructure.aspx> (last visited Feb. 14, 2014). There are eleven numbered circuits in addition to the D.C. circuit. There are also a number of specialized federal trial and appellate courts, such as the bankruptcy courts and appellate panels, the Court of Federal Claims, and the Court of Appeals for the Federal Circuit.

³⁴¹ 28 U.S.C. § 1291 (2006).

³⁴² *Table 1.1, Total Judicial Officers—Courts of Appeals, District Courts, and Bankruptcy Courts*, U.S. CTS., <http://www.uscourts.gov/uscourts/Statistics/JudicialFactsAndFigures/2010/Table101.pdf> (last visited Feb. 14, 2014).

³⁴³ 28 U.S.C. § 44 (2006).

³⁴⁴ *Compare Table 2.1, U.S. Courts of Appeals—Appeals Filed, Terminated, and Pending (Summary)*, U.S. CTS., <http://www.uscourts.gov/uscourts/Statistics/JudicialFactsAndFigures/2010/Table201.pdf> (last visited Feb. 14, 2014) (showing that the regional circuit courts of appeals had a combined 55,992 cases filed in 2010), *with Table 3.1, U.S. Court of Appeals for the Federal Circuit—Appeals Filed, Terminated, and Pending*, U.S. CTS., <http://www.uscourts.gov/uscourts/Statistics/JudicialFactsAndFigures/2010/Table301.pdf> (last visited Feb. 14, 2014) (showing that the national Court of Appeals for the Federal Circuit had only twelve judges and 1208 cases filed in 2010).

frustratingly slow, the robust national judicial discourse through appellate decisions increases both the quality and the legitimacy of legal reasoning. As Justice Ginsburg explained, “when frontier legal problems are presented, periods of ‘percolation’ in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by [the Supreme] Court.”³⁴⁵

This model has many strong suits, but for an emerging body of law that will deal with the most horrendous abuses, it is not necessarily the best. Because each circuit has the power to create binding precedent within its own jurisdiction, having twelve circuit courts of appeals hear human rights cases could result in splits between the courts and divergent interpretations of human rights law. It would be somewhat peculiar if an international treaty had different binding interpretations in New York, Texas, and California. Such divergence could complicate international relations and lead to unequal results for litigants depending on what circuit their suit is brought.³⁴⁶ For these reasons, it makes more sense for a national appellate court to hear all human rights cases, at least initially.

2. Creating a Specialized Circuit Court of Appeals to Hear Human Rights Cases

All appeals of treaty-based district court decisions could be heard by a circuit court of appeals specifically designated to hear human rights claims. The decisions of that specialized human rights court could act as precedent for all district courts presiding over treaty-based human rights

³⁴⁵ *Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting). This process of judicial “percolation” has been both lauded and criticized. See generally Todd J. Tiberi, *Supreme Court Denials of Certiorari in Conflicts Cases: Percolation or Procrastination?*, 54 U. PITT. L. REV. 861 (1993) (analyzing the process of percolation). Compare *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 918 (1950) (“It may be desirable to have different aspects of an issue further illumined by the lower courts. Wise adjudication has its own time for ripening.”), with William H. Rehnquist, *The Changing Role of the Supreme Court*, 14 FLA. ST. U. L. REV. 1, 12 (1986) (“Congress should not be held to have laid down one rule in North Carolina and another rule in North Dakota simply because the Court of Appeals for the Fourth Circuit and the Court of Appeals for the Eighth Circuit disagree with one another on the meaning of a federal statute.”).

³⁴⁶ For example, assume that the Second and Third Circuits are split on whether a consular notification treaty is self-executing. Alice is a foreign national who resides in New York a few feet north of the border with New Jersey. Bob is also a foreign national, but he resides in New Jersey a few feet south of the border with New York. Alice and Bob are detained on criminal charges and neither state notifies their respective embassies. As a result of the circuit split, Alice is able to bring suit in federal court under the consular notification treaty, while Bob is barred from doing so. The specter of such circuit splits, and divergent results, raises fundamental questions of equality and fairness.

cases. Of course, the U.S. Supreme Court could have the ultimate say over human rights treaty implementation if litigants believed that the specialized human rights court misinterpreted a treaty provision. Examples for this model already exist, such as the U.S. Court of Appeals for the Federal Circuit, which has limited subject matter jurisdiction³⁴⁷ and normally handles appeals where the government is a party, such as appeals from Article I courts and a few specialized Article III courts.³⁴⁸

One major advantage of this approach would be uniform binding precedent and the elimination of circuit splits. This is particularly important given treaties' international and foreign policy dimensions. With only one court of appeals, treaties would be given a single interpretation within the United States. Moreover, this approach eliminates the risk of a "rogue" circuit that defies an otherwise national consensus. Such uniformity prevents the embarrassment of multiple judicial decisions and promotes equality and the rule of law by ensuring that the government (at all levels) and its employees are operating under the same set of rules and rights, regardless of regional boundaries. While federalism and state sovereignty play an important role in our domestic legal system, there is little reason that international law should vary from state to state or from city to city.

The specialized human rights appellate court must be well staffed to be effective. If the court is forced to pick and choose the most pressing and important appeals, less significant, but nonetheless meritorious appeals would go unheard. This could result in lower court errors going uncorrected or difficult legal questions not being given the full consideration they deserve. The appeals process exists not only to set uniform rules, but also to correct errors and provide reexamination of difficult legal questions.

Moreover, while a single national court may increase the speed and uniformity of decisions, at least one scholar posits that such advantages come at the cost of reducing much needed dialogue between the circuit courts of appeal.³⁴⁹ Accepting this premise as true, interpreting human rights treaties, at least initially, might be best served by having multiple appellate courts engaging with each other over how treaties should be interpreted and what remedy would work best within the United States.

³⁴⁷ 28 U.S.C. § 1295 (2006) (amended 2011).

³⁴⁸ *Id.*; see, e.g., 28 U.S.C. § 1346(a)(2) (2006) (amended 2011) (Little Tucker Act claims).

³⁴⁹ See Charles L. Black, Jr., *The National Court of Appeals: An Unwise Proposal*, 83 YALE L.J. 883, 892 (1974).

Protracted deliberation among the circuits does not guarantee a correct or ideal result, nor does it resolve human rights violations quickly. But, it does bring to the surface multiple perspectives and solutions that would assist the Supreme Court in its deliberations and decision making.³⁵⁰ As Judge Clifford Wallace has stated:

When circuits differ, they provide the reasoned alternatives from which the resolver of the conflict can derive a more informed analysis. The many circuit courts act as the “laboratories” of new or refined legal principles . . . providing the Supreme Court with a wide array of approaches to legal issues and thus, hopefully, with the raw material from which to fashion better judgments.³⁵¹

In sum, there are multiple models within the existing Article III infrastructure that would work well for enforcing human rights treaties. Both a specialized trial court and/or appellate court would give human rights issues the attention they deserve and would guarantee uniformity in interpreting treaties throughout the country. In the alternative, federal district courts could hear cases before they were sent to the specialized human rights appellate court. This would increase the number of human rights cases that can be heard and make it easier for victims to litigate their cases, as they can do so locally.

VI. THE BEST WAY TO STAFF ARTICLE III COURTS OVERSEEING HUMAN RIGHTS CASES

Federal judges at all levels today are overworked and the courts are grossly understaffed.³⁵² Further, the judicial nomination process has been held hostage by a divided and highly politicalized Congress, at great detriment to the public.³⁵³ Given that judges would be tasked with creating

³⁵⁰ Clifford Wallace, *The Nature and Extent of Intercircuit Conflicts: A Solution Needed for a Mountain or a Molehill?*, 71 CAL. L. REV. 913, 929 (1983).

³⁵¹ *Id.*

³⁵² See Andrew Blotky & April Carson, *Federal Judicial Emergencies* 1–2, CENTER FOR AM. PROGRESS (Feb. 20, 2012), http://www.americanprogress.org/issues/2012/02/pdf/judicial_emergencies.pdf; Andrew Blotky & Doug Kendall, *It's Senate's Duty to Confirm Judges*, POLITICO (Aug. 4, 2011), <http://www.politico.com/news/stories/0811/60585.html>; David L. Cook, et al, *Criminal Caseload in U.S. District Courts: More Than Meets the Eye*, 44 AM. U. L. REV. 1579, 1579–80 (1995); Boyce F. Martin, Jr., *In Defense of Unpublished Opinions*, 60 OHIO ST. L.J. 177, 177 (1999); Sarah E. Ricks, *A Modest Proposal for Regulating Unpublished, Non-Precedential Federal Appellate Opinions While Courts and Litigants Adapt to Federal Rule of Appellate Procedure 32.1*, 9 J. APP. PRAC. & PROCESS 17, 17 (2007).

³⁵³ Editorial, *Judges Needed for Federal Courts*, N.Y. TIMES (Dec. 12, 2012), http://www.nytimes.com/2012/12/13/opinion/judges-needed-for-federal-courts.html?_r=0 (“A

and developing treaty-based human rights law, it is particularly critical to devote sufficient resources to deciding legal issues involved in human rights cases.

According to the Center for American Progress, more than half of Americans are “living in a jurisdiction that has been declared a judicial emergency.”³⁵⁴ A judicial emergency at the district court level is “any vacancy where weighted filings are in excess of 600 per judgeship; [] any vacancy in existence more than 18 months where weighted filings are between 430 and 600 per judgeship; or any court with more than one authorized judgeship and only one active judge.”³⁵⁵ As of this writing, there are at least thirty judicial emergencies, several of which have lasted several years.³⁵⁶

Furthermore, since 1960, federal district courts have seen an “explosion” in their caseloads.³⁵⁷ Before 1960, the judiciary’s caseload grew at an average of 1.1 percent per year.³⁵⁸ Since then, the growth rate has increased to 2.9 percent per year.³⁵⁹ According to the Federal Judiciary, “[t]otal civil and criminal filings in the district courts rose 2 percent to 367,692 in FY 2011.”³⁶⁰

This caseload increase has raised concerns over the quality of justice administered by federal courts.³⁶¹ Judges have implemented a variety of

significant reason for the slowdown has been the partisan opposition of Republicans to appeals court and even to trial court nominations, even though almost none of the nominees have backgrounds that raise ideological issues. The Republicans have time and again used the filibuster, the threat of filibuster, holds on nominations and other tactics to block confirmations.”)

³⁵⁴ Blotky & Carson, *supra* note 352, at 1.

³⁵⁵ *Federal Emergencies*, U.S. CTS., <http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies/JudicialEmergencies.aspx> (last visited Feb. 14, 2014). According to the judiciary’s website, “weights are applied based on the nature of cases” and “[t]he total for ‘weighted filings per judgeship’ is the sum of all weights assigned to civil cases and criminal defendants, divided by the number of authorized judgeships.” *Id.* at n.1.

³⁵⁶ *Id.*

³⁵⁷ WILLIAM F. SHUGHART II & GOKHAN R. KARAHAN, A STUDY OF THE DETERMINANTS OF CASE GROWTH IN U.S. FEDERAL DISTRICT COURTS i (July 2003), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/204010.pdf>.

³⁵⁸ *Id.* at 23.

³⁵⁹ *Id.*

³⁶⁰ *Federal District Court Workload Increases in Fiscal Year 2011*, U.S. CTS. (Mar. 13, 2012), http://www.uscourts.gov/News/NewsView/12-03-13/Federal_District_Court_Workload_Increases_in_Fiscal_Year_2011.aspx.

³⁶¹ See, e.g., Stefanie A. Lindquist, *Bureaucratization and Balkanization: The Origins and Effects of Decision-Making Norms in the Federal Appellate Courts*, 41 U. RICH. L. REV. 659, 661 (2007).

their own reforms to keep up with the volume of work. For example, federal circuit court judges have eliminated oral arguments in some cases and issue “unpublished, non-precedential opinions” to expedite the process, raising concerns about the value of such opinions and the effect it has on U.S. jurisprudence.³⁶²

A. THE USE OF SENIOR STATUS JUDGES

Given the shortage of federal judges, to give human rights cases the attention they deserve, they can be assigned to Article III judges who have attained senior status.³⁶³ Enjoying full pay, senior status judges may, and often do, continue to serve on the bench much in the same way that they did before attaining senior status. They work only on cases assigned to them, and may not necessarily have a full docket. These judges have become critical to the functioning of Article III courts.³⁶⁴ Senior status judges perform approximately 15 percent of the annual workload of the federal courts.³⁶⁵

Even without a formal process, assigning human rights cases to senior judges could address docket congestion issues raised by the creation of new treaty-based causes of action. Indeed, to some extent, complex cases that seem to require lengthy commitments of judicial resources are already assigned to senior judges who have the experience to oversee them and the docket time to devote to protracted litigation. Senior status Article III judges could, to a greater extent than judges who are required to handle a full docket, focus greater attention (or even focus exclusively) on complex and important human rights cases.

The advantages to using already confirmed and highly experienced federal judges are obvious. Senior Article III judges have experience

³⁶² Ricks, *supra* note 352, at 17–18. Incidentally, the shortage of federal judges and the volume of cases have even affected how law enforcement pursues criminal activity. See Alan Abrahamson, *Caseload Means a Break for Pot Dealers: Justice: Shortage of Federal Judges in San Diego Prompts U.S. Attorney's Office to Go Easy on First-time Offenders Involved in Marijuana Trafficking*, L.A. TIMES (Jan. 20, 1991), http://articles.latimes.com/1991-01-20/local/me-609_1_san-diego.

³⁶³ 28 U.S.C. § 371(c) (2006). As age increases, the tenure required to take senior status decreases. The “Rule of 80” requires that the sum of the age of the judge and the length of tenure equal eighty years. Therefore, a seventy-year-old federal judge with ten years of service would also be eligible.

³⁶⁴ Wilfred Feinberg, *Senior Judges: A National Resource*, 56 BROOK. L. REV. 409, 409 (1990).

³⁶⁵ *Frequently Asked Questions: Federal Judges*, U.S. CTS., <http://www.uscourts.gov/Common/FAQS.aspx> (last visited Feb. 14, 2014).

evaluating and using the powers of Article III courts, including issuing injunctions and enforcing rulings and judgments, and can be expected to exercise these powers competently. They are also experienced with the issues of federalism and the relationship between federal laws and state actors. Finally, these judges have already been confirmed by the Senate, side-stepping political problems associated with confirming new judges for the specialized purpose of adjudicating human rights.

B. THE USE OF COURT-APPOINTED EXPERTS, SPECIAL MASTERS, AND MAGISTRATE JUDGES

Article III judges can avail themselves of assistance that is already built into the judiciary's administrative system if they encounter particularly thorny issues. They can use court-appointed expert witnesses³⁶⁶ in international law and refer international law matters to special masters³⁶⁷ and magistrate judges.

1. Special Masters

Federal Rule of Civil Procedure 53 permits courts to use a "federal special master," a private individual or magistrate judge assigned by a federal judge, to assist with discovery (such as when the case involves taking the testimony of any witnesses in many inconvenient locations) or to advise the court in specialized areas of the law. Consent is required, for the most part, by all of the parties before a special master can be appointed to a case.³⁶⁸

Referral to a special master, without consent of the parties or in specialized matters regarding computation damages, requires "some exceptional condition."³⁶⁹ While the definition of what constitutes an "exceptional condition" is rather vague, and thus, generally within the discretion of the trial court, mere complexity or docket congestion does not qualify.³⁷⁰ Without some adjustment to Federal Rule of Civil Procedure 53, it is likely that the Supreme Court would not uphold a general practice of referring all treaty-based international law issues to

³⁶⁶ FED. R. EVID. 706 (court-appointed experts).

³⁶⁷ FED. R. CIV. P. 53 (special masters).

³⁶⁸ *Id.* at 53(1)(1)(A).

³⁶⁹ *Id.* at 53(a)(1)(B)(i).

³⁷⁰ See generally D.E. Ytreberg, *What Are "Exceptional Conditions" Justifying Reference Under Rule of Civil Procedure 53(b)*, 1 A.L.R. FED. 922 (1969) (listing cases that have dealt with an "exceptional condition").

special masters.

Special masters can be immensely helpful, particularly in the early stages of treaty interpretation. Special masters can be drawn from the pool of retired state or federal judges with outstanding reputations, judges who have sat on other international tribunals (such as the Inter-American Commission on Human Rights, the European Court of Human Rights, or the African Court on Human and People's Rights), or from the academic community of human rights scholars. These experts can assist and advise courts hearing human rights cases in a unique manner that would be outside of the scope of most litigants' abilities.

2. Court-Appointed Experts

Another manner in which judges can gain experience in complex areas of human rights law is by using court-appointed expert witnesses in international and treaty law. Ordinarily, matters of law are not properly the subject of expert testimony. One exception to this general doctrine is foreign or international law.³⁷¹ As with the recommendations of a special master, the court is not obligated to accord any weight to the opinions of an expert witness, except to the degree the judge finds that opinion useful to deciding the case.

Unlike the special master, who may take the testimony of witnesses and issue a recommendation that may be adopted in its entirety by the judge in charge of the case, a court-appointed expert witness is just a witness. Limited solely to responding to questions presented either by the parties or by the Court itself, the expert witness has no independent authority to develop a factual record or to independently analyze legal implications in a case.

When used sparingly, however, for particularly thorny areas of law, court-appointed experts could help to guide the court through uncharted territory. Such assistance could facilitate and accelerate litigation.

3. Specialized Magistrate Judges

A third option for moving human rights cases through the judicial process expeditiously is to refer this kind of case to specialized federal

³⁷¹ Matters of law are generally not proper subject matter for expert testimony. 31A AM. JUR. 2D *Expert and Opinion Evidence* § 29 (2012). However, foreign and international law experts can give testimony on the proper interpretation of such law. 21 AM. JUR. PROOF OF FACTS 2D *Law of Foreign Jurisdiction* § 12 (2013).

magistrate judges. Magistrate judges are appointed by district court judges.³⁷² Magistrate judges are not confirmed by the Senate and do not have the life tenure of full Article III judges.³⁷³ Magistrate judges can either be appointed as full-time for a term of eight years or as part-time for a term of four years.³⁷⁴

Currently, magistrate judges assist Article III judges with mostly non-substantive procedural matters. They can, however, with the approval of all of the parties and the Article III judge hearing the case, decide substantive legal issues.³⁷⁵ Specialized magistrate judges can serve as a first level of review for human rights cases and help to interpret matters for Article III judges. Additionally, “[a] magistrate judge may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States.”³⁷⁶ The Supreme Court has “applauded and encouraged the liberal employment of the ‘additional duties’ statutory clause in using magistrate judges.”³⁷⁷ In fact, the Court has “recognized that Congress intended magistrates to play an integral and important role in the federal judicial system.”³⁷⁸

As a result of their lack of tenure, however, magistrate judges may feel inhibited to advise district court judges to rule against the government in human rights cases. Magistrate judges may fear the political repercussions that would result from ruling that a government entity committed a human rights violation. Thus, they should play a strictly advisory role so that Article III judges who are shielded from political pressure are seen as the clear authority behind unpopular or sweeping decisions.

C. THE IMPORTANT ROLE OF LAW CLERKS

In the last three decades, legal practice and education have

³⁷² 28 U.S.C. § 631(a) (2006) (amended 2010).

³⁷³ *How the Federal Courts Are Organized*, FED. JUD. CENTER, <http://www.fjc.gov/federal/courts.nsf/autoframe?OpenForm&nav=menu3c&page=/federal/courts.nsf/page/A783011AF949B6BF85256B35004AD214?opendocument> (last visited Feb. 15, 2014).

³⁷⁴ 28 U.S.C. § 631(e).

³⁷⁵ 28 U.S.C. § 636(c)(1).

³⁷⁶ 28 U.S.C. § 636(b)(3).

³⁷⁷ Honorable Jacob Hagopian, *United States Magistrate Judges and Their Role in Federal Litigation*, ARMY LAW. 19, 28 (1999).

³⁷⁸ *Peretz v. United States*, 501 U.S. 923, 928 (1991).

increasingly embraced international human rights law.³⁷⁹ There has been a “marked increase in international law courses as well as non-course opportunities in law schools.”³⁸⁰ Additionally, the U.S. Supreme Court has relied on amicus briefs referencing international human rights standards in several high-profile civil rights cases.³⁸¹ Lawyers “have sought to use human rights not as a basis for decision, but as a frame of reference to educate judges about relevant human rights standards and thus to help them situate domestic decisions within a broader international context.”³⁸²

Law school deans are feeling pressure to ensure that graduating students are prepared to practice law in our globalized world.³⁸³ As Dean Claudio Grossman of American University’s Washington College of Law explained, “[f]ew issues today are strictly ‘domestic’ or strictly ‘international,’ and the ‘interconnected’ nature of the world necessitates cooperation and collaboration with actors around the globe.”³⁸⁴ Additionally, there has been an increase in the number of human rights clinics at U.S. law schools, beginning with the Lowenstein International Human Rights Law Clinic at Yale in 1989 and American University’s International Human Rights Law Clinic in 1990. Since then, at least twenty other human rights clinics have been established.³⁸⁵

³⁷⁹ See Scott L. Cummings, *The Internationalization of Public Interest Law*, 57 DUKE L.J. 891, 934–69, 975–77 (2008).

³⁸⁰ For example, American University Washington College of Law offers more than forty international law courses each semester. Claudio Grossman, *The Role of a Law School Dean: Balancing a Variety of Roles and Interests. The American University Washington College of Law Experience*, 29 PENN ST. INT’L L. REV. 113, 114–15 (2010). See also Peter Rosenblum, *Teaching Human Rights: Ambivalent Activism, Multiple Discourses, and Lingering Dreams*, 15 HARV. HUM. RTS. J. 301, 302 (2002). Jeffrey Fisher discusses the proliferation of clinical programs in law schools and argues that they give students the opportunity to do work in the public interest while still in school. Jeffrey L. Fisher, *A Clinic’s Place in the Supreme Court Bar*, 65 STAN. L. REV. 137 (2013).

³⁸¹ See *Roper v. Simmons*, 543 U.S. 551, 575–78 (2005); *Lawrence v. Texas*, 539 U.S. 558, 573 (2003); *Grutter v. Bollinger*, 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2001).

³⁸² Cummings, *supra* note 379, at 985.

³⁸³ Grossman, *supra* note 380.

³⁸⁴ *Id.* at 115.

³⁸⁵ Examples of human rights clinics include the Human Rights Clinic at the University of Texas School of Law, the International Women’s Human Rights Clinic at CUNY School of Law, the International Women’s Human Rights Clinic at Georgetown Law School, the Asylum and Human Rights Clinic at Connecticut Law School, the International Human Rights Law Clinic at Berkeley’s Boalt School of Law, the Human Rights Clinic at Columbia Law School, and the International Human Rights Clinic at Rutgers Law School–Newark.

As more law students become increasingly well versed in international human rights law, they have the potential to become valuable assets as law clerks to judges charged with overseeing treaty-based human rights cases. While the work assigned to law clerks depends on which judge they work for, generally law clerks are invaluable to the administration of justice in this country. Law clerks routinely conduct independent legal research in all cases assigned to the judge for whom they work; write memoranda for the judge; prepare the judge for hearings, trials and oral arguments; and make suggestions to the judge for rulings on dispositive motions.³⁸⁶ Clerks also often prepare the first draft of written opinions for judges.³⁸⁷

Given law students' increased exposure to international human rights issues, they may be the best tool to help usher-in treaty-based international human rights jurisprudence in the United States. Indeed, law clerks may likely have more experience thinking about international law issues than seasoned judges and magistrates. Given this expertise, judges hearing international human rights treaty-based claims should be granted special allowances for hiring additional law clerks to assist them in their work. Currently, as a general rule, federal magistrate judges are permitted up to two law clerks, federal district court judges are allowed three law clerks, and circuit court judges are permitted to have five law clerks.³⁸⁸

At least initially, allocation of federal funds for judges hearing human rights cases to have additional law clerks would be worth it. It is in our country's best interest to ensure that our treaty obligations are acknowledged and enforced with the greatest care. Having a cadre of young and energetic law clerks who are well versed in international law would help immensely with the administration of justice. It would also be in the public's interest, in the long run, to have as many human rights law clerks as the system can sustain. Those law clerks will then be experts in this emerging area of law. They will be able to litigate human rights cases when they finish their clerkships and begin practice. Their expertise will ensure that human rights cases are briefed clearly and thoroughly, so that courts can adjudicate cases effectively and expeditiously.

³⁸⁶ See David J. Richman, *How to Be a Great Law Clerk*, AM. BAR ASS'N, http://apps.americanbar.org/litigation/news/trial_skills/050510-tips-litigation-law-clerk-career.html (last visited Feb. 15, 2014).

³⁸⁷ *Id.*

³⁸⁸ *Who Does What*, FED. JUD. CENTER, <http://www.fjc.gov/federal/courts.nsf/autoframe?OpenForm&nav=menu5b&page=/federal/courts.nsf/page/C553D11564F1D8C985256A3E006C7F5F?opendocument> (last visited Feb. 15, 2014).

VII. CONCLUSION

The development of human rights jurisprudence in U.S. courts, through the ATS, which started in 1980 with the Second Circuit's landmark ATS decision *Filártiga v. Peña-Irala*, is over. The Supreme Court held, in *Kiobel v. Royal Dutch Petroleum*, that federal courts do not have jurisdiction, except perhaps in rare circumstances, to hear disputes involving extraterritorial human rights abuses.³⁸⁹ Although *Kiobel* left the door open for ATS cases where human rights abuses occur domestically, Justice Breyer's concurrence (joined by the other three liberal Justices) makes it clear that those cases will be rare as well.

Thus, in order for human rights law to remain viable in the United States, it is essential to find ways to enforce the United States' treaty-based human rights obligations. In my 2011 article, *Making Human Rights Treaty Law Actionable in the United States: The Case for Universal Implementing Legislation*, I moved beyond the familiar scholarly debates over whether it is unconstitutional or a violation of international law for the United States to side-step its human rights treaty obligations. I argued that in order for human rights law to truly become part of U.S. law and to protect U.S. citizens (and not only aliens, like the ATS), it is critical to have universal implementing legislation that is written, debated, and passed by Congress.³⁹⁰ I proposed straightforward enabling universal implementing legislation that would make all human rights treaties ratified by the United States actionable in U.S. courts.

This Article takes that discussion further. It envisions a landscape where Congress has enacted the enabling legislation that I proposed, making it possible for human rights victims to enforce their treaty-based human rights domestically. This Article not only shows that we already have the infrastructure in place to enforce human rights treaties, it discusses and evaluates different fora for adjudicating human rights claims in the United States.

As discussed above, on its face and in theory, the Article I administrative model promises quick adjudication by knowledgeable experts. Unfortunately, however, Article I courts are ineffective and have an unacceptably high reversal rate. Those courts cannot be trusted to remedy abuses of the most serious nature, protected by human rights treaties. As such, this Article discusses why human rights treaty

³⁸⁹ *Kiobel v. Royal Dutch Petroleum*, 133 S. Ct. 1659 (2013).

³⁹⁰ Venetis, *Making Human Rights*, *supra* note 10.

enforcement should be entrusted either to Article III district court judges or to specialized Article III human rights courts, modeled after the USCIT.

Although “hybrid” Article I/Article III courts (such as the bankruptcy courts) have significant benefits and would work just fine presiding over treaty-based claims, they too ultimately fail. It is critical for judges who adjudicate treaty-based claims to be shielded from political and public pressure because they will need to order federal, state and local governments (and their employees) to stop violating human rights and to take affirmative steps to end human rights abuses. Doing so may involve the expenditure of significant public funds. While never popular, ordering such expenditures is worse in today’s financially difficult times. Judges who do not enjoy life tenure may feel inhibited from issuing sweeping rulings that require governments to overhaul their practices. Moreover, it would defeat the whole purpose of treaty enforcement if the neutrality of judges hearing treaty-related cases were in any way called into question.

For these reasons, this Article argues that it would be more effective for Article III judges, who by constitutional mandate are above the political fray, to develop nascent treaty-based human rights jurisprudence.

Equally important as showing that we have multiple viable fora for adjudicating human rights claims domestically, this Article shows that it is in our legal DNA to permit human rights victims to use federal courts to seek redress for violations of their most fundamental rights. It discusses how treaty-based human rights are similar to constitutional rights and customary international law rights and how federal courts have provided effective relief to civil rights and human rights victims for decades. Thus, it shows that our federal courts already have vast experience making the kinds of difficult and necessary decisions that will result in the type of systemic governmental change required to protect treaty-based human rights.