
STATE REMEDIES FOR HUMAN RIGHTS

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Within the United States, states are the source of remedies for most legal wrongs. State law provides remedies for common law torts, statutory violations, and constitutional rights, and state courts are available to parties seeking these remedies. May states also provide remedies for the victims of international human rights violations? With the Supreme Court closing the door on human rights litigation in U.S. federal courts under the Alien Tort Statute, and with plaintiffs therefore turning to state courts and state law to redress violations of international human rights, this question has become especially important.

The dominant view among courts and commentators, however, treats human rights remedies as a foreign relations function committed to the federal government. If the federal government decides not to provide these remedies, then, this view holds, states must not provide them either.

This Article challenges that position. It argues that states may provide remedies for international human rights, much as they do for torts and civil rights. States provide law and courts for the redress of wrongs as a matter of course, particularly the types of torts that most human rights litigation addresses. Within the federal system, states have independent authority to provide remedies for legal wrongs. State courts and state law therefore play a fundamental role in fulfilling the aspiration that rights entail remedies. Under state law, federal law, and international law, states have a recognized interest in providing redress for human rights violations. And in many cases, a state's interest in providing remedies for human rights violations will outweigh the business or foreign relations costs of human rights litigation that are often invoked to deny remedies.

This Article's theory of state remedies for human rights has doctrinal and normative implications. The proper application of various doctrines that may limit access to state courts or the application of state law requires explicit consideration of the state interest in providing remedies for human rights.

Normatively, this Article's theory of state remedies for human rights provides a justification for doctrinal changes in order to accommodate that interest.

INTRODUCTION

Should U.S. courts provide remedies to victims of international human rights violations? International and regional human rights bodies have limited capacity to do so.¹ For this reason, the international human rights system depends primarily on domestic law to provide personal remedies.² Often, however, victims of human rights abuses will find it futile to seek a remedy in a domestic court of the country where the abuses occurred.³ Therefore, the domestic courts of other countries also have a role to play in providing law for the redress of human rights violations. For more than thirty years, the U.S. federal courts have played a role by adjudicating human rights claims under the Alien Tort Statute (“ATS”).⁴

The Supreme Court, however, has sharply limited the ability of the federal courts to hear ATS claims. The Court's 2004 decision in *Sosa v. Alvarez-Machain*⁵ limited the types of customary international law (“CIL”) rules that can serve as the basis for federal subject matter jurisdiction under the ATS.⁶ Most recently, in *Kiobel v. Royal Dutch Petroleum Co.*,⁷ the Court limited the territorial scope of permissible claims in federal courts under the ATS, and according to some commentators, brought an end to the era of human rights litigation in federal courts.⁸ Whatever the precise scope of *Kiobel*'s holding, the

¹ See BETH STEPHENS ET AL., INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS xxv (2d ed. 2008).

² See *id.*

³ See Curtis A. Bradley, *The Costs of International Human Rights Litigation*, 2 CHI. J. INT'L L. 457, 458 (2001); Christopher A. Whytock, *Foreign State Immunity and the Right to Court Access*, 93 B.U. L. REV. 2033, 2074-75 (2013) (finding that in more than half of cases in which access to U.S. courts is denied to plaintiffs on foreign-sovereign-immunity grounds, courts in foreign jurisdiction either lack judicial independence or are only partly independent).

⁴ *Filártiga v. Peña-Irala*, 630 F.2d 876, 876 (2d Cir. 1980) (holding that United States has federal jurisdiction under ATS to provide court access to alien parties who file suit against alleged torturers, regardless of parties' nationalities).

⁵ 542 U.S. 692 (2004).

⁶ *Id.* at 732 (“We are persuaded that federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when [ATS] was enacted.”).

⁷ 133 S. Ct. 1659 (2013).

⁸ *Id.* at 1669 (holding that ATS claims must “touch and concern” United States “with sufficient force” to overcome presumption against extraterritorial jurisdiction).

Court may be poised in *Jesner v. Arab Bank, PLC*⁹ to cut back further by limiting corporate liability under the ATS.¹⁰

In the American federal system, however, federal courts are not the only forums for providing law to redress wrongs. With the door closing on ATS suits in federal courts, attention is turning to suits asserting human rights claims in state courts based on state or foreign tort law or international law, and in federal courts based on state tort law.¹¹ The turn to state remedies for human rights is not unprecedented.¹² For example, in *Doe v. Unocal Corp.*,¹³ a California trial court applied California law to plaintiffs' claims that a California corporation was complicit in human rights abuses in Burma and allowed the case to proceed

⁹ 137 S. Ct. 1432 (2017).

¹⁰ *Id.* at 1432 (granting writ of certiorari in *In re Arab Bank, PLC Alien Tort Statute Litigation*, 808 F.3d 144, 159 (2d Cir. 2015), in which court of appeals held that district court did not abuse its discretion when denying leave to amend consolidated complaints brought under ATS by parties injured overseas).

¹¹ See, e.g., Roger P. Alford, *Human Rights After Kiobel: Choice of Law and the Rise of Transnational Tort Litigation*, 63 EMORY L.J. 1089, 1091 (2014) (arguing that "demise of ATS will signal rise of transnational tort litigation" of human rights claims); Donald Earl Childress III, *The Alien Tort Statute, Federalism, and the Next Wave of Transnational Litigation*, 100 GEO. L.J. 709, 715 (2012) (arguing that human rights claimants will increasingly rely on state and foreign law); Anna Maria Gabrielidis, *Human Rights Begin at Home: A Policy Analysis of Litigating International Human Rights in U.S. State Courts*, 12 BUFF. HUM. RTS. L. REV. 139, 179-84 (2006); Marco Simons, Keynote Address, *Kiobel v. Royal Dutch Petroleum: A Practitioner's Viewpoint*, 28 MD. J. INT'L L. 28, 41 (2013) ("[T]here is still no likelihood that transnational human rights litigation is going away anytime soon—the state courts remain open to transnational lawsuits for transitory torts."); Beth Stephens, *State Law Claims: The Next Phase of Human Rights Litigation*, 108 AM. SOC'Y INT'L L. PROC. 442, 442 (2014) (stating that "victims of human rights abuses [after *Kiobel*] will increasingly file their claims in state courts"); Christopher A. Whytock, Donald Earl Childress III & Michael D. Ramsey, *After Kiobel—International Human Rights Litigation in State Courts and Under State Law*, 3 U.C. IRVINE L. REV. 1, 5 (2013) ("[P]laintiffs alleging human rights violations are increasingly likely to consider pursuing their claims in state courts or under state law."); Svetlana Meyerzen Nagiel, Note, *An Overlooked Gateway to Victim Compensation: How States Can Provide a Forum for Human Rights Claims*, 46 COLUM. J. TRANSNAT'L L. 133, 133 (2007) (advocating "state statutory and common law causes of action" as "viable alternatives" to ATS). Another possibility is that state choice-of-law rules will point towards foreign law as a source for rights of action in human rights cases. See *infra* Section IV.B.1.

¹² See generally Paul Hoffman & Beth Stephens, *International Human Rights Cases Under State Law and in State Courts*, 3 U.C. IRVINE L. REV. 9 (2013) ("Long before the Second Circuit decided the *Filártiga* case, human rights advocates looked to state courts to enforce international human rights norms.")

¹³ Nos. BC 237 980, BC 237 679, 2002 WL 33944506 (Cal. Super. Ct. June 11, 2002).

to trial.¹⁴ And in *Bowoto v. Chevron Corp.*,¹⁵ human rights plaintiffs sued an American multinational corporation for allegedly paying the Nigerian military to carry out a “series of brutal attacks” against Nigerian villagers that left four dead.¹⁶ A federal district court held that California tort law applied in light of the state’s interest in protecting victims and holding domestic corporations “fully liable” for wrongs.¹⁷ Though not yet common, there are other examples of human rights plaintiffs seeking remedies for human rights violations in state courts¹⁸ or in federal courts under state tort law.¹⁹

¹⁴ *Id.* at *14; *see also* *Doe v. Unocal Corp.*, 963 F. Supp. 880, 883-84, 892 (C.D. Cal. 1997) (denying motion to dismiss). The federal district court granted Unocal’s motion for summary judgment on ATS claims, a decision affirmed in part and reversed in part by a panel of the Ninth Circuit, which remanded for trial. *See Doe v. Unocal Corp.*, 110 F. Supp. 2d 1294, 1294 (C.D. Cal. 2000), *aff’d in part, rev’d in part sub nom. Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002). While a decision en banc was pending in the Ninth Circuit, the case settled. *See Doe I v. Unocal Corp.*, 395 F.3d 978, 978-79 (9th Cir. 2003) (granting rehearing en banc).

¹⁵ No. C:99-cv-02506, 2006 WL 2455761 (N.D. Cal. Aug. 22, 2006).

¹⁶ *Id.* at *1 (N.D. Cal. Aug. 22, 2006).

¹⁷ *Id.* at *10 (“[I]f defendants were found responsible for the attacks allegedly committed by the Nigerian military but could not be held fully liable, California’s interest would be significantly impaired.”). After trial, a jury found for the defendants. *See Bowoto v. Chevron Corp.*, 621 F.3d 1116, 1122 (9th Cir. 2010).

¹⁸ *See, e.g.*, Complaint for Damages, *Kimata v. Al Shabaab*, No. BC 615 963, 2016 WL 1321457 (Cal. Super. Ct. filed Apr. 4, 2016) (asserting claims under state and federal law against terrorist organization); Amended Complaint, *Caballero v. Fuerzas Armadas Revolucionarias de Colom.*, No. 12-48803-CA-02, 2013 WL 10967065 (Fla. Cir. Ct. filed Mar. 20, 2013) (asserting claims under international law, federal law, state law, and Colombian law against Fuerzas Armadas Revolucionarias de Colombia (“FARC”) for human rights violations); Verified Complaint, *Funk v. Belneftekhim*, No. 501907/2012, 2012 WL 2863982 (N.Y. Sup. Ct. filed July 12, 2012) (stating claims under state law against defendant for aiding and abetting human rights violations by Belarusian KGB); *see also* *Caballero v. De*, No. 12-48803-CA-02, 2014 Fla. Cir. LEXIS 51243, at *1 (Fla. Cir. Ct. filed May 2, 2014) (granting plaintiff’s motion for summary judgment as to liability under international law and RICO statute). The Opportunity Agenda, a nongovernmental organization, and Northeastern University School of Law’s Program on Human Rights and the Global Economy periodically publish surveys of human rights litigation in state courts. *E.g.*, I. INDIA THUSI & MARTHA F. DAVIS, THE PROGRAM ON HUMAN RIGHTS AND THE GLOBAL ECONOMY, HUMAN RIGHTS IN STATE COURTS (Elizabeth Ennen & Juhu Thukral eds., 2016), <https://www.northeastern.edu/law/pdfs/academics/phrge/state-courts-2016.pdf> [<https://perma.cc/4YE3-WVQ2>].

¹⁹ For a survey of human rights cases filed in federal courts under state law, *see* Nagiel, *supra* note 11, at 167-76, and *see* Roger P. Alford, *The Future of Human Rights Litigation After Kiobel*, 89 NOTRE DAME L. REV. 1749, 1761 nn.84-86 (2014) (listing federal cases in which plaintiffs involved in ATS litigation added pendant state tort claims or presented claims alleging state law torts). By “foreign-squared,” we are referring to human rights cases that are not wholly domestic, but nevertheless involve U.S. plaintiffs, U.S. defendants, or conduct with a U.S. nexus, whereas when we use the term “foreign-cubed” we are referring to cases

The idea of state remedies for human rights is, however, controversial. Following the logic of “categorical federalism,”²⁰ some observers identify remedies for human rights violations as a matter of foreign relations vested in the federal government. Like Chief Justice John Roberts in *Kiobel*, they tend to see domestic remedies for human rights as being concerned with the “conduct of foreign policy”²¹ and nothing else. Like the D.C. Circuit in *Saleh v. Titan Corp.*,²² they tend to presume that when states provide remedies for human rights, they are performing a foreign relations function committed to the federal government.²³ They are “puzzled at what interest” a state might have in international human rights cases.²⁴ They ask rhetorically, “[s]hould state law rule the world when federal ATS law cannot?”²⁵—suggesting that if the federal courts have decided against providing remedies, then state courts may not provide them either. Other commentators argue that “[s]tate law is ill-fitting for

like *Kiobel*, which involved foreign plaintiffs, foreign defendants, and “exclusively foreign conduct.” E.g., Brady Bizarro, “*Vigilant Doorkeeping*”: *Post-Kiobel Corporate Accountability Under the Alien Tort Statute for Negligence and Violations of the International Prohibition on Nonconsensual Medical Experimentation*, 33 B.U. INT’L L.J. 493, 507 (2015) (providing same definition). There are considerable hurdles to *Kiobel*-style suits, even in state courts, including personal jurisdiction. See *Daimler AG v. Bauman*, 134 S. Ct. 746, 750-51 (2014) (dismissing suit in “absence of any [state] connection to the atrocities, perpetrators, or victims” for lack of personal jurisdiction). The decision whether a state court may provide a state law remedy in a foreign-cubed case requires working through a variety of doctrinal limits. See *infra* Part IV (illustrating court access doctrines and principles that may limit application of state law in providing remedies for human rights claims).

²⁰ Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L.J. 619, 620 (2001) (describing “categorical federalism” as “constructed around two sets of human activities, the subject matter of regulation and the locus of governance, with each assumed to have intelligible boundaries and autonomous spheres”).

²¹ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1661 (2013) (“[T]he danger of unwarranted judicial interference in the conduct of foreign policy is magnified in the context of the ATS, because the question is not what Congress has done but instead what courts may do.”).

²² 580 F.3d 1 (D.C. Cir. 2009) (2-1 decision).

²³ *Id.* at 9 (holding that alleged acts of abuse or torture were not in clear violation of international law norms and thus not actionable under ATS).

²⁴ *Id.* (“[W]e are still puzzled at what interest D.C., or any state, would have in extending its tort law onto a foreign battlefield.”); see also *Al Shimari v. CACI Int’l, Inc.*, 679 F.3d 205, 230-31 (4th Cir. 2012) (en banc) (Wilkinson, J., dissenting) (asserting that “there is no indication whatsoever that the Commonwealth of Virginia has any interest in having its tort law applied abroad” in torture claim against private U.S. military contractor and emphasizing that “federal government has exclusive power over foreign affairs”).

²⁵ U.S. CHAMBER INST. FOR LEGAL REFORM, *SHOULD STATE LAW RULE THE WORLD? A CALL FOR CAUTION IN APPLYING STATE LAW IN TRANSNATIONAL COURT CASES* 15 (2013); see also Childress III, *supra* note 11, at 755.

human rights claims²⁶ and that that tort law cannot adequately address human rights violations.²⁷

More generally, human rights litigation in state courts faces some of the same headwinds as ATS litigation. Against the backdrop of a resurgent nationalism in politics, many Americans are questioning the United States' interests in international law and in advancing international human rights. Federal judges have developed doctrinal limits on state adjudication, including preemption and personal jurisdiction, that may close the state courthouse doors to human rights plaintiffs, particularly in so-called "foreign-cubed" cases arising abroad. For many, providing remedies for international human rights is not something that U.S. courts, much less *state* courts, are competent to do. To address these concerns, it is not enough to repeat the case for human rights litigation under the federal ATS.

This Article develops the normative case for state remedies for human rights. We argue that providing law for redressing wrongs is what states do, and for good reason. Our argument is based on the constitutionally recognized remedial authority and interests of the states. In the American federal system, states have independent authority to redress wrongs. States provide law and courts for the redress of wrongs as a matter of course, particularly the types of tortious wrongs that constitute human rights violations.²⁸ As one scholar puts it: "Human rights violations are transnational torts. Torture is assault and battery. Terrorism is wrongful death. Slavery is false imprisonment."²⁹ Even if federal rights of action for human rights require special justification in light of the limited jurisdiction of federal courts—a debate we do not and need not enter here—it does not follow that state courts of general jurisdiction are incompetent to remedy human rights violations.

States may provide fora and remedial law for the victims of human rights violations, much as they provide for the redress of other legal wrongs. In *Saleh*, for instance, Judge Merrick Garland dissented from the D.C. Circuit's dismissal of the plaintiff's state law claims, reasoning that "one way to show that 'people

²⁶ Austen L. Parrish, *State Court International Human Rights Litigation: A Concerning Trend*, 3 U.C. IRVINE L. REV. 25, 40 (2013).

²⁷ Nathan J. Miller, *Human Rights Abuses as Tort Harms: Losses in Translation*, 46 SETON HALL L. REV. 505, 540 (2016).

²⁸ We acknowledge the concerns of those who argue that state tort law is not as well equipped as international law to address human rights violations. *See, e.g., id.* at 506 ("[T]he impending shift from federal to state courts will rob [human rights] cases of their public character and will reduce them to 'garden variety municipal torts.' Such an outcome will threaten the ability of such litigation to catalyze the kind of systemic change necessary to address human rights abuses."). However, we hope that our normative argument may partially address those concerns. Moreover, when suits based on international law are not available, our view is that remedies for the violation based on tort law is preferable to no remedy at all.

²⁹ Alford, *supra* note 11, at 1091.

will be held to account' is to permit this country's legal system to take its ordinary course and provide a remedy for those who were wrongfully injured."³⁰ In the ordinary course, Judge Garland explained, individuals who "were beaten, electrocuted, raped, subjected to attacks by dogs, and otherwise abused by private contractors" would have a remedy under a state's "traditional, generally applicable tort law."³¹ We argue that state courts may be open to perform this remedial function, including in human rights cases, even where the federal courthouse doors may be closed or federal law remedies may be unavailable. Providing for the redress of wrongs is not a matter of foreign relations committed to the federal government simply because those wrongs involve human rights violations.

Indeed, providing for the redress of wrongs is a traditional function of state law and state courts. Historically, the common law provided the means to redress wrongs through the forms of pleading. The ATS's framers assumed that state courts would have jurisdiction to provide common law remedies for non-citizens who suffered torts in violation of the law of nations.³² And state courts in the nineteenth century provided common law relief in transnational litigation, including cases arising from wrongs occurring abroad.³³ In the modern era, state law continues to provide law for the redress of wrongs, without guaranteeing relief in all cases. This aspiration is reflected in the maxim that "where there is a legal right, there is also a legal remedy," which Chief Justice John Marshall described in *Marbury v. Madison*³⁴ as the "essence of civil liberty."³⁵ The right-remedy principle—"every right when withheld must have a remedy, and every injury it's [sic] proper redress"³⁶—is the normative core of a state's interest in exercising its remedial authority to provide redress for the victims of human rights violations. Not all wrongs are redressed through legal remedies.³⁷ But the

³⁰ *Saleh v. Titan Corp.*, 580 F.3d 1, 28 (D.C. Cir. 2009) (Garland, J., dissenting).

³¹ *Id.* at 30 ("[T]here is no issue of 'extending' a state's law here; the case involves only the application of a state's traditional, generally applicable tort law. That such law may apply to conduct in a foreign country is hardly unusual."); see also Seth Davis, *Judge Garland and the Future of Human Rights Litigation*, PRAWFSBLAWG (Mar. 18, 2016, 1:11 PM), <http://prawnsblawg.blogspot.com/prawnsblawg/2016/03/judge-garland-and-the-future-of-human-rights-litigation.html?platform=hootsuite> [<https://perma.cc/9JNN-TVP2>].

³² *Sosa v. Alvarez-Machain*, 542 U.S. 692, 720 (2004).

³³ *Id.* at 706 (collecting cases).

³⁴ 5 U.S. (1 Cranch) 137 (1803).

³⁵ *Id.* at 163; see also 3 WILLIAM BLACKSTONE, COMMENTARIES *109; John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 550-51 (2005).

³⁶ 3 BLACKSTONE, *supra* note 35, at *109.

³⁷ See Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1778 (1991) ("Few principles of the American constitutional tradition resonate more strongly than one stated in *Marbury v. Madison*: for every violation of a right, there must be a remedy. Yet *Marbury's* apparent promise . . . reflects a principle, not an ironclad rule, and its ideal is not always attained.").

wrongs involved in many human rights cases, we argue, may be redressed through relief under state law in federal courts, or in state courts under state or foreign tort law or under international law.

Our argument is not that state courts or state law must always be available to human rights plaintiffs. Rather, our argument shifts the ground of debate; what presumptively seemed a “foreign relations” matter for the federal government alone now appears a remedial matter presumptively for state courts to decide. Our aim is to work through the normative arguments for state authority to provide law for redressing human rights violations. With the focus on ATS litigation, the normative case for state authority and remedial interests has largely been missing from the debate over human rights litigation in U.S. courts. Fundamentally, our aim is to clarify the hard choices that arise in human rights cases, rejecting a categorical approach that focuses upon the reasons to limit relief without due regard for the reasons to allow it. In any particular human rights case, courts may face difficult choices among competing values, based upon the demand for redress and pragmatic judgments about the risks of satisfying that demand. In such cases, courts should explain how they made those choices.

Three normative principles follow from our arguments. First, state authority to provide remedies for human rights violations requires no special justification. In the ordinary course, states provide law for the redress of wrongs, including the types of tortious wrongs that human rights litigation typically addresses. State authority to provide redress is the default; the limits are what require justification. Second, courts, legislatures, and commentators should not presume that the limits on federal jurisdiction in human rights cases extend to states. The limits on federal ATS litigation may not apply, or may apply differently, to state authority to provide remedies for human rights violations. Third, doctrinal limits on state remedies for human rights violations should not be categorical, but rather developed with awareness of the states’ distinct remedial authority within our federal system and applied on a case-by-case basis. In developing these limits, courts and legislatures should consider a state’s interest in providing remedies and the importance of remedies for persons who have suffered human rights abuses. If courts determine that these remedial considerations are outweighed by concerns about the burden on multinational businesses or about foreign relations complications, they should give explicit reasons showing why they are outweighed in the particular case. Sometimes foreign relations and other costs of state remedies will justify denying relief to a particular plaintiff. But we believe that if taken seriously, these normative principles would enhance respect for the constitutionally recognized remedial authority and interests of states while taking into account critics’ concerns.

Our normative argument has important doctrinal implications. Some doctrinal limits on federal ATS litigation—such as the political question doctrine—should not, in our view, be a barrier to state remedies for human rights, except in extraordinary cases. Other limits—such as the *forum non conveniens* doctrine and personal jurisdiction—should be applied on a case-by-case basis that

seriously weighs the availability of alternative relief and a state's interest in providing law for redressing wrongs. Under our view, moreover, cases filed in state courts under state tort or foreign law would not be removable based on the federal common law of foreign relations merely because the case is a human rights case. Federal preemption would not in the normal course be a bar to claims under state common law or foreign law, though it might limit state rights of action to enforce CIL or human rights treaties directly. And although it is difficult to generalize about choice-of-law analysis, a state's interest in providing remedies for human rights violations will often support the application of that state's law. The common thread to these doctrinal arguments is our basic claim that if "what is needed to ground governmental power is a *legitimate governmental interest*,"³⁸ then state authority to provide law for the redress of human rights violations is firmly grounded.

Our normative and doctrinal arguments proceed in four parts. In Part I, we provide the necessary context for our argument by explaining the role of domestic courts in the international human rights system and sketch the move from ATS litigation in federal courts to human rights litigation in state courts and under state law. In Part II, we present the categorical approach that would halt this move in its tracks. In Part III, we lay out the core of our doctrinal and normative case. We explain the structural principle of judicial federalism that confirms state authority to provide remedies in human rights cases. And we then explore a state's interest in providing law for the redress of human rights violations and demonstrate its foundations in state law, federal law, international law, and political theory. We conclude that states may exercise a constitutionally recognized role in providing law for redressing human rights violations. In Part IV, we draw out the doctrinal implications of our argument for human rights litigation in state courts and under state law. We do not argue that the demand for redress of human rights violations categorically prevails over limiting doctrines, such as preemption, personal jurisdiction, or the political question doctrine. Instead, we argue that proper application of these doctrines requires explicit consideration of the state interest in providing remedies for human rights violations, and that by attending to this remedial interest, decisions in human rights suits will better attend to the hard choices between providing remedies for wrongs and the potential costs of litigation to businesses, foreign governments, and U.S. foreign relations.

I. STATE REMEDIES AND THE INTERNATIONAL HUMAN RIGHTS SYSTEM

One of the most important developments in international law since the Second World War has been the growing recognition and codification of human rights

³⁸ Louise Weinberg, *What We Don't Talk About When We Talk About Extraterritoriality: Kiobel and the Conflict of Laws*, 99 CORNELL L. REV. 1471, 1514 (2014).

in international treaties.³⁹ Yet “[d]espite 50 years of rapid progress in the recognition of international human rights norms,” international enforcement remains underdeveloped,⁴⁰ both globally and regionally.⁴¹

To be sure, there are significant international mechanisms that contribute to human rights promotion and protection, including the Office of the United Nations High Commissioner for Human Rights, the United Nations Human Rights Council and its Special Procedures system, and human rights bodies established by major human rights treaties such as the United Nations Human Rights Committee—the body that monitors implementation of the International Covenant on Civil and Political Rights—and the Committee on Economic, Social and Cultural Rights—the body that monitors implementation of the International Covenant on Economic, Social and Cultural Rights.⁴² In addition, there are several regional human rights courts, including the African Court on Human and Peoples’ Rights, the European Court of Human Rights, and the Inter-American Court of Human Rights.⁴³

However, although some international human rights bodies allow individuals to submit complaints directly, they generally do not give individuals a right to have their claims decided, and they generally do not have the authority to provide personal remedies to victims of human rights abuses. Moreover, the geographical coverage of regional human rights courts remains limited, as does the willingness of countries to submit to their jurisdiction. Aside from the European Court of Human Rights, regional human rights courts do not provide reliable court access and availability of remedies to individuals.⁴⁴ As a result,

³⁹ Human rights have been codified in the following legal instruments: general treaties, such as the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights; specialized treaties, such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the Convention on the Elimination of All Forms of Discrimination against Women; and CIL. *See generally* THOMAS BUERGENTHAL, DINAH SHELTON & DAVID P. STEWART, *INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL* (3d ed. 2002).

⁴⁰ *See* STEPHENS ET AL., *supra* note 1, at xxiii; *see also* BUERGENTHAL ET AL., *supra* note 39, at 24.

⁴¹ *See, e.g.*, BUERGENTHAL ET AL., *supra* note 39, at 25 (“[P]rogress in the human rights area is greatly hampered in many countries by endemic poverty, illiteracy, corruption and various forms of discrimination that prevent large segments of the population from enjoying their internationally recognized human rights.”); Gabrielidis, *supra* note 11, at 141 (“The relevant [international law] bodies . . . either lack an enforcement mechanism or may lack jurisdiction to hear cases where the U.S. is a party.”).

⁴² *See* DANIEL MOECKLI ET AL., *INTERNATIONAL HUMAN RIGHTS LAW* 359-97 (Daniel Moeckli et al. eds., 2d ed. 2014).

⁴³ *Id.* at 416-57.

⁴⁴ For an overview of the limits of regional and international human rights bodies, *see* Gabrielidis, *supra* note 11, at 151-55.

there often are no plausible avenues for victims of human rights violations to seek remedies at the international or regional level.⁴⁵

For these reasons, the international human rights system depends on domestic enforcement.⁴⁶ In many cases, however, the victim of a human rights violation may not have a meaningful opportunity to obtain a remedy from the domestic courts of the country where the violation occurred.⁴⁷ For instance, a government may threaten persons who seek such remedies.⁴⁸ Even short of threats, the country that has violated a person's human rights may lack rule of law or have courts that are not independent from the government, making the pursuit of remedies there futile.⁴⁹

When remedies are unavailable internationally or in the country where the violation occurred, the victim of a human rights violation may seek redress in the domestic courts of another country.⁵⁰ Litigation in other countries' domestic courts is not necessarily the best way to redress violations of human rights. But litigation of human rights claims in the third countries' domestic courts is "an important tool in the struggle to protect human rights" where alternative remedial mechanisms are inadequate.⁵¹

⁴⁵ See STEPHENS ET AL., *supra* note 1, at xxv.

⁴⁶ *Id.*

⁴⁷ See MARK GIBNEY, INTERNATIONAL HUMAN RIGHTS LAW: RETURNING TO UNIVERSAL PRINCIPLES 122 (2d ed. 2016) ("[T]he problem . . . is that the state that has violated human rights is the same entity that is primarily responsible for enforcing the law—against itself! This, of course, has almost never taken place . . .").

⁴⁸ See, e.g., *Filártiga v. Peña-Irala*, 630 F.2d 876, 878 (2d Cir. 1980) (stating that plaintiff sought remedy in Paraguayan courts following son's murder and that government officials allegedly responded by arresting plaintiff's attorney and threatening him with death).

⁴⁹ See Bradley, *supra* note 3, at 458 (arguing that U.S. courts should provide remedies for international human rights victims who cannot obtain domestic relief); Whytock, *supra* note 3, at 2075 (finding that in more than half of cases in which U.S. courts deny court access to plaintiffs on foreign sovereign immunity grounds, courts in foreign jurisdiction in question either lack judicial independence or are only partly independent).

⁵⁰ See GIBNEY, *supra* note 47, at 124 ("There are few (if any) 'places' where individuals can bring a claim for a violation of their human rights.").

⁵¹ See Beth Stephens, *The Civil Lawsuit as a Remedy for International Human Rights Violations Against Women*, 5 HASTINGS WOMEN'S L.J. 143, 154 ("ACTA and TVPA litigation has proven to be an important tool in the struggle to protect human rights. The impact of these cases on both the individual plaintiffs and the human rights movement in their home countries and elsewhere should not be underestimated."); see also GIBNEY, *supra* note 47, at 130 (noting importance of "domestic courts of outside states" in addressing human rights violations); Ernest A. Young, *Universal Jurisdiction, the Alien Tort Statute, and Transnational Public-Law Litigation After Kiobel*, 64 DUKE L.J. 1023, 1028 (2015).

For more than three decades, federal courts played a significant role in making personal remedies available to alleged victims of human rights abuses.⁵² Beginning in the 1980s, the federal courts began hearing human rights claims under the ATS, which provides that “[t]he 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.”⁵³ In its 1980 decision in *Filártiga v. Peña-Irala*,⁵⁴ the U.S. Court of Appeals for the Second Circuit held that the ATS provided subject matter jurisdiction over a claim of torture brought by Paraguayan citizens against a Paraguayan police official.⁵⁵ Following *Filártiga*, litigation in federal courts under the ATS became the most prominent form of human rights litigation in the United States.⁵⁶

By the early 2000s, the Supreme Court began imposing new limitations on ATS litigation. In its 2004 decision in *Sosa v. Alvarez-Machain*,⁵⁷ the Court held that “although the ATS is a jurisdictional statute creating no new causes of action,” the federal courts are authorized to recognize common law “private causes of action for certain torts in violation of the law of nations.”⁵⁸ The Court emphasized that “federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted.”⁵⁹ Scholars generally agree that *Sosa* narrowed the scope of possible causes of action that could be pursued under

⁵² Beyond U.S. federal courts, the domestic courts of other nations have also opened their doors to human rights claims. See Robert McCorquodale, *Waving, Not Drowning: Kiobel Outside the United States*, 107 AM. J. INT’L L. 846, 846 (2013); see also *id.* at 851 (“The effect of EU regulations and the use of imaginative common law tort claims and civil law criminal procedures, combined with innovative legal techniques, have enabled the development of effective litigation outside the United States that avoids many of the difficulties seen in ATS claims.”); *50 Human Rights Cases You Need to Know*, OXFORD PUB. INT’L L., <http://opil.oup.com/page/426/50-human-rights-cases-you-need-to-know> [https://perma.cc/MM59-TB3Y] (last visited Feb. 19, 2018).

⁵³ 28 U.S.C. § 1350 (2012).

⁵⁴ 630 F.2d 876 (2d Cir. 1980).

⁵⁵ *Id.* at 890 (“[F]or purposes of civil liability, the torturer has become . . . an enemy of all mankind. Our holding today, giving effect to a jurisdictional provision enacted by our First Congress, is a small but important step in the fulfillment of the ageless dream to free all people from brutal violence.”).

⁵⁶ See, e.g., Ralph G. Steinhardt, *Fulfilling the Promise of Filartiga: Litigating Human Rights Claims Against the Estate of Ferdinand Marcos*, 20 YALE J. INT’L L. 65, 67 (1995).

⁵⁷ 542 U.S. 692 (2008).

⁵⁸ *Id.* at 724.

⁵⁹ *Id.* at 732-33. These paradigmatic violations included “offenses against ambassadors, violation of safe conducts, and piracy.” *Id.* at 694.

the ATS.⁶⁰ Although the Court cited the *Filártiga* court's recognition of a right of action for torture with approval,⁶¹ it declined to recognize a right of action for arbitrary detention.

In *Kiobel*, the Supreme Court further narrowed the scope of ATS litigation.⁶² In *Kiobel*, the issue was "whether and under what circumstances courts may recognize a cause of action under the ATS, for violations of the law of nations occurring within the territory of a sovereign other than the United States."⁶³ The court held that "the presumption against extraterritoriality applies to claims under the ATS, and that nothing in the statute rebuts that presumption."⁶⁴ It acknowledged, however, that the presumption may be displaced "where the claims touch and concern the territory of the United States . . . with sufficient force."⁶⁵ In his concurring opinion, Justice Kennedy emphasized that the Court had left open several "significant questions," and therefore the proper implementation of the presumption against extraterritorial application "may require some further elaboration and explanation."⁶⁶ But on the specific facts of the *Kiobel* case, where "all the relevant conduct took place outside the United States," the plaintiff's ATS suit was dismissed.⁶⁷

Although human rights litigation under the ATS in federal courts is not over, it has been narrowed quite dramatically.⁶⁸ One scholar goes so far as to suggest that the *Kiobel* decision "signals the end of [the] *Filartiga* human rights revolution" and "will foreclose the vast majority of ATS cases."⁶⁹

The Court is poised to cut back further on ATS litigation in *Jesner v. Arab Bank, PLC*.⁷⁰ *Kiobel* left open the question of whether liability under the ATS extends to corporate defendants.⁷¹ *Jesner* presents that question, as the corporate defendant argues that corporate liability is not "universally recognized" in international law and therefore does not satisfy *Sosa*'s standard.⁷² If the Court

⁶⁰ See, e.g., Hoffman, *supra* note 12, at 18 ("[S]tate tort law should offer broader coverage than ATS claims, which are limited by the historical paradigm test in *Sosa*.").

⁶¹ *Sosa*, 542 U.S. at 732 (citing *Filártiga v. Peña-Irala*, 630 F.2d 876, 890 (2d Cir. 1980)).

⁶² *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013).

⁶³ *Id.* at 1662.

⁶⁴ *Id.* at 1669.

⁶⁵ *Id.*

⁶⁶ *Id.* (Kennedy, J., concurring).

⁶⁷ *Id.*

⁶⁸ See, e.g., Alford, *supra* note 11, at 1098.

⁶⁹ *Id.* at 1097-98.

⁷⁰ 808 F.3d 144 (2d Cir. 2015), *cert. granted*, 137 S. Ct. 1432 (2017).

⁷¹ *Kiobel*, 133 S. Ct. at 1669.

⁷² Brief for Respondent at 4, *Jesner v. Arab Bank, PLC*, 137 S. Ct. 1432 (2017) (No. 16-499), 2017 WL 3668990, at *3.

holds that human rights plaintiffs may not sue corporations under the ATS, then it will indeed foreclose most ATS litigation.⁷³

As a result, lawyers and scholars are turning their attention to state remedies for human rights violations.⁷⁴ States can provide remedies for human rights violations in at least two ways. First, they can make their courts available to hear human rights claims—whether those claims are based on state law, foreign law, or international law. Second, human rights claims—whether brought in state or federal courts—can be based on state law, such as state tort law.

The turn towards state courts and state law is not unprecedented.⁷⁵ To the contrary, “human rights claims were litigated in state courts for decades before *Filártiga* inaugurated modern ATS claims” and “post-*Filártiga* human rights claims based on state law have been litigated in both federal and state courts on behalf of U.S. citizens and when ATS claims were unavailable for other

⁷³ See Alford, *supra* note 11, at 1091 (“[W]ith the Supreme Court’s recent decision in *Kiobel*, reframing human rights violations as transnational torts may be the only viable alternative for redressing international wrongs through U.S. litigation.”).

⁷⁴ Whytock et al., *supra* note 11, at 5 (discussing human rights litigation in state courts and referencing existing scholarship); see also Alford, *supra* note 19, at 1749-50 (“The most important alternative avenue [to ATS litigation] is tort law. Indeed, one could say that the future of human rights litigation in the United States depends on refashioning human rights claims as state or foreign tort violations.”); Alford, *supra* note 11, at 1091 (“The demise of the ATS will signal the rise of transnational tort litigation.”); Childress III, *supra* note 11, at 715 (noting that debate regarding international human rights litigation is shifting from federal courts and federal law to state courts and state law); Paul L. Hoffman, *The Application of International Human Rights Law in State Courts: A View from California*, 18 INT’L LAW. 61, 61 (1984); Hoffman & Stephens, *supra* note 12, at 12 (noting that some human rights claims that otherwise would have been brought in federal court will now be filed in state courts under state law or international law); Burt Neuborne, *Some Quick Thoughts on Transnational Human Rights Litigation in American Courts After Kiobel*, N.Y.U. J. INT’L L. & POL. (Apr. 19, 2013), <http://nyujilp.org/some-quick-thoughts-on-transnational-human-rights-litigation-in-american-courts-after-kiobel> [<https://perma.cc/4ZU4-MRKZ>] (“[M]aybe it’s time to explore the international human rights enforcement capabilities of state courts.”); Simons, *supra* note 11, at 41 (“[T]here is still no likelihood that transnational human rights litigation is going away anytime soon—the state courts remain open to transnational lawsuits for transitory torts.”); Stephens, *supra* note 11, at 442 (“[V]ictims of human rights abuses will increasingly file their claims in state courts . . .”).

⁷⁵ See Gabrielidis, *supra* note 11, at 167-70 (discussing state court cases that have applied international human rights law); Hoffman, *supra* note 74, at 65-67 (arguing that California state court judges should apply international human rights law); see also STEPHENS ET AL., *supra* note 1, at 120-27; Nagiel, *supra* note 11, at 135 (“[S]ome foreigners have turned to more novel alternatives, using state law—rather than the ATS—to bring their claims in U.S. courts.”).

reasons.”⁷⁶ Following *Sosa* and *Kiobel*, however, it is unsurprising that “victims of human rights abuses will increasingly file their claims in state courts.”⁷⁷ After all, “state courts [like federal courts] can also function as effective fora for human rights accountability.”⁷⁸

Human rights claims in state courts or under state law may be purely domestic (when the plaintiff and the defendant are domestic and the relevant conduct and injury occurred in U.S. territory), mixed (when there are both domestic and foreign parties, or when relevant conduct or injury occurred outside U.S. territory), or purely foreign (when the plaintiff and defendant are foreign and the relevant conduct and injury occurred outside U.S. territory). Mixed cases are sometimes called “foreign-squared” cases, and purely foreign cases are sometimes called “foreign-cubed” cases.⁷⁹ As we will show, the implications of our analysis depend on which type of case is involved.

The human rights system relies heavily on domestic enforcement.⁸⁰ For the past three decades, federal courts and federal law have contributed domestic law for the redress of human rights violations.⁸¹ But after *Kiobel*, any such contribution from the United States will increasingly need to come from state courts or under state law.

II. CATEGORICAL FEDERALISM AND THE CASE AGAINST STATE REMEDIES FOR HUMAN RIGHTS VIOLATIONS

State remedies for human rights are controversial, however, even more so than federal remedies. Supporters of human rights litigation in federal courts under the ATS may worry that state remedies for human rights are at best a distraction, and at worst a threat to U.S. foreign relations and the progressive development of international law.⁸² For their part, critics of human rights

⁷⁶ Hoffman & Stephens, *supra* note 12, at 11. The Opportunity Agenda, a nongovernmental organization, has systematically tracked human rights claims in state courts since 2007. *See generally* THUSI & DAVIS, *supra* note 18.

⁷⁷ Stephens, *supra* note 11, at 442; *see also* Hoffman & Stephens, *supra* note 12, at 18.

⁷⁸ Hoffman & Stephens, *supra* note 12, at 20.

⁷⁹ *See* Bizarro, *supra* note 19, at 507-08.

⁸⁰ *See* STEPHENS ET AL., *supra* note 1, at xxv.

⁸¹ *See supra* note 52 and accompanying text.

⁸² One concern is that applying tort law in state courts rather than international law in federal courts can trivialize human rights violations. As the U.S. District Court for the District of Massachusetts put it: “[L]ooking to domestic tort law to provide the cause of action mutes the grave international law aspect of the tort, reducing it to no more (or less) than a garden-variety municipal tort. . . . [M]unicipal tort law is an inadequate placeholder for [human rights] values.” *Xuncax v. Gramajo*, 886 F. Supp. 162, 183 (D. Mass. 1995); *see also* Parrish, *supra* note 26, at 41 (“There is . . . something uncomfortable about addressing claims like genocide or torture through state common law claims of wrongful death or battery.”). Professor Nathan Miller has thoroughly developed this critique. He argues that “translating

litigation in federal courts under the ATS may charge that state remedies for human rights present all the problems of ATS litigation and more.⁸³ Common to both criticisms of state remedies is the idea that domestic remedies for human rights involve foreign relations conduct. The upshot of such criticism is that human rights litigation should remain a matter for the federal courts, even if that means dismissing most claims for relief.

In this Part, we sketch a strong form of this view to throw into relief concerns about state remedies for human rights. Taken for all it might suggest, the logic of “categorical federalism”⁸⁴ might hold that state remedies are categorically ill suited to redressing human rights violations. Human rights issues are foreign relations issues, the argument runs, and the federal government has exclusive authority to govern U.S. foreign relations.⁸⁵ Therefore, if the federal courts have decided against providing remedies for human rights violations, states may not do so either.⁸⁶

In addition, making some of the same arguments made against human rights litigation in federal courts under the ATS prior to *Kiobel*, critics argue that state remedies for human rights burden businesses, risk offending foreign interests, and interfere with the conduct of foreign relations.⁸⁷

Our goal is not to downplay these concerns. There are sometimes valid reasons for American courts to deny state remedies for human rights violations.⁸⁸

human rights abuses into tort harms sacrifices normativity at the altar of practicality, and in so doing undermines many of the aims that have animated the last thirty years of human rights litigation in federal courts.” Miller, *supra* note 27, at 514. Miller also raises the related concern that the turn towards state law will undermine the development of international law as a force for systemic change. *Id.* at 506. Similar concerns were raised in the *Kiobel* litigation. See Brief for *Amici Curiae* Hassan Ahmed et al. in Support of Petitioners, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (No. 10-1491), 2012 WL 2165343, at *30 (arguing that state courts would “produce decisions that could turn human rights litigation, currently decided according to a uniform body of international and federal common law, into an unruly patchwork of unpredictable rules”). On the other hand, state courts of general jurisdiction have developed normatively rich bodies of common law that can provide redress for most, if not all, of the wrongs that arise in human rights litigation in domestic courts. See *infra* Section III.A.1 (arguing that states have common law authority to provide remedies for human rights litigation). We believe, therefore, that it is important to consider the alternative of state remedies in its own right.

⁸³ See, e.g., Young, *supra* note 51, at 1121.

⁸⁴ Resnik, *supra* note 20, at 620.

⁸⁵ See, e.g., Young, *supra* note 51, at 1050 (discussing broad consensus among scholars that international law is within federal realm).

⁸⁶ See *id.*

⁸⁷ See *supra* notes 20-27 and accompanying text.

⁸⁸ Some of these reasons—such as foreign relations concerns or fairness to defendants—may weigh more heavily than a state’s interest in providing remedies, particularly in those “foreign-cubed” cases that lack a meaningful U.S. connection. But, as Beth Stephens has

As we will argue in Part III, however, the categorical approach to state remedies for human rights overlooks states' remedial authority under our system of judicial federalism and their interest in providing remedies for human rights. There is no good reason to presume that state courts and state law are excluded from redressing international human rights violations.

A. *The Case Against State Remedies for Human Rights Violations*

"Categorical federalism," as Professor Judith Resnik has defined it, is a "mode of analysis for which the phrases 'truly national' and 'truly local' are touchstones."⁸⁹ Three assumptions undergird the categorical approach to allocating authority between federal and state governments. First, this approach "assumes that a particular rule of law regulates a single aspect of human action: Laws are described as about 'the family,' 'crime,'" and so on.⁹⁰ Second, "categorical federalism relies on such identification to locate authority in state or national governments."⁹¹ Third, and finally, "categorical federalism has a presumption of exclusive control—to wit, if it is family law, it belongs *only* to the states."⁹²

The appeal of categorical federalism is threefold. In theory, institutional competence may match up with discrete categories of social life: States, unlike the federal government, are competent to design family law, or so we might conclude from the purportedly "local" nature of "the family."⁹³ Categorical federalism might also promote democratic values insofar as it allocates exclusive authority to governmental institutions that directly represent those most affected by government action and fosters accountability by making clear to voters which government actors are responsible for which actions.⁹⁴ And a categorical approach might best protect rights by limiting duplicative and unnecessary regulation.

The Supreme Court has sometimes opined that states are categorically excluded from matters involving U.S. foreign relations, going so far as to suggest that states "[do] not exist" when it comes to "foreign relations generally."⁹⁵ And, therefore, the Court has reasoned, "[p]ower over external affairs . . . is vested in the national government exclusively."⁹⁶

noted, "it is a mistake to think that human rights litigation is typified by 'foreign-cubed' cases." Stephens, *supra* note 11, at 444.

⁸⁹ Resnik, *supra* note 20, at 619.

⁹⁰ *Id.* at 620.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *See id.*

⁹⁴ *See id.*

⁹⁵ *United States v. Belmont*, 301 U.S. 324, 331 (1937).

⁹⁶ *United States v. Pink*, 315 U.S. 203, 233 (1942).

Categorical federalism may seem appealing as an approach to state remedies for human rights. When it comes to human rights law, a categorical approach draws a further distinction between the “national” and the “local” on the one hand and the “global” or the “foreign” on the other. As Resnik explains, federalism—or, more commonly, “states’ rights”—is often offered as a reason not to bind state and local governments to comply with international human rights norms.⁹⁷ Further, the categorical approach would *deny* states authority to engage with human rights norms in cases of “global” or “foreign” concern both because human rights enforcement is a matter of “foreign relations” committed to the federal government and because the enforcement of international human rights is a matter for either international institutions or foreign countries’ own courts.

A U.S. Chamber of Commerce report criticizing human rights litigation under state tort law adopts this type of argument:

The appropriateness of applying state law extraterritorially also touches on bedrock principles of the allocation of authority between federal and state law as well as federal and state courts. The extraterritorial application of state law threatens a delicate balance in light of the potential for transnational forum shopping.⁹⁸

The report argues that human rights litigation under state law, at least insofar as it arises out of violations occurring outside U.S. territory, “is ripe for a foreign relations and federalism disaster.”⁹⁹ In addition, it argues that “courts lack both a democratic mandate and institutional competence to address foreign policy” and should look for legislative guidance before “affecting international affairs.”¹⁰⁰ The report therefore proposes a federal statute that would “provide for removal of cases that touch on issues of foreign affairs” and require states to apply the law of the place of injury.¹⁰¹

In a variety of doctrinal contexts dealing with both access to state courts and the applicability of state law, courts have followed the logic of categorical

⁹⁷ Resnik, *supra* note 20, at 666-67.

⁹⁸ U.S. CHAMBER INST. FOR LEGAL REFORM, *supra* note 25; *see also* Childress III, *supra* note 11, at 727 (arguing that these cases “will complicate the international policies of the Executive Branch, thus forcing policy outcomes constitutionally vested in the elected branches of government”); Donald Earl Childress III, *Escaping Federal Law in Transnational Cases: The Brave New World of Transnational Litigation*, 93 N.C. L. REV. 995, 1042 (2015) (“[T]hrusting transnational cases into state courts risks creating discord in an important area of international relations that requires the speaking of ‘one voice’ by the federal government.”).

⁹⁹ U.S. CHAMBER INST. FOR LEGAL REFORM, *supra* note 25, at 21.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 21-22 (“The most appropriate choice of law rule for Congress to choose would probably be the law of the place of injury.”).

federalism.¹⁰² First, a plaintiff's claim is treated as if it deals with a "single aspect of human action,"¹⁰³ namely "foreign relations." Second, that identification is used to locate authority over that claim in a particular level of government (the federal government). Third, the court presumes exclusive control (namely, exclusive federal control).¹⁰⁴

Consider a few examples from diverse doctrinal contexts. In *Torres v. Southern Peru Copper Corp.*,¹⁰⁵ for example, the U.S. Court of Appeals for the Fifth Circuit affirmed the lower court's denial of plaintiff's motion to remand to state court, reasoning that removal was proper—even though the suit was based on state tort law—because the suit implicated "foreign policy concerns" and thus raised "substantial questions of federal common law."¹⁰⁶ In a different doctrinal context, Judge Harvie Wilkinson stated the categorical position: "[G]iven that the Constitution entrusts foreign affairs to the federal political branches, limits state power over foreign affairs, and establishes the supremacy of federal enactments over state law, the presumption against extraterritorial application is even stronger in the context of state tort law."¹⁰⁷ In part, Judge Wilkinson continued, the force of this presumption against state remedies for human rights follows from state law itself: "A state's interest in employing a tort regime is largely confined to tortious activity within its own borders or against its own citizens."¹⁰⁸

This categorical approach takes much of its normative force from concerns about the impacts of domestic litigation on foreign relations. State remedies, by implicitly passing judgment on the human rights practices of foreign countries, might offend the sovereignty of those nations. As Professor Donald Childress III argues, transnational cases may "interfere with the sovereignty of other nations."¹⁰⁹ He suggests that transnational cases in U.S. courts "might interfere with other, foreign measures to regulate or address the harm in question."¹¹⁰ His proposed solution is "to refocus . . . court-access doctrines . . . on state consent" by having courts "seek to determine the precise sovereign interests at stake . . . [to] encourage coordination between the United States and foreign

¹⁰² See Resnik, *supra* note 20, at 619-20.

¹⁰³ *Id.* at 620.

¹⁰⁴ See *id.*

¹⁰⁵ 113 F.3d 540 (5th Cir. 1997).

¹⁰⁶ *Id.* at 543.

¹⁰⁷ *Al Shimari v. CACI Int'l, Inc.*, 679 F.3d 205, 231 (4th Cir. 2012) (en banc) (Wilkinson, J., dissenting).

¹⁰⁸ *Id.* at 233.

¹⁰⁹ Childress III, *supra* note 98, at 1042 (arguing that federal courts are reluctant to adjudicate transnational cases for fear of interfering with sovereignty of other nations); see also Childress III, *supra* note 25, at 727 (hypothesizing that ATS cases risk "offending the sovereignty of international partners").

¹¹⁰ Childress III, *supra* note 98, at 995, 1042-43.

sovereigns.”¹¹¹ Professor Ernest Young notes a further concern from the perspective of foreign nations, namely that these nations are “both uncomfortable and unfamiliar with the American civil-litigation system.”¹¹² Still others argue that human rights litigation in U.S. courts is a form of “judicial imperialism” that offends foreign interests.¹¹³

Such concerns may be heightened when litigation occurs in state, rather than federal, courts. In the context of ATS litigation, foreign relations concerns were used as a basis for an argument that human rights litigation in federal courts encroached upon the foreign relations powers of the executive and legislative branches.¹¹⁴ These doctrinal arguments were sometimes combined with functional arguments that courts lack the institutional competence of the executive branch to adjudicate matters of U.S. foreign relations.¹¹⁵ Chief Justice Roberts relied partly on these premises in *Kiobel*, noting “the danger of unwarranted judicial interference in the conduct of foreign policy.”¹¹⁶ If anything, critics have argued, state court litigation poses an even greater threat to foreign policy. After all, there are fifty states; were each to develop their own human rights jurisprudence, it would threaten the president’s ability to speak with one voice in foreign relations—not to mention the coherent, progressive development of international human rights law. State courts, the argument runs, have even less authority and competence than federal courts to make the sensitive foreign relations judgments necessary when redressing violations of human rights.¹¹⁷

That is particularly true, critics suggest, when domestic litigation gives the power to enforce human rights law to unelected private litigants. For example, Young argues that implying rights of action in human rights cases “cuts against

¹¹¹ *Id.* at 995, 1043-44, 1046.

¹¹² Young, *supra* note 51, at 1023, 1101.

¹¹³ GARY CLYDE HUFBAUER & NICHOLAS K. MITROKOSTAS, *AWAKENING MONSTER: THE ALIEN TORT STATUTE OF 1789*, at 45-48 (2003).

¹¹⁴ See, e.g., Elizabeth Ann Chandler, *NFTC and USA*Engage Cite U.S. Supreme Court Decision to More Narrowly Define Alien Tort Provision as Important Step in Curbing Erroneous Lawsuits*, NAT’L FOREIGN TRADE COUNCIL (June 30, 2004) (quoting Bill Reinsch, President of the Nat’l Foreign Trade Council and Co-Chairman of USA*Engage), <http://www.nftc.org/newsflash/newsflash.asp?Mode=View&articleid=1691> [<https://perma.cc/D4KU-4J6V>] (praising Supreme Court’s *Sosa* decision for “warn[ing] courts . . . to be ‘wary’ of the foreign relations implications of using the ATS to impede the ‘discretion of the Legislative and Executive Branches in managing foreign affairs’”).

¹¹⁵ Julian Ku & John Yoo, *Beyond Formalism in Foreign Affairs: A Functional Approach to the Alien Tort Statute*, 2004 SUP. CT. REV. 153, 220; Young, *supra* note 51, at 1056.

¹¹⁶ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013); see also Curtis A. Bradley & Jack L. Goldsmith, *Pinochet and International Human Rights Litigation*, 97 MICH. L. REV. 2129, 2158 (1999); Childress III, *supra* note 98, at 995, 1046.

¹¹⁷ See *supra* notes 20-27 and accompanying text (discussing critics’ arguments against state court litigation of transnational matters).

the grain of federal-courts doctrine counseling restraint where Congress has not explicitly authorized private litigation.”¹¹⁸ He argues that unlike criminal prosecutions, which are conducted by government officials, private litigation is initiated and controlled by private parties who are unelected and often noncitizens.¹¹⁹ Linking the argument to foreign relations concerns, he argues that “[t]he independence of the bar from government . . . heightens the potential disconnect between ATS litigation and national foreign policy.”¹²⁰ Accordingly, the problem with private enforcement is that “it places the decision to initiate human-rights litigation in the hands of persons with no particular mandate (and insufficient information) to reconcile that litigation with their nation’s broader foreign policy.”¹²¹

Among the potential pathologies of private enforcement are the costs that frivolous litigation can impose on businesses. This seems to be a primary concern motivating opposition to human rights litigation in U.S. courts.¹²² According to one business-oriented interest group, human rights litigation under state law should be discouraged because of the risk that it “will hurt business interests.”¹²³ As the report explains, in addition to the threat of damages, the “discovery process can be unusually expensive,” and the litigation lengthy and time-consuming; moreover, even where a corporation has not violated human rights, “[t]he mere filing of such a case can topple corporate stock values and debt ratings” in light of the “[t]he extreme allegations.”¹²⁴

Some critics argue that U.S.-based multinational businesses disproportionately bear the burdens imposed by U.S. human rights litigation. Because they are more likely to be subject to personal jurisdiction in the United States than their foreign-based counterparts, they are more likely to be subject to the supposedly more plaintiff-friendly U.S. legal environment than their

¹¹⁸ Young, *supra* note 51, at 1028.

¹¹⁹ *Id.* at 1093 (attributing ATS’s “troubling” civil regime to private plaintiffs).

¹²⁰ *Id.* at 1100.

¹²¹ *Id.* at 1121; *see also* Bradley, *supra* note 3, at 460.

¹²² *See* Brian Jacek, *Alien Invasion: Corporate Liability and Its Real Implications Under the Alien Tort Statute*, 43 SETON HALL L. REV. 273, 275 (2013); Young, *supra* note 51, at 1026, 1057. Empirical analysis casts doubt on the validity of this concern, at least for U.S. businesses and businesses operating in countries with strong human rights practices. *See* Darin Christensen & David K. Hausman, *Measuring the Economic Effect of Alien Tort Statute Liability*, 32 J.L. ECON. & ORG. 794, 809 (2016) (finding that “ATS increased the cost of doing business for mining companies in countries with poor human rights records”).

¹²³ U.S. CHAMBER INST. FOR LEGAL REFORM, *supra* note 25, at 23; *see also* Gary Clyde Hufbauer, *The Alien Tort Statute of 1789: Time for a Fresh Look*, PETERSON INST. FOR INT’L ECON., May 2009, at 2.

¹²⁴ *See* U.S. CHAMBER INST. FOR LEGAL REFORM, *supra* note 25, at 13.

competitors.¹²⁵ This is said to put U.S.-based businesses at a competitive disadvantage, thus reducing economic welfare.¹²⁶ Relatedly, some critics claim that human rights litigation in U.S. courts threatens trade and both inbound and outbound foreign investment.¹²⁷

B. *Responding to Categorical Federalism in Human Rights Enforcement*

These concerns may motivate a categorical argument that because the federal courts are declining to provide remedies for human rights, states cannot provide those remedies either. As a recent interest-group report asks, “[s]hould state law rule the world when federal ATS law cannot?”¹²⁸

Our argument, which we develop in the remainder of this Article, is that the states have independent authority to provide remedies for rights—including human rights—and a constitutionally recognized interest in doing so. We respond to the arguments for categorical federalism in three steps. In this Section, we argue there are reasons to doubt the logic of categorical federalism. This critique of categorical federalism clears space for Part III, in which we offer an affirmative doctrinal and normative argument for state remedial authority in human rights cases. Finally, in Part IV we return to the sometimes legitimate concerns that state remedies may burden businesses, offend foreign governments, or interfere with U.S. foreign relations. We argue that these criticisms must be considered alongside the remedial function of state law and state courts in the American system of judicial federalism.

Fundamentally, it simply is not the case that the states cease to exist in the realm of foreign relations. As Professors Michael Glennon and Robert Sloane have recently described, American states form agreements with foreign countries, incorporate international law into state law, set up offices and send

¹²⁵ We say “supposedly” because there are empirical reasons to question the extent to which the U.S. legal environment is favorable to plaintiffs today compared to foreign legal systems, especially in transnational cases. 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 L. 31, 33 (2011) (arguing that “United States is no longer as attractive to litigants as it supposedly once was, and that other countries will increasingly draw litigants to their courts through a combination of ex ante forum selection agreements and ex post forum shopping”). See generally Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 CORNELL L. REV. 481 (2011) (documenting conventional wisdom about forum shopping into U.S. courts in transnational cases and presenting empirical evidence challenging it).

¹²⁶ See Alan O. Sykes, *Transnational Forum Shopping as a Trade and Investment Issue*, 37 J. LEGAL STUD. 339, 376 (2008).

¹²⁷ HUFBAUER & MITROKOSTAS, *supra* note 113, at 37-43 (forecasting potential “collateral damage” that ATS litigation could bring by predicting, for example, that “\$55 billion of US FDI could be deterred by ATS suits” and noting that some “[multinational corporations] may simply decide to avoid the United States in order to avoid ATS liability”).

¹²⁸ U.S. CHAMBER INST. FOR LEGAL REFORM, *supra* note 25, at 3.

representatives to other countries, adopt financial incentives to lure foreign business and investment, form lasting relationships with “sister cities,” issue their own statements on foreign policy, impose trade bans and “Buy American” procurement rules, tax foreign businesses, welcome—or seek to drive out—foreign immigrants, and regulate in myriad ways that impact other countries and their citizens.¹²⁹ Sometimes states make decisions impacting foreign relations with federal support, while other times they do so despite federal opposition or in the face of federal inaction.¹³⁰ And as Professor Julian Ku has shown, state courts have made law touching on foreign relations throughout American history; indeed, in many instances, state courts have been at the front line of meeting U.S. treaty obligations and developing CIL.¹³¹

All of which is to suggest that the logic of categorical federalism needs rethinking. Conceptually, there is no “neat distinction” between foreign relations and domestic matters reserved to the states under the Tenth Amendment.¹³² For example, generally applicable state laws permit citizens and non-citizens alike to sue for personal wrongs. Where international law requires remedies for injuries to non-citizens, has the state made foreign relations policy if it provides such remedies through generally applicable law?¹³³ Or is the provision of law for redress simply a matter of states doing what they typically do under the American federal system? In exceptional cases with transnational elements, contract enforcement, adjudication of a property dispute, or remedying a tortious wrong might have implications for foreign relations. But the ubiquity of transnational litigation in state courts or under state law makes a mess of neat

¹²⁹ MICHAEL J. GLENNON & ROBERT D. SLOANE, *FOREIGN AFFAIRS FEDERALISM: THE MYTH OF NATIONAL EXCLUSIVITY* 60-73 (2016).

¹³⁰ See Jean Galbraith, Book Review, *Cooperative and Uncooperative Foreign Affairs Federalism*, 130 HARV. L. REV. 2131, 2133-34 (2017) (reviewing GLENNON & SLOANE, *supra* note 129, and explaining that “increasingly transnational nature of our society has done much more than raise the likelihood of state and local involvement in transnational issues”; “[i]t has also made it much more likely that the federal political branches and state or local governments will find themselves *interacting* with respect to these issues”).

¹³¹ See Julian G. Ku, *Customary International Law in State Courts*, 42 VA. J. INT’L L. 265, 291-328 (2001); see also Julian G. Ku, *The State of New York Does Exist: How the States Control Compliance with International Law*, 82 N.C. L. REV. 457, 491-95 (2004) [hereinafter Ku, *New York Does Exist*] (explaining how U.S. treaties in 1800s regarding alien property rights were dependent upon states, and stating that, for most part, “federal government has suggested it would rely on the states to implement and carry out any treaty obligations involving alien property”).

¹³² See GLENNON & SLOANE, *supra* note 129, at xvii-xviii (arguing that categorical conceptual distinction between foreign and domestic matters is “myth”).

¹³³ See Ku, *New York Does Exist*, *supra* note 131, at 498 (describing how state legislatures created generally available rights of action for victims of mob violence that permitted non-citizens to sue for redress).

conceptual distinctions between the conduct of foreign relations and adjudication of a claim for personal redress.

While globalization has made such categorical distinctions difficult to maintain, the basic problem stretches back to the early days of the Republic. Consider, for example, Chief Judge James Kent's opinion for the New York Supreme Court of Judicature in *Clarke v. Morey*.¹³⁴ Clarke, a British subject residing in the United States, sued Morey for failure to pay a promissory note.¹³⁵ Morey's defense was that Clarke, as a citizen of a country with whom the United States was at war, could not sue in a U.S. court.¹³⁶ Looking to international law, Chief Judge Kent rejected this defense as inconsistent with "enlarged views of national policy."¹³⁷ "The right to sue, in such a case, rests on still broader ground than that of a mere municipal provision, for it has been frequently held that the law of nations is part of the common law."¹³⁸ As the Supreme Court noted in 1942, Chief Judge Kent's opinion "set the legal pattern which, with sporadic exceptions, has since been followed" as a matter of national policy.¹³⁹ Providing law for the redress of a broken promise was neither simply a domestic matter, nor simply a matter of foreign relations committed to the federal government.¹⁴⁰

Taken for all it seems to suggest, the one-voice model does not describe the actual practice of foreign relations in U.S. courts. As Ku points out, "the U.S. system tolerates more voices, at least with respect to international law, than either the Court's or Founders' statements seem to indicate."¹⁴¹ Indeed, as Part III describes, the First Congress expressly anticipated that state courts would have jurisdiction to adjudicate tortious wrongs that might be brought to federal court under the ATS. More generally, scholars have argued that there is little support in the Constitution's text or original understanding for the "one-voice doctrine" or federal exclusivity in foreign affairs.¹⁴²

Nor do we see any sound functional reason today to preclude states from providing law for the redress of wrongs that might have foreign relations

¹³⁴ 10 Johns 69 (N.Y. Sup. Ct. 1813).

¹³⁵ *Id.* at 69-70.

¹³⁶ *Id.* at 70.

¹³⁷ *Id.* at 74.

¹³⁸ *Id.* at 72.

¹³⁹ *Ex parte Kumezo Kawato*, 317 U.S. 69, 74 (1942).

¹⁴⁰ While the cause of action in *Clarke v. Morey* arose within the United States and involved a contract dispute, in Part III we argue that state law's function in providing remedies for non-citizens extends to the redress of international human rights, particularly because many human rights claims overlap with traditional torts under U.S. and foreign law.

¹⁴¹ Ku, *New York Does Exist*, *supra* note 131, at 527.

¹⁴² See MICHAEL D. RAMSEY, *THE CONSTITUTION'S TEXT IN FOREIGN AFFAIRS* ¶ 13 (2007) (demonstrating lack of support in constitutional text and original understanding for federal exclusivity in foreign affairs); David H. Moore, *Beyond One Voice*, 98 MINN. L. REV. 953, 991-99 (2014) (critiquing one-voice doctrine).

implications. The idea that the United States must speak with one voice in international affairs has a long lineage and reflects the possibility that state engagement in foreign relations might, in exceptional circumstances, bring the United States into conflict with other countries.¹⁴³ There is also a concern that fifty states might reach conflicting results with respect to international matters, and such conflicts might not be reviewable by the Supreme Court.¹⁴⁴ We think these concerns might arise in particular cases but do not justify a categorical rule precluding states from providing law or fora for redressing human rights violations. In any event, in practice it is unlikely that a decision of a state court in a particular lawsuit would be understood as expressing “foreign policy,” not to mention U.S. foreign policy. Foreign nations know that the United States is a federal system with separate state governments and with courts at the federal and state levels that are independent from other branches of government. As Professor Peter Spiro has put it, “[t]oday, not only do other countries understand that when California acts on certain matters, it is acting alone, they also enjoy the capacity to retaliate directly and discretely against California.”¹⁴⁵

In fact, there are functional virtues of allowing litigation in state courts or under state law. Not only may states help fill enforcement gaps by providing domestic remedies for human rights violations, but they may also contribute to developing international law. Where a state oversteps, creating an actual foreign relations conflict, the political branches, not to mention foreign countries,¹⁴⁶ have no shortage of ways of responding. When, for example, the Commonwealth of Massachusetts barred its agencies from transacting with anyone “doing business” with the government of Myanmar, Congress quickly enacted a federal sanctions regime, and Japan and the European Union lodged complaints with the World Trade Organization against the state law.¹⁴⁷ Against this backdrop, the Supreme Court concluded in *Crosby v. National Foreign Trade Council*¹⁴⁸ that

¹⁴³ See, e.g., *Chy Lung v. Freeman*, 92 U.S. 275, 279 (1875) (noting concern that “a silly, an obstinate, or a wicked [state official] may bring disgrace upon the whole country, the enmity of a powerful nation, or the loss of an equally powerful friend”).

¹⁴⁴ See *Michigan v. Long*, 463 U.S. 1032, 1041 (1983) (discussing “principle that [the Court] will not review judgments of state courts that rest on adequate and independent state grounds”).

¹⁴⁵ Peter J. Spiro, *Foreign Relations Federalism*, 70 U. COLO. L. REV. 1223, 1225-26 (1999); see also Daniel Abebe & Aziz Z. Huq, *Foreign Affairs Federalism: A Revisionist Approach*, 66 VAND. L. REV. 723, 793 (2013) (arguing on functionalist grounds for “presumption in favor of state regulation” in foreign affairs, at least when the United States is “hegemon of a unipolar world”).

¹⁴⁶ See, e.g., Spiro, *supra* note 145, at 1225-26.

¹⁴⁷ GLENNON & SLOANE, *supra* note 129, at 296-97 (internal quotation marks omitted).

¹⁴⁸ 530 U.S. 363 (2000).

Congress's action had preempted state law.¹⁴⁹ Some might see this episode as an object lesson in why states should be categorically barred from the development of human rights law. We think, however, the case teaches an altogether different lesson. First, *Crosby* shows that the political branches and foreign countries can respond directly and forcefully when a state's actions actually cause foreign relations conflicts. Second, as Glennon and Sloane have argued, the case illustrates that state law can play an "affirmative role" in prompting the political branches to consider the national interest in a human rights dispute.¹⁵⁰

State remedies for human rights raise valid concerns, but these concerns do not justify prohibiting such remedies. Redressing wrongs is an important interest that is not inherently federal, but it is one that states share in the federal system. In place of categorical federalism, we suggest a human rights federalism rooted in states' independent authority to redress legal wrongs, including when those wrongs constitute violations of human rights. What some characterize as a "foreign relations" matter for the federal government alone is a remedial matter presumptively for states to decide.

III. HUMAN RIGHTS FEDERALISM: STATE AUTHORITY AND STATE INTERESTS

This Part argues that states may provide remedies for human rights violations even though federal courthouse doors may be closed. State authority to provide law for the redress of wrongs is the basis for state remedies for human rights. Providing law to redress wrongs is a basic aspiration of government and the rule of law. Within the American federal system, state courts and state law play a constitutionally recognized role in satisfying this aspiration to redress legal wrongs. This role, we argue, extends to providing domestic remedies for violations of international human rights.

Our argument proceeds in five steps. First, we argue that state law supports state authority for, and establishes a state's interest in, providing remedies for the victims of human rights violations. Nearly all the states have recognized the aspiration to provide law for redressing wrongs in their state constitutions, and the remaining states have affirmed it in their common law. One of the basic guarantees of the rule of law, Chief Justice Marshall observed in *Marbury v. Madison*,¹⁵¹ is the "right of every individual to claim the protection of the laws, whenever he receives an injury."¹⁵² From this right follows the "general and indisputable rule, that where there is a legal right, there is also a legal remedy."¹⁵³

¹⁴⁹ *Id.* at 366 (holding Massachusetts law "invalid under the Supremacy Clause . . . owing to its threat of frustrating federal statutory objectives").

¹⁵⁰ GLENNON & SLOANE, *supra* note 129, at 299-300.

¹⁵¹ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

¹⁵² *Id.* at 163.

¹⁵³ *Id.* (quoting BLACKSTONE, *supra* note 35, at *23) (internal quotation marks omitted).

This right-remedy principle, we stress, is aspirational. In many cases, *Marbury* included, courts have denied remedies for legal wrongs.¹⁵⁴ But state courts provide law for the redress of many wrongs as a matter of course, among them the sorts of tortious wrongs that also violate international human rights. We argue that the aspiration to provide law for redressing wrongs, which all fifty states have recognized, is the normative core of a state's interest in providing redress for the victims of human rights violations.¹⁵⁵

The second step in our argument focuses upon structural principles of American federalism. The U.S. Constitution reserves power to the states to provide law for redressing wrongs. It presumes that state courts may be open to provide relief even when federal courts are not. The Constitution does not expressly prohibit states from exercising this function in cases involving international human rights. To the contrary, the constitutional structure preserves a role for state law and state courts to redress violations of human rights.

The first and second steps of our argument work hand in glove. Structural principles of American federalism confirm that states presumptively have the authority to provide law or courts for human rights claims, which are like many types of claims state courts routinely adjudicate. And the state law interest in providing law for redress of wrongs not only supports those structural principles but also is important for our normative claim that states should exercise their authority in human rights cases.

The third step in our argument turns from domestic to international law. International law may not *require* domestic remedies for human rights violations. But we argue that international law, which has recognized the aspiration to provide effective remedies for violations of rights, *supports* state remedies for human rights.

¹⁵⁴ *Id.* at 168-80 (refusing to issue writ of mandamus).

¹⁵⁵ Scholars have noted that state courts' common law authority supports state remedies for human rights. *See, e.g.*, Alford, *supra* note 19, at 1749-50 (stating that "one could say that the future of human rights litigation in the United States depend on refashioning human rights claims as state or foreign tort violations" and also arguing that there is not "anything that prevents state courts from recognizing international law violations as state common law claims," albeit noting this latter approach as untested). More specifically, "state tort laws represent a quintessential exercise of traditional state prerogatives." Alford, *supra* note 11, at 1159. Our approach is different and more fundamental: We argue that state interests in providing law for the redress of wrongs provide a state *and* federal constitutional foundation for state remedies in transnational human rights litigation.

A preliminary word on our use of the term "state interests" is in order. Most, and arguably all, of the limits on state authority in transnational cases require analysis of the state's "interest" in the dispute. Our use of the term "state interests" is broad; we mean to encompass each of the senses in which state interests are relevant in doctrines bearing on transnational litigation.

The fourth step in our argument turns from positive law to theory. We argue that political theory helps explain and justify the positive legal bases for a state's interest in remedying human rights violations.

Finally, we address the objection that the aspiration to provide law for redressing wrongs is just that—an aspiration—and thus is too indeterminate to provide normative guidance. Our argument is not that, as a descriptive matter, state law stands as a guarantor of remedies for every legal wrong. Nor do we argue, as a normative matter, that state law should provide such a guarantee. Rather, we share with Professor Louise Weinberg the assumption that “what is needed to ground governmental power is a legitimate governmental interest.”¹⁵⁶ Our structural constitutional argument in this Part is that the American system of judicial federalism recognizes a state's authority to provide law for redressing wrongs and that a state's interest in providing this law grounds state remedies for human rights.

To know when the state courthouse doors must close, we must first understand why they might be opened to human rights plaintiffs. A state's authority and its interest in providing law for redressing wrongs provide a constitutional basis for human rights litigation in state courts and under state law. This constitutional basis persists notwithstanding doctrinal limits on federal judicial authority and constitutional concerns about state participation in foreign relations. Redressing human rights violations is about the basic remedial functions of state courts and state law, not solely about regulating foreign relations. Foreign relations concerns should not categorically prevail over the interest in providing remedies for human rights violations.

A. *State Law*

The first foundation of the state interest in remedying human rights violations is state law itself. State law clearly sets out the government's interest in providing law to redress wrongs. In order to fulfill this interest, states have created courts of general jurisdiction with the authority to provide remedies for rights arising under state, federal, and foreign law. States have primary authority within the American federal system to provide law for redressing wrongs, whether through common lawmaking in state courts of general jurisdiction or through state legislation. The U.S. Constitution does not expressly prohibit states from exercising this authority in transnational human rights cases and imposes modest constraints on state choice-of-law rules and extraterritorial state laws. We think, therefore, that the analysis of a state's interest in remedying human rights violations should begin with the right-remedy principle under state law.

¹⁵⁶ Weinberg, *supra* note 38, at 1514 (emphasis omitted).

1. State Law for the Redress of Wrongs

The following words *do not* appear in the *U.S.* Constitution: “The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.” They *do* appear, however, in the first article of the *Florida* Constitution.¹⁵⁷ It is worth dwelling on them for a moment.

First, Florida’s guarantee of legal remedy for wrongs assumes the existence of “courts,” that is, government institutions vested with “general judicial power[.]”¹⁵⁸ and tasked with “administering right and justice by due course of law” through adjudication.¹⁵⁹ Second, the constitutional guarantee makes no apparent distinctions based upon the citizenship or residence of a claimant or the place of injury; instead it directs courts to “be open to *every* person for redress of *any* injury.”¹⁶⁰ Third, the Florida Constitution’s apparent purpose in guaranteeing a judicial remedy for “any injury” is to ensure “justice.”¹⁶¹

Nearly all state constitutions contain a similar guarantee of judicial remedies to redress legal wrongs. Forty-one states, including Florida, have constitutional provisions that guarantee the right to a judicial remedy either expressly or by direct implication.¹⁶² The Connecticut Constitution, for example, provides that “[a]ll courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay.”¹⁶³ In Michigan, by contrast, the right to a remedy is directly implied by its constitutional guarantee that “[a] suitor in any court of this state has the right to prosecute or defend his suit, either in his own proper person or by an attorney.”¹⁶⁴

The other nine states have constitutional provisions that guarantee some “court-based rights,”¹⁶⁵ and have recognized the right-remedy principle through

¹⁵⁷ FLA. CONST. art. I, § 21.

¹⁵⁸ *Canney v. Bd. of Pub. Instruction of Alachua Cty.*, 278 So. 2d 260, 262 (Fla. 1973).

¹⁵⁹ *In re Alkire’s Estate*, 198 So. 475, 482 (Fla. 1940) (Whitfield, J., supplemental opinion).

¹⁶⁰ FLA. CONST. art. I, § 21 (emphases added).

¹⁶¹ *Id.*

¹⁶² Judith Resnik, *Constitutional Entitlements to and in Courts: Remedial Rights in an Age of Egalitarianism: The Childress Lecture*, 56 ST. LOUIS U. L.J. 917, 978 & n.249, app. I (2012).

¹⁶³ CONN. CONST. art. I, § 10.

¹⁶⁴ MICH. CONST. art. I, § 13. Two state constitutions expressly limit the right to a remedy to subjects, in the case of Massachusetts, a “subject of the commonwealth,” MASS. CONST. pt. I, art. XI, and in New Hampshire’s case, a “subject of this state,” N.H. CONST. pt. I, art. XIV, while Rhode Island and Vermont’s constitutions seem to limit the right to anyone residing “within” the state, R.I. CONST. art I, § 5; VT. CONST. ch. I, art. IV.

¹⁶⁵ See Resnik, *supra* note 162, at 978 n.249 (explaining that those states without express judicial remedy language in their constitutions “have texts referencing other court-based rights”).

constitutional construction or common lawmaking. California's courts, for example, have recognized a "right of access" to the courts "[i]n a variety of contexts," which includes the right to a judicial remedy for redress of wrongs.¹⁶⁶ Hawai'i, the nation's youngest state, has recognized, through judicial decision, the entitlement of all "persons" to "redress for wrongs," and the Constitution of Alaska, the second-youngest state, also recognizes the importance of judicial redress to realize legal rights.¹⁶⁷

In Alaska and Hawai'i,¹⁶⁸ as in every other state,¹⁶⁹ courts of general jurisdiction have common law authority to provide remedies to vindicate rights. Courts of general jurisdiction presumptively have subject matter jurisdiction necessary to provide relief for legal wrongs.¹⁷⁰ As a matter of course, therefore, state courts award damages for breaches of contract, enjoin nuisances that interfere with an owner's property rights, and redress tortious wrongs. State courts also imply remedies for violations of statutory and constitutional law.

Private law has provided for redress of many of the wrongs that fall within the general jurisdiction of state courts. State tort law in particular provides an evolving system of law for redressing wrongs. Providing redress for tortious

¹⁶⁶ See *Cal. Teachers Ass'n v. State*, 975 P.2d 622, 629 (Cal. 1999) (internal quotation marks omitted) (quoting *Payne v. Superior Court*, 553 P.2d 565, 568 (Cal. 1976)); *Miller v. R. K. A. Mgmt. Corp.*, 160 Cal. Rptr. 164, 169 (Ct. App. Dep't Super. Ct. 1979) ("Free access to the courts is an invaluable aspect of our system of jurisprudence.").

¹⁶⁷ *Petersen v. City & Cty. of Honolulu*, 462 P.2d 1007, 1009 (Haw. 1969) ("[I]n general, minor children are entitled to the same redress for wrongs done them as are any other persons." (citing *Dunlap v. Dunlap*, 150 A. 905, 906 (N.H. 1930))); see also *Patrick v. Lynden Transp., Inc.*, 765 P.2d 1375, 1379 (Alaska 1988) ("We have construed the right to court access under the Alaska Constitution to be an important right. In *Bush [v. Reid]*, 516 P.2d 1215, 1219 (Alaska 1973),] we recognized that a 'legal right' exists only so long as one may obtain redress through the court system."); *Young v. Allstate Ins. Co.*, 198 P.3d 666, 683 (Haw. 2008) ("Public policy requires that all persons shall [be able to] resort freely to the courts for redress of wrongs and to enforce their rights" (internal quotation marks omitted) (quoting *Dickinson v. Echols*, 578 So. 2d 1257, 1258 (Ala. 1991))).

¹⁶⁸ See ALASKA CONST. art. IV, § 3 (stating that "superior court shall be the trial court of general jurisdiction"); *In re Chow*, 656 P.2d 105, 109-10 (Haw. Ct. App. 1982) (noting that "state circuit courts are courts of general jurisdiction and that jurisdiction extends to all matters properly brought before them" (citing *In re Keamo*, 650 P.2d 1365, 1369-70 (Haw. Ct. App. 1982))).

¹⁶⁹ See *State Court Caseload Statistics, Civil—Total Caseloads*, COURT STATISTICS PROJECT, <http://www.courtstatistics.org/Other-Pages/StateCourtCaseloadStatistics.aspx> [<https://perma.cc/TT2S-H3SB>] (last visited Feb. 19, 2018) (listing caseload statistics for every state's courts of general jurisdiction that was able to provide data).

¹⁷⁰ For a typical discussion of a state court's "general jurisdiction," see *Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71, 75 (Tex. 2000) (citing 13 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3522 (1984); *Bowles v. Angelo*, 188 S.W.2d 691, 693 (Tex. Civ. App. 1945)).

wrongs is a traditional state function that the Tenth Amendment reserves to the states.¹⁷¹ Since the Founding, “the idea of a tort—a legally defined injurious wrong for which the victim is entitled to an avenue of recourse”—has been “an organizing concept” in state common law.¹⁷² For example, the Wisconsin Supreme Court made explicit the link between tort law and the right-remedy principle. The Wisconsin Constitution provides that “[e]very person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property, or character.”¹⁷³ The right-remedy principle, the court explained, provides courts with the authority to develop the common law of tort to redress wrongs in “new situations as the need [arises].”¹⁷⁴

The right-remedy principle has not, however, ever been a guarantee of personal redress for every wrong. Historically, the forms of pleading under state law provided causes of action for judicial relief to vindicate rights.¹⁷⁵ Whether suing in law or equity, the victim of a wrong had to plead within the established forms, which linked right and remedy in an indivisible whole.¹⁷⁶ Together, the common law and equity reflected the “aspiration of *ubi jus, ibi remedium*”¹⁷⁷—for every right, there is a remedy—but they did not guarantee legal relief for every wrong.¹⁷⁸ The common law “phrase ‘no writ-no right’” expressed “the difficulties faced by those seeking relief” within the “highly technical . . .

¹⁷¹ See, e.g., Cynthia C. Lebow, *Federalism and Federal Product Liability Reform: A Warning Not Heeded*, 64 TENN. L. REV. 665, 679 (1997) (“As American jurisprudence evolved, notions of state sovereignty gave vitality to the idea that tort law, substantially rooted in the tradition of common law, should be left to the states.”).

¹⁷² John C.P. Goldberg, *Tort Law at the Founding*, 39 FLA. ST. U. L. REV. 85, 105 (2011).

¹⁷³ WIS. CONST. art. I, § 9.

¹⁷⁴ *Collins v. Eli Lilly Co.*, 342 N.W.2d 37, 45 (Wis. 1984) (internal quotation marks omitted) (quoting *Bielski v. Schulze*, 114 N.W.2d 105, 110 (Wis. 1962)). To be clear, our arguments in Part III do not depend on the idea that tort law is the only way to satisfy “the notion of giving individual redress to those who feel wronged.” Guido Calabresi, *Civil Recourse Theory’s Reductionism*, 88 IND. L.J. 449, 467 (2013) (suggesting that aspiration of providing remedies for rights might be satisfied “by letting victims participate in the criminal adjudication and sentencing process”).

¹⁷⁵ Anthony J. Bellia, Jr., *Article III and the Cause of Action*, 89 IOWA L. REV. 777, 786 (2004) (explaining that “in America at the time of the Founding the existence of a cause of action generally depended upon the availability of a remedy” and “[m]ost states had adopted the common law of England and, with it, legal and equitable forms of proceeding”).

¹⁷⁶ *Id.* at 784.

¹⁷⁷ *Id.* at 792 (“To characterize the concept of the cause of action that appears to be most legally germane at law and in equity as formal and remedies-based is not to deny the aspiration of *ubi jus, ibi remedium*; it is merely to recognize the reality that the forms of proceeding at law and in equity failed to fulfill it.”).

¹⁷⁸ *Id.* at 784-86.

minefield” of the common law forms of action.¹⁷⁹ Moreover, some harms were *damnum absque injuria*—that is, they did not give rise to a legal remedy.¹⁸⁰

Over time, the forms of proceeding came to be seen as unnecessarily stringent, poorly adapted to an increasingly complex world, and inadequate to ensure remedies for new legal rights.¹⁸¹ Even though American law abandoned the common law forms of proceeding, it maintained the aspiration to provide personal remedies for legal rights. Some state courts have interpreted their constitutional right-remedy provisions to provide a source of judicial power to imply remedies, while others have concluded that the constitutional right to a remedy precludes the legislature from abrogating particular rights to judicial relief.¹⁸² Still other state courts have concluded the constitutional right-remedy provision states an aspiration of state law but does not restrict legislative power over the system of remedies.¹⁸³ No state court thinks its law guarantees a personal remedy for every legal wrong. Rather, providing law for the redress of wrongs is a recognized state interest, even where countervailing concerns may counsel withholding a remedy.¹⁸⁴

2. State Remedial Interests and Human Rights

Courts and commentators have doubted that the states have an interest in providing remedies for international human rights. Judge Wilkinson, for example, has suggested that the “constitutional entrustment of foreign affairs to the national government” precludes any role for state tort law to be applied to remedy human rights violations abroad.¹⁸⁵ Scholars have argued that “[s]tate law

¹⁷⁹ *Barlow v. Sun Chem. Co.*, 838 N.Y.S.2d 387, 389 (N.Y. App. Div. 2007) (citing *Fiorini v. Parkhurst*, 100 N.Y.S.2d 569 (N.Y. Sup. Ct. 1950)).

¹⁸⁰ *See, e.g., Platt v. Johnson & Root*, 15 Johns. 213, 218-19 (N.Y. Sup. Ct. 1818) (citing *Palmer v. Mulligan*, 3 Cai. 307, 312 (N.Y. Sup. Ct. 1805) (opinion of Spencer, J.)).

¹⁸¹ *See* Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 945 (1987).

¹⁸² For an excellent overview of right-remedy clauses in state constitutions by a former chief justice of the Supreme Court of Texas, see Thomas R. Phillips, *The Constitutional Right to a Remedy*, 78 N.Y.U. L. REV. 1309, 1335-39 (2003).

¹⁸³ *See Hawley v. Green*, 788 P.2d 1321, 1324 (Idaho 1990) (holding that applicable state statute of limitations did not violate Idaho constitutional provision regarding court remedies and recognizing that the provision “does not prohibit the legislature from abolishing a common law right of action without providing a substitution” (citing *Twin Falls Clinic & Hosp. Bldg. Corp. v. Hamill*, 644 P.2d 341, 346 (Idaho 1982))).

¹⁸⁴ For an expression of this state interest in affording a remedy for redress of grievances, see FLA. CONST. art. I, § 21.

¹⁸⁵ *See Al Shimari v. CACI Int’l, Inc.*, 679 F.3d 205, 230-31 (4th Cir. 2012) (en banc) (Wilkinson, J., dissenting).

is ill-fitting for human rights claims” and human rights litigation risks undermining federalism principles.¹⁸⁶

Yet the typical human rights claim in U.S. courts seeks to redress injuries that fit comfortably within the right-remedy principle of state law. As Professor Roger Alford has explained, nearly all human rights claims can be pled as torts, which state law does not define by reference to citizenship or territorial borders.¹⁸⁷ In any given tort case, a judge “looks to whether an individual has been injured by a wrong in a way that requires recourse”—and that is true even of judges who think that tort law is not simply a law of private wrongs.¹⁸⁸ The question, in other words, is whether to provide a remedy for violation of a legal right. As discussed, the aspiration to provide remedies for legal rights is a fundamental one in every state’s law. That is one reason—some might say the most important reason¹⁸⁹—that all states provide legal remedies to redress tortious wrongs.

The state interest in providing remedies for wrongs is reflected in the transitory tort doctrine. This doctrine holds that a common law court may take cognizance of a tort cause of action arising in another jurisdiction.¹⁹⁰ Under the U.S. Constitution, a state court has an obligation to adjudicate transitory causes of action arising in other states.¹⁹¹ It is generally accepted that state courts have jurisdiction over transitory torts arising abroad,¹⁹² on the theory that the tortious wrong “gave rise to an obligation, an *obligation*, which, like other obligations, follows the person, and may be enforced wherever the person may be found.”¹⁹³

¹⁸⁶ Parrish, *supra* note 26, at 40; *see also* Childress III, *supra* note 11, at 753-57.

¹⁸⁷ Alford, *supra* note 11, at 1091 (arguing that international human rights violations can be “reframed” as “transnational torts” in part because “[w]ith common law tort claims, there is no presumption against extraterritoriality”).

¹⁸⁸ Calabresi, *supra* note 174, at 450-51.

¹⁸⁹ Goldberg, *supra* note 35, at 596-605.

¹⁹⁰ *See, e.g.*, *Dennick v. R.R. Co.*, 103 U.S. 11, 17 (1880) (applying transitory tort doctrine and explaining that “when the act is done for which the law says the person shall be liable, and the action by which the remedy is to be enforced is a personal and not a real action, and is of that character which the law recognizes as transitory and not local, we cannot see why the defendant may not be held liable in any court whose jurisdiction he can be subjected”). *See generally* William S. Dodge, *Alien Tort Litigation and the Prescriptive Jurisdiction Fallacy*, 51 HARV. INT’L L.J. ONLINE 35, 39-42 (2010) (providing historical overview of transitory tort doctrine).

¹⁹¹ *See* Weinberg, *supra* note 38, at 1509 (discussing *Hughes v. Fetter*, 341 U.S. 609, 613 (1951), and describing Court’s holding as being “that state courts of general jurisdiction are under a constitutional duty to adjudicate a transitory cause of action arising in a sister state”).

¹⁹² *See, e.g.*, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1665 (2013) (recognizing “common-law doctrine that allowed courts to assume jurisdiction over such ‘transitory torts,’ including actions for personal injury, arising abroad”).

¹⁹³ *Slater v. Mexican Nat’l R.R. Co.*, 194 U.S. 120, 126 (1904). One explanation for adjudicating transitory actions is to punish blameworthy defendants. This reason is only a

The adjudication of transitory torts is not only consistent with, but also often explained by, the right-remedy principle. Transitory torts are consistent with the right-remedy principle by providing the victim of a legal wrong with a remedy in any court having jurisdiction over the wrongdoer. State courts have explained the doctrine in precisely these terms. In *Mexican Central Railway Co. v. Mitten*,¹⁹⁴ for example, the Texas Court of Civil Appeals traced the transitory tort doctrine to the English tradition

of opening her courts to litigants who present themselves with their grievances at their doors[, which] has been of the most liberal, enlightened, and generous character. Not only is it the boast of the English people that their courts are ever open to protect the rights and redress the wrongs of those aggrieved by acts done within their own confines, but, with a few simple conditions, the privilege is extended in all transitory actions, no matter where the cause of action may have arisen. Under the wise and beneficent operation of that system, except in certain cases, a remedy can be found in English courts for torts committed in places outside the territorial jurisdiction of those courts.¹⁹⁵

Other state courts have celebrated the “general rule of law that for the purpose of redress it is immaterial where a tort was committed,”¹⁹⁶ because “the personal wrong to the plaintiff, for which she is entitled to redress, is transitory.”¹⁹⁷

Here, as elsewhere, the right-remedy principle is not an absolute guarantee. Under the common law doctrine, transitory torts cross territorial bounds, but local actions do not. The obligatory citation is *Livingston v. Jefferson*,¹⁹⁸ in

partial explanation at best; it matters that transitory torts entail a right to a remedy for the victim of the wrong. And not all transitory actions necessarily involve punishing blameworthy defendants; contract actions can be transitory.

¹⁹⁴ 36 S.W. 282 (Tex. Civ. App. 1896).

¹⁹⁵ *Id.* at 283. In *Armendiaz v. Stillman*, 54 Tex. 623, 631 (1881), the Supreme Court of Texas interpreted the transitory tort doctrine in light of the state’s constitutional guarantee of a “remedy by due course of law” to “every person for an injury done him in his lands, goods, person or reputation.” Based upon that guarantee, it generously construed the doctrine, concluding that “the fact that a more full and effectual redress might be afforded in the jurisdiction where the wrong was done, or that the plaintiff must necessarily have greater difficulty in making out his cause of action elsewhere, is no good ground to deny him all chance of redress.” *Id.* at 632.

¹⁹⁶ *Myers v. Chi., St. Paul, Minneapolis & Omaha Ry. Co.*, 72 N.W. 694, 694 (Minn. 1897).

¹⁹⁷ *McIvor v. McCabe*, 26 How. Pr. 257, 259 (N.Y. Sup. Ct. 1863). Courts have also expressed interest in redressing a transitory tort in terms of the defendant’s liability to the plaintiff. *See, e.g.*, *Roberts v. Dunsuir*, 16 P. 782, 782 (Cal. 1888) (“The action is transitory, and the defendant may be sued wherever found; otherwise, a person might in some cases escape such liability by simply going into another state.”).

¹⁹⁸ 15 F. Cas. 660 (C.C.D. Va. 1811) (No. 8,411).

which Chief Justice Marshall, riding circuit, concurred with District Judge John Tyler in holding that a federal court in Virginia lacked jurisdiction over a cause of action for trespass arising in New Orleans.¹⁹⁹ The trespass action was a local action, and therefore had to be heard in a court where the land was located.²⁰⁰ Marshall doubted the “technical distinction,” at least on the facts of *Livingston*, but concluded he was bound by precedent to apply it.²⁰¹ That the author of *Marbury* doubted the distinction should not come as a surprise. As Marshall explained, courts had held that causes of action arising from “contracts respecting lands” are transitory because “if the action be disallowed, the injured party may have a clear right without a remedy.”²⁰² In Marshall’s view, the right-remedy principle similarly called for the court to take cognizance of the trespass action in *Livingston*, but precedent barred treating the action as transitory.²⁰³ Transitory actions thus implemented the right-remedy principle without preventing “the inconvenience of a clear right without a remedy” in every case.²⁰⁴

Some states have expanded the transitory tort doctrine in order to avoid the “failure of justice” that Marshall identified.²⁰⁵ For example, some state courts have rejected the rule that an action for damages to real property is necessarily local.²⁰⁶ In 1896, the Minnesota Supreme Court held that a cause of action for damages to real property was transitory and thus triable in Minnesota though the

¹⁹⁹ *Id.* at 662.

²⁰⁰ *Id.* at 662 (opinion of Tyler, J.) (stating that court “must have jurisdiction of every cause it attempts to sustain” and finding courts cannot adjudicate “local actions” if the underlying action did not occur in court’s district).

²⁰¹ *Id.* at 663 (opinion of Marshall, J.) (“[B]ut for the loss of [a court’s jurisdiction] where the remedy is against the person and can be afforded by the court, I have not yet discerned a reason, other than a technical one, which can satisfy my judgment. If, however, this technical distinction be firmly established, if all other judges respect it, I cannot venture to disregard it.”).

²⁰² *Id.*

²⁰³ *See id.* (noting distinction between local and transitory actions is “firmly established,” but questioning validity of that distinction as “the jurisdiction of the court depends on the character of the parties”).

²⁰⁴ *Id.* at 665.

²⁰⁵ *Id.* (“Other judges . . . have struggled ineffectually against the distinction [between local and transitory torts], which produces the inconvenience of a clear right without a remedy.”).

²⁰⁶ Some states have altered the rule by legislation, and Congress recently abolished the distinction between local and transitory actions for purposes of the general venue statute. *See* Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. No. 112-63, § 202, 125 Stat. 758, 763-64 (codified as amended at 28 U.S.C. § 1391).

land was located in another jurisdiction.²⁰⁷ “[W]e cannot see why the courts of the present day should deem themselves slavishly bound,” the court reasoned, by a rule that would leave a party with a “clear, legal right without a remedy.”²⁰⁸ It thus rejected the dissenting justice’s opinion that a nonresident should be left without a remedy in Minnesota courts out of “comity” and because “[p]rotection of our own citizens is the primary object and duty of our own courts.”²⁰⁹ The Arkansas Supreme Court reached the same conclusion through interpreting its constitution, which provided that “[e]very person is entitled to a certain remedy in the laws for all injuries or wrongs he may receive in his person, property or character.”²¹⁰ Under this constitutional principle, “wrongs should not go unredressed.”²¹¹ “If the [plaintiff] has been wronged he should have a remedy,” the court reasoned; accordingly, it expanded the doctrine of transitory torts to include a cause of action for damages to real property.²¹²

With the transitory tort doctrine in mind, the common law history goes far to confirm a state’s interest in providing remedies in most of the human rights cases that find their way into American courts. The Tenth Amendment reserved to the states their “primitive jurisdiction” over common law causes of action.²¹³ The common law forms provided remedies when an American citizen wronged a foreign citizen in violation of the law of nations, whether on American soil or abroad. Jurists, such as Emer de Vattel, also presumed that common law tort actions would lie between foreign citizens within the United States and could

²⁰⁷ *Little v. Chi., St. Paul, Minneapolis & Omaha Ry. Co.*, 67 N.W. 846, 847 (Minn. 1896) (“An action for damages for injuries to real property is on principle just as transitory in its nature as one on contract or for a tort committed on the person or personal property.”).

²⁰⁸ *Id.* at 847-48.

²⁰⁹ *Id.* at 849 (Buck, J., dissenting).

²¹⁰ *Reasor-Hill Corp. v. Harrison*, 249 S.W.2d 994, 996 (Ark. 1952) (quoting ARK. CONST. art. 2, § 13).

²¹¹ *Id.*

²¹² *Id.* (rejecting majority rule from *Livingston* and allowing action on damage to real property located in another state, remarking that “majority rule has no basis in logic or equity”). While recognizing that the right-remedy principle undermined the common law distinction between transitory torts and local actions involving injuries to real property, the court had “some sympathy” for limiting transitory actions to personal torts “in international disputes,” especially given the difficulty of determining land ownership under foreign law. *Id.* (“[T]here is an understandable reluctance to subject one’s own citizens to suits by aliens, especially if the other jurisdiction would provide no redress if the situation were reversed One may have some sympathy for this position in international disputes, but it has no persuasive effect when the States are involved.”).

²¹³ See Michael G. Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 WIS. L. REV. 39, 47-48, 51 (discussing Alexander Hamilton’s view in *Federalist* 82 that “[a]s with other powers granted to the federal government in the Constitution, states retained their ‘pre-existing’ or primitive authority”).

reach “an alien-alien claim arising abroad [where] the defendant alien had established domicile in the forum territory.”²¹⁴

Some commentators argue that the transitory tort doctrine does not extend to foreign-cubed cases—that is, cases where neither the plaintiff nor the defendant is a U.S. resident and the wrong occurred outside U.S. territory. As Professors Anthony Bellia and Bradford Clark point out, “common law judges and treatise writers suggested that common law courts should not hear claims between nonresident aliens for acts occurring abroad.”²¹⁵ De Vattel’s influential treatise reasoned that a court should not adjudicate a dispute between foreigners when the alleged wrong took place in another country, unless the defendant was domiciled in the forum state.²¹⁶ His concern was directed towards respect for a country’s territorial sovereignty.²¹⁷ It does not seem, however, that this respect for territorial sovereignty was an absolute bar to adjudication of a foreign-cubed case. Professor Chimène Keitner has described two nineteenth-century New York cases in which trial judges concluded that state courts could adjudicate causes of action arising from wrongs occurring abroad between foreign citizens who were not U.S. residents.²¹⁸ Though a court could take jurisdiction, it should do so only in an “exceptional” case where the defendant was “evad[ing] justice” and the plaintiff had no alternative forum in which to seek a remedy.²¹⁹ Keitner rightly explains these cases in terms of a claimant’s interest in “meaningful redress.”²²⁰ What is doing the normative work, in other words, is the right-remedy principle of state law.

Recognizing the right-remedy principle behind these common law forms helps make clear why the history matters today. In some states, the state constitutional guarantee of a remedy for every right may preclude the legislature from repealing these common law rights of action.²²¹ More generally, the right-

²¹⁴ Anthony J. Bellia, Jr. & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. CHI. L. REV. 445, 486 (2011).

²¹⁵ *Id.* at 523.

²¹⁶ *Id.* at 485-86 (explaining that Vattel’s reasoning “suggested that a judge should not hear [a] case if he were in a place where the defendant was not domiciled or where the cause of action did not arise”).

²¹⁷ *Id.* at 486.

²¹⁸ Chimène I. Keitner, *State Courts and Transitory Torts in Transnational Human Rights Cases*, 3 U.C. IRVINE L. REV. 81, 85-86 (2013) (describing two cases between foreign parties involving wrongs occurring outside United States which suggest “jurisdiction over transitory tort claims exists, but that courts may, under certain circumstances, decline to exercise it”).

²¹⁹ *Id.* at 86 (suggesting early opinions acknowledge courts’ jurisdiction over foreign-cubed transitory torts but should exercise discretion in adjudicating those cases).

²²⁰ *Id.* at 82 (arguing that U.S. courts are “most justified in exercising jurisdiction” over violations of “universally recognized prohibitions on conduct” when victim has no other viable means of obtaining remedy where injury occurred).

²²¹ See Phillips, *supra* note 182, at 1337.

remedy principle confirms that states have a constitutionally recognized interest in providing redress, including for transitory wrongs.

Nothing in what we have argued thus far proves that states are *required* to provide remedies for every human rights case within their constitutional cognizance. Some states are wary of reaching foreign-cubed cases. Florida's Supreme Court, for example, has held that its constitutional provision requires an accommodation between the right to a remedy and the potential limits on transnational litigation.²²² The constitutional right-remedy provision is not "a limitless warrant to bring the world's litigation [to Florida's courts]," because "[t]he use of Florida courts to police activities even in the remotest parts of the globe is not a purpose for which our judiciary was created."²²³ Therefore, Florida's right-remedy principle does not bar a Florida court from dismissing transnational litigation based upon the *forum non conveniens* defense in some cases. At the same time, in light of "the obvious purpose underlying article I, section 21[, which] is to guarantee access to a potential remedy for wrongs," a Florida court analyzing that defense must assure itself "that remedies are available in convenient alternative fora with better connections to the events complained of."²²⁴ Applying this framework, Florida courts have dismissed tort actions involving non-U.S. parties and foreign conduct in favor of a more convenient forum, but they have also heard these types of cases "where the adequacy of the alternative forum is uncertain."²²⁵ Other states strike the balance differently; for our purposes in this Part, it is enough to argue that states have recognized—and should recognize—the state interest in providing law for redress of wrongs in human rights cases.

Redressing human rights violations hits upon the basic remedial functions of state courts. The demand for an individual remedy is intuitive in most human rights cases under state law. Prisoners who were beaten, electrocuted, and otherwise abused by private contractors at a military prison;²²⁶ villagers who were forced to labor and falsely imprisoned during the construction of a natural gas pipeline;²²⁷ and the families of children who were subjected to medical

²²² *Kinney Sys., Inc. v. Cont'l Ins. Co.*, 674 So. 2d 86, 93 (Fla. 1996).

²²³ *Id.* at 92-93.

²²⁴ *Id.* at 93.

²²⁵ *Publicidad Vepaco, C.A. v. Mezerhane*, 176 So. 3d 273, 278 (Fla. Dist. Ct. App. 2015) (applying four-step federal standard for addressing *forum non conveniens* challenges adopted by Florida courts in *Kinney*, and finding Florida courts to be appropriate fora for foreign wrongs at issue).

²²⁶ *Saleh v. Titan Corp.*, 580 F.3d 1, 17 (D.C. Cir. 2009) (Garland, J., dissenting) (arguing alleged severe human rights violations are actionable under ATS, noting there is "no warrant for displacing ordinary operation of state law and dismissing plaintiffs' complaints solely on preemption grounds").

²²⁷ *See Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 15 (D.C. Cir. 2011) (finding, *inter alia*, "that neither the text, history, nor purpose of the ATS supports corporate immunity for torts

experiments without their informed consent²²⁸ each have a compelling demand for a remedy to redress the violations of their human rights. To decide whether to meet that demand requires analysis of the underlying rights, the remedies the plaintiffs seek, and the limits on judicial competence to afford relief—all legal questions that state courts routinely answer.

B. *Federal Law*

Federal law recognizes state authority to provide remedies for wrongs, including remedies for human rights violations. As this Section explains, within the American federal system, state courts bear most of the load of providing law for the redress of wrongs. The states' constitutionally recognized interest in remedying the violations of legal rights extends to violations of international human rights. Our structural constitutional argument is, in a nutshell, that "federalism abhors a remedial vacuum," and not just in cases involving American constitutional law, but also in human rights law.²²⁹

A starting point for our argument is Article III itself, which authorizes but does not *require* Congress to create lower federal courts.²³⁰ Under the terms of the Madisonian Compromise, reached by the Framers at the Philadelphia Convention, Congress could have declined to create lower federal courts to hear federal claims.²³¹ Thus, the Framers assumed the possibility that state courts would have authority to do most of the work of providing law and fora for redressing *federal* law violations.²³² And, at the same time the Framers contemplated that states could adjudicate federal claims, they also included the Supremacy Clause, and made treaties "the supreme Law of the Land,"²³³ suggesting the Framers presumed state courts could provide law and fora for the

based on heinous conduct allegedly committed by its agents in violation of the law of nations").

²²⁸ See *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 169 (2d Cir. 2009) (holding that customary prohibition in international law against "nonconsensual human medical experimentation" can be enforced through ATS).

²²⁹ Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1505 (1987) (arguing that structure of federalism provides "mechanism of overlapping remedies for constitutional wrongs" by allowing federal government to furnish "supplemental remed[ies]" to those provided by state courts).

²³⁰ See 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.").

²³¹ See, e.g., *Haywood v. Drown*, 556 U.S. 729, 745-46 (2009) (Thomas, J., dissenting).

²³² See *id.* at 746 ("The assumption that state courts would continue to exercise concurrent jurisdiction over federal claims was essential to this compromise.").

²³³ U.S. CONST. art. VI, cl. 2.

redress of violations of *international* law as well.²³⁴ We think, therefore, that our basic argument—that states may provide law and courts for the redress of violations of human rights, particularly when the causes of action arise under state law or foreign tort law—is consistent with the Framers’ presumptions regarding state authority to provide courts of general jurisdiction.

1. Federal Recognition of a State’s Interest in Providing Remedies

Federal law itself recognizes the right to a remedy. The U.S. Constitution does not expressly guarantee this right.²³⁵ It is generally acknowledged, however, that federal constitutional law aspires to provide personal remedies for violations of constitutional rights.²³⁶ *Marbury*, of course, provides an early statement of the right-remedy principle—though *Marbury* is also an example of jurisdictional limits on that principle.²³⁷ The right-remedy principle has underwritten key doctrines of constitutional remedies, including in *Ex parte Young*, which implied a right of action for injunctive relief from violations of the Fourteenth Amendment,²³⁸ and in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, which implied a damages remedy directly from the Fourth Amendment.²³⁹ The right-remedy principle has also been the basis for implied private rights of action to enforce federal statutes.²⁴⁰

The Rehnquist and Roberts Courts have retreated from the right-remedy principle under federal law. However, they have explicitly left to state law a primary role in providing remedies for federal rights. For example, in *Minnecci v. Pollard*,²⁴¹ the Court declined to imply a *Bivens* remedy under the Eighth Amendment in light of an available remedy against the defendants under state tort law.²⁴² As the *Minnecci* Court explained, state tort law provided an “adequate

²³⁴ Ernest A. Young, *Sorting out the Debate over Customary International Law*, 42 VA. J. INT’L L. 365, 426 (2002).

²³⁵ The two exceptions are the Fifth Amendment’s Takings Clause, which requires “just compensation” for the taking of private property, and the Suspension Clause, which sets out the “Privilege of the Writ of Habeas Corpus.” U.S. CONST. amend. V; *id.* art. I, § 9, cl. 2.

²³⁶ See Susan Bandes, *Reinventing Bivens: The Self-Executing Constitution*, 68 S. CAL. L. REV. 289, 303-11 (1995).

²³⁷ Having recognized that *Marbury* could claim a right to a remedy under the writ of mandamus, the Supreme Court denied him judicial relief on the ground that it lacked jurisdiction under the Constitution. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803) (“The authority, therefore, given to the supreme court, by the act establishing the judicial courts of the United States, to issue writs of mandamus to public officers, appears not to be warranted by the constitution.”).

²³⁸ 209 U.S. 123, 148 (1908).

²³⁹ 403 U.S. 388, 389 (1971).

²⁴⁰ *Tex. & Pac. Ry. Co. v. Rigsby*, 241 U.S. 33, 39 (1916).

²⁴¹ 565 U.S. 118 (2012).

²⁴² *Id.* at 126.

‘alternative, existing [remedial] process.’²⁴³ Under *Minnecci*, a federal court should refrain from implying a damages remedy where “traditional state tort law” provides a remedy that will vindicate the underlying federal constitutional right.²⁴⁴ The primary justification for the retreat from implied rights of action under federal law, as Justice Antonin Scalia noted in his concurring opinion in *Sosa*, is that “federal courts, unlike state courts, are not general common-law courts.”²⁴⁵ Accordingly, Justice Scalia recognized the authority of state courts “to develop and apply their own rules of decision” regarding rights and remedies.²⁴⁶

The doctrinal implications of this structural principle are powerful. Federal law treats a state’s interest in providing law for the redress of wrongs as an important factor in analyzing federal limits on state law. Several examples should prove the point. Personal jurisdiction doctrine affirms a state’s “manifest interest in providing effective means of redress for its residents.”²⁴⁷ This interest goes to the reasonableness, under the Due Process Clause, of a state’s exercise of jurisdiction over a defendant.²⁴⁸ First Amendment doctrine recognizes a state’s “legitimate interest in redressing wrongful injury,” which requires an “accommodation” between constitutional limits on civil liability for speech and the demand for redress of wrongs.²⁴⁹ Federal labor law similarly recognizes an “overriding state interest” in remedying injuries arising from libelous speech, which “vitiates the ordinary arguments for pre-emption” where federal law does not “provide redress to the maligned party.”²⁵⁰

²⁴³ *Id.*

²⁴⁴ *Id.* at 119. State remedies have become all the more important following *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017), which seems to cut back significantly on *Bivens* remedies under federal law. In *Abbasi*, the Court cited *Minnecci* in denying a *Bivens* remedy on several grounds, including the availability of what it saw as alternative and more effective forms of relief. *Id.* at 1857.

²⁴⁵ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 741 (2004) (Scalia, J., concurring in part and concurring in the judgment) (quoting *Milwaukee v. Illinois*, 451 U.S. 304, 312 (1981)); see also *Abbasi*, 137 S. Ct. at 1856 (“[I]t is a significant step under separation-of-powers principles for a court to determine that it has the authority, under the judicial power, to create and enforce a cause of action for damages against federal officials . . .”).

²⁴⁶ *Sosa*, 542 U.S. at 741 (Scalia, J., concurring in part and concurring in the judgment).

²⁴⁷ *McGee v. Int’l Life Ins. Co.*, 355 U.S. 220, 223 (1957) (holding that finding that state court lacked personal jurisdiction over defendant insurance company would place great burden on state residents because they would be forced to litigate in possibly distant state).

²⁴⁸ See, e.g., *Burger King v. Rudzewicz*, 471 U.S. 462, 482 (1985).

²⁴⁹ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341-42 (1974) (discussing careful balance of First Amendment rights of press with state common law tort claims); see also Seth Davis, *Equal Sovereignty as a Right Against a Remedy*, 76 LA. L. REV. 83, 92-103 (2015) (describing how state’s interest in providing system for redress of wrongs arises in due process, First Amendment, and equal protection jurisprudence).

²⁵⁰ *Linn v. United Plant Guard Workers of Am., Local 114*, 383 U.S. 53, 63-64 (1966).

More generally, the Supreme Court has explained that it “rel[ies] on the presumption [against preemption]” of state tort law “because respect for the States as ‘independent sovereigns in our federal system’ leads us to assume that ‘Congress does not cavalierly pre-empt state-law causes of action.’”²⁵¹ The possibility that state tort suits might complement federal regulation by detecting and deterring violations of law is one reason to employ the presumption against preemption. Another is that “[i]t is difficult to believe that Congress would . . . remove all means of judicial recourse for those injured by illegal conduct.”²⁵² As the Court recently put it, “[n]o such design can be attributed to a rational Congress.”²⁵³

In short, within our federal system, state courts and state law are guarantors of redress of legal wrongs. This feature of U.S. federalism follows from the Framers’ decision to limit jurisdiction of the federal courts to particular “[c]ases” and “[c]ontroversies.” In the absence of a “valid excuse,” the U.S. Constitution requires state courts to adjudicate federal claims.²⁵⁴ And, as the Court held in *Clafin v. Houseman*,²⁵⁵ state courts presumptively have concurrent jurisdiction over claims arising under federal law.²⁵⁶ Thus, the Constitution, in most cases, leaves state courts free to exercise whatever jurisdiction they have under state law, even when that jurisdiction allows them to provide remedies in cases that also fall within federal jurisdiction.

²⁵¹ *Wyeth v. Levine*, 555 U.S. 555, 565 n.3 (2009) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)).

²⁵² *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984).

²⁵³ *Dan’s City Used Cars, Inc. v. Pelkey*, 133 S. Ct. 1769, 1781 (2013). We do not, however, want to overstate the point. In recent years, the Court has given less weight to a state’s interest in providing redress for wrongs. As Professor Gillian Metzger put it, “this consideration was lacking in recent preemption decisions.” Gillian E. Metzger, *Federalism and Federal Agency Reform*, 111 COLUM. L. REV. 1, 32 (2011) (discussing recent shift in Supreme Court jurisprudence where Court found no preemption for state tort claims not because of concerns over preserving injured plaintiff’s access to compensation, but as way to supplement federal regulation by identifying areas where regulators and Congress could focus their efforts). Several decisions have treated state tort law as simply a way of regulating behavior, ignoring or downplaying its remedial function, and found that federal regulatory law preempted tort remedies. For a critique of these decisions that emphasizes a state’s interest in redressing wrongs, see Nathan B. Oman & Jason M. Solomon, *The Supreme Court’s Theory of Private Law*, 62 DUKE L.J. 1109, 1157-58 (2013).

²⁵⁴ See *Testa v. Katt*, 330 U.S. 386, 392 (1947) (rejecting argument that State’s policy against enforcement by its courts of statutes from other states and from federal government is sufficient to deny plaintiff’s state law claims).

²⁵⁵ 93 U.S. 130 (1876).

²⁵⁶ *Id.* at 134.

2. Judicial Federalism and International Human Rights

A state's interest in remedying a legal wrong is not diminished merely because the wrong happens to be a human rights violation. The U.S. Constitution does not expressly prohibit states from providing remedies for human rights violations, even when the parties are foreign and the wrongs occurred abroad.²⁵⁷ To the contrary, there is evidence that the Constitution was understood to recognize the remedial authority of states even when the parties, relevant occurrences, or applicable law were foreign. For instance, when adopting the presumption of concurrent jurisdiction in *Clafin*, the Court quoted Alexander Hamilton in *Federalist* No. 82: "The judiciary power of every government looks beyond its own local or municipal laws and, in civil cases, lays hold of all subjects of litigation between parties within its jurisdiction, though the causes of dispute are relative to the laws of the most distant part of the globe."²⁵⁸ As Hamilton had it, the laws of "Japan, not less than of New York, may furnish the objects of legal discussion to our courts."²⁵⁹ In a sense, then, we are not treading new ground: Hamilton's "classic"²⁶⁰ statement of judicial federalism lends support to a state's constitutionally recognized interest in remedying transitory legal wrongs wherever they may arise.²⁶¹

In transnational cases not involving human rights violations, the Supreme Court has recognized that a state's constitutional interest in remedying wrongs may apply and that analysis of limits on state remedies must take this interest

²⁵⁷ Instead, it expressly prohibits states from "enter[ing] into any Treaty, Alliance or Confederation," "grant[ing] Letters of Marque or Reprisal," "lay[ing] any Imposts or Duties on Imports or Exports," "keep[ing] Troops or Ships of War in time of Peace," "enter[ing] into any Agreement or Compact . . . with a foreign Power," and "engag[ing] in War, unless actually invaded." U.S. CONST. art. I, § 10. States may engage in some of those activities with congressional consent. *Id.* Congress has the power to "define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations," *id.* § 8, cl. 10, but this delegation does not exclude the states from "providing for the punishment of the same thing," *United States v. Arjona*, 120 U.S. 479, 487 (1887). See generally Ross J. Corbett, Kiobel, Bauman, and the Presumption Against the Extraterritorial Application of the Alien Tort Statute, 13 NW. J. INT'L HUM. RTS. 50 (2015). The clause delegating to Congress the power to define "Offences against the Law of Nations" grew out of a recommendation to the states, drafted by Edmund Randolph, that called upon them to exercise their authority to provide for the punishment of violations of international law and to create private rights of action for damages. The Framers, concerned that the states would not do so, decided "to give Congress the authority to ensure compliance with international law." Sarah H. Cleveland & William S. Dodge, *Defining and Punishing Offenses Under Treaties*, 124 YALE L.J. 2202, 2232 (2015).

²⁵⁸ *Clafin*, 93 U.S. at 138.

²⁵⁹ *Howlett v. Rose*, 496 U.S. 356, 369 (1990).

²⁶⁰ *Id.* at 368.

²⁶¹ See Alice H. Henkin, *The Influence of International Human Rights on State Courts and State Constitutions*, 90 AM. SOC'Y INT'L L. PROC. 259, 259 (1996).

into account. For example, in *Chick Kam Choo v. Exxon Corp.*,²⁶² the Supreme Court held that federal forum non conveniens principles did not foreclose Texas from adjudicating a transnational dispute under Singaporean law.²⁶³ The Court highlighted two distinctions between federal and state law: first, the Texas Constitution guarantees a remedy to redress wrongs, and, second, Texas has an “open-courts” statute that applied to the dispute.²⁶⁴ Given state law’s recognition of the right-remedy principle, the Court reasoned, federal forum non conveniens law “simply [could not] determine whether” the state courts would be “an appropriate forum.”²⁶⁵ Mining the same vein, state courts have held that constitutional or statutory right-remedy and open-courts principles may trump, or at least limit and guide the interpretation of, forum non conveniens defenses.²⁶⁶ In other words, there are some transnational cases in which a state’s

²⁶² 486 U.S. 140 (1988).

²⁶³ *Id.* at 148-49.

²⁶⁴ *Id.* at 148 (first citing TEX. CONST. art. I, § 13; then citing TEX. CIV. PRAC. & REM. CODE ANN. § 71.031 (1986)).

²⁶⁵ *Id.*

²⁶⁶ See *Dow Chem. Co. v. Alfaro*, 786 S.W.2d 674 (Tex. 1990). *Alfaro* was superseded by the legislature, which made the forum non conveniens defense available. See Act of Feb. 23, 1993, ch. 4, § 1, 1993 TEX. GEN. LAWS 10 (codified as amended at TEX. CIV. PRAC. & REM. CODE ANN. § 71.051) (repealed in part by Act of June 2, 2003, ch. 204, § 3.09, 2003 TEX. GEN. LAWS 847, 855). Other state courts have concluded that the right-remedy principle should be considered in applying forum non conveniens. See *McDonnell-Douglas Corp. v. Lohn*, 557 P.2d 373, 373 (Colo. 1976) (“Cogent opinions construing similar provisions in the South Carolina and Georgia constitutions lead us to the conclusion that a provision such as [the Colorado open-court rule] limits very stringently the power to exclude resident plaintiffs from our court system where jurisdiction has otherwise been properly established.”); *Sabino v. Ruffolo*, 562 A.2d 1134, 1136 (Conn. App. 1989) (“State courts . . . have jurisdiction over all types of cases except those few that congress or the constitution have specifically removed from their jurisdiction. Therefore, states bear the ultimate responsibility for providing their citizens with a forum in which to resolve their differences.” (citations omitted)); *Taylor v. LSI Logic Corp.*, 689 A.2d 1196, 1201 n.18 (Del. 1997); *Chapman v. S. Ry. Co.*, 95 S.E.2d 170, 173 (S.C. 1956) (“Under the 1895 Constitution of South Carolina, Article I, § 15, it is provided that ‘All Courts shall be public, and every person shall have speedy remedy therein for wrongs sustained . . .’ [W]hen a resident of this state sues a foreign corporation upon a transitory cause of action . . . it would not be consistent with sound public policy to deny such resident access to the courts of this state”); *Summa Corp. v. Lancer Indus., Inc.*, 559 P.2d 544, 546 (Utah 1977) (“There is no provision in our statutes or our rules of procedure expressly authorizing the dismissal of an action on the basis of forum non conveniens. However, as part of the inherent power that our district courts have . . . they undoubtedly could refuse to exercise jurisdiction if convinced that it would place an unreasonable burden upon some or all of the parties, or upon the court”); Jeffrey A. Meyer, *Extraterritorial Common Law: Does the Common Law Apply Abroad?*, 102 GEO. L.J. 301, 338 (2014) (explaining that handful of state legislatures have expressly directed their courts to adjudicate foreign actions).

interest in providing remedies for violations of rights confirms that the state's courts are an appropriate forum.

Constitutional recognition of a state's remedial authority distinguishes state and federal courts with respect to remedies for human rights. The history of the ATS shows that the United States has long viewed there to be some form of right to a remedy under international law²⁶⁷ and that states have the authority—and perhaps even a responsibility—to provide that remedy with respect to claims by non-citizens.²⁶⁸

One of the ATS's original purposes was to fulfill U.S. obligations under international law by allowing a non-citizen to seek redress in a federal forum.²⁶⁹ There are a host of competing accounts of the ATS's history, but many find common ground in the right-remedy principle. Anne-Marie Slaughter has argued that Congress adopted the ATS in order to fulfill a “general obligation to help redress certain violations of international law as such,” an obligation that “flowed not to other states individually, but to the community of civilized nations.”²⁷⁰ Professor William Casto also argues for a “liberal” construction of the statute, reasoning that it created a form of protective jurisdiction allowing domestic courts to “create a domestic damage remedy to give meaning to an individual right created by international law.”²⁷¹ Professor Thomas Lee has argued that the ATS was designed to provide aliens with a federal forum to redress “transgressions of safe conducts”—i.e., “a noncontract injury to an alien's person or property”—in light of the United States' international legal obligation to provide a remedy for this type of wrong.²⁷² Bellia and Clark also look to the United States' international obligations to remedy wrongs, concluding that the ATS gave aliens a “right to sue Americans in federal court for torts that, if not redressed . . . , would render the United States responsible for its citizens' violations of the law of nations.”²⁷³ Though the details vary, these competing accounts share the view that the ATS was “adopted . . . because of the longstanding recognition in Anglo-American law, and international law, of

²⁶⁷ See *infra* Section II.C (discussing right to remedy under international law).

²⁶⁸ Another statutory example of federal recognition of remedial rights for international wrongs is the Torture Victims Protection Act. See William R. Casto, *The ATS Cause of Action Is Sui Generis*, 89 NOTRE DAME L. REV. 1545, 1564 (2014) (discussing TVPA as evidence that “Congress has championed the concept of an international tort action”).

²⁶⁹ See generally HUFBAUER & MITROKOSTAS, *supra* note 113.

²⁷⁰ Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461, 464 (1989) (emphasis omitted).

²⁷¹ William R. Casto, *The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 482 (1986).

²⁷² Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830, 836-37 (2006).

²⁷³ Bellia & Clark, *supra* note 214, at 450.

the importance attached to a government's performance of its obligation to provide recourse to victims of wrongs."²⁷⁴

When enacting the ATS, Congress assumed that state courts had authority to satisfy the nation's obligations by providing remedies for violations of international law, including in cases that might not fall within ATS jurisdiction. As originally enacted, the ATS stated that federal district courts had jurisdiction "concurrent with the courts of the several States."²⁷⁵ Congress enacted the ATS because it was concerned states had not, and would not, exercise their authority to redress wrongs against aliens, thus potentially leading the United States to violate its obligations under international law.²⁷⁶ But neither the First Congress nor any subsequent Congress has ousted state courts of their concurrent jurisdiction over ATS cases. If anything, as Bellia and Clark suggest, the First Congress expected that state courts were "available to hear" not only ATS cases, but also tort suits involving aliens that might not fall within the ATS's ambit.²⁷⁷ Then, as now, state tort law "supplie[d] an important means" of remedying torts in violation of international law.²⁷⁸

If one reason for the ATS was to ensure that if states did not remedy a wrong against a foreign citizen in violation of international law, federal courts would be empowered to do so, then it would make little sense to limit the ability of states to perform this remedial function now that the federal courts are retreating from this role after *Kiobel*. Furthermore, the reasons for the Supreme Court's retrenchment from ATS litigation follow in part from two features that are peculiar to federal courts and not applicable to state courts. First, federal courts presume that Congress does not intend them to apply federal statutes extraterritorially, and *Kiobel* applied that presumption.²⁷⁹ But nothing in the U.S. Constitution, nor in most states' laws, requires state courts to apply a strong presumption against extraterritoriality.²⁸⁰ Second, and more important, federal

²⁷⁴ Goldberg, *supra* note 172, at 97.

²⁷⁵ Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 78. In subsequent amendments, Congress dropped this text, which has become unnecessary in light of the background constitutional principle that state courts have concurrent jurisdiction over federal cases. *See supra* notes 254-60 and accompanying text.

²⁷⁶ *See supra* notes 270-73 and accompanying text.

²⁷⁷ Bellia & Clark, *supra* note 214, at 450; *see also id.* at 520.

²⁷⁸ *Id.* at 545.

²⁷⁹ *See Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1661 (2013).

²⁸⁰ Katherine Florey, *State Law, U.S. Power, Foreign Disputes: Understanding the Extraterritorial Effects of State Law in the Wake of Morrison v. National Australia Bank*, 92 B.U. L. REV. 535, 563 (2012) ("What should we make of the fact that, in many areas of law, state law is more likely than federal law to be applied outside the United States?"); *see also* RESTATEMENT (FOURTH) OF U.S. FOREIGN RELATIONS LAW § 203 reporters' note 5 (AM. LAW INST., Tentative Draft No. 3, 2017) ("The presumption against extraterritoriality is a presumption about the intent of Congress and therefore applies only to federal statutes

courts presume that they are not competent to provide damages remedies for violations of statutory and international law unless Congress has specifically authorized it.²⁸¹ This presumption does not apply to state courts, which have general jurisdiction to redress wrongs. Moreover, state and federal constitutional law recognizes and affirms the state interest in providing remedies for wrongs.²⁸²

C. *International Law*

A third foundation for the right-remedy principle is international law. Generally, international law contains “conduct-regulating rules that are translated into ‘causes of action’ by domestic legal systems and international courts.”²⁸³ At the time of the Founding, the right-remedy principle was a feature of international law in the sense that a nation had, at a minimum, an obligation to provide redress when one of its citizens committed certain torts against a foreign citizen.²⁸⁴ Today, the right-remedy principle under international law is evolving in a different direction, such that “[t]he obligation to provide effective remedies is an essential component of international human rights law.”²⁸⁵ We do not argue that international law necessarily imposes a binding legal obligation on the United States to provide remedies for violations of human rights. Rather, we argue that the right to a remedy under international law provides an independent justification for the states’ interest in remedying human rights.

1. *Treaties*

Several major multilateral treaties embody a right-remedy principle. As Professor Beth Stephens has catalogued, the International Covenant on Civil and

Subject to constraints imposed by federal law, the geographic scope of State statutes is a question of State law Some States have adopted their own State presumptions against extraterritoriality.”). *See generally* Hannah L. Buxbaum, *Determining the Territorial Scope of State Law in Interstate and International Conflicts: Comments on the Draft Restatement (Third) and on the Role of Party Autonomy*, 27 *DUKE J. COMP. & INT’L L.* 381, 385-89 (2017).

²⁸¹ *See, e.g.*, *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001) (Scalia, J.) (citing *Cort v. Ash*, 422 U.S. 66, 78 (1975)).

²⁸² *See supra* Part I.

²⁸³ Keitner, *supra* note 218, at 91.

²⁸⁴ *See* Bellia & Clark, *supra* note 214, at 449 (“The First Congress was undoubtedly aware of [the principles of liability for international torts] and enacted several statutory provisions—including the ATS—in order to comply with the United States’ obligations under the law of nations . . .”).

²⁸⁵ SHELTON, *supra* note 39, at 85.

Political Rights (“ICCPR”),²⁸⁶ the American Convention on Human Rights,²⁸⁷ the European Convention for the Protection of Human Rights and Fundamental Freedoms,²⁸⁸ and the Convention on the Elimination of All Forms of Racial Discrimination,²⁸⁹ to name some prominent examples, require states to provide an effective remedy for violation of the human rights they protect.²⁹⁰ The right to a remedy also finds expression in international investment law. As Professor Sergio Puig has discussed, international investment arbitration under the International Centre for Settlement of Investment Disputes (“ICSID”) Convention established a right to a remedy in “response to calls for access to effective justice.”²⁹¹

The right to a remedy embodied in these and other treaties is not necessarily enforceable in U.S. courts. For one thing, it is not certain that these rights are extraterritorial. There is ongoing debate, for example, about whether the ICCPR has extraterritorial scope.²⁹² Thus, a human rights treaty might not directly support state remedies for human rights violations by a party to the treaty that occurred outside the party’s territory.²⁹³ For another, there are domestic law

²⁸⁶ International Covenant on Civil and Political Rights art. 2(3), Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 (1967) (stating duties that each party to covenant must undertake, including “ensur[ing] that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy”).

²⁸⁷ American Convention on Human Rights art. 8(1), *opened for signature* Nov. 22, 1969, O.A.S.T.S. No. 36 at 1, 1144 U.N.T.S. 123, 9 I.L.M. 673 (1970) (entered into force July 18, 1978).

²⁸⁸ European Convention for the Protection of Human Rights and Fundamental Freedoms art. 13, Nov. 4, 1950, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953).

²⁸⁹ Convention on the Elimination of All Forms of Racial Discrimination art. 7, *opened for signature* Mar. 7, 1966, 5 I.L.M. 352 (1966) (entered into force Jan. 4, 1969).

²⁹⁰ 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, 46-47 (2002).

²⁹¹ Sergio Puig, *No Right Without a Remedy: Foundations of Investor-State Arbitration*, 35 U. PA. J. INT’L L. 829, 841 (2014).

²⁹² See, e.g., Aldo S. Zilli, Note, *Approaching the Extraterritoriality Debate: The Human Rights Committee, the U.S. and the ICCPR*, 9 SANTA CLARA J. INT’L L. 399, 401 (2011) (“The United States, along with other state parties, argue that the plain meaning of the language shows that the ICCPR only applies within a state’s territory.”). For a thorough discussion of the issue of extraterritorial application of human rights treaties, see generally Oona A. Hathaway et al., *Human Rights Abroad: When Do Human Rights Treaty Obligations Apply Extraterritorially?*, 43 ARIZ. ST. L.J. 389 (2011).

²⁹³ On the other hand, the right to a remedy is distinct from the human right that has been violated in the first instance for which a remedy is sought. If a person seeks a remedy in a given territory, no extraterritorial application of the right to a remedy is necessary to obligate a court there to provide a remedy, even if the human rights violation for which the remedy is sought occurred outside that territory.

limits on a court's authority to imply domestic remedies from international treaties.²⁹⁴ Even if not directly enforceable, however, human rights treaties provide normative support for state remedies when human rights protected by those treaties are violated. When the United States is a party to the relevant treaty, the foundation for state remedies may be even stronger. Indeed, the understanding of the United States regarding some human rights treaties, including the ICCPR, is that the federal government has limited responsibility and state and local governments have primary responsibility for implementing treaty obligations.²⁹⁵ Moreover, the existence of major multilateral commitments to provide redress for human rights violations helps to confirm the validity of a state's interest in remedies for those violations.

2. Customary International Law

Customary international law ("CIL") also supports a state's interest in providing remedies for human rights. CIL recognizes a right to a remedy for at least some human rights violations. In particular, CIL recognizes a right to a remedy for "gross" violations of international human rights law and "serious" violations of international humanitarian law.

The U.N. General Assembly recognized this remedial right in its non-binding *Basic Principles and Guidelines on the Right to a Remedy* (the "Principles"), which the United States joined in adopting.²⁹⁶ In particular, the Principles state:

A victim of a gross violation of international human rights law or of a serious violation of international humanitarian law shall have equal access to an effective judicial remedy as provided for under international law. . . . Obligations arising under international law to secure the right to access justice and fair and impartial proceedings shall be reflected in domestic laws.²⁹⁷

²⁹⁴ See *infra* Section III.B.4.

²⁹⁵ See S. EXEC. REP. No. 102-23, at 23 (1992) ("[T]he United States understands that this Covenant shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the state and local governments."); David Kaye, *State Execution of the International Covenant on Civil and Political Rights*, 3 U.C. IRVINE L. REV. 95, 104-10 (2013) (discussing legislative history of ICCPR and Congress's concerns of maintaining federalism).

²⁹⁶ G.A. Res. 60/147, U.N. Doc. A/RES/60/147, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (Dec. 16, 2005).

²⁹⁷ *Id.*; see also William J. Aceves, *Litigating the Arab-Israeli Conflict in U.S. Courts: Critiquing the Lawfare Critique*, 43 CASE W. RES. J. INT'L L. 313, 318 (2010) ("[T]he central purpose of any legal system is to offer a viable alternative to the use of force and a mechanism for victims to seek redress for their injuries."). *But cf.* Katharine Shirey, *The Duty to Compensate Victims of Torture Under Customary International Law*, 14 INT'L LEGAL PERSP.

The Principles do not define the especially serious human rights violations that trigger an obligation to provide individual redress, but they comfortably include many wrongs alleged in human rights suits in American courts, such as torture, disappearances, and extrajudicial killings.²⁹⁸

International law has also begun to recognize a broader “right to court access, [which,] whether or not it has become a legally binding rule of international law, is widely accepted and increasingly legalized.”²⁹⁹ Like the right to a remedy, this international norm provides a basis for a state’s interest in adjudicating foreign suits.³⁰⁰ To the extent that the United States has an obligation under international law to provide redress—a question that we need not answer here—state courts may be required to implement that obligation. Even if there is no such obligation, the right to a remedy under CIL affirms the legitimacy of the state interest in redressing human rights violations.

D. *Political Theory*

Political theory also supports the state interest in providing remedies for human rights. The principle that rights imply remedies is a longstanding principle of political morality reflected in positive law. In addition, several different traditions in political theory point toward a right-remedy principle that does not turn on the place of the alleged human rights abuse or the nationality of the victim. Nor do these theories have any less normative force for state remedies than for federal remedies.

1. *Corrective Justice*

Corrective justice theory is one theoretical basis. The corrective justice ideal aims to remedy relational wrongs between a victim and a tortfeasor.³⁰¹ The right-remedy principle is an expression of this ideal. Understood in terms of corrective justice, the right-remedy principle recognizes the ideal of ordering a wrongdoer

30, 38 (2004) (“The acceptance of a substantive human right as customary international law does not automatically carry with it the individual victim’s right to a remedy.”).

²⁹⁸ See, e.g., HILDE HEY, *GROSS HUMAN RIGHTS VIOLATIONS: A SEARCH FOR CAUSES* 18 (1995).

²⁹⁹ Whytock, *supra* note 3, at 2048.

³⁰⁰ See *id.* at 2059; see also Stephens, *supra* note 290, at 49 (arguing that right-remedy “principles [under conventional and CIL] support the conclusion that states at the very least are *permitted* to offer civil remedies for violations of international law, no matter where those abuses took place” (emphasis added)).

³⁰¹ See Ernest J. Weinrib, *Civil Recourse and Corrective Justice*, 39 FLA. ST. U. L. REV. 273, 275 (2011) (“Long ago Learned Hand formulated this relationship as a truism when he characterized a remedy as ‘an obligation destined to stand in the place of the plaintiff’s rights, and be, as nearly as possible, an equivalent to him for his rights.’” (citing Learned Hand, *Restitution or Unjust Enrichment*, 11 HARV. L. REV. 249, 255 (1897))).

to correct a loss by compensating the victim.³⁰² This ideal may support private remedies against a wrongdoer wherever she may be found because it depends on the existence of a wrongdoer-victim relationship, not on any particular territorial connections.

Corrective justice supplies an attractive account of state remedies for human rights violations for several reasons. First, it has a tether to positive law—the law of torts.³⁰³ Second, the wrongs alleged in most human rights litigation in domestic courts fit within the relational model of corrective justice. Because they generally entail claims by individual victims against alleged wrongdoers who are individuals or business entities, they do not run into the standard objection that corrective justice is a poor fit for international justice because countries cannot be treated as moral agents.³⁰⁴ And, because international law and international legal institutions remain comparatively “incapable of supplying corrective justice,”³⁰⁵ state remedies have an important role to play in realizing the ideals of corrective justice.

2. Social Contract Theory: Contracts Among Nations and Among People

John Locke rooted the right to a remedy in the social contract, which obliges the government to provide for redress of wrongs.³⁰⁶ Understood in civil recourse terms, the right-remedy principle empowers a victim to seek judicial recourse against the wrongdoer. Empowering victims with private rights of action fulfills the government’s obligation under the social contract. The government has assumed a political duty to provide victims of legal wrongs, who have surrendered their natural right to self-help, with a means of recourse against those who wronged them.³⁰⁷

³⁰² See Seth Davis, *Implied Public Rights of Action*, 114 COLUM. L. REV. 1, 14 (2014).

³⁰³ See Louis E. Wolcher, *The Paradox of Remedies: The Case of International Human Rights Law*, 38 COLUM. J. TRANSNAT’L L. 515, 524 (2000) (“[C]orrective justice is the traditional philosophy of remedial justice within the international legal system.”); cf. James F. Moseley, *Overview of American Justice*, 75 TUL. L. REV. 1725, 1747 (2001).

³⁰⁴ See, e.g., Eric A. Posner & Cass R. Sunstein, *Climate Change Justice*, 96 GEO. L.J. 1565, 1592 (2008) (arguing that “the climate change problem poorly fits the corrective justice model because the consequence of tort-like thinking would be to force many people who have not acted wrongfully to provide a remedy to many people who have not been victimized”).

³⁰⁵ Lea Brilmayer, *International Justice and International Law*, 98 W. VA. L. REV. 635, 641 (1996).

³⁰⁶ As Locke put it, “he who has suffered the damage has a Right to demand in his own name, and he alone can remit.” JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT*, in *TWO TREATISES OF GOVERNMENT* 273-74 (Peter Laslett ed., 1988).

³⁰⁷ See Andrew S. Gold, *The Taxonomy of Civil Recourse*, 39 FLA. ST. U. L. REV. 65, 70-71 (2011); Goldberg, *supra* note 35, at 550-51 (characterizing private rights of action and civil recourse as legitimately held moral enforcement rights).

A social-contract account of the right-remedy principle has purchase in domestic litigation. It explains why one citizen may call upon the judicial machinery for redress against another. On this theory, tort law, for example, ensures that citizens are equally accountable to one another for private wrongs. Private rights of action allow a tort victim the legal right to decide whether to bring the wrongdoer to account.

Extending social contract theory to international law may help explain the normative force of the right-remedy principle in international human rights cases. At first glance, human rights and remedies might appear inconsistent with social contract theory.³⁰⁸ One view of social contract theory posits countries as parties to an international social contract.³⁰⁹ On this view, individual remedies for international human rights violations are derivative of the social contract among countries. The chief difficulty of this view is that it cannot easily explain why countries—which vary widely in economic, military, and political power, not to mention living conditions—would consent to a system of universal human rights and remedies that limits their sovereignty. But there is another view of social contract theory that treats individuals as parties to a global social contract that transcends nation-states.³¹⁰ This view need not entail a single world government and global citizenship, but it does hold that the international system’s *raison d’être* is to instantiate fundamental principles of justice among individuals. While such a system might direct individual citizens to appeal first to their own governments to protect their human rights, it would not bar them from seeking redress from foreign courts where necessary to remedy human rights violations.

3. Cosmopolitan Theory

This latter conception of the international social contract bears more than a passing resemblance to cosmopolitan theory. Cosmopolitanism provides a

³⁰⁸ See Zachary Mills, Note, *Does the World Need Knights Errant to Combat Enemies of All Mankind? Universal Jurisdiction, Connecting Links, and Civil Liability*, 66 WASH. & LEE L. REV. 1315, 1351 (2009) (“Unlimited jurisdiction flies in the face of the social contract theory of government, and any academic suggestions that international law affirmatively supports a norm of unlimited jurisdiction, and thus supersedes democracy and the social contract, are merely wishful thinking.”); cf. David Luban, *A Theory of Crimes Against Humanity*, 29 YALE J. INT’L L. 85, 125 (2004) (“[S]ocial contract theory is unable to explain why states should choose a system of international law that protects human rights in other states.”).

³⁰⁹ See David Singh Grewal, Essay, *The Domestic Analogy Revisited: Hobbes on International Order*, 125 YALE L.J. 618, 626 (2016) (discussing that some have postulated necessity of Hobbesian social contract among states in order to achieve international order).

³¹⁰ See, e.g., DARREN J. O’BYRNE, *THE DIMENSIONS OF GLOBAL CITIZENSHIP: POLITICAL IDENTITY BEYOND THE NATION-STATE* 123 (2003) (explaining this view where “global citizens” are “bound up within a wider recognition of their role as individuals living on a single globe”).

foundation for state remedies for human rights, including in foreign-cubed cases. Cosmopolitan moral theory claims that humans have a duty to aid fellow humans, regardless of nationality.³¹¹ This duty may arise, as Professor Martha Nussbaum has argued, from focusing upon what human dignity requires of all of us.³¹² She derives the idea of human rights from human dignity, which “requires many things from the world: adequate nutrition, education of the faculties, protection of bodily integrity, liberty for speech and religious self-expression, and so forth.”³¹³ We have rights to these goods because they are necessary for a life of basic dignity. These rights create duties that bind all of us: “Humanity is under a collective obligation to find ways of living and cooperating together so that all human beings have decent lives.”³¹⁴ This way of living together can be “respectful of cultural difference” by looking to nation-states to implement our collective obligations.³¹⁵

Cosmopolitanism might seem to entail a “radical”³¹⁶ view of universal jurisdiction in which any domestic court can at any time take cognizance of any human rights violations arising anywhere. But this view is not necessary to our argument, which, following Professor Noah Feldman, might rest on the more “minimalist” conception that the global system of remedies for human rights violations must preclude a “legal vacuum.”³¹⁷ In other words, cosmopolitanism need entail only the view that states have a legal interest—and perhaps a moral duty—in “expanding” remedies for human rights to fill enforcement “gap[s]” that create, either formally or in practice, “law-free zone[s].”³¹⁸ At a minimum, cosmopolitan theory suggests that “[e]ven if the Constitution does not require a law for the redress of wrongs, providing such a law surely counts as an important state interest” in human rights cases.³¹⁹

E. *The Limits of the Aspiration to Provide Law for the Redress of Wrongs*

There is, in short, both a positive-law and a political-theory foundation for a state’s authority and interest in providing law for the redress of violations of

³¹¹ See Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791, 1851 (2009) (noting that many cosmopolitan theorists “argue that international morality (and therefore, ideally, international law) imposes a duty on nations to act to help peoples in other states and enhance global welfare, regardless of domestic political preferences”).

³¹² Martha C. Nussbaum, *Beyond the Social Contract: Capabilities and Global Justice*, 32 OXFORD DEV. STUD. 13 (2004).

³¹³ *Id.*

³¹⁴ *Id.*

³¹⁵ *Id.*

³¹⁶ Noah Feldman, *Cosmopolitan Law?*, 116 YALE L.J. 1022, 1065 (2007).

³¹⁷ See *id.* at 1066-67.

³¹⁸ *Id.* at 1067.

³¹⁹ Cf. Oman & Solomon, *supra* note 253, at 1157.

human rights. But state authority to provide such law is limited by countervailing concerns. The aspiration to provide law for the redress of wrongs is not a guarantee of a personal remedy in every case.

It hardly follows, however, that the right-remedy principle is an empty “slogan,”³²⁰ “pious cant,”³²¹ a “trite jingle,”³²² or a “historical relic.”³²³ Though a remedy is not guaranteed for every right, “[f]ew principles of the American constitutional tradition resonate more strongly than [the right-remedy principle].”³²⁴ In almost all the states, the aspiration to provide remedies for rights is a fundamental precept of constitutional government. To be sure, merely reciting the right-remedy principle does not answer the difficult questions of which rules of primary conduct count as “rights,” when those rights presumptively imply remedies, and when that presumption is overcome by countervailing reasons to deny relief. At the same time, recognizing that state laws uniformly recognize the right-remedy principle and task state courts of general jurisdiction with developing law for the redress of wrongs has important implications for how we think about limits on remedies under state law. Every state has concluded that providing remedies for legal wrongs is an important state interest, and many have said so in their constitutional laws. And every state has a body of law—the law of torts—designed specifically to implement the fundamental aspiration to redress wrongs.³²⁵ If “what is needed to ground governmental power is a *legitimate government interest*,”³²⁶ then state authority to provide law for the redress of wrongs is a firmly grounded “democratic norm[.]”³²⁷

Our aim in this Part has been to show that states have a constitutionally recognized interest in providing remedies for international human rights. Our argument shifts the ground of debate; what presumptively seemed a “foreign relations” matter for the federal government alone now appears a remedial matter presumptively for state courts and state law to decide. If we are correct,

³²⁰ Paul Caritj, Note, *Tortious Interference with the Expectancy of Entitlement Benefits*, 45 U. MICH. J.L. REFORM 455, 467 (2012).

³²¹ Charles L. B. Lowndes, *Civil Liability Created by Criminal Legislation*, 16 MINN. L. REV. 361, 364 (1932).

³²² *Id.*

³²³ William C. Koch, Jr., *Reopening Tennessee’s Open Courts Clause: A Historical Reconsideration of Article I, Section 17 of the Tennessee Constitution*, 27 U. MEM. L. REV. 333, 341 (1997).

³²⁴ Fallon & Meltzer, *supra* note 37, at 1778.

³²⁵ As our colleague Professor Ken Simons has put it, tort law can be “understood as a mode of private redress for wrongs.” Kenneth W. Simons, *Victim Fault and Victim Strict Responsibility in Anglo-American Tort Law*, 8 J. TORT L. 29, 31 (2015).

³²⁶ Weinberg, *supra* note 38, at 1514.

³²⁷ Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78, 168, 170 (2011).

then courts and legislatures working through the doctrinal limits on state remedies for human rights must give due weight to the state's interest in providing remedies.³²⁸

IV. IMPLICATIONS FOR HUMAN RIGHTS LITIGATION IN STATE COURTS AND UNDER STATE LAW

So far, we have argued that states have a significant role to play in promoting human rights, including by making their courts available for human rights claims and providing law for adjudicating those claims. This role is especially important given the limits of the international framework for human rights protection and, in the post-*Kiobel* era, the curtailed accessibility of federal courts for human rights claims. We have also argued that states have the authority to remedy human rights violations and a valid interest in doing so that draws its normative force from the right-remedy principle, which is founded on state law, federal law, international law, and political theory. We have demonstrated that this interest may extend to human rights cases involving foreign parties and violations occurring outside U.S. territory.

But the right to a remedy has never been absolute. As we discussed at the outset, there are countervailing considerations. Critics argue that human rights litigation in state courts or under state law may adversely affect the interests of

³²⁸ The right-remedy principle is related, both conceptually and doctrinally, to the principle that the courts should be open. The open-courts principle under state constitutional law refers to a constellation of ideas—"open access, independent judges authorized to sit in judgment of the state and to assess the fairness of their own as well as other decision-making procedures, [and] equal and dignified treatment of all participants"—about the role of courts and the citizenry's positive entitlement to them. Judith Resnik, *Constitutional Entitlements to and in Courts: Remedial Rights in an Age of Egalitarianism: The Childress Lecture*, 56 ST. LOUIS U. L.J. 917, 938 (2012); cf. Whytock, *supra* note 3, at 2048 ("According to the right to court access, a person generally is entitled to access to a fair hearing by an independent and impartial court for the determination of a legal claim."). The right-remedy principle is different and more focused: It recognizes a right to law for the redress of wrongs and confirms that states have a substantial interest in providing that law. There is, of course, some overlap; state constitutional provisions that guarantee open courts may also recognize the right to a remedy. International law keeps the two concepts distinct, while arguably treating the right to court access as implicit in the right to a remedy. See, e.g., DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW 16 (3d ed. 2015) ("The word 'remedies' contains two separate concepts, the first being procedural and the second substantive. In the first sense, remedies are the processes by which arguable claims of human rights violations are heard and decided, whether by courts, administrative agencies, or other competent bodies. The second notion of remedies refers to the outcome of the proceedings, the relief afforded to the successful claimant."). Though nothing about our argument necessarily turns on the label, the right-remedy principle captures the nature of the state's interest in providing remedies for human rights violations, while the open-courts principle, with its emphasis on a fair hearing and public access to judicial proceedings, does not.

multinational corporations, offend foreign nations, or interfere with U.S. foreign relations.³²⁹

The problem is that courts and commentators tend to take a categorical approach that emphasizes the supposed costs of human rights litigation in state courts or under state law without taking into account remedial concerns. More importantly, when deciding whether to allow access to U.S. courts or the application of U.S. law in human rights cases, judges often bar human rights claimants from seeking a remedy based on assertions about the purported costs but without considering the importance of state remedies for human rights and the state interest in providing them. This occurs, for example, when U.S. courts deny access to state courts by allowing removal of tort claims to federal court on shaky grounds such as the federal common law of foreign relations, even when the plaintiff's claim is not based on that law.³³⁰

In this Part, we illustrate these tendencies by focusing on four court access doctrines—the removal, political question, personal jurisdiction, and forum non conveniens doctrines—and two sets of principles that may limit the application of state law to provide remedies for human rights—federal preemption principles and choice-of-law principles.³³¹ We show that when applying them, courts tend to ignore or downplay the state interest in remedying human rights violations. We argue that proper application of these doctrines requires courts to do two things. First, they must explicitly consider both a state's interest in providing remedies and the importance of remedies for individuals who have been wronged, including in human rights cases. Second, if they determine that other considerations outweigh these remedial considerations, they must give explicit reasons showing why remedial considerations are outweighed.

To be clear, we do not suggest that these limiting doctrines will never bar human rights claims. Rather, we argue that the right-remedy principle can and should influence courts' decisions under these doctrines. The result will be a more balanced approach that takes seriously the contributions of states to human rights.

³²⁹ See discussion *supra* Section II.A.

³³⁰ See discussion *infra* Section IV.A.1.

³³¹ We acknowledge that other doctrines may potentially limit state remedies for human rights violations. These doctrines may, for example, include foreign sovereign immunity and foreign official immunity. See, e.g., Chimène I. Keitner, *Immunities of Foreign Officials from Civil Jurisdiction*, in THE CAMBRIDGE HANDBOOK OF IMMUNITIES AND INTERNATIONAL LAW (Tom Ruys, Nicolas Angelet & Luca Ferro eds., forthcoming 2018) (manuscript at 11, 14, 17-19), <https://ssrn.com/abstract=3098924> [<https://perma.cc/4L32-N65G>] (discussing foreign official immunity); Whytock, *supra* note 3, at 2038-46 (discussing foreign sovereign immunity). Space does not allow a thorough discussion of all such doctrines. As a normative matter, however, we argue that the state interest in redressing wrongs should be explicitly considered by courts whenever they apply these doctrines in human rights cases.

A. *State Interests and Court Access Doctrines*

1. Foreign Relations Removal

Defendants in human rights lawsuits may invoke the doctrine of removal in an attempt to avoid having claims against them adjudicated by state courts. Under § 1441 of the U.S. Judiciary Code, a defendant may in some circumstances remove a state court action to federal court, but only if the federal courts have subject matter jurisdiction.³³² Depending on the citizenship of the parties, there may be diversity jurisdiction, which would allow removal if the defendant is not a citizen of the forum state.³³³ In addition, if the plaintiff's claim "aris[es] under the Constitution, laws, or treaties of the United States,"³³⁴ removal may be allowed based on federal question jurisdiction.

The well-pleaded complaint rule "severely limits" removal,³³⁵ however, including removal of state court human rights claims based on state law or foreign law rather than federal law. Under the well-pleaded complaint rule, "a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action."³³⁶ Human rights claims based on state law or foreign law are *not* based on the federal law of foreign relations and therefore should *not* be removable in the normal course.

Even when a plaintiff's state court human rights claim is based solely on state law or foreign law, a defendant may seek to remove the case to federal court based on the argument that the case "implicates the 'uniquely federal' interest in foreign relations, and so must be heard in a federal forum."³³⁷ While some circuits have made that leap and allowed so-called "foreign affairs removal,"³³⁸

³³² See 28 U.S.C. § 1441(a) (2012) ("Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.")

³³³ See *id.* § 1441(b)(2) ("A civil action otherwise removable solely on the basis of the jurisdiction under section 1332(a) of this title may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.")

³³⁴ *Id.* § 1331.

³³⁵ *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Tr. for S. Cal.*, 463 U.S. 1, 9 (1983).

³³⁶ *Id.* at 10-11 (citations omitted).

³³⁷ *Patrickson v. Dole Food Co.*, 251 F.3d 795, 801 (9th Cir. 2001). A defendant may undertake removal in an effort to secure pleading rules that are stricter in federal court than in state court, as well as other procedural rules that may be more pro-defendant than in state court.

³³⁸ See *Torres v. S. Peru Copper Corp.*, 113 F.3d 540, 543 (5th Cir. 1997) (concluding federal question jurisdiction existed because "complaint raises substantial questions of federal common law by implicating important foreign policy concerns").

the Ninth Circuit has not been so willing, holding instead that removal is not appropriate “simply because a foreign government has expressed a special interest in [a case’s] outcome.”³³⁹

Normatively, the right-remedy principle justifies the state interest in redressing wrongs, including wrongs that violate human rights. Because one purpose of the well-pleaded complaint rule is to resolve conflicts between state and federal jurisdiction,³⁴⁰ this interest militates against judicial dilution of the well-pleaded complaint rule or expansion of the theory of foreign relations removal. In light of a state’s legitimate interest in providing remedies for wrongs, federal courts are right to be “reluctant” to find that a private state law or foreign law action is removable simply because it arises from tortious human rights violations abroad.³⁴¹

The correct view is that human rights claims based on state law or foreign law are not removable to federal court in the absence of jurisdictionally sufficient diversity of citizenship. As Part III argued, the provision of remedies for wrongs does not constitute “foreign relations” simply because those wrongs happen to violate human rights. Thus, even without the well-pleaded complaint rule, these suits ordinarily would not substantially implicate a federal interest in exclusive control of foreign relations.

³³⁹ *Patrickson*, 251 F.3d at 803. Scholars have strongly criticized foreign relations removal. See, e.g., Curtis A. Bradley, *The Costs of International Human Rights Litigation*, 2 CHI. J. INT’L L. 457, 471 n.51 (2001) (“The basis for removal [in *Torres*] to federal court—that the case arose under the ‘federal common law of foreign relations’—is questionable.”); Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1697-98 (1997) (criticizing *Torres* decision, arguing that “federal common law rule announced in *Torres* is inconsistent with scores of very similar cases in which federal jurisdiction was denied” and that case “illustrate[s] the difficulties that inhere in a federal common law of foreign relations”); Ernest A. Young, *Federal Suits and General Laws: A Comment on Judge Fletcher’s Reading of Sosa v. Alvarez-Machain*, 93 VA. L. REV. ONLINE 33, 37-38 (2007) (“Foreign affairs removal—under which some lower courts have allowed removal from state court on the ground that a suit implicates federal foreign affairs interests, even though there is no federal law element in the case—is an . . . unsanctioned and uncabined judicial creation.”).

³⁴⁰ See *Franchise Tax Bd.*, 463 U.S. at 9-10 (“[T]he ‘well-pleaded complaint’ rule . . . as a practical matter severely limits the number of cases in which state law ‘creates the cause of action’ that may be initiated in or removed to federal district court, thereby avoiding more-or-less automatically a number of potentially serious federal-state conflicts.”).

³⁴¹ *Pacheco de Perez v. AT&T Co.*, 139 F.3d 1368, 1378 (11th Cir. 1998) (“[W]e are reluctant to find that the plaintiffs’ private cause of action sounding in Georgia tort law implicates important foreign policy on the face of the plaintiffs’ pleadings.”). Ultimately, a state court may dismiss a human rights case under state law, but federal courts should leave that weighing of interests to the states in the first instance. Cf. *AT&T Corp. v. Sigala*, 549 S.E.2d 373, 378 (Ga. 2001) (holding that Georgia courts have discretion to dismiss human rights action filed by non-resident non-citizens on forum non conveniens grounds).

Even if the state court claim is based on CIL or on a state- or foreign-law created cause of action to redress a violation of CIL, the claim is not necessarily removable to federal court. First, whether a claim based on CIL arises under federal law for purposes of establishing federal question jurisdiction is uncertain—partly because it is unsettled whether CIL is part of federal law or not.³⁴² Second, such claims, as we have argued, do not necessarily implicate foreign relations. The human rights claim of an individual or group against a defendant—even a foreign sovereign defendant—is aimed at obtaining a remedy for a right, whether declaratory, compensatory, or symbolic. The relationship at issue is between an alleged victim of human rights violations and an alleged perpetrator of the violation, not between a foreign nation and the United States. For a court—especially a state court—in a discrete lawsuit to provide a remedy for a particular human rights violation is not equivalent to the United States taking a general policy position regarding a foreign country involved in the alleged violation. Foreign countries are aware that the United States is a federal system, with courts at the state and federal levels that are independent from the other branches of government. Therefore, even when the claim is based on CIL, there is a strong argument that foreign relations removal is not appropriate in the absence of an independent basis for subject matter jurisdiction.

Finally, in cases that are removed because of their foreign relations implications, federal courts must still apply state substantive law (or, according to state choice-of-law rules, foreign substantive law)³⁴³ and take seriously the state's remedial interest when assessing any foreign relations concerns under other doctrinal headings.

³⁴² See, e.g., *Sosa v. Alvarez-Machain*, 542 U.S. 692, 731 n.19 (2004) (“[The ATS] was enacted on the congressional understanding that courts would exercise jurisdiction by entertaining some common law claims derived from the law of nations; and we know of no reason to think that federal-question jurisdiction was extended subject to any comparable congressional assumption.”). For an overview of the issue, see generally Gwynne Skinner, *When Customary International Law Violations Arise Under the Laws of the United States*, 36 BROOK. J. INT'L L. 205 (2010) (examining whether non-statutory, common law claims for violations of CIL “arise under the ‘laws of the United States’ for purposes of federal question jurisdiction and Article III of the Constitution”). The literature is voluminous, but for an argument that CIL is not federal law, see Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 817 (1997) (arguing that CIL should not have status of federal law, because it is founded on “questionable assumptions” and is “in tension with fundamental constitutional principles”), and for a defense of the status of CIL as federal law, see Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1827 (1998) (arguing against Bradley and Goldsmith's position).

³⁴³ *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941).

2. Political Question Doctrine

If a defendant does successfully remove a human rights claim to federal court, it might, as a subsequent procedural move, file a motion to dismiss the claim based on the political question doctrine. We argue, however, that a court's decision to provide law for the redress of human rights violations will rarely raise a nonjusticiable political question.

As an initial matter, the political question doctrine is unlikely to be a barrier as a matter of *state* law.³⁴⁴ Generally speaking, “state common law courts do tend to hear an array of questions that would be nonjusticiable under federal law,” including ones that would be political questions under federal doctrine.³⁴⁵ There are good reasons to think the political question doctrine should play an even smaller role in state constitutional law than it does in federal constitutional law.³⁴⁶ And, as we shall argue, the political question doctrine should not preclude most human rights litigation in state courts or in federal courts under state law.

Our argument is not that questions which are political when filed in federal court become judicial simply upon being filed in state court. To the contrary, our argument is that the political question doctrine under *federal* law should rarely bar human rights claims, whether filed in federal court or in state court.

According to the federal political question doctrine, certain political questions may be nonjusticiable. In *Baker v. Carr*,³⁴⁷ the Supreme Court enumerated six criteria for identifying a political question, which include a “textually demonstrable constitutional commitment of the issue to a coordinate political department,” a “lack of judicially discoverable and manageable standards for resolving it,” “the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion,” and “the potentiality of embarrassment from multifarious pronouncements by various departments on one question.”³⁴⁸

The Supreme Court has stated that the political question doctrine is a doctrine “of ‘political questions,’ not one of ‘political cases.’”³⁴⁹ It has been adamant in

³⁴⁴ The political question doctrine is most likely to be raised in state law human rights claims brought in (or removed to) federal courts, but could also be raised in state courts. *See, e.g.,* *Freeman v. Am. K-9 Detection Servs., L.L.C.*, 494 S.W.3d 393, 403 (Tex. App. 2015) (denying motion to dismiss on political question grounds, among others).

³⁴⁵ Helen Hershkoff, *State Courts and the “Passive Virtues”: Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1863 (2001).

³⁴⁶ *See* Daniel B. Rodriguez, *The Political Question Doctrine in State Constitutional Law*, 43 RUTGERS L.J. 573, 586-87, 590 (2013) (“[The] role for the political question doctrine in state constitutional adjudication is a small one.”).

³⁴⁷ 369 U.S. 186 (1962).

³⁴⁸ *Id.* at 217.

³⁴⁹ *Id.* (“[I]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.”).

maintaining that questions touching on foreign relations are not necessarily nonjusticiable political questions.³⁵⁰ Thus, the Court has insisted that political question doctrine analysis focus narrowly on the specific issues that a claimant is asking to be decided, not on the indirect political implications of a claim. For example, *Zivotofsky v. Clinton*³⁵¹ involved a federal statute permitting U.S. citizens born in Jerusalem to elect to have “Israel” indicated in their passports as their place of birth.³⁵² The petitioner, a U.S. citizen born in Jerusalem, made such an election. However, the State Department’s Foreign Affairs Manual required passport officials to enter “Jerusalem” rather than “Israel” for persons born in Jerusalem, based on the Department’s policy of not taking a position regarding the political status of Jerusalem. The Department, therefore, refused to honor the petitioner’s election.³⁵³ The district court dismissed the case based on the political question doctrine, reasoning that deciding the petitioner’s claim would require it to determine the political status of Jerusalem, and the court of appeals affirmed, reasoning that deciding the claim would require courts to intrude on the Executive’s exclusive power to recognize foreign sovereigns.³⁵⁴ The Supreme Court reversed, holding the lower courts mischaracterized the question presented and concluding that the question presented required the courts to adjudicate “a specific statutory right,” not to “supplant a foreign policy decision of the political branches.”³⁵⁵ The enforcement of a specific right, the Court concluded, “is a familiar judicial exercise.”³⁵⁶

Human rights cases in state courts or under state law should rarely be subject to dismissal under *Zivotofsky*’s refined political question doctrine. As our discussion of the right-remedy principle shows, human rights claims directly raise only two questions: whether the claimant’s rights have been violated and, if so, what the appropriate remedy is. Even if a human rights claim has foreign relations implications, this is not by itself enough to require dismissal based on the political question doctrine. To the contrary, the application of legal rules to

³⁵⁰ *Id.*; see also *Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221, 229-30 (1986) (rejecting petitioners’ argument based on political question doctrine that respondents’ claims were “unsuitable for judicial review because they involve foreign relations” and emphasizing that “not every matter touching on politics is a political question . . . and more specifically, that it is ‘error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance’” (citations omitted)).

³⁵¹ 566 U.S. 189 (2012).

³⁵² *Id.* at 191.

³⁵³ *Id.* at 192.

³⁵⁴ *Id.* at 193-95.

³⁵⁵ *Id.* at 196.

³⁵⁶ *Id.*

determine whether a remedy is available for the violation of a right is “a familiar judicial exercise.”³⁵⁷

In fact, the executive branch has taken this position in litigation. In its amicus brief in *Filártiga*, the United States argued against dismissal on political question grounds. It argued that “[t]he courts are properly confined to determining whether an individual has suffered a denial of rights guaranteed him as an individual by customary international law.”³⁵⁸ Although the brief acknowledged that human rights cases can implicate foreign relations, it concluded that “the protection of fundamental human rights is not committed exclusively to the political branches of the government.”³⁵⁹

Our argument shows why that would be the case not only for federal courts, but also for state courts. The provision of remedies for rights—including human rights—is not committed to the political branches. To the contrary, as we have argued, this is a traditional function of courts (including state courts). When human rights claims are based on state tort law, there will be no lack of “judicially discoverable and manageable standards.”³⁶⁰ State remedies for rights

³⁵⁷ Moreover, some have read *Zivotofsky* as refining the political question so as to turn only on the first two *Baker* factors—“a textually demonstrable constitutional commitment of the issue to a coordinate political department” and “a lack of judicially discoverable and manageable standards for resolving it.” *Id.* at 202 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)). As Professor Harlan Cohen explains:

Notably, in discussing application of the political question doctrine, Chief Justice Roberts mentioned only the first two *Baker* factors—“a textually demonstrable constitutional commitment of the issue to a coordinate political department” and “a lack of judicially discoverable and manageable standards for resolving it.” The other four—the avoidance of judicial policymaking, the need to avoid embarrassment, the need for finality, or concerns about maintaining “one voice” in foreign affairs—are notably omitted. The implication that those four factors were no longer valid was not lost on Justice Sotomayor, who wrote a concurrence with the main purpose of resuscitating them.

Harlan Grant Cohen, *A Politics-Reinforcing Political Question Doctrine*, 49 ARIZ. ST. L.J. 1, 20 (2017). If this reading is correct, then it would be even less likely that a human rights claim under state law would be dismissed on political question grounds. After all, providing remedies for human rights is not textually committed to the political branches. To the contrary, as we have argued, providing remedies for rights violations is a fundamental function of states. And, because courts are capable of determining and applying state law, foreign law, and international law, and routinely do so, there is no lack of manageable standards.

³⁵⁸ Brief of the United States as Amicus Curiae at 22, *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980) (No. 79-6090).

³⁵⁹ *Id.* (citing *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423, 430 n.34 (1964)).

³⁶⁰ *Cf.* Benjamin Ewing & Douglas A. Kysar, *Prods and Pleas: Limited Government in an Era of Unlimited Harm*, 121 YALE L.J. 350, 380 (2011) (internal quotation marks omitted) (noting that under existing doctrine “[c]ommon-law tort claims are rarely thought to present

under CIL will be no less judicially manageable in most cases.³⁶¹ Deciding whether rights have been violated requires the application of law to facts, and does not require any “initial policy determination of a kind clearly for nonjudicial discretion.”³⁶²

Nor should federal courts intervene to preclude state remedies for human rights under the political question doctrine. Congress or the executive branch could conceivably make an affirmative decision to prohibit states from providing remedies for violations of human rights, but then the analysis would turn on preemption doctrine, not on political question principles. And perhaps in some cases, Congress or the executive branch may make a pronouncement regarding a particular country’s human rights performance, but it is unlikely that either would do so on the “one question” before a court in a human rights case: whether to provide a remedy for a right.³⁶³

nonjusticiable political questions” and arguing that they should never be dismissed on political question grounds).

³⁶¹ It is possible, however, that when claims are based on highly uncertain areas of CIL, such standards may be lacking—but where there is such a high degree of uncertainty it is unlikely that a court would find that a rule of CIL exists in the first place. See JAMES CRAWFORD, BROWNIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 24-25 (8th ed. 2012) (noting that CIL is by definition general practice of states accepted as law, and there must be high degree of uniformity and consistency of practice). Where there is little or no reason to think that CIL establishes a right, there is correspondingly less reason to think that providing remedies is within a state’s traditional competence. Cf. Erwin Chemerinsky, *A Unified Approach to Justiciability*, 22 CONN. L. REV. 677, 700 (1990) (arguing that “terminology of the political question doctrine . . . should be replaced by” focusing on question “of what” rules of primary conduct “should be judicially unenforceable”).

³⁶² Ewing & Kysar, *supra* note 360, at 380. This, however, may not always be the case. See, e.g., *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 977-84 (9th Cir. 2007) (affirming grant of dismissal on political question grounds in suit against provider of equipment to Israeli Defense Force to destroy homes in Palestinian Territories, in which plaintiffs argued that Israel’s policy violated international law).

³⁶³ To be clear, our argument is not that a human rights case will never involve a political question. Professor Tara Leigh Grove has recently shown that the traditional political question doctrine—the one existing prior to *Baker v. Carr*—treated some factual questions as “political” ones, which triggered federal and state judicial deference to the political branches’ factual determinations. Tara Leigh Grove, *The Lost History of the Political Question Doctrine*, 90 N.Y.U. L. REV. 1908, 1915-16 (2015). Among these factual, political questions was the question of whether the United States was still a party to a treaty. *Id.* at 1917 (including questions such as “the date on which a war began or ended” and “whether a certain group of Native Americans constituted a ‘tribe’”). We can imagine this kind of factual, political question arising in a human rights case and think it may well be appropriate for a state or federal court to defer to the political branches’ answer to it.

3. Personal Jurisdiction

Whether a remedy for a human rights violation is sought in state court or federal court, a defendant may, of course, file a motion to dismiss for lack of personal jurisdiction. Two otherwise similar claims should not be treated differently under personal jurisdiction doctrine merely because one of them is based on conduct that would be a human rights violation. That is, personal jurisdiction is not more of a barrier to plaintiffs seeking remedies for human rights than for plaintiffs seeking remedies for other wrongs. Nevertheless, we devote some attention here to personal jurisdiction because it may indeed be a growing barrier for human rights claims against non-U.S. defendants, just as it is for claims against foreign defendants in general. Doctrinally, we show how the state interest in providing remedies for human rights is relevant to personal jurisdiction analysis and, in some cases, may influence outcomes in favor of a finding of jurisdiction. Normatively, the validity of the state interest in redressing human rights violations serves as the basis for criticizing the direction in which the law of personal jurisdiction is evolving in transnational litigation.

As the Supreme Court recently reiterated:

The canonical opinion in this area remains *International Shoe [Co. v. Washington]*, . . . in which we held that a State may authorize its courts to exercise personal jurisdiction over an out-of-state defendant if the defendant has “certain minimum contacts with [the State] such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’”³⁶⁴

This standard evolved into two categories of personal jurisdiction. Under the doctrine of specific jurisdiction, a court in a particular state may assert jurisdiction over a defendant even if the defendant has engaged only in “single or occasional acts” in the forum state, provided that the plaintiff’s claim “aris[es] out of or relate[s] to the defendant’s contacts with the forum.”³⁶⁵ Under the doctrine of general jurisdiction, a court in a particular state may assert jurisdiction over a defendant even if the plaintiff’s claim is unrelated to the defendant’s contacts with the forum state, if those contacts “are so ‘continuous and systematic’ as to render them essentially at home in the forum State.”³⁶⁶ “For an individual, the paradigm forum for the exercise of general jurisdiction is the individual’s domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home,” such as its place of incorporation or principal place of business³⁶⁷—but these are not the only places

³⁶⁴ *Daimler AG v. Bauman*, 134 S. Ct. 746, 754 (2014) (citations omitted).

³⁶⁵ *Id.* at 754 (citations omitted).

³⁶⁶ *Id.* (citations omitted).

³⁶⁷ *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 924 (2011).

where a corporation may be at home for general jurisdiction purposes.³⁶⁸ In addition, a court may assert personal jurisdiction over a defendant who is personally served in the forum state, even in suits unrelated to the defendant's in-state activities.³⁶⁹ Thus, the requirements for personal jurisdiction can be met if a human rights claim arises out of the defendant's activity in the forum state; if the defendant is a corporation incorporated in the forum state or with its principal place of business there, or an individual domiciled there; or if the defendant is an individual personally served in the forum state.

On the other hand, personal jurisdiction will bar human rights suits—as well as any other type of suits—in states with which the defendant has no contacts that are related to the plaintiff's claim and in which the defendant neither has contacts sufficient to render it at home nor is an individual personally served there.

But this does not mean that the state's interest in providing for redress of wrongs has no role to play in personal jurisdiction analysis. To the contrary, the plaintiff's interest in a forum in which to pursue a remedy, and the forum state's interest in providing a remedy, are among the factors that courts must consider when evaluating the reasonableness of an assertion of personal jurisdiction.³⁷⁰ As the Supreme Court has pointed out, “[t]hese considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required.”³⁷¹ The right-remedy principle reinforces the importance of weighing the state's interest in providing remedies for human rights violations in this analysis. More generally, the right-remedy principle should be among the considerations in close cases—for example, when it would be equally plausible to conclude that the extent of contacts or degree of relatedness is or is not sufficient for specific jurisdiction, or when it appears that a corporate defendant may be “at home” for general jurisdiction purposes in a state other than its state of incorporation or principal place of business.³⁷²

³⁶⁸ *Bauman*, 134 S. Ct. at 760 (acknowledging that corporations may still be subject to general jurisdiction in forums where they are neither incorporated nor have their principal place of business).

³⁶⁹ *Burnham v. Superior Court*, 495 U.S. 604, 627 (1990).

³⁷⁰ *See Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113 (1987) (“[T]he determination of the reasonableness of the exercise of jurisdiction in each case will depend on an evaluation of several factors. A court must consider the burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief. It must also weigh in its determination ‘the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies.’” (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980))).

³⁷¹ *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985).

³⁷² *See Bauman*, 134 S. Ct. at 761 n.19 (“We do not foreclose the possibility that in an exceptional case . . . a corporation's operations in a forum other than its formal place of

Some commentators suggest that the Court's personal jurisdiction holding in *Daimler AG v. Bauman* makes personal jurisdiction an even more imposing barrier to human rights claims in U.S. courts.³⁷³ Filed in federal court in California, *Bauman* was a "foreign cubed" case that "concern[ed] the authority of a court in the United States to entertain a claim brought by foreign plaintiffs against a foreign defendant based on events occurring entirely outside the United States."³⁷⁴ The plaintiffs, who were Argentine citizens, sued a German company, alleging that the defendant's Argentine subsidiary collaborated with Argentine security forces to kidnap, detain, and kill Argentine workers during Argentina's "Dirty War."³⁷⁵ Because none of the defendant's activity giving rise to the claim occurred in California, the only potential basis for personal jurisdiction over the defendant was general jurisdiction. Due to the paucity of California contacts on the part of the defendant and its Argentine subsidiary, the plaintiffs attempted to base jurisdiction on the California contacts of a separate subsidiary of the defendant that was incorporated in Delaware and had its principal place of business in New Jersey.³⁷⁶ The Supreme Court, assuming for the purposes of the decision that the Delaware subsidiary's California contacts would be sufficient for *Daimler* to be subject to general jurisdiction in a California court, held that the defendant lacked sufficient contacts to be subject to general jurisdiction in California, even if the subsidiary's California contacts could be imputed to the parent.³⁷⁷

The Supreme Court's decision in *Bauman* is best understood as a specific application of the rule pronounced in *Goodyear Dunlop Tires Operations, S.A. v. Brown*,³⁷⁸ that general jurisdiction requires that the defendant's "affiliations with the State are so 'continuous and systematic' as to render [it] essentially at home in the forum State."³⁷⁹ Under these facts, the defendant's contacts with California were simply not enough. It is possible, but incorrect, to read *Bauman* more broadly to suggest that states do not have an interest in asserting jurisdiction to provide remedies for human rights violations. The *Bauman* Court

incorporation or principal place of business may be so substantial and of such a nature as to render the corporation at home in that State.").

³⁷³ See Corbett, *supra* note 257, at 51; Gwynne L. Skinner, *Beyond Kiobel: Providing Access to Judicial Remedies for Violations of International Human Rights Norms by Transnational Business in a New (Post-Kiobel) World*, 46 COLUM. HUM. RTS. L. REV. 158, 163 (2014) (arguing that even if plaintiffs can successfully rebut presumption of extraterritoriality, "*Bauman* may still present a significant barrier").

³⁷⁴ *Bauman*, 134 S. Ct. at 750.

³⁷⁵ *Id.* at 750-51.

³⁷⁶ *Id.* at 751.

³⁷⁷ *Id.* at 749 (explaining that relying on plaintiff's reasoning would result in general jurisdiction in too many cases).

³⁷⁸ 564 U.S. 915 (2011)

³⁷⁹ *Bauman*, 134 S. Ct. at 761 (quoting *Goodyear*, 564 U.S. at 919).

noted that the Ninth Circuit had supported its finding of jurisdiction based in part on plaintiffs' assertion of human rights claims under the ATS, and it quoted language from the lower court's opinion stating that "American federal courts, be they in California or any other state, have a strong interest in adjudicating and redressing international human rights abuses."³⁸⁰ The Supreme Court's opinion then noted, however, that after the *Kiobel* decision, plaintiffs' ATS claims were "infirm."³⁸¹ By doing so, the *Bauman* court was simply describing the impact of its earlier *Kiobel* decision on human rights claims in federal courts based on the ATS. This dictum does not contradict the Ninth Circuit's statement that federal courts have a strong interest in providing remedies for human rights violations, and it does not refer to state courts at all. It merely says that as a matter of federal law, plaintiffs' ATS claims could not survive in federal court. It does not address whether states can provide remedies, which is a matter—as we have argued—of state authority and state interests. We have argued that a state's constitutionally recognized interest in remedying wrongs justifies state remedies for human rights in many cases. Given this constitutionally recognized interest, we think it would be reading *Bauman* for more than it is worth to conclude that states have no interest in redressing human rights violations.

In any event, there remain other avenues to personal jurisdiction in human rights cases, including, most importantly, "foreign-squared" cases.³⁸² *Bauman* did not hold for purposes of personal jurisdiction analysis that states lack a significant interest in providing remedies in human rights cases. Moreover, *Bauman* leaves some routes open to general jurisdiction over non-U.S. corporations, even on the facts of *Bauman* itself.³⁸³ As courts work through these doctrinal problems, a state's interest in providing remedies should be a significant factor.

The Supreme Court's decision in *Bristol-Myers Squibb Co. v. Superior Court*³⁸⁴ might be read as imposing new limits that might make human rights suits in U.S. courts more difficult. In that case, a group of plaintiffs—some of whom were California residents and some of whom were not—filed product

³⁸⁰ *Id.* at 762.

³⁸¹ *Id.* at 763.

³⁸² It is a mistake to assume that most human rights litigation involves "foreign-cubed" cases like *Bauman* without links to the United States.

³⁸³ In *Bauman*, the plaintiffs premised personal jurisdiction over Daimler (a non-U.S. corporation) based upon the contacts of Mercedes-Benz USA (a U.S. corporation and Daimler subsidiary) with California. The Court held that even if Mercedes-Benz USA was "at home in California" and its "contacts are imputable to Daimler," there would still be no general jurisdiction over Daimler. *Bauman*, 134 S. Ct. at 760. As Childress asks, "would Daimler be subject to general jurisdiction in Delaware or New Jersey, where MBUSA would be subject to general jurisdiction [under *Bauman*]?" Donald Earl Childress III, *General Jurisdiction After Bauman*, 66 VAND. L. REV. EN BANC 197, 207-08 (2014).

³⁸⁴ 137 S. Ct. 1773 (2017).

liability claims against Bristol-Myers Squibb in a California Superior Court.³⁸⁵ The California Supreme Court affirmed the California Court of Appeal's holding that there was specific jurisdiction over Bristol-Myers Squibb.³⁸⁶ The U.S. Supreme Court reversed the California Supreme Court as to the non-resident plaintiffs' claims, criticizing it for its "sliding scale approach" whereby "the strength of the requisite connection between the forum and the specific claims at issue is relaxed if the defendant has extensive forum contacts that are unrelated to those claims."³⁸⁷ The U.S. Supreme Court emphasized that "[i]n order for a state court to exercise specific jurisdiction, 'the *suit*' must 'aris[e] out of or relat[e] to the defendant's contacts with the *forum*.'"³⁸⁸ Finding that "[t]he relevant plaintiffs are not California residents and do not claim to have suffered harm in that State" and that "all the conduct giving rise to the nonresidents' claims occurred elsewhere," the Court held that California lacked jurisdiction.³⁸⁹

However, it is far from clear that *Bristol-Myers Squibb* would make personal jurisdiction significantly more difficult to obtain in most human rights cases. First, the Court decided the case was based on a "straightforward application . . . of settled principles of personal jurisdiction."³⁹⁰ It is best read as insisting on a strict application of the relatedness requirement for specific jurisdiction. In addition to rejecting California's sliding scale approach to relatedness, the Court confirmed that forum contacts of the defendant related to the resident plaintiffs' claims cannot be used to satisfy the relatedness requirement for the non-resident plaintiffs' claims.³⁹¹ Rather, "[w]hat is needed—and what is missing [in the California Supreme Court's reasoning]—is a connection between the forum and the specific claims at issue"—namely, the *non-resident plaintiffs' claims*.³⁹² By noting the key facts that the non-California plaintiffs were not injured in California and none of the defendant's conduct giving rise to the plaintiffs' claims was inside California, the Court implied that the presence of injury or conduct in the forum state are the types of connections that could count toward satisfying the relatedness requirement—and for many human rights claims, this will be the case.³⁹³

³⁸⁵ *Id.* at 1777.

³⁸⁶ *Id.*

³⁸⁷ *Id.* at 1776.

³⁸⁸ *Id.* at 1780 (quoting *Bauman*, 134 S. Ct. at 754).

³⁸⁹ *Id.* at 1782.

³⁹⁰ *Id.* at 1783.

³⁹¹ *See id.* at 1781 ("The mere fact that *other* plaintiffs were prescribed, obtained, and ingested Plavix in California—and allegedly sustained the same injuries as did the non-residents—does not allow the State to assert specific jurisdiction over the nonresidents' claims.").

³⁹² *Id.*

³⁹³ *See id.* at 1782-83.

Second, the Court emphasized what is already part of the required reasonableness analysis: “In determining whether personal jurisdiction is present, a court must consider a variety of interests” including “the interests of the forum State.”³⁹⁴ The Court thus preserved the doctrinal link between personal jurisdiction and the state interest in providing remedies for human rights that may, in close cases at least, tip the balance in favor of a finding of personal jurisdiction.

Finally, there is a strong doctrinal and normative case to be made for a national-contacts approach to specific jurisdiction, whereby the relevant forum for determining a non-U.S. defendant’s minimum contacts would be the United States as a whole rather than the particular state in which the court sits.³⁹⁵ Other things being equal, this approach may facilitate jurisdiction in human rights suits against non-U.S. parties, even post-*Bristol-Myers Squibb*.

Even if neither *Bauman* nor *Bristol-Myers Squibb* significantly changed personal jurisdiction doctrine, together they confirm that personal jurisdiction will be difficult to obtain in most so-called “foreign-cubed” cases—that is, cases with non-U.S. plaintiffs, non-U.S. defendants, and arising out of non-U.S. activity. General jurisdiction will not be available because a defendant that is neither incorporated in nor has its principal place of business in a U.S. state is unlikely to be considered “at home” in any state.³⁹⁶ For specific jurisdiction, the plaintiff will have to establish that the defendant had minimum contacts with the forum state related to the plaintiff’s claim, which obviously will not be possible if defendant has *no* related contacts with the forum state.

4. Forum Non Conveniens

Even if a court has personal jurisdiction, a defendant in a human rights lawsuit may file a motion to dismiss based on the forum non conveniens doctrine. Properly taken into account, the right-remedy principle means that such dismissals generally will not be appropriate.

³⁹⁴ *Id.* at 1780.

³⁹⁵ See William S. Dodge & Scott Dodson, *Personal Jurisdiction and Aliens*, 116 MICH. L. REV. (forthcoming 2018) (manuscript at 1, 6) (deriving support for jurisdiction from fairness and interstate-federalism components of personal jurisdiction); see also Patrick J. Borchers, *Extending Federal Rule of Civil Procedure 4(k)(2): A Way to (Partially) Clean up the Personal Jurisdiction Mess*, 67 AM. U. L. REV. 413 (2017) (proposing to extend Federal Rule of Civil Procedure 4(k)(2)—which in its current form allows for nationwide personal jurisdiction in federal question cases in which plaintiff would not have another U.S. forum—to include diversity and alienage cases).

³⁹⁶ *Daimler AG v. Bauman*, 134 S. Ct. 746, 749 (2014). However, the *Bauman* Court left open the possibility of finding a corporate defendant “at home” in other circumstances. See *id.* at 760 (“*Goodyear* did not hold that a corporation may be subject to general jurisdiction only in a forum where it is incorporated or has its principal place of business; it simply typed those places paradigm all-purpose forums.”).

Under the forum non conveniens doctrine, a “court may dismiss an action on the ground that a court abroad is the more appropriate and convenient forum for adjudicating the controversy.”³⁹⁷ We focus here on the federal forum non conveniens doctrine. There are also state forum non conveniens doctrines applied by state courts, for which space does not allow a detailed discussion. It should be noted, however, that state forum non conveniens doctrines generally follow the federal approach.³⁹⁸ Some state doctrines differ from the federal doctrine, however, with some imposing more and some imposing less stringent requirements for dismissal.³⁹⁹

The federal forum non conveniens doctrine has three main elements. The first element requires a court to determine whether the defendant’s proposed foreign court is an available and adequate alternative forum. Unless it is, a forum non conveniens dismissal is not permitted.⁴⁰⁰ A foreign court is ordinarily deemed available if the defendant is subject to its jurisdiction.⁴⁰¹ A foreign court is generally deemed adequate for forum non conveniens purposes unless the potential remedy it offers “is so clearly inadequate . . . that it is no remedy at all,”⁴⁰² such as “where the alternative forum does not permit litigation of the subject matter of the dispute,”⁴⁰³ although some scholars have argued for, and some courts have applied, a more rigorous foreign judicial adequacy standard.⁴⁰⁴

³⁹⁷ *Sinochem Int’l Co. v. Malay. Int’l Shipping Corp.*, 549 U.S. 422, 425 (2007).

³⁹⁸ See Martin Davies, *Time to Change the Federal Forum Non Conveniens Analysis*, 77 TUL. L. REV. 309, 315 (2002) (“Thirty states, the District of Columbia, and all U.S. territories engage in an analysis effectively identical to that undertaken in federal courts, and thirteen other states employ a factor-based analysis very similar to [the one] used [by the Supreme Court].”).

³⁹⁹ See RESTATEMENT (FOURTH) OF U.S. FOREIGN RELATIONS LAW § 304 reporters’ note 2 (AM. LAW INST., Tentative Draft No. 2, 2016).

⁴⁰⁰ See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.22 (1981); see also 14D WRIGHT ET AL., *supra* note 170, § 3828.3, at 629.

⁴⁰¹ See *Piper*, 454 U.S. at 254 n.22; *Tazoe v. Airbus S.A.S.*, 631 F.3d 1321, 1330 (11th Cir. 2011); 14D WRIGHT ET AL., *supra* note 170, § 3828.3, at 639. Defendants often satisfy this requirement by consenting to the jurisdiction of the alternative forum. See *id.* (noting that dismissal is generally conditioned on defendant accepting personal jurisdiction in alternative forum).

⁴⁰² *Piper*, 454 U.S. at 254.

⁴⁰³ *Id.* at 254 & n.22. The Supreme Court noted the example of a “court refus[ing] to dismiss, where alternative forum is Ecuador, it is unclear whether Ecuadorean tribunal will hear the case, and there is no generally codified Ecuadorean legal remedy for the unjust enrichment and tort claims asserted.” *Id.* at 254-55 & n.22 (citing *Phx. Can. Oil Co. v. Texaco, Inc.*, 78 F.R.D. 445, 456 (D. Del. 1978)). A foreign court may be deemed adequate and dismissal may be granted even if the law that the foreign court would apply is less favorable to the plaintiff than the law that a U.S. court would apply. See *id.* at 250.

⁴⁰⁴ Christopher A. Whytock & Cassandra Burke Robertson, *Forum Non Conveniens and the Enforcement of Foreign Judgments*, 111 COLUM. L. REV. 1444, 1456-60 (2011).

The doctrine's second element requires a court to analyze private and public interest factors to determine whether they point toward dismissal in favor of the defendant's proposed foreign court.⁴⁰⁵ The Supreme Court has described the private interest factors as follows:

Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforceability [sic] of a judgment if one is obtained.⁴⁰⁶

The Supreme Court has described the public interest factors as follows:

Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself.⁴⁰⁷

Third, in order to assess whether the private and public factors point strongly enough toward the foreign court to justify dismissal, the court must determine what degree of deference it owes to the plaintiff's choice of a U.S. court. This depends on whether the plaintiff is a U.S. or foreign citizen. According to the Supreme Court, "there is ordinarily a strong presumption in favor of the plaintiff's choice of forum, which may be overcome only when the private and public interest factors clearly point towards trial in the alternative forum."⁴⁰⁸ However, the Court also held this presumption applies with less force to foreign plaintiffs.⁴⁰⁹

The right-remedy principle plays an important role in case-specific forum non conveniens analysis. First, although the classic formulation of the federal forum non conveniens doctrine refers to the "local interest" in "localized controversies," the right-remedy principle provides a basis for a strong interest

⁴⁰⁵ See 14D WRIGHT ET AL., *supra* note 170, § 3828.4, at 673.

⁴⁰⁶ *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508; *see also* *Am. Dredging Co. v. Miller*, 510 U.S. 443, 448 (1994).

⁴⁰⁷ *Gilbert*, 330 U.S. at 508-09; *see also* *Am. Dredging Co.*, 510 U.S. at 448-49.

⁴⁰⁸ *Piper*, 454 U.S. at 255; *see also* *Gilbert*, 330 U.S. at 508.

⁴⁰⁹ *Piper*, 454 U.S. at 255-56.

of the forum state in providing access to a remedy for human rights violations.⁴¹⁰ An underlying purpose of the doctrine is to preserve access to a court that can provide a remedy.⁴¹¹ To apply the doctrine without properly weighing the state's interest in remedying human rights violations would defeat that purpose.

Second, the right-remedy principle compels a rigorous application of the doctrine's adequate alternative forum analysis, one that will ensure that the alternative forum is one that can fairly and impartially—and independently of political influence—determine whether the claimant's rights were violated and, if so, provide a meaningful remedy. For example, in *Gutierrez v. Advanced Medical Optics, Inc.*,⁴¹² the Ninth Circuit vacated the district court's order dismissing a suit on forum non conveniens grounds because the alternative forum had declined to accept jurisdiction, rendering it unavailable.⁴¹³ The court of appeals noted that “[a]t its core, the doctrine of *forum non conveniens* is concerned with fairness to the parties” and emphasized the objective that “every right, when withheld, must have a remedy, and every injury its proper redress.”⁴¹⁴ The court reasoned that “to simply affirm the district court without acknowledging that Plaintiffs do not have a forum in which to bring their case would, apparently, be to leave their . . . injuries wholly unredressed.”⁴¹⁵

Third, the right-remedy principle underscores the importance of the judgment-enforceability factor in forum non conveniens analysis. After all, if a judgment by the defendant's alternative forum would not be enforceable, the dismissal would be tantamount to denying the plaintiff any opportunity to pursue a remedy at all. The availability of an enforceable judgment from the alternative forum will generally depend on whether the defendant has sufficient assets in that forum so that the judgment can be enforced there, or on whether the defendant has sufficient assets in another jurisdiction—such as the United States—and whether that other jurisdiction's rules governing the enforcement of foreign country judgments there would give the plaintiff the right to enforce the judgment against the defendant's assets there. As this is not always the case, the right-remedy principle requires careful analysis of these questions.⁴¹⁶

⁴¹⁰ Whytock & Robertson, *supra* note 404, at 1461.

⁴¹¹ *Cf. id.* at 1454.

⁴¹² 640 F.3d 1025 (9th Cir. 2011).

⁴¹³ *Id.* at 1027.

⁴¹⁴ *Id.* (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803)).

⁴¹⁵ *Id.*

⁴¹⁶ See *Espinoza v. Evergreen Helicopters, Inc.*, 376 P.3d 960, 984-85 (Or. 2016) (citing Whytock & Robertson, *supra* note 404) (“If . . . the court determines that the judicial system in the alternative forum fails to comport with minimum standards of due process, such that its judgments would be unenforceable where the defendant's assets are located, that forum is inherently inadequate and the defendant's motion will fail at this first step.”). For an explanation of the importance of the judgment enforceability factor and a proposed methodology for applying the factor, see generally Tarik R. Hansen & Christopher A.

B. *The Applicable Law*

Human rights lawsuits may be based on state law, which could provide a remedy through tort law or by recognizing a right of action to enforce CIL or treaty law. Such suits may also, as a matter of state choice-of-law doctrine, be based upon causes of action under foreign law. In this Section we consider the implications of our normative arguments for questions of the applicable law, focusing upon choice of law and preemption.

1. Choice of Law

In some cases, choice of law is a potential barrier to state remedies for human rights. Sometimes, of course, both forum and foreign tort law will provide a basis for a plaintiff's claim, making the choice-of-law issue less salient than in cases where either forum or foreign law does not recognize the plaintiff's alleged wrong.⁴¹⁷ In the latter cases, however, choice of law can determine whether a plaintiff's claim can proceed. If, according to the forum's choice-of-law rules, foreign law applies and provides a basis for the claim, then the suit might proceed. But if, according to the forum's choice-of-law rules, the applicable law does not provide a basis for the claim, then the claim may not proceed.

It is difficult to generalize about choice of law, because different states have different choice-of-law rules. As Professor Roger Alford has discussed, there "are numerous approaches" in the various states' choice of law rules, with different approaches tending towards different outcomes in human rights cases.⁴¹⁸ Generally speaking, however, choice-of-law rules take into account factors including the domicile or citizenship of the parties and the territorial locus of the conduct and injury giving rise to the claim. For this reason, choice-of-law decisions will tend to be substantially influenced by these factors. At one extreme, when plaintiff and defendant are both citizens of a foreign country and all of the alleged conduct and injuries occurred in that foreign country, a court

Whytock, *The Judgment Enforceability Factor in Forum Non Conveniens Analysis*, 101 IOWA L. REV. 923 (2016).

⁴¹⁷ In tort actions, foreign law will almost certainly recognize a right to a remedy for "harm to life, liberty, dignity, physical and mental integrity and property," human rights that encompass most of the cases filed in domestic courts. See Alford, *supra* note 19, at 1763 (quoting 3 EXPERT LEGAL PANEL ON CORP. COMPLICITY IN INT'L CRIMES, INT'L COMM'N OF JURISTS, CORPORATE COMPLICITY & LEGAL ACCOUNTABILITY: CIVIL REMEDIES 11 (2008), <https://www.icj.org/wp-content/uploads/2012/06/Vol.3-Corporate-legal-accountability-thematic-report-2008.pdf> [<https://perma.cc/ECD3-7ZRD>]). For an overview of choice-of-law issues that arise in tort-based human rights suits, see Patrick J. Borchers, *Conflict-of-Laws Considerations in State Court Human Rights Actions*, 3 U.C. IRVINE L. REV. 45, 49-55 (2013).

⁴¹⁸ See Alford, *supra* note 19, at 1749, 1762. See generally Alford, *supra* note 11. Professor Symeon Symeonides has categorized seven methods for choice of law in torts cases. SYMEON C. SYMEONIDES, THE AMERICAN CHOICE-OF-LAW REVOLUTION: PAST, PRESENT AND FUTURE 64 tbl.4 (2006).

is likely to apply the foreign country's law; but when one or more parties are citizens of the forum state, or when one or more instances of conduct or injury occurred in the forum state, the likelihood may increase that the court will apply forum law.⁴¹⁹

However, a state's constitutionally-recognized interest in providing redress for legal wrongs has implications for a variety of choice-of-law methods that incorporate other factors into the analysis. For example, the leading choice-of-law method in the United States—the Restatement (Second) of Conflict of Laws—includes among its choice-of-law factors “the relevant policies of the forum”⁴²⁰ and “the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue.”⁴²¹ When applying the Second Restatement, courts should give due weight to the forum state's interest in redressing wrongs, including when such wrongs violate human rights.⁴²² The Second Restatement's choice-of-law factors also include “the needs of the interstate and international systems.”⁴²³ When applying this factor, courts should give due weight to the needs of the international human rights system, including its reliance on domestic courts to enforce human rights.⁴²⁴ Another factor is “the basic policies underlying the particular field of law.”⁴²⁵ The remedial policy of states is a fundamental policy underlying state tort law; thus, it should also be considered in choice-of-law analysis.⁴²⁶

A state's constitutionally recognized interest in providing remedies for rights should also be weighed when applying choice-of-law methods based on interest analysis. The father of interest analysis, Professor Brainerd Currie, argued that a state generally has an interest in having its law apply only to protect its own residents, not foreign residents.⁴²⁷ But, as John Hart Ely has demonstrated, “the premise that states are ‘interested’ only in generating verdicts for their own citizens . . . is out of accord with any sensible notion of what lawmakers either

⁴¹⁹ See Christopher A. Whytock, *Myth of Mess? International Choice of Law in Action*, 84 N.Y.U. L. REV. 719, 777 (explaining that while not certain, these variables provide fairly reliable rule to reduce uncertainty).

⁴²⁰ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2)(b) (AM. LAW INST. 1977).

⁴²¹ *Id.* § 6(2)(c).

⁴²² See *id.* § 6(2) cmt. e.

⁴²³ *Id.* § 6(2)(a).

⁴²⁴ See *supra* notes 29-39 and accompanying text.

⁴²⁵ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2)(e) (AM. LAW INST. 1977).

⁴²⁶ See *id.* § 6(2) cmt. h.

⁴²⁷ See, e.g., BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 86 (1963); see also KERMIT ROOSEVELT, *CONFLICT OF LAWS* 46 (2d ed. 2015) (noting that Currie “posits a ‘selfish state,’ interested only in the welfare of its domiciliaries”); SYMEON C. SYMEONIDES, *CHOICE OF LAW* 99-100 (2016) (“Currie assumed that, in the vast majority of cases, a state has an interest in applying its law only when it would benefit its own domiciliaries, but not when it would benefit similarly situated non-domiciliaries . . .”).

are or should be doing.”⁴²⁸ The right-remedy principle reinforces this conclusion by providing a basis for a more general state interest in applying its law to provide remedies for wrongs, independent of the domicile of the person injured. There are reasons to think that choice of law “should not be a mechanism for corrective justice,” full stop.⁴²⁹ After all, “tort law involves a *compromise* between plaintiff-protecting . . . and defendant-protecting interests.”⁴³⁰ But a state’s potential interest in “provid[ing] full civil recourse to [the] victims” of a tort is owed consideration in domestic litigation,⁴³¹ and we see no grounds in choice of law doctrine to think that this interest is no longer worth considering whenever a case has human rights or foreign elements.⁴³²

In theory, states are not completely free to make choice-of-law decisions as they see fit. In sister-state choice-of-law cases, the Supreme Court has held that “for a State’s substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.”⁴³³ However, the applicability of this standard in international cases is unclear, especially because one of the bases for the standard is the U.S. Constitution’s Full Faith and Credit Clause, which does not

⁴²⁸ John Hart Ely, *Choice of Law and the State’s Interest in Protecting Its Own*, 23 WM. & MARY L. REV. 173, 208 (1981); see also SYMEONIDES, *supra* note 427, at 100 (describing criticism of Currie’s assumption that states only have interest in protecting their own domiciliaries).

⁴²⁹ Scott Fruehwald, *A Multilateralist Method of Choice of Law*, 85 KY. L.J. 347, 368 (1996) (explaining that choice of law should be substantively neutral because it would be improper for judge to decide which state’s law to apply based on his or her personal view of which is more just); see also Laura E. Little, *Hairsplitting and Complexity in the Conflict of Laws: The Paradox of Formalism*, 37 U.C. DAVIS L. REV. 925, 947-48 (2004) (“Corrective justice is more a value by which to judge competing outcomes in litigation than a methodology or analytical technique for resolving cases.”).

⁴³⁰ Joseph William Singer, *Multistate Justice: Better Law, Comity, and Fairness in the Conflict of Laws*, 2015 U. ILL. L. REV. 1923, 1934 (arguing that it is “nonsense” to apply the law of one state over another because it “better achieves tort law policy” without balancing reasons behind such policies).

⁴³¹ *Id.* at 1931.

⁴³² *Cf.* Doe I v. Unocal Corp., 395 F.3d 932, 937 (9th Cir. 2002), *reh’g en banc granted*, 395 F.3d 978 (9th Cir. 2003), *appeal dismissed*, 403 F.3d 708 (9th Cir. 2005) (invoking public-policy exception on right-remedy grounds when applying *lex loci delicti* approach to choice of law).

⁴³³ *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981) (holding that Minnesota Supreme Court did not violate Due Process Clause or Full Faith and Credit Clause of U.S. Constitution by applying Minnesota law because aggregation of contacts in state established state interest and thus warranted application of state law without being arbitrary or unfair).

apply to foreign countries.⁴³⁴ In any event, it is generally understood that this standard is lenient and easily satisfied.⁴³⁵ Nevertheless, even in international cases, when a state simply has no connection to the parties or events giving rise to the plaintiff's claim, there will ordinarily be questions about the ability of that state to apply its law. It is important to remember, however, that the non-application of forum state law is not necessarily fatal to a human rights claim. As we have argued above, such claims might alternatively proceed on the basis of foreign law or international law.⁴³⁶ The answer will depend on the content of the applicable law, whether it is forum law, foreign law, or international law.

Aside from choice of law, some commentators have considered whether there should be a presumption against the extraterritorial application of state law similar to the presumption against the extraterritorial application of federal law.⁴³⁷ However, the federal presumption against extraterritoriality created by the Supreme Court does not apply to state law—it refers solely to federal law.⁴³⁸ States may, and some states have, independently stated presumptions against extraterritorial application of their own statutes—but this is not the case for common law and, as Judge Jeffrey Meyer of the U.S. District Court for the District of Connecticut has argued, for a variety of structural reasons a presumption against extraterritorial application of common law would make little sense.⁴³⁹ Moreover, one of the primary rationales for a presumption against extraterritoriality, according to the Supreme Court, is that allowing U.S. statutes to apply to conduct abroad “presents . . . danger of international friction.”⁴⁴⁰ But the right-remedy principle shows why this rationale is suspect as a basis for a presumption against extraterritoriality: when a state applies its law

⁴³⁴ The other basis is the Due Process Clause, which creates the possibility that *Allstate* has implications for limits in international cases too. *See id.* at 320.

⁴³⁵ *See* SYMEONIDES, *supra* note 427, at 28 (referring to Supreme Court's approach as “laissez-faire”).

⁴³⁶ *See* discussion *supra* Section IV.B.

⁴³⁷ *See* *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2100 (2016) (stating “canon of statutory construction known as the presumption against extraterritoriality” is “[a]bsent clearly expressed congressional intent to the contrary, federal laws will be construed to have only domestic application” (citations omitted)). *See generally* Florey, *supra* note 280 (discussing possibility of presumption against extraterritorial application of state law).

⁴³⁸ *See* *RJR Nabisco*, 136 S. Ct. at 2100 (referring exclusively to *federal* laws—that federal laws will be construed to have only domestic application absent clearly contrary intent from Congress); Meyer, *supra* note 266, at 331-34 (arguing that under *Erie* doctrine, states, not federal courts, have authority to decide reach of state law).

⁴³⁹ Meyer, *supra* note 266, at 301, 330 (“[J]urisprudential differences between the common law and statutes explain why the common law—perhaps counterintuitively—should not be subject to a presumption against extraterritoriality.”).

⁴⁴⁰ *RJR Nabisco*, 136 S. Ct. at 2107 (2016). *But see id.* at 2116 (Breyer, J., concurring in part, dissenting in part, and dissenting from the judgment) (refusing to accept “international strife” argument under facts of case).

extraterritorially, it is acting upon the well-established interest to provide remedies for rights. Even if doing so in human rights cases would have some plausible effect on foreign relations—something which in many if not most cases will be doubtful⁴⁴¹—there is no reason why such an effect should categorically trump the right-remedy principle whether in the form of a presumption against extraterritoriality or otherwise. In any event, when claims are based on foreign or international law, there will be no issue about the extraterritorial application of state law.

2. Preemption

Choice-of-law rules may point to remedies under foreign law or under state law. Where state law provides a right to a remedy, defendants may argue that federal law preempts it.⁴⁴² The strength of such preemption arguments depends in part on whether the plaintiff claims relief under state tort law or based on a state-created right of action under CIL or treaty law.

a. *State Tort Law*

Federal law may preempt state law when federal law expressly preempts state law (express preemption), when Congress intends federal law to “occupy the field” of an area of regulation (field preemption), or when there is a conflict between state law and federal law (conflict preemption).⁴⁴³ The doctrines of field preemption and conflict preemption are sometimes used to preempt state laws that are said to involve foreign relations. In *American Insurance Ass’n v. Garamendi*,⁴⁴⁴ the Supreme Court stated:

There is . . . no question that at some point an exercise of state power that touches on foreign relations must yield to the National Government’s policy, given the ‘concern for uniformity in this country’s dealings with foreign nations’ that animated the Constitution’s allocation of the foreign relations power to the National Government in the first place.⁴⁴⁵

⁴⁴¹ See, e.g., *id.* at 2116 (“Unlike the Court, I cannot accept as controlling the Government’s argument as *amicus curiae* that ‘[a]llowing recovery for foreign injuries in a civil RICO action . . . presents the . . . danger of international friction.’” (quoting majority opinion)).

⁴⁴² In theory, there might be a preemption concern with the choice of foreign law. But, as Alford has argued, “[f]oreign affairs preemption does not preempt a state court’s exercise of its choice-of-law rules to apply foreign tort laws.” Alford, *supra* note 11, at 1160.

⁴⁴³ See *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 372-73 (2000).

⁴⁴⁴ 539 U.S. 396 (2003).

⁴⁴⁵ *Id.* at 413 (citations omitted); see also *Zschernig v. Miller*, 389 U.S. 429, 440-41 (1968) (“[State] regulations must give way if they impair the effective exercise of the Nation’s foreign policy.”). In *Garamendi*, the Court declined to state whether, in foreign relations cases, it was necessary to make a “categorical choice” between the theories of field and conflict preemption, instead calling them “complementary.” *Garamendi*, 539 U.S. at 419 &

One might argue that foreign relations preemption should preclude state or federal courts from applying state law—including state tort law—to provide remedies for wrongs that are violations of human rights.

In some cases, preemption may be appropriate. There are important reasons for the foreign relations preemption doctrine. When properly applied, it can help prevent states from implementing policies that undermine the foreign relations functions that the Constitution vests in the federal government, and it can promote the value of having the United States speak with “one voice” in its official relations with foreign countries.⁴⁴⁶ For two reasons, however, preemption doctrine should not presumptively bar human rights claims based on state law, including state tort law.⁴⁴⁷

i. The Remedial Function of State Law

First, the application of state law to provide redress for wrongs is a remedial function of domestic law. In this sense, human rights cases are not foreign relations cases (indeed, in many cases, they are not foreign relations cases in any sense). Critics of human rights litigation under state law might characterize this function as an exercise of foreign relations in order to invoke the foreign relations preemption doctrine.⁴⁴⁸ But providing a remedy for a wrong does not become foreign relations policymaking merely because the wrong happens to violate international human rights law.

This is not to say that state efforts to remedy human rights never cross into the realm of foreign relations. For example, in *Crosby v. National Foreign Trade Council*,⁴⁴⁹ the Supreme Court preempted a Massachusetts statute that barred state entities from buying goods or services from any company doing business with Burma.⁴⁵⁰ The statute was explicitly intended to exert economic pressure on Burma to improve its human rights and, as such, constituted a state policy

n.11. When applied in foreign relations cases, field preemption is sometimes called “dormant foreign affairs preemption” and together these two preemption theories are sometimes referred to as the “foreign affairs doctrine.” *E.g.*, *Movsesian v. Victoria Versicherung AG*, 670 F.3d 1067, 1071-72 (9th Cir. 2012).

⁴⁴⁶ Childress III, *supra* note 98, at 995, 1039 (advocating that federal government speak with “one voice” in area of international relations).

⁴⁴⁷ *Cf.* Goldsmith, *supra* note 339, at 1698 (“There is little reason to think that state control over matters not governed by enacted federal law affects U.S. foreign relations in a way that warrants preemption. Of course, states—like corporations, individuals, and federal government officials—can pursue their self-interest to the detriment of U.S. foreign relations. The political branches, however, are quite capable of identifying and responding to any adverse consequences of this behavior. A supplemental federal judicial lawmaking power discourages such political branch action while creating serious problems of its own.”).

⁴⁴⁸ See Whytock et al., *supra* note 11, at 20.

⁴⁴⁹ 530 U.S. 363 (2000).

⁴⁵⁰ *Id.* at 366.

targeted toward a foreign country.⁴⁵¹ Moreover, there was a federal statute and a presidential executive order that specifically addressed the human rights situation in Burma.⁴⁵² The Court's holding relied on the findings that the state statute undermined at least three provisions of the federal statute⁴⁵³ and that the executive branch had "consistently represented that the state Act has complicated its dealings with foreign sovereigns."⁴⁵⁴ Most human rights litigation in U.S. courts is unlikely to be based on state foreign policy statutes targeted at the human rights practices of a particular foreign country, like the statute in *Crosby*.⁴⁵⁵ Nor are such suits likely to interfere with federal statutes and executive orders expressing U.S. policy on the human rights practices of a particular foreign nation, as was the case in *Crosby*.⁴⁵⁶ Therefore, most human rights cases under state tort law should be readily distinguishable from *Crosby*.

In *Garamendi*, the Supreme Court concluded that federal law preempted California's Holocaust Victim Insurance Relief Act of 1999, which required any insurer doing business in California to disclose information about all policies it sold in Europe between 1920 and 1945.⁴⁵⁷ The Court's holding depended on its finding that the federal government, through executive agreements with foreign countries, including Germany, provided a remedy for Holocaust era insurance claims, and that there was a "clear conflict" between California's policy and the federal policy.⁴⁵⁸ The Court also emphasized that the executive agreements that the California law interfered with were designed to restore "friendly relations" with Germany "in the aftermath of [the] hostilities" of World War II.⁴⁵⁹ Like the Massachusetts statute in *Crosby*, the California statute, which expressed a California policy for resolving Holocaust era insurance claims, bears little resemblance to the application of general legal rules to provide a remedy for a particular victim of a human rights violation. In addition, most human rights do

⁴⁵¹ *Id.* at 366-68.

⁴⁵² *Id.* at 368-71.

⁴⁵³ *Id.* at 363-64 (holding first that state act "is an obstacle to the federal Act's delegation of discretion to the President to control economic sanctions against Burma," second, "is an obstacle to the federal Act's delegation of discretion to the President to control economic sanctions against Burma," and third, "is an obstacle to the federal Act's delegation of discretion to the President to control economic sanctions against Burma").

⁴⁵⁴ *Id.* at 383.

⁴⁵⁵ *See, e.g.,* Gabrieldis, *supra* note 11, at 167-68 (giving various examples of state courts accepting applicability of human rights, none of which were based on state statute targeting particular foreign country).

⁴⁵⁶ *See id.* at 165.

⁴⁵⁷ *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 401 (2003) ("The issue here is whether HVIRA interferes with the National Government's conduct of foreign relations. We hold that it does, with the consequence that the state statute is preempted.").

⁴⁵⁸ *Id.* at 420-21.

⁴⁵⁹ *Id.* at 420.

not overlap with remedial mechanisms established between the United States and a foreign nation after a war, as was the case in *Garamendi*.

ii. Weighing a State's Remedial Interests

Second, even when human rights litigation under state law affects foreign relations, a state's interest in providing law for the redress of wrongs should be given substantial weight in any preemption analysis. In *Garamendi*, the Supreme Court distinguished two situations: one in which a state "take[s] a position on a matter of foreign policy with no serious claim to be addressing a traditional state responsibility" and another in which "a State has acted within . . . its 'traditional competence' but in a way that affects foreign relations."⁴⁶⁰ In the former situation, the Court suggested that field preemption would be the appropriate doctrine.⁴⁶¹ But in the latter situation, a conflict preemption analysis would be appropriate, one that takes into account two factors: the "clarity or substantiality" of the conflict, and the "strength or the traditional importance of the state concern asserted."⁴⁶² The stronger the state concern, the clearer and more substantial the conflict would need to be to justify preemption.⁴⁶³

Notwithstanding the Supreme Court's instructions in *Garamendi*, some lower courts have failed to perform the first step of foreign relations preemption analysis, thus ignoring state interests and erroneously focusing exclusively on federal interests.⁴⁶⁴ Courts that neglect to consider a state's interest in providing

⁴⁶⁰ *Id.* at 419 n.11 (quoting *Zschernig v. Miller*, 389 U.S. 429, 459 (1968) (Harlan, J., concurring)).

⁴⁶¹ *Id.* (explaining that "Constitution entrusts foreign policy exclusively to the National Government").

⁴⁶² *Id.* (noting that federal foreign policy interest is another question that should be weighed).

⁴⁶³ *Id.* ("[I]t might make good sense to require a conflict, of a clarity or substantiality that would vary with the strength or the traditional importance of the state concern asserted." (citation omitted)). An example of this two-part foreign relations preemption analysis based on *Garamendi* is *Movsesian v. Victoria Versicherung AG*, 670 F.3d 1067, 1077 (9th Cir. 2012). In that case, the Ninth Circuit emphasized that "[f]ield preemption is a rarely invoked doctrine" but "Supreme Court jurisprudence makes clear . . . that field preemption may be appropriate when a state intrudes on a matter of foreign policy with no real claim to be addressing an area of traditional state responsibility." *Id.* at 1075. It then performed a two-part analysis, first analyzing whether the state statute at issue "concern[ed] an area of traditional state responsibility" and then analyzing the extent to which the statute "intrude[d] on the federal government's foreign affairs power." *Id.* at 1075-76. Another case that used this approach is *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1187-88 (C.D. Cal. 2005), which first analyzed the strength of the state's interest, then analyzed the strength of the conflict with federal foreign relations.

⁴⁶⁴ *See, e.g., Saleh v. Titan Corp.*, 580 F.3d 1, 13 (D.C. Cir. 2009) ("[T]he very imposition of any state law created a conflict with federal foreign policy interests.").

remedies skew the analysis in favor of preemption and against redress for legal wrongs.

Even in cases where courts do consider state interests, they often underestimate those interests. In *Garamendi*, for example, the Supreme Court concluded that the California statute was preempted by a “consistent Presidential foreign policy . . . to encourage European governments and companies to volunteer settlement funds . . . in preference to litigation or coercive sanctions.”⁴⁶⁵ California’s disclosure requirement was backed by regulatory sanctions and a private right of action.⁴⁶⁶ The Supreme Court held that the disclosure requirements were preempted “given the weakness of the State’s interest, against the backdrop of traditional state legislative subject matter.”⁴⁶⁷ The state’s interest was insubstantial, the Court reasoned, because the United States shared an interest in redressing wrongs against Holocaust survivors living throughout the country.⁴⁶⁸

Though *Garamendi* may have been rightly decided on its facts, the Court erred in suggesting that the state’s interest was not well within the “backdrop of traditional state legislative subject matter.”⁴⁶⁹ Providing law for redress of wrongs is traditional state lawmaking, enshrined in forty-one state constitutions.⁴⁷⁰ Moreover, we think the Court erred in suggesting that the state’s interest in redressing wrongs against Holocaust survivors could not be concurrent with the federal government’s interest.⁴⁷¹ Concurrence in remedial

⁴⁶⁵ *Garamendi*, 539 U.S. at 398.

⁴⁶⁶ *Id.* at 409-10.

⁴⁶⁷ *Id.* at 425.

⁴⁶⁸ *Id.* at 427 (“The question relevant to preemption in this case is conflict, and the evidence here is ‘more than sufficient to demonstrate that the state Act stands in the way of [the President’s] diplomatic objectives.’” (citation omitted)).

⁴⁶⁹ *See id.* at 425.

⁴⁷⁰ *See generally* Goldberg, *supra* note 35 (characterizing redress of wrongs as “vested interest”).

⁴⁷¹ We also think the wartime context was responsible for some loose reasoning in the Ninth Circuit’s opinion in *Deutsch v. Turner Corp.*, 324 F.3d 692, 712 (9th Cir. 2003). In that case, the Ninth Circuit held that federal law preempted a California statute creating a right of action for slave laborers during the Second World War. *Id.* at 719. The nub of the court’s reasoning was that the United States had already resolved wartime claims without “incorporat[ing] into that resolution a private right of action against our wartime enemies or their nationals.” *Id.* at 712. Preemption on the basis of legislative silence is often questionable, but because creation of a private right of action can alter a regulatory scheme, the court may have been right to think that the federal government’s resolution of the wartime claims preempted the state-created right of action. The court seemed to go further, however, when it opined first that “[i]n the absence of some specific action that constitutes authorization on the part of the federal government, states are prohibited from exercising foreign affairs powers,” and second that a state “lacks the power to create a right of action” for wartime wrongs. *Id.* at 714, 716. When it comes to state remedies for human rights, the first statement is inapposite,

matters is a feature of our federal system. Whether a state may create a remedy for human rights should depend upon a balanced assessment of the state and other interests involved, not upon a categorical exclusion of state law and state courts from remedying violations of human rights.

b. *State Remedies for Customary International Law*

Another possibility is for states to recognize rights of action to enforce international human rights law. State legislatures might create a state ATS, for example, or state courts might supply common law remedies under state or federal common law to redress violations of human rights.

We agree with those commentators who have concluded that state courts would have concurrent jurisdiction over the federal common law right of action recognized in *Sosa v. Alvarez-Machain*.⁴⁷² The current ATS does not specify that federal jurisdiction is exclusive, and, indeed, the initial statute expressly recognized concurrent state jurisdiction.⁴⁷³ In adjudicating the federal cause of action, state courts would of course be limited to redressing violations of international law rules that meet *Sosa*'s standard. *Sosa* held that a federal court could recognize a right of action for violating a norm of CIL that is "accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms" of "violation of safe conducts, infringement of the rights of ambassadors, and piracy."⁴⁷⁴ This standard may preclude remedies for at least some human rights recognized by CIL.

To reach further, states might recognize a state law right of action to enforce CIL. Such a right of action might, however, be more readily preempted than a suit under state tort law. As Professor Carlos Vázquez has argued, federal law may preempt state remedies for violations of CIL beyond what *Sosa* permitted for federal law.⁴⁷⁵ *Sosa* did not present a question of preemption, but the Court's concern about the foreign policy prerogatives of the federal political branches

and the second is too categorical. Similarly, Justice Ruth Bader Ginsburg's dissent in *Garamendi* notes that the California statute creating a right of action for Holocaust-era insurance claims was not at issue. 539 U.S. at 434-35 (Ginsburg, J., dissenting).

⁴⁷² 542 U.S. 692, 731-32 (2008); see also Miller, *supra* note 27, at 559 ("Commentators have recognized for some time that state courts have concurrent jurisdiction over international law claims.").

⁴⁷³ See *supra* notes 256-60 and accompanying text.

⁴⁷⁴ *Sosa*, 542 U.S. at 724-25 (referring to claims based on present-day law of nations).

⁴⁷⁵ Carlos M. Vázquez, *Things We Do with Presumptions: Reflections on Kiobel v. Royal Dutch Petroleum*, 89 NOTRE DAME L. REV. 1719, 1727-28 (2014) ("[S]tate causes of action based on violations of customary international law for which there is no federal cause of action for the reasons given in *Sosa* are very likely preempted.").

might equally apply to state rights of action to enforce CIL, particularly if the defendants are foreign officials.⁴⁷⁶

While we do not mean to dismiss the possibility of dormant foreign affairs preemption of state remedies for violations of CIL in some cases, we think that the question is a hard one and that the remedial authority and interests of states deserve considerable weight in the analysis. *Sosa*'s concerns about federal judicial authority do not all map onto state judicial authority. The Court gave five reasons for requiring its heightened standard for a CIL norm to be actionable under the ATS: first, the common law is now understood to be "created," not "discovered"; second, following *Erie*, federal courts do not have general authority to create common law, but instead must "look for legislative guidance"; third, therefore, federal courts have become reluctant to imply private rights of action; fourth, private enforcement of CIL risks angering foreign governments and thus creating foreign relations problems for the political branches; and fifth, the federal courts had "no congressional mandate to seek out and define new and debatable violations of the law of nations."⁴⁷⁷ Most of these reasons for limiting ATS litigation in federal courts have to do with the view that federal courts must wait for Congress before fulfilling the government interest in providing remedies for legal rights.⁴⁷⁸

State courts, by contrast, may have common law authority to enforce CIL. States have a constitutionally recognized role in creating law for the redress of wrongs. Preemption would have to do the heavy lifting in holding that states lack the authority to create independent rights of action to enforce CIL. But, as we have shown, the state's constitutional interest in providing remedies for rights must have independent weight in that analysis. There is an active debate, of course, about whether CIL is federal or state law, or something in between.⁴⁷⁹ CIL may be federal law, full stop, but that would not—by itself—decide whether

⁴⁷⁶ See *id.* at 1728 (stressing that executive and legislative branches should have discretion in this area); see also Carlos M. Vázquez, *Customary International Law as U.S. Law: A Critique of the Revisionist and Intermediate Positions and a Defense of the Modern Position*, 86 NOTRE DAME L. REV. 1495, 1627 (2011) ("[I]t would appear that a State Alien Tort Claims Act with less stringent requirements than contemplated by *Sosa* would be preempted by the same structural constitutional concerns that led the Court to limit the federal right of action.").

⁴⁷⁷ *Sosa*, 542 U.S. at 725-28.

⁴⁷⁸ *Sosa*'s first three reasons have to do with the post-*Erie* understanding that federal courts, as courts of limited jurisdiction, need a license in positive law to recognize remedial rules. No such independent license is needed for state courts of general jurisdiction to create rights of action and, if one were needed, it might easily be supplied by a state legislature. *Sosa*'s fourth reason for concern boils down to a question of preemption. And its fifth reason can be read to concern foreign relations or the domestic law limits on federal courts, or both.

⁴⁷⁹ See generally Bradley & Goldsmith, *supra* note 342 (setting forth "modern position" holding that CIL has been indoctrinated into federal common law and offering critique emphasizing this position's inconsistency with history and structural mandates imposed by U.S. Constitution).

a state could create a right of action to enforce CIL as federal law.⁴⁸⁰ States may create rights of action to enforce federal law as a matter of course.⁴⁸¹

As we see it, critics of state common law remedies for CIL have the burden of showing that foreign relations concerns leave little to no room for state remedial lawmaking.⁴⁸² *Sosa* did not say that foreign relations concerns alone required limiting the federal right of action to a subset of CIL. Taking *Sosa* at its word, we are unconvinced that states have no remedial role to play because CIL is a “foreign relations” matter committed to the national government alone.⁴⁸³ Instead, we think the foreign relations concerns that provided one of many reasons for *Sosa*’s outcome may preempt a broader state right of action, particularly where the plaintiff seeks to apply CIL against a foreign official. But we think these concerns have to be demonstrated, not assumed based on *Sosa* alone, in each case. And, even taking *Kiobel* for all it might suggest, we think it is doubtful that federal law flatly preempts a state from creating a right of action for CIL violations abroad.⁴⁸⁴ *Kiobel* rested on a presumption against interpreting federal statutes to apply extraterritorially, and said nothing about state courts proceeding under state common law.⁴⁸⁵ We are not sure what applying a presumption about legislative intent to a state common law right of action would look like. But the reasons for applying such a “presumption”—really, a “flat

⁴⁸⁰ As Vázquez discusses, it might matter for Article III jurisdiction over the state right of action. Vázquez, *supra* note 475, at 1728 (“There would be no Article III problem even if the cause of action was based on state law if the underlying substantive law (in this case, customary international law) were deemed to have the status of federal law for Article III purposes.”).

⁴⁸¹ See, e.g., *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Manning*, 136 S. Ct. 1562, 1573 (2016) (noting, even in admiralty context, that states have “wide scope” to create remedies to enforce federal law (citing *Romero v. Int’l Terminal Operating Co.*, 358 U.S. 354, 373 (1959))).

⁴⁸² This burden may be very hard to satisfy. See Goldsmith, *supra* note 339, at 1698 (“There is little reason to think that state control over matters not governed by enacted federal law affects U.S. foreign relations in a way that warrants preemption. Of course, states—like corporations, individuals, and federal government officials—can pursue their self-interest to the detriment of U.S. foreign relations. The political branches, however, are quite capable of identifying and responding to any adverse consequences of this behavior. A supplemental federal judicial lawmaking power discourages such political branch action while creating serious problems of its own.”).

⁴⁸³ See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 726 (2004).

⁴⁸⁴ *But cf.* Vázquez, *supra* note 475, at 1728 (noting possibility that “Court will extend the ‘presumption’ [against extraterritoriality] to state laws based on its purpose of avoiding foreign relations problems”).

⁴⁸⁵ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013).

limit”⁴⁸⁶ on state lawmaking—must take into account the countervailing state interest in providing remedies for wrongs.

c. *State Remedies for Treaty Rights*

Implementing the right-remedy principle with respect to treaty-based human rights requires treaty interpretation. At its most basic, the question is whether recognizing a remedy is precluded, implied, or required by the treaty. Answering this question when a treaty is silent about private remedies requires courts to decide between two competing presumptions. As Professor David Sloss has described, the transnationalist approach presumes that domestic remedies are available for violations of private rights under treaties.⁴⁸⁷ The transnationalist approach is founded on the right-remedy principle.⁴⁸⁸ By contrast, the nationalist approach presumes that domestic remedies are not available for private treaty rights, on the theory that the executive controls treaty enforcement.⁴⁸⁹

In the federal courts, claims based upon treaties have run into nationalist barriers in the past three decades. The question of private enforcement of treaties under federal law is complicated by the distinction in U.S. law between self-executing and non-self-executing treaties.⁴⁹⁰ In *Medellin v. Texas*,⁴⁹¹ the Supreme Court endorsed the nationalist presumption in dictum: “Even when treaties are self-executing in the sense that they create federal law, the background presumption is that ‘[i]nternational agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts.’”⁴⁹²

As with remedies for CIL, states might pass legislation creating a right of action to enforce human rights treaties, at least those treaties the United States has ratified. Or state courts might imply private rights of action from the treaty

⁴⁸⁶ Vázquez, *supra* note 475, at 1729 (“[T]he presumption would not function as a presumption but rather as a flat limit on state legislative power . . .”).

⁴⁸⁷ David Sloss, *When Do Treaties Create Individually Enforceable Rights? The Supreme Court Ducks the Issue in Hamdan and Sanchez-Llamas*, 45 COLUM. J. TRANSNAT’L L. 20, 34 (2006) (“[I]f a treaty has the status of supreme federal law, and it creates or protects individual rights, the transnationalist model presumes that an individual whose treaty rights were violated is entitled to a domestic judicial remedy.”).

⁴⁸⁸ *See id.* at 37.

⁴⁸⁹ *See id.*

⁴⁹⁰ *See* Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT’L L. 695, 719-22 (1995) (discussing interplay between self-execution and private rights of action).

⁴⁹¹ 552 U.S. 491 (2008).

⁴⁹² *Id.* at 506 n.3 (2008) (quoting the RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 907 cmt. a (AM. LAW INST. 1986)) (explaining result that “Courts of Appeals have presumed that treaties do not create privately enforceable rights in the absence of express language to the contrary”).

itself. We think that the right-remedy principle counsels some leeway today for state implementation of human rights treaties through private enforcement in state courts. How much leeway is debatable; as in the case of direct enforcement of CIL, state remedies for treaty rights may raise foreign relations concerns. On the one hand, we think there is a good argument that states have the authority to provide remedial law for the redress of violations of human rights treaties, at least if the treaties create private rights. As discussed, under our system of judicial federalism, states have greater leeway than federal courts to imply private rights of action. Traditionally, the common law forms of action, which we would think of today as state law, provided a way to enforce treaty rights.⁴⁹³ On the other hand, there may be strong counter-arguments when the relevant treaty is non-self-executing. Yet it is not clear that this concern justifies preemption of state remedies for every non-self-executing human rights treaty.

All else being equal, the case for preemption is likely to be stronger in cases involving rights of action designed to implement treaties directly than in cases involving generally applicable common law. But we think it is incorrect to assume that state courts' authority will be as limited as that of the federal courts under current law. And one of the reasons we think that is our tradition of judicial federalism and the right-remedy principle, which together suggest that redressing violations of rights is an appropriate function of state law.

CONCLUSION

Domestic courts—including U.S. courts—have an important role to play in human rights promotion and protection. Because the Supreme Court is closing the door to human rights litigation in the federal courts under the ATS, state courts have emerged as an important alternative forum for state remedies for human rights. Critics of human rights litigation in state courts and under state law emphasize the potential costs to multinational corporations, the risk of offending foreign countries, and the federal interest in the conduct of U.S. foreign relations. But judges and scholars should not consider the reasons for limiting state remedies in isolation. They should also consider the state interest in redressing wrongs, including wrongs that are violations of human rights.

State remedies for human rights are consistent with two basic features of American remedial law: first, courts should aim to redress wrongs and do justice in every case; and, second, state courthouse doors may remain open even where federal courthouse doors would be closed. The Constitution does not divest the states from providing remedies for legal wrongs; to the contrary, it reserves to the states the power to do so, including in the realm of human rights.

These principles have important doctrinal implications for human rights litigation in state courts and under state law. The Constitution reserves power to the states to remedy wrongs as a way of satisfying the right-remedy principle.

⁴⁹³ Carlos Manuel Vázquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1144 (1992).

The right-remedy principle shows that redressing human rights violations is not primarily about foreign relations, but above all about the basic remedial functions of state courts. Any analysis of the potential limits on state remedies must give this state interest explicit, independent, and substantial weight. When courts conclude that other considerations outweigh the remedial authority and interests of a state, they must explicitly give reasons for that conclusion.

The implications of our analysis extend beyond human rights. As the federal courts are decreasingly receptive to providing remedies for violations of individual rights in general⁴⁹⁴—whether under international human rights law or the U.S. Constitution—it is more important than ever that the states are able to pursue their legitimate interest in providing remedies for rights violations.

⁴⁹⁴ See generally Zachary D. Clopton, *Procedural Retrenchment and the States*, 106 CALIF. L. REV. (forthcoming 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2832124 [<https://perma.cc/9C8Y-8F2G>] (discussing ways for states to be proactive, given Roberts Court's decision to "limit court access").