

# State Court International Human Rights Litigation: A Concerning Trend?

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## INTRODUCTION

A new, but somewhat predictable, phenomenon is beginning to emerge in the human rights field. Reluctant to re-embrace more traditional international lawmaking and faced with higher hurdles to successfully asserting Alien Tort Statute claims in U.S. courts, advocates have begun to experiment with alternative strategies for redressing human rights violations. One strategy involves state court litigation.<sup>1</sup> State courts are emerging as the next battleground in efforts to

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1. See, e.g., Donald Earl Childress III, *The Alien Tort Statute, Federalism, and the Next Wave of Transnational Litigation*, 100 GEO. L.J. 709, 709 (2012) (exploring a new wave of international and transnational law litigation under state and foreign law and the issues that will arise for that wave in reaching state courts); Anna Maria Gabrielidis, *Human Rights Begins at Home: A Policy Analysis of Litigating International Human Rights in U.S. State Courts*, 12 BUFF. HUM. RTS. L. REV. 139, 140 (2006) (examining “the role that state courts can and should play in the implementation of human rights in the U.S.”); Johanna Kalb, *Human Rights Treaties in State Courts: The International Prospects of State Constitutionalism After Medellín*, 115 PENN ST. L. REV. 1051, 1051 (2011) (explaining how “[f]or human rights advocates, state courts provide an alternative and possibly friendlier forum” for human rights

incorporate international human rights norms into American law and to advance respect for human rights generally.<sup>2</sup> Some predict that state courts, applying state constitutional, statutory, or common law, may prove a particularly promising venue for the recognition of economic, social, and cultural rights.<sup>3</sup>

This strategy, while just now emerging in the human rights context,<sup>4</sup> is not unfamiliar. Human rights activists draw on and imitate the strategies of others.<sup>5</sup> In the 1970s, the state constitutional rights movement sought out state courts when federal courts grew less receptive to recognizing certain kinds of civil liberties.<sup>6</sup> More recently, international environmental rights activists have asserted state claims as a way to address global climate change and other transboundary harms when opponents have stymied international lawmaking efforts.<sup>7</sup> In both contexts, the retreat to state courts on some level represented defensive maneuvers:

claims); *see also* THE OPPORTUNITY AGENDA, LEGAL AND POLICY ANALYSIS: HUMAN RIGHTS IN STATE COURTS 2011, at 1–2 (2011), *available at* [http://www.ncdsv.org/images/OppAgenda\\_HumanRightsInStateCourts\\_FullReport\\_8-2011.pdf](http://www.ncdsv.org/images/OppAgenda_HumanRightsInStateCourts_FullReport_8-2011.pdf).

2. The recent scholarship advocating state courts' advancement of human rights builds on scholarship that urges other branches of state and local governments to adopt international human rights standards. *See, e.g.*, Johanna Kalb, *Dynamic Federalism in Human Rights Treaty Implementation*, 84 TUL. L. REV. 1025, 1028–29 (2010); Stacy Laira Lozner, *Diffusion of Local Regulatory Innovations: The San Francisco CEDAW Ordinance and the New York City Human Rights Initiative*, 104 COLUM. L. REV. 768, 790 (2004) (describing how cities have experimented with regulations inspired by human rights regimes); Catherine Powell, *Dialogic Federalism: Constitutional Possibilities for Incorporation of Human Rights Law in the United States*, 150 U. PA. L. REV. 245, 250–52 (2001).

3. *See, e.g.*, Martha F. Davis, *The Spirit of Our Times: State Constitutions and International Human Rights*, 30 N.Y.U. REV. L. & SOC. CHANGE 359, 359 (2006) (asserting that “[s]tate courts have a responsibility to consider international human rights norms and other transnational law in rendering state constitutional decisions”); Martha F. Davis, *Upstairs, Downstairs: Subnational Incorporation of International Human Rights Law at the End of an Era*, 77 FORDHAM L. REV. 411, 412 (2008) (describing “the growing list of state and local laws that reflect the influence of international human rights norms”); Robert Doughten, *Filling Everyone’s Bowl: A Call to Affirm a Positive Right to Minimum Welfare Guarantees and Shelter in State Constitutions to Satisfy International Standards of Human Decency*, 39 GONZ. L. REV. 421, 446 (2004) (urging state courts to use international human rights law to protect the poor); Julian G. Ku, *The State of New York Does Exist: How the States Control Compliance with International Law*, 82 N.C. L. REV. 457, 476 (2004) (describing state enforcement of international law).

4. Admittedly, the idea of advancing human rights in state courts is not itself entirely new either. *See, e.g.*, Kathryn Burke et al., *Application of International Human Rights Law in State and Federal Courts*, 18 TEX. INT’L L.J. 291, 322 (1983); Paul L. Hoffman, *The Application of International Human Rights Law in State Courts: A View from California*, 18 INT’L LAW. 61, 61, 63 (1984); Richard B. Lillich, *Invoking International Human Rights Law in Domestic Courts*, 54 U. CIN. L. REV. 367 (1985).

5. *See generally* Kalb, *supra* note 2, at 1028–29 (describing how the “increased focus on states as a possible site for experimentation and innovation is not unique to the context of international human rights law” and setting forth other areas of “dynamic federalism”).

6. *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 498–501 (1977) [hereinafter Brennan, *State Constitutions*]; William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 548–49 (1986) [hereinafter Brennan, *Bill of Rights*]; *see also* Hans A. Linde, *First Things First: Rediscovering the States’ Bills of Rights*, 9 U. BALT. L. REV. 379, 387–92 (1980); Hans A. Linde, *Without “Due Process”: Unconstitutional Law in Oregon*, 49 OR. L. REV. 125, 163–64 (1970).

7. *See* Sarah M. Morris, *The Intersection of Equal and Environmental Protection: A New Direction for Environmental Alien Tort Claims After Sarei and Sosa*, 41 COLUM. HUM. RTS. L. REV. 275 (2009).

attempts to eke out marginal gain when other avenues for progress were blocked. Both movements hearkened back to an earlier time, when the bench and bar were more preoccupied with application of state, rather than federal, law.<sup>8</sup>

This Article explores the parallels between the recent willingness to consider state court litigation to remedy human rights violations occurring abroad and earlier attempts to use similar strategies to advance other causes, particularly those implicating environmental rights. The exploration is made in three steps. First, I sketch the emerging phenomenon where advocates and scholars have urged greater use of state law remedies to advance human rights. Second, I describe how a parallel strategy was recently employed in the international environmental law context and how that strategy also traces back to the state rights movement from the 1970s. Finally, I end on a note of caution. Asserting state claims in state courts, unconnected to treaty regimes and as a way to advance international human rights for human rights violations occurring abroad (i.e., Alien Tort Statute-type litigation), has its drawbacks. State court litigation is at best a short-term palliative. Over the longer haul, it potentially places human rights on a weaker, defensive footing. State court litigation—similar to its federal analogue—is likely to prove a poor substitute for more traditional, multilateral, and collaborative international lawmaking.

Before continuing and to avoid being misunderstood, I want to underscore the limits of this Article's scope. Skepticism over the benefits of state court litigation involving claims for alleged human rights abuses by foreigners occurring abroad should not be interpreted as skepticism over other methods by which states incorporate and implement international human rights. This Article does not explore implementation of human rights norms at the state level for alleged human or civil rights violations occurring within the United States. Nor does the Article seek to limn how state courts invoke international human rights law as persuasive authority or as an interpretative guide to domestic law.<sup>9</sup> Instead, it focuses only on international human rights litigation in the United States against foreigners for conduct occurring abroad, similar to litigation presently brought under the Alien Tort Statute.

## I. THE MOVE TO STATE COURT HUMAN RIGHTS LITIGATION

The recent interest in invoking state courts as the protector of progressive human rights did not spring full-blown. It developed after a series of lost political battles; after a growing reluctance of U.S. institutions to recognize social, economic, and cultural rights; and after the federal courts appeared less receptive

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8. See discussion *infra* Part II.B.

9. For an overview of the long history of state courts referring to foreign law as persuasive authority, see Austen L. Parrish, *Storm in a Teacup: The U.S. Supreme Court's Use of Foreign Law*, 2007 U. ILL. L. REV. 637, 649–73 (2007).

to broad-based human rights claims. This new strategy was largely removed from earlier strategies that focused more on treaty law and building international institutions sensitive to human rights concerns.<sup>10</sup>

*A. Early Beginnings: Treaties and International Lawmaking*

Until recently, the human rights movement relied little on judges and courts and instead focused primarily on multilateral treaties as the principle manner to advance protection of human rights.<sup>11</sup> After the Second World War, the world saw a blossoming of interest in human rights treaties, particularly those imposed upon vanquished nations.<sup>12</sup> In part, human rights were designed to prevent the genocide and other atrocities associated with Nazi Germany from reoccurring.<sup>13</sup> The United States was particularly active in prodding the newly formed United Nations to develop conventions and treaties to build on new efforts to “promot[e] and encourag[e] respect for human rights and for fundamental freedoms.”<sup>14</sup>

From the 1950s through the 1980s, the primary focus of the human rights movement remained the development of norms through treaty implementation.<sup>15</sup> As states took on legal commitments to protect human rights, advocates were also initially optimistic that they were witnessing a fundamental shift in the structure of international society.<sup>16</sup> Western states were often happy to lend support to the movement’s goals and to use the rhetoric of human rights as a weapon in the Cold War.<sup>17</sup> For other states, human rights were a way to cement domestic power,

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10. See discussion *infra* Parts I.A, I.B.

11. Lillich, *supra* note 4, at 371 (stating, “only in the past few decades have domestic courts been asked to apply [international human rights norms] as part of conventional or customary international law”).

12. LOUIS HENKIN, *THE AGE OF RIGHTS* 16 (1990).

13. See, e.g., AMNESTY INT’L, *UNIVERSAL JURISDICTION: 14 PRINCIPLES ON THE EFFECTIVE EXERCISE OF UNIVERSAL JURISDICTION* 1 (1999).

14. U.N. Charter art. 1, para. 3; see also MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* 16–20 (2002).

15. See generally Neri Sybesma-Knol, *The New Law of Treaties: The Codification of the Law of Treaties Concluded Between States and International Organizations or Between Two or More International Organizations*, 15 GA. J. INT’L & COMP. L. 425, 433 (1985) (stating that the codification of certain general principles has caused treaties to become “the primary source of international law in both importance and quantity”).

16. For a more detailed discussion on the impact of human rights law on the international system, see Douglass Cassel, *Does International Human Rights Law Make a Difference?*, 2 CHI. J. INT’L L. 121 (2001).

17. See YVES DEZALAY & BRYANT G. GARTH, *THE INTERNATIONALIZATION OF PALACE WARS: LAWYERS, ECONOMISTS, AND THE CONTEST TO TRANSFORM LATIN AMERICAN STATES* 61–72 (2002) (describing how the human rights movement in the United States was closely allied with the Cold War and the foreign policy establishment); see also Curtis A. Bradley, *The United States and Human Rights Treaties: Race Relations, the Cold War, and Constitutionalism*, 9 CHINESE J. INT’L L. 321, 326 (2010) (noting the concern in the Cold War that “international human rights law would develop in ways antithetical to U.S. conceptions of rights and that it would be used by the Soviet bloc in its ideological campaign against the United States”).

enhance legitimacy in the international community, or to influence regime change.<sup>18</sup>

When the Cold War came to an end, though, international human rights lawmaking did not continue at the pace that advocates hoped and many of these advocates became disillusioned with the progress being made.<sup>19</sup> The United States began to attempt to limit its obligations under human rights treaties through the frequent use of reservations.<sup>20</sup> Advocates primarily viewed the problems with multilateral lawmaking as threefold: First, ratification of international human rights treaties was slow.<sup>21</sup> Second, powerful states, prominently including the United States, increasingly asserted reservations to those treaties.<sup>22</sup> Third, and most problematic, some states appeared to view the commitment to human rights as a commitment of convenience.<sup>23</sup> Advocates also became concerned about the lack of rigorous enforcement.<sup>24</sup> Scholars and advocates alike began to question the

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18. See, e.g., DEZALAY & GARTH, *supra* note 17; see also Yves Dezalay & Bryant G. Garth, *Constructing Law out of Power: Investing in Human Rights as an Alternative Political Strategy*, in CAUSE LAWYERING AND THE STATE IN A GLOBAL ERA 354, 360–64 (Austin Sarat & Stuart Scheingold eds., 2001).

19. For the changed U.S. approach to treaties, see Thomas M. Franck, Editorial Comment, *Taking Treaties Seriously*, 82 AM. J. INT'L L. 67, 67 (1988) (explaining that the “United States seems increasingly content to be perceived by other nations as indifferent to its most solemn treaty obligations”); Laurence R. Helfer, *Exiting Treaties*, 91 VA. L. REV. 1579, 1623–25 (2005) (“The United States has recently refrained from ratifying—or has withdrawn from—numerous multilateral agreements that are widely ratified by other nations and that it at one time championed.”); Detlev F. Vagts, Editorial Comment, *Taking Treaties Less Seriously*, 92 AM. J. INT'L L. 458, 458–60 (1998) (describing an “alarming exacerbation” of the United States’ failure to fully respect its treaty obligations in the 1990s).

20. JOSEPH D. BECKER, *THE AMERICAN LAW OF NATIONS: PUBLIC INTERNATIONAL LAW IN AMERICAN COURTS* 41 (2001) (“In [the 1990s] the United States . . . adopted the practice of attaching reservations (or their equivalent) to ratified treaties . . .”); Margaret E. McGuinness, Medellín, *Norm Portals*, and the *Horizontal Integration of International Human Rights*, 82 NOTRE DAME L. REV. 755, 759 (2006) (“[T]he United States . . . has become more sophisticated in its use of reservations, understandings and declarations to limit its obligations under the central human rights regimes . . .”).

21. Andrew Moravcsik, *The Paradox of U.S. Human Rights Policy*, in AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 147, 148 (Michael Ignatieff ed., 2005) (stating that the United States has ratified treaties “only after a long delay and with greater substantive and procedural reservations than any other developed democracy”).

22. BECKER, *supra* note 20; McGuinness, *supra* note 20.

23. See, e.g., Emilie M. Hafner-Burton & Kiyoteru Tsutsui, *Human Rights in a Globalizing World: The Paradox of Empty Promises*, 110 AM. J. SOC. 1373, 1373 (2005) (looking at data from 1976 to 1999 and concluding that “governments often ratify human rights treaties as a matter of window dressing, radically decoupling policy from practice and at times exacerbating negative human rights practices”). For inconsistencies in U.S. human rights policy, see Moravcsik, *supra* note 21, at 147 (describing the United States’ reluctance to ratify and apply multilateral human rights treaties).

24. See Oona A. Hathaway et al., *International Law at Home: Enforcing Treaties in U.S. Courts*, 37 YALE J. INT'L L. 51, 57 (2012) (describing how courts increasingly found treaties to not be self-executing and to not create private rights of action, thereby reducing the ability to enforce treaty rights in U.S. courts).

efficacy of treaties in light of common noncompliance<sup>25</sup> and began speculating that governments were using human rights law to shield domestic abuses.<sup>26</sup> The United States also seemed less receptive to advancing human rights in the post-Cold War era than it had been previously when the language of rights served clearer foreign policy goals.<sup>27</sup>

*B. An Alternative Approach: Federal Litigation and Alien Tort Claims*

As international lawmaking slowed and the executive branch grew more reluctant to advance broad-based human rights in the form of new treaty obligations, advocates sought a different mechanism for advancing human rights claims. Advocates turned to federal courts and the rediscovered Alien Tort Statute as one way of doing so.

In 1980, with the landmark *Filártiga v. Peña-Irala* case,<sup>28</sup> the Second Circuit awoke the once dormant Alien Tort Statute.<sup>29</sup> What began as a law intended to avoid unnecessary conflict between the United States and foreign countries<sup>30</sup> developed into a law used to remedy human rights abuses by foreign officials, to penalize corporate malfeasance, and to attempt to constrain U.S. governmental action.<sup>31</sup> Other cases followed on the heels of *Filártiga*, and domestic human rights litigation began to take hold.<sup>32</sup> The decision “triggered a wave of academic

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25. See, e.g., Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 1940 (2002) (finding noncompliance with human rights treaty obligations to be common and finding no treaty where ratification “seems to be reliably associated with better human rights practices”).

26. Hafner-Burton & Tsutsui, *supra* note 23, at 1384.

27. Cf. Bradley, *supra* note 17, at 326 (stating that the end of the Cold War cannot fully explain the complicated relationship of the United States to human rights treaties). For a history of the arguments against using international treaties to advance human rights in the United States, see generally Natalie Hevener Kaufman, HUMAN RIGHTS TREATIES AND THE SENATE: A HISTORY OF OPPOSITION (1990) (hypothesizing that Senate opposition to human rights treaties since the 1950s has given rise to current opposing viewpoints).

28. *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980); see also RICHARD ALAN WHITE, BREAKING SILENCE: THE CASE THAT CHANGED THE FACE OF HUMAN RIGHTS (2004).

29. 28 U.S.C. § 1350 (2006). The Alien Tort Statute was enacted in 1789 as part of the first Judiciary Act. Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73, 77. For a discussion of *Filártiga*'s impact, see Beth Stephens, *Translating Filártiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT'L L. 1, 6–10 (2002).

30. Kenneth C. Randall, *Federal Jurisdiction over International Law Claims: Inquiries into the Alien Tort Statute*, 18 N.Y.U. J. INT'L L. & POL. 1, 15–21 (1985).

31. See Julian G. Ku, *The Third Wave: The Alien Tort Statute and the War on Terrorism*, 19 EMORY INT'L L. REV. 105–10 (2005). See generally JEFFREY DAVIS, JUSTICE ACROSS BORDERS: THE STRUGGLE FOR HUMAN RIGHTS IN U.S. COURTS 55–64, 164–274 (2008) (describing the history of Alien Tort Statute litigation).

32. See, e.g., *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004); *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000); *Hilao v. Estate of Marcos*, 103 F.3d 789 (9th Cir. 1996); *Kadic v. Karadžić*, 70 F.3d 232 (2d Cir. 1995); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984); *Doe v. Unocal Corp.*, 110 F. Supp. 2d 1294 (C.D. Cal. 2000), *vacated*, 403 F.3d 708 (9th Cir. 2005).

scholarship and more than a quarter-century of human rights litigation in U.S. courts.”<sup>33</sup>

A change in mindset accompanied these doctrinal developments.<sup>34</sup> Before the 1980s, the idea that human rights would be developed in federal courts was a novel, perhaps even slightly odd, concept.<sup>35</sup> While U.S. courts had long been cognizant of foreign and international law, courts were generally viewed as impotent to make meaningful changes abroad.<sup>36</sup> In the 1990s, however, scholars began to welcome the use of federal courts as a means to promote accountability and to give teeth to international norms.<sup>37</sup> Human rights advocates made efforts to “deploy domestic courts around the world to implement the human rights policies not only of their own countries but also of the international community as a whole.”<sup>38</sup> As a result, human rights litigation underwent a “significant expansion, both in terms of the number of cases filed as well as the scope of the claims raised.”<sup>39</sup>

But the victory was short lived. Skeptics of international law sought to foreclose greater international lawmaking over concerns of sovereignty loss<sup>40</sup> and

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33. HAROLD HONGJU KOH, *TRANSNATIONAL LITIGATION IN UNITED STATES COURTS* 35 (2008).

34. See Mark Gibney, *Human Rights Litigation in U.S. Courts: A Hypocritical Approach*, 3 *BUFF. J. INT'L L.* 261, 269 (1996) (noting how “[i]t is remarkable to think that it was only slightly more than a decade and a half ago that the prospects of bringing to trial torturers and murderers from . . . anywhere else seemed completely out of the realm of the possibility,” and that “[m]uch has changed in a relatively short period of time”).

35. See Anne-Marie Slaughter & David Bosco, *Plaintiff's Diplomacy*, *FOREIGN AFF.*, Sept.–Oct. 2000, at 102, 104; cf. Louis Henkin, *International Human Rights Standards in National Law: The Jurisprudence of the United States*, in *ENFORCING INTERNATIONAL HUMAN RIGHTS IN DOMESTIC COURTS* 189, 189 (Benedetto Conforti & Francesco Francioni eds., 1997) (noting that international human rights laws “were not designed to ‘internationalise’ the relation between individual and society” but rather “to persuade every state to recognise these rights and to guarantee them *within its own constitutional and legal system*”).

36. Slaughter & Bosco, *supra* note 35, at 103 (describing a “new trend toward lawsuits that shape foreign policy”); see Henkin, *supra* note 35, at 199 (noting that there are not many human rights norms incorporated into our domestic law, and “[e]ven as to international human rights norms that become part of U.S. law, it is not likely that enforcing them will become an important judicial activity”).

37. See, e.g., AMNESTY INT'L, *supra* note 13, at 3.

38. Paul R. Dubinsky, *Human Rights Law Meets Private Law Harmonization: The Coming Conflict*, 30 *YALE J. INT'L L.* 211, 216 (2005).

39. Curtis A. Bradley, *The Costs of International Human Rights Litigation*, 2 *CHI. J. INT'L L.* 457, 458 (2001).

40. See Peter Spiro, *The New Sovereignists: American Exceptionalism and Its False Profits*, *FOREIGN AFF.*, Nov.–Dec. 2000, at 9, 9–11 (describing critics of international law because of concerns that international law erodes sovereignty); see also Daniel W. Drezner, *On the Balance Between International Law and Democratic Sovereignty*, 2 *CHI. J. INT'L L.* 321, 322–23 (2001) (describing concern that international law is “making a sure and steady encroachment on democratic sovereignty, affecting the United States in particular”); cf. Oona A. Hathaway & Ariel N. Lavinbuk, *Rationalism and Revisionism in International Law*, 119 *HARV. L. REV.* 1404, 1414 (2006) (reviewing JACK L. GOLDSMITH & ERIC A.

were particularly concerned over the potential expansion of human rights norms through federal lawsuits.<sup>41</sup> In many ways, these opponents viewed human rights litigation as a way for left-leaning groups (loosely defined) to make headway in domestic political squabbles over racial discrimination, gay rights, and religious freedom.<sup>42</sup> Left-leaning groups had turned to international human rights norms to strengthen domestic positions on civil rights and to bolster claims for recognition of progressive social and economic reform, including advancing rights to education, adequate housing, and welfare.<sup>43</sup> Not surprisingly then, as the federal courts became more identified with conservative (right-leaning) political and social ends and more shaped by the Rehnquist Court's and then the Roberts Court's particular brand of conservatism, federal courts became less attractive as a forum for human rights litigation.<sup>44</sup>

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POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005)) (describing and critiquing how some scholars argue that states should ignore international law in favor of sovereign interests).

41. See, e.g., Slaughter & Bosco, *supra* note 35, at 104 (“Encouraged by a Reagan administration uncomfortable with this expansive new jurisprudence . . . some U.S. courts soon acted to limit the reach of *Filártiga vs. Peña-Irala*”); Bradley, *supra* note 39; Curtis A. Bradley & Jack L. Goldsmith III, *The Current Illegitimacy of International Human Rights Litigation*, 66 *FORDHAM L. REV.* 319 (1997); see also John O. McGinnis & Ilya Somin, *Democracy and International Human Rights Law*, 84 *NOTRE DAME L. REV.* 1739, 1740 (2009) (asserting that international human rights are undemocratic). See generally David J. Bederman, *International Law Advocacy and Its Discontents*, 2 *CHI. J. INT'L L.* 475, 476 (2001) (describing analysis of international human rights litigation in the United States).

42. Jeffrey Rosen, *Juvenile Logic: Court Outsourcing*, *NEW REPUBLIC.*, Mar. 21, 2005, at 11 (discussing the internationalization of the culture wars); see also Yves Dezalay & Bryant G. Garth, *Legitimizing the New Legal Orthodoxy*, in *GLOBAL PRESCRIPTIONS: THE PRODUCTION, EXPORTATION, AND IMPORTATION OF A NEW LEGAL ORTHODOXY* 306, 310 (Yves Dezalay & Bryant G. Garth eds., 2002) (“[L]abor unions and environmental groups in the United States today take their fights for influence over domestic policy into transnational arenas such as NAFTA and the Multilateral Investment Agreement. Success in the transnational arena helps particular groups build legitimacy and protect their national power and influence from erosion through transnational decision making and rule construction.”) (footnote omitted); Makau Mutua, *Human Rights International NGOs: A Critical Evaluation*, in *NGOs AND HUMAN RIGHTS: PROMISE AND PERFORMANCE* 152, 153 (Claude E. Welch, Jr., ed., 2001) (describing the connection between the human rights community and Democrats or those sympathetic to the Democratic party). See generally Rhoda E. Howard, *Human Rights and the Culture Wars: Globalization and the Universality of Human Rights*, 53 *INT'L J.* 94 (1998) (analyzing and balancing the interests in cultural preservation against the development of universal human rights); David J. Bederman, *Globalization, International Law and United States Foreign Policy*, 50 *EMORY L.J.* 717 (2001) (discussing international law and culture wars).

43. See generally Moravcsik, *supra* note 21, at 158 (explaining that based on ideological interests, “[i]n domestic courts, the Left would be aided in its efforts by the domestic application of international norms, whereas the Right would generally be impeded”); Jide Nzelibe, *Strategic Globalization: International Law as an Extension of Domestic Political Conflict*, 105 *NW. U. L. REV.* 635, 652 (2011) (explaining that in the United States, “foreign pressure on human and social rights issues may tend to benefit certain left-leaning groups because of a convergence of interests between these groups and European elites who are more sympathetic to the welfare state and a progressive vision of social rights than the median American voter”).

44. Bradley, *supra* note 39, at 466 (arguing that U.S. federal judges have used judicially created doctrines to limit, not advance, human rights litigation). One example is procedural changes that made human rights litigation more difficult to pursue. For a recent discussion in the context of



For many advocates, *Sosa v. Alvarez-Machain* symbolically marked the end to ambitious federal court remedies. In *Sosa*, the United States Supreme Court limited the scope of the Alien Tort Statute by holding that it incorporated only a “very limited category” of tort claims “defined by the law of nations and recognized at common law.”<sup>45</sup> The Court identified only three causes of action that would clearly give rise to personal liability—offenses against ambassadors, violations of safe conduct, and actions related to piracy.<sup>46</sup> And while not entirely foreclosing other claims, the Court indicated that plaintiffs must identify a precisely defined customary international law norm.<sup>47</sup> Courts were instructed to be “vigilant doorkeep[ers]”<sup>48</sup> and were “cautioned that judges should carefully craft substantive rights to match only widely accepted international law norms.”<sup>49</sup> More recent litigation also portends that federal claims under the Alien Tort Statute are likely to be more narrowly prescribed.<sup>50</sup>

### C. *The Move to State Court Litigation*

With the federal courts’ doors only slightly ajar and appearing that they might further close, advocates began to explore other venues. Until recently, “state litigation ha[d] generally been a course of last resort, when federal claims [were] dismissed.”<sup>51</sup> Even when filing federal claims, advocates had long been able to plead a number of parallel state law domestic tort claims.<sup>52</sup> As a result, renewed attention is starting to be given to state courts.<sup>53</sup>

A number of reasons explain the recent consideration of state court litigation of human rights claims under state law. First, as described above, federal courts have become less receptive to human rights claims. In part, this is the result of several high-profile Alien Tort Statute cases in which the statute has been interpreted narrowly.<sup>54</sup> Academic debates over whether customary international

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pleading rules, see Jordan D. Shepherd, Note, *When Sosa Meets Iqbal: Plausibility Pleading in Human Rights Litigation*, 95 MINN. L. REV. 2318 (2011).

45. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712 (2004).

46. *Id.* at 720.

47. *Id.* at 732.

48. *Id.* at 729. For a discussion of the case and an assessment of the future of Alien Tort Statute litigation, see William S. Dodge, *After Sosa: The Future of Customary International Law in the United States*, 17 WILLAMETTE J. INT’L L. & DISP. RESOL. 21, 22–28 (2009).

49. *Federal Statutes—Wesfall Act—D.C. Circuit Holds That U.S. Officials Are Immune from Alien Tort Statute Claims.*—Ali v. Rumsfeld, 649 F.3d 762 (D.C. Cir. 2011), 125 HARV. L. REV. 1080, 1081 (2011).

50. See, e.g., *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010).

51. BETH STEPHENS ET AL., INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 121 (2d ed. 2008).

52. *Id.* (describing state courts as a forum for human rights claims).

53. See, e.g., Gabrieliadis, *supra* note 1, at 170–72; see also THE OPPORTUNITY AGENDA, *supra* note 1.

54. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712 (2004); *Kiobel*, 621 F.3d at 111.

law can constitute federal common law may have also influenced courts.<sup>55</sup> Second, and more broadly, federal courts have become less receptive to many kinds of public law litigation.<sup>56</sup> In a number of areas—from pleading requirements, to personal jurisdiction, to summary judgment—the Supreme Court has made it more difficult for plaintiffs to successfully assert public law claims.<sup>57</sup> Some decisions reflect concerns over perceived burgeoning transnational litigation<sup>58</sup> and appear influenced by tort reform rhetoric.<sup>59</sup> Some reflect “efficiency-focused jurisprudence” and “a widespread concern about a ‘litigation crisis.’”<sup>60</sup>

The recent interest in state law and state courts, however, is more than just a reaction to recent federal court decisions. In many ways, the turn to state courts as a plausible alternative reflects broader changes in mindset: substate actors have become exalted as important players in creating international norms.<sup>61</sup> Many academics who push for state courts to play a greater role in human rights norm development also, not surprisingly, seek to have state and other localities play a

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55. For a detailed discussion of how academic scholarship may have changed the way some courts view these cases, see Childress, *supra* note 1, at 719–22.

56. The Supreme Court’s standing cases have long evoked controversy, with critics asserting that they unnecessarily impede public law litigation. See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 60–66 (3d ed. 2006) (discussing standing doctrine); cf. Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1016, 1020 (2004) (describing how public law litigation can succeed and also noting that “key decisions of the Rehnquist Court sometimes seem unreflectively hostile to public law litigation”).

57. For a general discussion focused on more narrow pleading rules, see Robert G. Bone, Twombly, *Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873 (2009).

58. For a discussion of transnational litigation, see Marcus S. Quintanilla & Christopher A. Whytock, *The New Multipolarity in Transnational Litigation: Foreign Courts, Foreign Judgments, and Foreign Law*, 18 SW. J. INT’L LAW 31 (2011).

59. See Samuel P. Baumgartner, *Human Rights and Civil Litigation in United States Courts: The Holocaust-Era Cases*, 80 WASH. U. L.Q. 835, 849 nn.85–87 (2002) (describing how proponents of tort reform have influenced transnational litigation); see also Samuel P. Baumgartner, *Class Actions and Group Litigation in Switzerland*, 27 NW. J. INT’L L. & BUS. 301, 315–17, 348–49 (2007) (explaining how opposition to international class actions derived from propaganda of the tort reform movement).

60. Lewis A. Grossman, *The Story of Parklane: The “Litigation Crisis” and the Efficiency Imperative*, in CIVIL PROCEDURE STORIES 405, 406 (Kevin M. Clermont ed., 2d ed. 2008).

61. See, e.g., Yishai Blank, *Localism in the New Global Legal Order*, 47 HARV. INT’L L.J. 263, 265 (2006) (“The more international law extends its reach over nonstate actors, the more they become involved in international relations, transnational dialogue, and conflict. Domestic interest groups, transnational corporations, and global networks of NGOs all take part in the new global, political, and social constellation that defines the age of globalization.”); see also Yishai Blank, *The City and the World*, 44 COLUM. J. TRANSNAT’L L. 875, 883–84 (2006) (cataloguing literature describing roles of non-state actors in international law). For a description of how the number of human-rights related nongovernmental organizations have exploded over the past few decades, see Anne-Marie Slaughter, *Breaking Out: The Proliferation of Actors in the International System*, in GLOBAL PRESCRIPTIONS: THE PRODUCTION, EXPORTATION, AND IMPORTATION OF A NEW LEGAL ORTHODOXY, *supra* note 42, at 12, 13 (noting the “veritable explosion of nongovernmental organizations”); Peter J. Spiro, *Accounting for NGOs*, 3 CHI. J. INT’L L. 161, 161 (2002) (“Non-governmental organizations have enjoyed a phenomenally rapid rise on the world scene.”).

greater role in the international system.<sup>62</sup> And the push to promote human rights through unilateral domestic litigation remains a preferred strategy over more traditional, multilateral approaches. In part, this is because treaty law and multilateralism have been under sustained attack from both the right and the left of the political spectrum.<sup>63</sup> In part, it may be that human rights advocates feel comfortable in U.S. courts as a place to seek redress.

Much of the suggested use of state courts and state law is aspirational since few claims have been filed. State courts and state law could be, in theory, substantively more favorable to human rights causes. State law may be broader than federal law, permit claims that do not exist under federal law, and incorporate broader international law norms than those incorporated in federal law. State court judges may also feel less constrained than federal courts in incorporating international norms into state law.<sup>64</sup>

## II. PLACING IN CONTEXT: SIMILAR STRATEGIES

It may be tempting to view the changes in the human rights context to be *sui generis*. But the greater reliance on state courts and state law is not unique to the human rights context. Although some may perceive the renewed interest in state courts and state law claims as progressive—reflecting greater integration of human rights law into American law—when state court litigation has been employed in other contexts, it has usually been a defensive maneuver.

### *A. A Recent Parallel: International Environmental Law and State Law*

The international environmental law movement provides a recent parallel example. Specifically, in the global climate change context, efforts were initially made to address the problem internationally.<sup>65</sup> After those efforts were stymied,

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62. Henkin, *supra* note 35, at 199–203 (noting that enforcing international human rights norms will not likely become a focus of the judiciary, but that “international human rights standards should be incorporated into national constitutions and afforded the protections of judicial . . . review”).

63. *Cf.* Moravcsik, *supra* note 21, at 184 (arguing that Democratic presidents and members of Congress disproportionately support international human rights treaties).

64. THE OPPORTUNITY AGENDA, *supra* note 1, at 2 (“The federal courts, however, are in flux when it comes to the consideration of individual rights in general and human rights in particular. Federal constitutional and legislative protections tend not to include economic, social, and cultural rights that are an important part of the international human rights system. State courts, by contrast, often consider such protections and, in interpreting state law, have the independence to recognize a broader panoply of rights. In addition, state courts have authority to interpret international treaties, including human rights treaties.”).

65. *See* Charlotte Booncharoen & John Gase, Note, *International Commitment Toward Curbing Global Warming: The Kyoto Protocol*, 4 ENVTL. L. 917, 919 (1998) (noting that the First World Climate Conference convened in 1979 and “called on governments to examine how human-induced climate changes could be foreseen and avoided”).

environmentalists first moved to federal and then state courts as a way to make progress.<sup>66</sup>

Climate change first appeared on the international stage in the 1970s. As with human rights, the initial focus was on multilateral cooperation.<sup>67</sup> In 1979, the World Meteorological Organization held the First World Climate Conference, where experts expressed concern over climate change. A decade later, the United Nations Environment Program and the World Meteorological Organization formed the Intergovernmental Panel on Climate Change. The panel's first report formed the basis for negotiating the United Nations Framework on Climate Change.<sup>68</sup> That international treaty, adopted in 1992 and entering into force in 1994, set out the overall framework for state-to-state attempts to address the challenges posed by climate change. With widespread agreement on the nature of the environmental challenge, over 190 countries ratified the treaty. Around the same time, the successful ozone treaty regime was negotiated. This was a set of treaties considered to have been an extremely successful response to a complicated political, scientific, and global problem.<sup>69</sup> In 1997, the Kyoto Protocol was adopted by the Third Conference of the Parties to the Framework Convention, which set goals to target greenhouse gas emissions.<sup>70</sup> At the time, a sense of great optimism existed.<sup>71</sup> Multilateralism was at its high mark.

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66. The environmental rights movement has often drawn from human rights strategies to advance environment concerns. See Neil A.F. Popović, *Pursuing Environmental Justice with International Human Rights and State Constitutions*, 15 STAN. ENVTL. L.J. 338, 340 (1996) (noting that, “[l]ike environmental justice efforts in the United States, the international movement concerns itself with the human impact of environmental degradation and employs a rights-based strategy to fight it”); see also Dinah Shelton, *Human Rights, Environmental Rights, and the Right to Environment*, 28 STAN. J. INT'L L. 103, 138 (1991). For a recent discussion, see Morris, *supra* note 7, at 276 (arguing “that certain environmental justice claims are cognizable under the ATS as violations of customary international law’s prohibition of racial discrimination”).

67. See Booncharoen & Gase, *supra* note 65; see also Edith Brown Weiss, *Climate Change, Intergenerational Equity, and International Law*, 9 VT. J. ENVTL. L. 615, 615–16 (2008) (noting that “the United Nations Environment Programme, the World Meteorological Organization, and the International Council of Scientific Unions jointly held the First World Climate Conference in 1979” in order to address scientific uncertainty “as to whether global warming was occurring, when it would occur, and with what effects within geographic regions”).

68. United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107, available at <http://unfccc.int/resource/docs/convkp/conveng.pdf>.

69. See Richard Elliot Benedick, *The Montreal Ozone Treaty: Implications for Global Warming*, 5 AM. U. INT'L L. REV. 227, 227 (1990) (noting that signatories to the 1987 Montreal Protocol were party to “an agreement unique in the annals of international diplomacy—an accord which many observers had believed would be impossible to achieve”).

70. Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 37 I.L.M. 22, available at [http://unfccc.int/essential\\_background/kyoto\\_protocol/items/1678.php](http://unfccc.int/essential_background/kyoto_protocol/items/1678.php).

71. See Benedick, *supra* note 69, at 233 (“The Montreal Protocol can be a hopeful paradigm of an evolving global diplomacy, one wherein sovereign nations find ways to accept common responsibility for stewardship of the planet and for the security of generations to come.”).

But the sense of optimism did not last long: the decline of multilateralism was quickly felt and precipitous. Soon after the Kyoto Protocol was adopted, government efforts to address climate change began to flounder.<sup>72</sup> By the early 2000s, the international system for addressing climate change was under siege.<sup>73</sup> In 2001, President George W. Bush announced that the United States would not ratify the Protocol, leading to a fractious split between the European Union and the remaining Kyoto parties.<sup>74</sup>

With international efforts stalled, climate change litigation began to increase both “in quantity and sophistication, presenting one of the newest challenges in the public law arena.”<sup>75</sup> Litigation was largely used as a way to attempt “to force or block regulatory behavior” in response to perceived policy failures.<sup>76</sup> But climate change litigation was relatively short lived in the federal courts. A number of decisions undercut, in many respects, the viability of climate change litigation, particularly those based on federal common law claims.<sup>77</sup> While some have called for filing of state court nuisance claims,<sup>78</sup> it seems unlikely that these will have much success.<sup>79</sup>

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72. See Shi-Ling Hsu, *A Realistic Evaluation of Climate Change Litigation Through the Lens of a Hypothetical Lawsuit*, 79 U. COLO. L. REV. 701, 707 (2008) (noting that, as of 2008, “the Kyoto signatories have thus far paid little or no attention toward trying to improve participation and compliance, and have rejected the one sanction that would effectively induce cooperation: trade sanctions”) (footnote omitted).

73. *Id.* at 705 (describing how the Kyoto Protocol and the Framework Convention are “under siege”).

74. DAVID HUNTER ET AL., *INTERNATIONAL ENVIRONMENTAL LAW AND POLICY* 675–76 (4th ed. 2011).

75. Luciano Butti, *The Tortuous Road to Liability: A Critical Survey on Climate Change Litigation in Europe and North America*, SUSTAINABLE DEV. L. & POL’Y, Winter 2011, at 32, 32; Hsu, *supra* note 72, at 710–15 (describing a catalogue of actions broadly considered climate change litigation); Hari M. Osofsky, *Conclusion: Adjudicating Climate Change Across Scales*, in *ADJUDICATING CLIMATE CHANGE: STATE NATIONAL, AND INTERNATIONAL APPROACHES* 375, 380–81 (William C. G. Burns & Hari M. Osofsky eds., 2009).

76. Butti, *supra* note 75, at 32 (quoting Hari M. Osofsky, *The Continuing Importance of Climate Change Litigation*, 1 CLIMATE L. 1878, 1886 (2010)).

77. *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2537 (2011) (holding that “the Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants”); see also Hari M. Osofsky, *AEP v. Connecticut’s Implications for the Future of Climate Change Litigation*, 121 YALE L.J. ONLINE 101, 102 (2011), <http://yalelawjournal.org/images/pdfs/1000.pdf> (explaining how Supreme Court decisions have limited the possibility of federal common law claims); Katherine A. Trisolini, *The Sweet Taste of Defeat: American Electric Power Co. v. Connecticut and Federal Greenhouse Gas Regulation*, 30 UCLA J. ENVTL. L. & POL’Y 227, 228–30 (2012) (arguing that the case promotes a federal regulatory regime to address climate change, but noting that the case forecloses federal nuisance actions).

78. Benjamin Ewing & Douglas A. Kysar, *Prods and Pleas: Limited Government in an Era of Unlimited Harm*, 121 YALE L.J. 350, 372 (2011) (describing how state law suits could help prod other institutional actors to respond); Trisolini, *supra* note 77, at 241–46 (describing the benefits of state public nuisance law).

79. See Butti, *supra* note 75, at 33, 36 (noting “such [tort] claims have yet to result in fully successful outcomes,” the “bleak prospects for civil liability,” and that “the road to clear and

Indeed, as a whole, climate change litigation has been only marginally successful.<sup>80</sup> Tort claims—public nuisance and negligence actions—have floundered.<sup>81</sup> And the procedural hurdles to succeeding have been substantial,<sup>82</sup> with litigants having significant difficulty proving standing.<sup>83</sup> Judges “are often conscious of the vast, wide-ranging consequences (involving, *inter alia*, economic, energetic, developmental, and migratory issues) that holding an American or European actor responsible for damages occurring thousands of miles away would entail in legal terms.”<sup>84</sup> State court litigation has done little then to broadly address climate change challenges.<sup>85</sup>

### B. Another Parallel: The State Constitutionalism Movement

Another similar parallel lies with the state constitutionalism movement of the 1970s. During the late 1950s and through the 1960s, the federal courts broadly expanded protections of individual rights. With the end of the Warren Era, however, the federal courts became less receptive to civil rights claims.<sup>86</sup> Led by Justice Brennan<sup>87</sup> and other well-known jurists,<sup>88</sup> state supreme courts were urged

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convincing guidelines for establishing liability in cases of climate change-originated damages still appears to be long and tortuous”).

80. Hsu, *supra* note 72, at 701, 726–42 (describing the numerous hurdles necessary for litigants to overcome to assert a successful climate change claim); see also Ewing & Kysar, *supra* note 78, at 350 (exploring how the political question doctrine, standing, and implied preemption can limit climate change litigation).

81. Butti, *supra* note 75, at 33, 36.

82. Tristan L. Duncan, *The Past, Present, and Future of Climate Change Litigation: How to Successfully Navigate the Shifting Landscape*, in *THE LEGAL IMPACT OF CLIMATE CHANGE: LEADING LAWYERS ON RESPONDING TO CLIMATE CHANGE DEVELOPMENTS AND COMPLYING WITH NEW REGULATIONS* 7, 8 (Jo Alice Darden ed., 2012) (describing how climate change claims “appear to face untold legal and scientific obstacles”).

83. Mary Kathryn Nagle, *Tracing the Origins of Fairly Traceable: The Black Hole of Private Climate Change Litigation*, 85 TUL. L. REV. 477, 494–510 (2010) (describing how the Supreme Court’s standing jurisprudence has significantly limited the ability for climate change litigation to succeed).

84. Butti, *supra* note 75, at 36.

85. For an argument that state court climate change litigation should be preempted, see Richard A. Epstein, *Beware of Prods and Pleas: A Defense of Conventional Views on Tort and Administrative Law in the Context of Global Warming*, 121 YALE L.J. ONLINE 317, 317 (2011), <http://yalelawjournal.org/images/pdfs/1037.pdf> (arguing that domestic responses to global climate change should exist only at the federal level and that private rights of action under federal and state law should be blocked).

86. See Brennan, *State Constitutions*, *supra* note 6, at 495 (discussing “a trend in recent opinions of the United States Supreme Court to pull back from, or at least suspend for the time being, the enforcement of the *Boyd* principle [that courts ought to be vigilant in the protection of individual constitutional rights] with respect to application of the federal Bill of Rights and the restraints of the due process and equal protection clauses of the fourteenth amendment”).

87. Brennan, *Bill of Rights*, *supra* note 6, at 503, 548–52.

88. For some examples, see Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141, 1143 (1985) (discussing federal court of appeals judge Skelly Wright’s support for state judges who had begun to actively defend individuals’ constitutional rights); Judith S. Kaye, *Dual Constitutionalism in Practice and Principle*, 61 ST. JOHN’S L.

“to seize control of the protection of constitutional rights by looking to state constitutions as potentially more generous guarantors of individual rights than the U.S. Constitution as construed by the Burger Court.”<sup>89</sup>

Innovative litigators heard the call of Brennan and others and began to assert state constitutional law arguments, and a few state courts anchored their rights-based decisions on state law grounds.<sup>90</sup> The state rights movement did not end in the 1970s.<sup>91</sup> As the U.S. Supreme Court has, over time, adopted a less rights-friendly approach, state constitutionalism has been revived.<sup>92</sup> But overall, few have viewed the state constitutional movement as an overwhelming success. While state constitutionalism holds out the promise of recognizing the distinctive political and cultural histories of individual states, rarely have state courts adopted significantly broader views of constitutional rights than have the federal courts.<sup>93</sup> All in all, the state court constitutional strategy has not led to radically different results.

### III. THE LIMITS OF STATE COURT STRATEGIES

The renewed interest in state court litigation raises an obvious normative question: how should the human rights community view this development? Should it actively pursue state court remedies in the face of federal reluctance to

REV. 399, 429 (1987) (noting that “state constitutional law is significant historically; its independent development is sound today, both practically and theoretically; and it represents an avenue for the future delineation of constitutional rights nationally”); Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 193 (1984) (noting that “state constitutions enshrine quite diverse values, not only those of privacy, humane treatment of prisoners, and state equal rights clauses . . . but labor, educational, and environmental rights, and many others”); Robert F. Utter, *State Constitutional Law, the United States Supreme Court, and Democratic Accountability: Is There a Crocodile in the Bathtub?*, 64 WASH. L. REV. 19, 49 (1989) (“The reliance on state constitutions as the source of many of our individual rights is part of the historic fabric of the United States.”).

89. James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 762 (1992); see also Stewart G. Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707, 716 (1983).

90. See, e.g., *People v. Disbrow*, 545 P.2d 272, 280 (Cal. 1976); *State v. Opperman*, 247 N.W.2d 673, 674–75 (S.D. 1976).

91. After Justice Brennan’s 1977 article, a rigorous scholarly debate developed that continued into the 1980s and 1990s about state constitutionalism. See, e.g., Brennan, *Bill of Rights*, *supra* note 6, at 50–52; Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147, 1147–48 (1993); Earl M. Maltz, *False Prophet—Justice Brennan and the Theory of State Constitutional Law*, 15 HASTINGS CONST. L.Q. 429, 449 (1988) (“Justice Brennan fails in his attempt to demonstrate that state court activism enhances the autonomy of the states in the American system . . . Justice Brennan’s argument . . . also distorts state constitutional analysis generally.”); Robert F. Williams, *In the Supreme Court’s Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Resalt*, 35 S.C. L. REV. 353, 365–74 (1984).

92. See, e.g., Stephen Kanter, *Sleeping Beauty Wide Awake: State Constitutions as Important Independent Sources of Individual Rights*, 15 LEWIS & CLARK L. REV. 799, 799–813 (2011).

93. Gardner, *supra* note 89 at 763 (describing the failures of state constitutionalism). For a description of the current status of scholarship on state constitutionalism, see Jim Rossi, *Assessing the State of State Constitutionalism*, 109 MICH. L. REV. 1145, 1153–61 (2011).

hear human rights claims (at least those involving violations occurring abroad among foreigners)? Is a state court litigation strategy likely to bear fruit?

As an initial matter, state court litigation will rarely be successful. A range of procedural obstacles such as personal jurisdiction,<sup>94</sup> choice of law,<sup>95</sup> preemption,<sup>96</sup> and forum non conveniens<sup>97</sup> make these claims exceedingly difficult to win.<sup>98</sup> In cases involving state legislation or codified common law, legislative jurisdiction also will often prevent lawsuits from being filed.<sup>99</sup> Statutes of limitations and other substantive barriers also make these cases difficult to win. Just as federal courts have been reluctant to hear cases to which the United States has few connections,<sup>100</sup> so too will state courts likely be reluctant.

But another problem exists too. State law is ill-fitting for human rights claims. State judges are likely to be less familiar with international law principles,<sup>101</sup> and, in practice, are often dismissive of arguments that they are bound by treaties

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94. See *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2857 (2011); *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2791 (2011); Linda J. Silberman, *Goodyear and Nicastro: Observations from a Transnational and Comparative Perspective*, 63 S.C. L. REV. 591, 603 (2012). For a discussion of the personal jurisdiction issues raised in international civil litigation cases, see Austen L. Parrish, *Sovereignty, Not Due Process: Personal Jurisdiction over Nonresident Alien Defendants*, 41 WAKE FOREST L. REV. 1, 18–27 (2006).

95. See Childress, *supra* note 1, at 724, 744–49, for a discussion of the impact of state choice of law rules on international human rights cases.

96. See *id.* at 749–50, noting the probability that state court IHR cases could be thrown out on preemption grounds because they affect foreign affairs.

97. For a recent discussion of the forum non conveniens doctrine in transnational cases, see Christopher A. Whytock & Cassandra Burke Robertson, *Forum Non Conveniens and the Enforcement of Foreign Judgments*, 111 COLUM. L. REV. 1444 (2011).

98. Childress, *supra* note 1, at 709, 709, 741–52 (describing the obstacles of state court human rights litigation, including “issues of federalism, choice of law, preemption, and due process”); Cassandra Burke Robertson, *Transnational Litigation and Institutional Choice*, 51 B.C. L. REV. 1081, 1081 (2010) (describing how “[t]he courts have expanded the doctrines of forum non conveniens and prudential standing to dismiss a growing number of transnational cases”). For a detailed overview of the procedural issues facing international civil litigation cases, see GARY B. BORN & PETER B. RUTLEDGE, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* (5th ed. 2011).

99. See *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2884–85 (2010) (noting that Congress likely has no power under international law to regulate foreign securities exchanges). See generally Austen L. Parrish, *Evading Legislative Jurisdiction*, 87 NOTRE DAME L. REV. 1673, 1677–88 (2012) (describing the history and limits of legislative jurisdiction). For other recent discussions of legislative jurisdiction in transnational cases, see Anthony J. Colangelo, *A Unified Approach to Extraterritoriality*, 97 VA. L. REV. 1019 (2011); John H. Knox, *A Presumption Against Extrajurisdictionality*, 104 AM. J. INT’L L. 351 (2010); Jeffrey A. Meyer, *Dual Illegality and Geoambiguous Law: A New Rule for Extraterritorial Application of U.S. Law*, 95 MINN. L. REV. 110 (2010).

100. See, e.g., Transcript of Oral Argument at 3–4, *Kiobel v. Royal Dutch Petroleum Co.* (2012) (No. 10-1491), (noting concern over amicus Chevron’s argument that “[n]o other nation in the world permits its court to exercise universal civil jurisdiction over alleged extraterritorial human rights abuses to which the nation has no connection”).

101. See Janet Koven Levit, *Sanchez-Llamas v. Oregon: The Glass Is Half Full*, 11 LEWIS & CLARK L. REV. 29, 33 (2007) (“[S]tate courts, state judges, and state bars remain ill-equipped to grapple with questions of international law . . .”).



and international conventions.<sup>102</sup> There is also something uncomfortable about addressing claims like genocide or torture through state common law claims of wrongful death or battery. The common law torts fail to capture the gravity and the seriousness of the offenses. In so doing, state claims potentially undermine the expressive function of human rights cases by belittling the importance of the claims.

Even if state court litigation could be a viable alternative for certain claims, whether pursuing state court litigation benefits human rights goals over the long term is unclear. Focusing on state court litigation may detract from other, more meaningful, law-making efforts.<sup>103</sup> Also, this sort of U.S. litigation addressing atrocities occurring abroad is usually viewed cynically by other countries.<sup>104</sup> That is unlikely to change. Because of this, attention is focused away from the violators and the atrocities committed and instead on the legitimacy of the proceedings themselves. That change in focus does little to advance human rights concerns.

Lastly, state court litigation of foreign human rights violations is in tension with other human rights goals. Universal human rights, by definition, require a universal outlook.<sup>105</sup> Most human rights organizations have a particular vision of

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102. Kalb, *supra* note 1, at 1059 (noting that state courts “have generally been dismissive of the claim that they are bound by even the ratified instruments”); *see also* Nadine Strossen, *Recent U.S. and International Judicial Protection of Individual Rights: A Comparative Legal Process Analysis and Proposed Synthesis*, 41 HASTINGS L.J. 805, 824 (1990) (noting that courts are reluctant “to view themselves as bound directly by international human rights principles on substantive issues”).

103. For a discussion of the relationship between treaty ratification and human rights practices, see Cassel, *supra* note 16, at 121–36 (discussing the impact of international human rights treaties on state behavior); Hathaway, *supra* note 25, at 2024–25 (finding that “it may be worthwhile to develop, consider and debate more radical approaches to improving human rights through the use of new types of treaty membership policies”). For an argument for why the human rights community should favor multilateral solutions, see Austen L. Parrish, *Rehabilitating Territoriality in Human Rights*, 32 CARDOZO L. REV. 1099, 1136–40 (2011).

104. *See, e.g.*, Gary Clyde Hufbauer & Nicholas K. Mitrokostas, *International Implications of the Alien Tort Statute*, 16 ST. THOMAS L. REV. 607, 609 (2004) (describing the potential impact of Alien Tort Statute claims on foreign trade); Joseph G. Finnerty III & John Merrigan, Op-Ed, *Legal Imperialism*, WALL ST. J., Feb. 28, 2007, at A15 (decrying Alien Tort Statute-type claims); *cf.* Gary B. Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 GA. J. INT’L & COMP. L. 1, 28–29 (1987) (describing how an exorbitant jurisdictional assertion “can readily arouse foreign resentment” and may “provoke diplomatic protests, trigger commercial or judicial retaliation, and threaten friendly relations in unrelated fields”) (footnotes omitted).

105. *See* Universal Declaration of Human Rights, G.A. Res. 217 (III) A, ¶ 1, U.N. Doc. A/RES/217(III) (Dec. 10, 1948). The debate between universalism and cultural relativism is a longstanding one. *See, e.g.*, Jack Donnelly, *Cultural Relativism and Universal Human Rights*, 6 HUM. RTS. Q. 400, 414–19 (1984) (defending the universality of certain rights); Karen Engle, *Culture and Human Rights: The Asian Values Debate in Context*, 32 N.Y.U. J. INT’L L. & POL. 291, 291–93 (2000) (underscoring the importance of cultural narratives in human rights discourse); Fernando R. Tesón, *International Human Rights and Cultural Relativism*, 25 VA. J. INT’L L. 869, 873 (1985) (arguing that international human rights standards must be universal yet respect cultures).

human rights—usually a westernized vision.<sup>106</sup> That universalistic outlook is in tension with the idea of states as laboratories, each developing its own novel version of human rights. Said differently, state court litigation seems much more supportive of emerging pluralistic theories of international governance—a mess of garbled and competing voices—than the clear universal principles that human rights require. Having many substate actors develop human rights norms will therefore not only lead to greater fragmentation of human rights laws,<sup>107</sup> but also is more likely to lead to degenerative, rather than favorable, outcomes.

This is not to suggest that human rights advocates should always avoid state law claims. Attorneys representing human rights victims may have few choices, and state court litigation may be one of the few places where victims of human rights have some chance (albeit small) of obtaining relief. State court litigation can serve a number of other purposes too. On the margins, state court claims can serve a deterrent function. Even if the claims are not ultimately successful, foreign corporations may fear the potential of being snared in the long arms of U.S. law. The cases—similar to their federal counterparts—are also important symbolically in bringing public attention to atrocities. Some scholars have argued that this aspect of human rights litigation may be perhaps the most important.<sup>108</sup> But these benefits are only on the margins, and do not rescue state court litigation from its more significant drawbacks.

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106. Makau wa Mutua, *The Ideology of Human Rights*, 36 VA. J. INT'L L. 589, 592 (1996) (criticizing human rights discourse as imposing a westernized ideology); see also DEBRA L. DELAET, *THE GLOBAL STRUGGLE FOR HUMAN RIGHTS: UNIVERSAL PRINCIPLES IN WORLD POLITICS* 209 (2006) (“Relativist critics of the concept of human rights argue that, despite its secular language, international human rights law is . . . often inconsistent with political and cultural realities in many non-Western settings.”).

107. For a general discussion of the problems of fragmentation in international law, see Eyal Benvenisti & George W. Downs, *The Empire's New Clothes: Political Economy and the Fragmentation of International Law*, 60 STAN. L. REV. 595 (2007); see also Study Group of the Int'l Law Comm'n, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006).

108. See, e.g., Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CALIF. L. REV. 75, 86–87 (1996) (“For much human rights litigation, however, the largely symbolic finding of state wrongdoing represents the most far-reaching goal of the litigation. . . . Indeed, the symbolic promotion of human rights norms is a major goal of international human rights law, in the hope that state behavior will eventually conform to norms adopted and recognized as legitimate by the world community.”); Stephan Landsman, *Alternative Responses to Serious Human Rights Abuses: Of Prosecution and Truth Commissions*, 59 LAW & CONTEMP. PROBS. 81, 83 (1996) (“Holding violators accountable for their misdeeds signals all members of society that the law’s authority is superior to that of individuals. Such a signal is of immense value in building a lasting tradition of respect for and adherence to the law, and has been identified by some commentators as the key to the development of truly democratic institutions.”); Slaughter & Bosco, *supra* note 35, at 106 (noting that the principal benefit in human rights litigation under the Alien Tort Claims Act may be the public attention it generates); cf. Randall S. Abate, *Kyoto or Not, Here We Come: The Promise and Perils of the Piecemeal Approach to Climate Change Regulation in the United States*, 15 CORNELL J.L. & PUB. POLY 369, 398 (2006) (noting that the value of environmental citizen suits are “often more symbolic than substantive”).

## CONCLUSION

Faced with a federal judiciary that is increasingly skeptical of Alien Tort Statute claims, advocates have begun to explore other venues for relief. Some have urged greater use of state law and state courts and believe that state courts may prove more amenable to enforcing and advancing human rights. The move to state court litigation, however, is unlikely to prove beneficial. Over the long-term, relying on state courts will place human rights advocates in a weaker position. State court litigation is a poor substitute for more difficult—but more effective—multilateral, international lawmaking.