
DEVELOPMENTS IN THE LAW
ACCESS TO COURTS

“The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship”

Chambers v. Baltimore & Ohio Railroad Co.,
207 U.S. 142, 148 (1907).

“All of the doctrines that cluster about Article III — not only standing but mootness, ripeness, political question, and the like — relate . . . to an idea . . . about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government.”

Vander Jagt v. O’Neill, 699 F.2d 1166, 1178–79
(D.C. Cir. 1983) (Bork, J., concurring).

“The right of access to the courts is basic to our system of government, and it is well established today that it is one of the fundamental rights protected by the Constitution.”

Ryland v. Shapiro,
708 F.2d 967, 971 (5th Cir. 1983).

“The degree to which the courts become converted into political forums depends not merely upon what issues they are permitted to address, but also upon when and at whose instance they are permitted to address them.”

Antonin Scalia, *The Doctrine of Standing As an Essential Element of the Separation of Powers*,
17 SUFFOLK U. L. REV. 881, 892 (1983).

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I. INTRODUCTION

The right of detainees in the war on terror to have their cases heard before federal courts has been the subject of several of the most widely discussed recent cases decided by the federal judiciary. Last Term, the Supreme Court held in *Boumediene v. Bush*¹ that the Constitution's guarantee of the writ of habeas corpus extended to detainees at Guantánamo Bay. In *Munaf v. Geren*,² the Court found that, while the writ of habeas corpus extended to American citizens detained by U.S. forces while fighting abroad, it did not prevent their transfer to the courts of the foreign nations in which they were captured. In another case related to the war on terror, the Supreme Court declined to hear an appeal from a Sixth Circuit decision holding that plaintiffs lacked standing to bring an action challenging the U.S. National Security Agency Terrorist Surveillance Program's practice of data mining and warrantless interception of telephone and email communications.³

Despite the visibility of these cases, the centrality of questions of access to courts has also been demonstrated in cases with no connection to the war on terror. In *Massachusetts v. EPA*,⁴ for example, the Supreme Court held that states have standing to sue to compel the EPA to regulate automobile greenhouse gas emissions, although it is unclear to what extent these specific emissions cause harm through global warming, and a reduction in emissions gives rise only to the *possibility* (not the likelihood) of redress. Implicating access in a slightly different way, the Supreme Court's 2007 decision in *Bell Atlantic Corp. v. Twombly*⁵ raised the threshold for the specificity necessary for complex cases to survive motions to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Heightened pleading requirements provide federal courts with a means of dismissing claims, thereby constricting access for some potential plaintiffs. Statutory measures can also affect access to courts. For example, the Class Action Fairness Act of 2005⁶ has affected court access by making it easier for defendants to remove cases from state to federal courts, which are generally less amenable to class action claims.⁷ Even contractual language can limit access; by forcing plaintiffs to waive their right to file a class action, mandatory arbitration clauses may deny potential plain-

¹ 128 S. Ct. 2229 (2008).

² 128 S. Ct. 2207 (2008).

³ *ACLU v. NSA*, 493 F.3d 644 (6th Cir. 2007), *cert. denied*, 128 S. Ct. 1334 (2008).

⁴ 127 S. Ct. 1438 (2007).

⁵ 127 S. Ct. 1955 (2007).

⁶ Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified in scattered sections of 28 U.S.C.).

⁷ See Robert H. Klonoff & Mark Herrmann, *The Class Action Fairness Act: An Ill-Conceived Approach to Class Settlements*, 80 TUL. L. REV. 1695, 1695-96 (2006).

tiffs their chance at a day in court. The next five Parts of this Development grapple with a broad range of topics that implicate access to courts, demonstrating the pervasive importance of this issue in today's legal environment.

Part II examines the obstacles that have confronted prisoners detained in connection with the war on terror who claim they were wrongly detained and tortured by U.S. officials abroad. This Part surveys the current state of legal doctrine relevant to torture claims. Evaluating in turn the use of the Federal Tort Claims Act,⁸ other potential statutory sources of a cause of action, and *Bivens*⁹ actions, this Part suggests that, at best, these avenues leave daunting challenges for plaintiffs attempting to have their claims heard in federal court. The Part then examines foreign claims commissions (FCCs) used by the U.S. Army in Iraq and Afghanistan, which have not yet been used for detainees at Guantánamo or elsewhere. Finally, this Part considers potential reforms, including the establishment of a cause of action for torture claims in federal court, the use of an independent legislative commission to investigate possible abuses, and the strengthening of existing administrative remedies such as FCCs. After evaluating the potential benefits and drawbacks of these various avenues for compensation, this Part concludes that building on administrative remedies is an attractive reform strategy that is likely to garner support from both sides of the political spectrum, whether or not broader reforms are eventually instituted. Expanding administrative remedies, this Part argues, would not foreclose future developments such as the recognition by the courts of a *Bivens* action for detainees at Guantánamo, but it would provide meaningful compensation in the interim.

Part III evaluates the proposed Arbitration Fairness Act of 2007¹⁰ as a possible response to concerns about binding consumer arbitration. The legislation would void the arbitration clauses that currently appear widely in consumer contracts. This Part distinguishes between consumer-plaintiff and consumer-defendant arbitrations, suggesting that measures that might correct problems that frequently arise in the former context may not be equally appropriate solutions in the latter, and it analyzes the Arbitration Fairness Act from the perspective of consumer-defendant arbitrations. Recent statistical and anecdotal evidence supports the assertion that consumer-defendant arbitration tends to be biased in favor of corporations,¹¹ and the use of more flexible, limited procedures than those involved in court proceedings may make

⁸ 28 U.S.C. §§ 1346(b), 2671–2680 (2006).

⁹ *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

¹⁰ S. 1782, 110th Cong. (2007); H.R. 3010, 110th Cong. (2007).

¹¹ PUBLIC CITIZEN, *THE ARBITRATION TRAP: HOW CREDIT CARD COMPANIES ENSNARE CONSUMERS* 13–18 (2007).

it harder for less sophisticated parties to prevail. This evidence suggests that the Arbitration Fairness Act would likely represent an improvement over the status quo, but this Part proposes that the Act could itself be improved upon by maintaining some role for binding pre-dispute arbitration clauses in the consumer-defendant context. Arbitration can vindicate corporate-plaintiff creditors' rights to collect against consumer-defendant debtors in an efficient way, and given that consumer-defendants will not always be perfectly rational, it is unlikely that they will agree to arbitration after a dispute has arisen. Because at least some consumer-defendant cases would not be cost-effective for plaintiffs to bring in court, retaining the arbitration mechanism may be essential to maximizing the number of valid claims that are ultimately resolved in some forum. This Part concludes by suggesting that the focus in addressing the criticisms leveled at arbitration in recent years should be on finding ways to make the arbitration system fairer for consumers. A system that imposes penalties on arbitrators who do not provide a minimum standard of procedure and that gives private parties an incentive to sue to collect those penalties might both retain the benefits of arbitration and be a more desirable response than that embodied in the Arbitration Fairness Act.

Part IV discusses the use of videoconferencing technology in immigration proceedings. This Part begins its exploration of the issue with the observation that the factfinding process traditionally has relied upon first-hand observations and evaluations of credibility and demeanor. The Federal Rules of Civil Procedure and Federal Rules of Criminal Procedure have fairly recently recognized a role for videoconferencing in court proceedings, but both have restricted its use to a rather narrow range of situations.¹² The 1996 amendments to the Immigration and Nationality Act,¹³ by contrast, allow for the use of videoconferencing as an alternate means of conducting removal hearings.¹⁴ After describing the dynamics of typical immigration proceedings using videoconferencing, this Part notes that research has suggested that video testimony is less effective than in-person testimony at conveying information essential to credibility determinations. Furthermore, technical problems might adversely affect immigration respondents. This Part follows existing challenges to videoconferencing in arguing that the distortion created by the use of this technology amounts to a due process violation. The Part recognizes that technology may be a means of improving access to courts, but it cautions that broader or more expeditious access can be devalued if that access,

¹² FED. R. CIV. P. 43(a); FED. R. CRIM. P. 5(f); FED. R. CRIM. P. 10(c).

¹³ 8 U.S.C. § 1229a (2006).

¹⁴ *Id.* § 1229a(b)(iii) (2006).

when it occurs, does not amount to a meaningful chance to be heard. Ultimately, this Part finds that the extensive use of videoconferencing in immigration proceedings fails to provide meaningful access to courts for immigrants.

Part V discusses the way lower courts have expanded the political question doctrine in order to block access to courts for claimants with international grievances. The Supreme Court articulated a six-category political question test in *Baker v. Carr*,¹⁵ and in every relevant case since then, it has strictly applied the test. However, in two 2004 cases, *Republic of Austria v. Altmann*¹⁶ and *Sosa v. Alvarez-Machain*,¹⁷ the Supreme Court made oblique references to deference to the executive in cases involving international grievances. While neither case concerned the political question doctrine, lower courts have taken these references as inspiration for an expansion of that doctrine. Thus, several recent lower court decisions have only nominally followed the *Baker* test, using the *Baker* categories as thin pretexts for deferring to the wishes of the Executive. For example, a Third Circuit case, *In re Nazi Era Cases Against German Defendants Litigation*,¹⁸ upheld the dismissal of a suit involving Nazi medical experiments under the fourth prong of the *Baker* test — the court's ability to adjudicate a case without expressing disrespect to the executive branch. The court's reasoning, though, was that the Executive would be disrespected if the court did not defer to the Executive's establishment of alternative claims resolution proceedings and the Executive's statements that such proceedings were preclusive.¹⁹

This Part argues that the sort of expanded political question doctrine on display in this and similar lower court decisions extends too much deference to the Executive, raising serious separation of powers concerns and potentially blocking access for individual rights claims that the courts are best suited to vindicate. At the same time, the Part acknowledges that the limited version of the political question doctrine might allow too many claims to be heard in American courts, even

¹⁵ 369 U.S. 186 (1962). The categories are: [1.] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2.] a lack of judicially discoverable and manageable standards for resolving [the question]; or [3.] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4.] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5.] an unusual need for unquestioning adherence to a political decision already made; or [6.] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217.

¹⁶ 541 U.S. 677 (2004).

¹⁷ 542 U.S. 692 (2004).

¹⁸ 196 F. App'x 93 (3d Cir. 2006).

¹⁹ *Id.* at 98.

when more suitable foreign forums exist. The Part therefore argues that the use of limited political question analysis should be supplemented by the doctrine of international comity, which holds that a court may dismiss a case if there is a foreign forum with a greater stake in addressing the plaintiff's claims.²⁰ If courts begin their inquiries in international grievance cases by asking whether another, more suitable forum exists, in many cases they will be able to dismiss the claim without undertaking a political question analysis. Dismissals for comity reasons are preferable because comity does not invoke — as the political question doctrine does — constitutional restrictions on subject matter jurisdiction. Thus, comity dismissals are less likely to create uncomfortably binding precedent. This Part uses *Bancoult v. McNamara*,²¹ a recently decided case in which the court applied the political question doctrine to dismiss a claim, to illustrate how using comity provides a more practical and flexible analysis of the relevant questions. This Part concludes by advocating a two-step test when courts address a potentially nonjusticiable question: a discretionary comity analysis followed by an application of the limited political question doctrine.

Part VI examines a development in the constitutional standing requirement of “injury in fact” that expands judicial access for citizen suits seeking to enforce animal rights. It has been long established that a person can have a legally cognizable, aesthetic interest in the protection of a species.²² It is only recently, however, that courts have recognized that one can have such an interest in the humane treatment of an individual animal. Three cases, *Animal Legal Defense Fund v. Glickman*,²³ *Animal Legal Defense Fund v. Veneman*,²⁴ and *American Society for the Prevention of Cruelty to Animals v. Ringling Bros. & Barnum & Bailey Circus*,²⁵ illustrate this trend. This Part argues that

²⁰ See *Hilton v. Guyot*, 159 U.S. 113, 164 (1895) (“[Comity] is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.”).

²¹ 445 F.3d 427 (D.C. Cir. 2006).

²² See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562–63 (1992) (noting that the “desire to use or observe an animal species . . . is undeniably a cognizable interest for purpose of standing”); *Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221, 231 n.4 (1986) (holding that plaintiffs “alleged a sufficient ‘injury in fact’ in that the whale watching and studying of their members will be adversely affected”); *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972) (holding that plaintiffs alleged sufficient injury in their claim that a development “would destroy or otherwise adversely affect the scenery, natural and historic objects and wildlife of the park” (internal quotation mark omitted)).

²³ 154 F.3d 426 (D.C. Cir. 1998) (en banc).

²⁴ 469 F.3d 826 (9th Cir. 2006), *vacated en banc at the request of the parties*, 490 F.3d 725 (9th Cir. 2007).

²⁵ 317 F.3d 334 (D.C. Cir. 2003).

this development in standing jurisprudence is significant. Whereas the prior case law allowed for suits adjudicating species protections, this development provides for standing in a new type of suit in which animal rights are enforced. Although some might contend that the recent cases simply expand human access to courts or that they create community property rights in individual animals, this Part argues that they can be read as providing a type of judicial access for animals. Human plaintiffs, through their empathy with particular animals, become proxies for the animals, as animal suffering is transformed into human suffering. This way of enforcing animal rights might be unsatisfying from the perspective of traditional animal rights theory, as the law still considers proof only of human injury, not animal injury, and thus does not extend the protection of U.S. courts to animals as such. This Part suggests, however, that this development in the law of standing treats concern for animals as a component of human quality of life, and that this type of change in sensibilities might be an essential component of providing animals true access to the courts.

II. COMPENSATING VICTIMS OF WRONGFUL DETENTION, TORTURE, AND ABUSE IN THE U.S. WAR ON TERROR

Gradually and without fanfare, the United States has released hundreds of prisoners detained in connection with the “war on terror.”¹ Many of these prisoners claim they were wrongfully detained and tortured by U.S. officials, or illegally deported to be tortured abroad. But with the exception of two prisoners detained in Iraq,² none has been offered compensation from the U.S. government. A number have begun to sue in federal court.³

¹ According to the Department of Defense (DoD), more than 500 prisoners have been released from the detention facilities at Guantánamo Bay, Cuba since 2002. As of September 2, 2008, approximately 255 detainees remained. News Release, U.S. Dep’t of Def., Office of the Assistant Sec’y of Def. for Pub. Affairs, Detainee Transfer Announced (Sept. 2, 2008), available at <http://www.defenselink.mil/Releases/Release.aspx?ReleaseID=12174>.

² See U.S. DEP’T OF STATE, LIST OF ISSUES TO BE CONSIDERED DURING THE EXAMINATION OF THE SECOND PERIODIC REPORT OF THE UNITED STATES OF AMERICA, RESPONSE OF THE UNITED STATES OF AMERICA 183–84 (2006) [hereinafter U.S. CAT RESPONSE], available at <http://www.state.gov/documents/organization/68662.pdf>.

³ See, e.g., *Arar v. Ashcroft*, 532 F.3d 157 (2d Cir. 2008), *reh’g en banc granted* (Aug. 12, 2008); *Rasul v. Myers*, 512 F.3d 644 (D.C. Cir. 2008); *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007); *Mohamed v. Jeppesen Dataplan, Inc.*, 539 F. Supp. 2d 1128 (N.D. Cal. 2008); *Ibrahim v. Titan Corp.*, 556 F. Supp. 2d 1 (D.D.C. 2007); *In re Iraq and Afg. Detainees Litig.*, 479 F. Supp. 2d 85 (D.D.C. 2007); First Amended Complaint, *Al-Janabi v. Stefanowicz*, No. CV08-2913 (C.D. Cal. May 20, 2008), available at http://ccrjustice.org/files/5.20.08_First_Amended_Complaint15.pdf; Complaint, *Padilla v. Yoo*, No. CV08-0035 (N.D. Cal. Jan. 4, 2008), available at <http://howappealing.law.com/PadillaVsYooComplaint.pdf>; Amended Complaint, *Celikgogus v. Rumsfeld*, No. 06-CV-1996 (D.D.C. Mar. 21, 2007) [hereinafter *Celikgogus* Complaint], available at http://ccrjustice.org/files/CELIKOGUS_AmendComplaint.pdf.

Courts have quickly disposed of most of these claims. While at least one torture case against a civilian contractor has gone forward,⁴ no case against the U.S. government or government officials has survived summary judgment and few are likely to do so under existing law.⁵ Nor has Congress provided a viable alternative to the federal courts for compensating victims.

This Part examines the recent history of torture claims in federal courts — the legal strategies plaintiffs have employed to try to gain access to court and the legal doctrine that currently keeps their claims out — as well as alternative forms of compensation. It will then contemplate potential reforms, such as legislation explicitly creating a cause of action for claims of torture and abuse by U.S. officials abroad, the creation of an investigative commission reporting to Congress, and an expansion of the existing administrative compensation regime. The Part concludes that, notwithstanding the desirability of broader reforms, ensuring effective, robust administrative remedies is an important part of any viable compensation regime.

A. *The State of the Law*

The existing torture lawsuits fall into three broad categories: those alleging torture by U.S. officials and government contractors in detention centers close to an area of combat operations, such as Iraq or Afghanistan;⁶ those alleging torture by U.S. officials far from an area of combat operations, such as at the detention facilities in Guantánamo Bay;⁷ and those alleging that U.S. officials, through the policy of “extraordinary rendition,” arranged for the transport of detainees to foreign countries with the expectation that they would be tortured by foreign officials.⁸ Plaintiffs have filed claims against the U.S. government itself, U.S. government officials in their personal capacity, and private contractors and their corporate employers. Of these, plaintiffs are likely to have legal recourse only against private contractors, who may lack the immunity protections granted to government officials.⁹

The U.S. government, as a sovereign power, cannot be sued unless it waives its immunity. It has done so through the Federal Tort Claims Act¹⁰ (FTCA), which allows suits against the government for

⁴ See *Ibrahim*, 556 F. Supp. 2d at 10–11.

⁵ See generally Jaykumar A. Menon, *Guantánamo Torture Litigation*, 6 J. INT’L CRIM. JUST. 323 (2008); Richard Henry Seamon, *U.S. Torture As a Tort*, 37 RUTGERS L.J. 715 (2006).

⁶ See, e.g., *Ibrahim*, 556 F. Supp. 2d at 22; *Iraq and Afg. Detainees*, 479 F. Supp. 2d at 88.

⁷ See, e.g., *Rasul*, 512 F.3d at 649; *Celikogus* Complaint, *supra* note 3, at 4. There may also be detainees held by the CIA at so-called blacksites, far from areas of combat. However, no such detainee has been released and brought suit.

⁸ See, e.g., *Arar*, 532 F.3d at 162; *El-Masri*, 479 F.3d at 299–300.

⁹ See *Ibrahim*, 556 F. Supp. 2d at 5.

¹⁰ 28 U.S.C. §§ 1346(b), 2671–2680 (2006).

torts committed by federal officials acting within “the scope of [their] office or employment.”¹¹ Congress enacted the FTCA to make the government liable for certain “garden-variety torts” by federal employees, such as the negligent operation of government motor vehicles.¹²

The FTCA contains numerous exceptions to its waiver of immunity, however, and few plaintiffs have bothered to sue under the FTCA for claims of government torture abroad because the barriers to success appear so daunting. Courts have thus not had occasion to adjudicate potentially contentious definitional issues.¹³ Even so, the morass of FTCA exceptions is likely to swallow most possible torture claims.¹⁴

Plaintiffs will also face troublesome immunity defenses if they sue government employees in their individual capacities. Under the Westfall Act,¹⁵ federal officials enjoy immunity from liability for acts undertaken “within the scope of [their] office or employment,” except for acts in violation of the Constitution or a federal statute.¹⁶ If an act falls within the scope of employment, the court will substitute the United States in place of the defendant and, as discussed above, likely dismiss the case under the FTCA. To see their claims against government officials go forward, then, plaintiffs must win at least one of three possible arguments: that the conduct in question was not within the officials’ scope of employment, that there is a U.S. federal statute on point that provides them with a cause of action, or that they have a cause of action under the Constitution.

Plaintiffs have argued that torture by its nature cannot be within an official’s scope of employment because, among other reasons, it

¹¹ *Id.* § 1346(b).

¹² *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 706 n.4 (2004) (citing S. REP. NO. 79-1400, at 31 (1946)).

¹³ For example, it is unclear whether claims arising out of abuse at Guantánamo would be barred by the exception which excludes “[a]ny claim arising in a foreign country,” 28 U.S.C. § 2680(k), or whether DoD, FBI, or CIA interrogators would qualify as “investigative or law enforcement officers” for purposes of the “intentional torts” exception, which bars “[a]ny claim arising out of assault, battery, false imprisonment, [or] false arrest” unless caused by “investigative or law enforcement officers.” *Id.* § 2680(h). Other exceptions bar claims “based upon the exercise or performance . . . [of] a discretionary function . . . on the part of a federal agency or any employee of the Government,” *id.* § 2680(a); “[a]ny claim arising out of the combatant activities of the military or naval forces . . . during time of war,” *id.* § 2680(j); and claims where an official exercised “due care[] in the execution of a statute or regulation,” *id.* § 2680(a). In addition, the United States will not be held liable where the plaintiff has failed to exhaust administrative remedies. *See id.* § 2675(a); *Rasul v. Myers*, 512 F.3d 644, 661 (D.C. Cir. 2008).

¹⁴ *See Seamon*, *supra* note 5, at 724–62 (explaining in detail the FTCA exceptions and arguing that FTCA actions are inadequate to address torture sanctioned by the United States).

¹⁵ 28 U.S.C. § 2679.

¹⁶ *Id.* § 2679(b).

“violates the most basic norms of civilized conduct and law”¹⁷ and is “directly contrary to military law, training and tradition.”¹⁸ But courts evaluating scope of employment questions have often focused less on the severity or “nature of the tort” than on “the underlying dispute or controversy” and have looked to whether or not the tort arose “out of a dispute that was originally undertaken on the employer’s behalf.”¹⁹ The fact that torture is a crime under U.S. law²⁰ is also not by itself dispositive: “[W]hether or not the act is seriously criminal” is a “fact . . . to be considered” in the court’s analysis,²¹ “[b]ut criminal conduct is not *per se* outside the scope of employment.”²² In practice, then, official immunity is likely to shield most individual government employees from liability, with the possible exception of “low-level rogue officials” who clearly act beyond the scope of their regulations and directives.²³

Failing in their “scope of employment” arguments, plaintiffs have searched for a relevant federal statute (or treaty) that would provide them with a cause of action. Prime candidates include the Alien Tort Statute²⁴ (ATS), the Torture Victim Protection Act²⁵ (TVPA), the Geneva Conventions,²⁶ and the Religious Freedom Restoration Act of 1993²⁷ (RFRA), but in each case courts have ruled that the statute does not quite fit the claims.²⁸

¹⁷ Petition for Writ of Certiorari at 35, *Rasul v. Myers*, No. 08-235 (filed Aug. 22, 2008) [hereinafter *Rasul* Petition] (citing *Brown v. Mississippi*, 297 U.S. 278, 285–86 (1936)), available at <http://www.scotusblog.com/wp/wp-content/uploads/2008/08/rasul-petition-8-22-08.pdf>

¹⁸ *Id.* at 36.

¹⁹ *Rasul v. Myers*, 512 F.3d 644, 657 (D.C. Cir. 2008) (quoting Council on Am. Islamic Relations v. Ballenger, 444 F.3d 659, 664 (D.C. Cir. 2006)). Courts will also take account of the Attorney General’s certification that a defendant was acting within the scope of employment as prima facie evidence of this fact. See *id.* at 655. Reliance on Attorney General or Office of Legal Counsel opinions regarding the legality of a particular practice might also provide immunity. See Daniel L. Pines, *Are Even Torturers Immune from Suit? How Attorney General Opinions Shield Government Employees from Civil Litigation and Criminal Prosecution*, 43 WAKE FOREST L. REV. 93, 115–18 (2008); Note, *The Immunity-Conferring Power of the Office of Legal Counsel*, 121 HARV. L. REV. 2086, 2086 (2008).

²⁰ Torture Act of 2000, 18 U.S.C. §§ 2340–2340B (2006); War Crimes Act of 1996, 18 U.S.C. § 2441 (2006).

²¹ *Rasul*, 512 F.3d at 659 (quoting RESTATEMENT (SECOND) OF AGENCY § 229(2)(j) (1958)).

²² *Id.*

²³ Seamon, *supra* note 5, at 763.

²⁴ 28 U.S.C. § 1350 (2006).

²⁵ *Id.* § 1350 note (2006).

²⁶ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; Geneva Convention Relative to the Protection of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

²⁷ Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. §§ 2000bb-1 to -4 (2000)), *invalidated in part* by *City of Boerne v. Flores*, 521 U.S. 507 (1997).

²⁸ Plaintiffs have been barred from bringing suit under the ATS, for example, because the ATS is a jurisdictional statute that does not create a cause of action. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724 (2004); *accord In re Iraq and Afg. Detainees Litig.*, 479 F. Supp. 2d 85, 112 (D.D.C.

Absent a suitable statute, plaintiffs can still bring claims based on violations of certain constitutional rights, through so-called *Bivens*²⁹ actions. *Bivens* allows plaintiffs to recover and government officials to be held accountable when the officials' misfeasance rises to a constitutional level, but Congress has failed to explicitly authorize a statutory cause of action.³⁰ In practice, however, the Supreme Court has "responded cautiously to suggestions that *Bivens* remedies be extended into new contexts"³¹ out of deference to the legislature. Courts have expanded the doctrine only twice since its inception³² and will decline to do so if "any special factors counsel[] hesitation before authorizing a new kind of federal litigation."³³ Such "special factors" include separation of powers concerns, such as the primacy of the Executive and legislature in formulating national security and foreign relations policy.³⁴

Bivens claims regarding U.S. torture abroad touch on a decidedly unsettled legal question — namely, the extraterritorial reach of the

2007) ("[T]he Alien Tort Statute is not a federal statute that authorizes recovery against a federal employee."). For its part, the TVPA requires that the defendant have acted under "actual or apparent authority, or color of law, of any *foreign* nation," 28 U.S.C. § 1350 note (emphasis added), thus excluding suits against U.S. officials acting only under color of domestic law or policy. Plaintiffs in rendition cases have argued, thus far unsuccessfully, that U.S. agents have acted under color of foreign law in conspiring with foreign officials to torture them abroad. See *Arar v. Ashcroft*, 532 F.3d 157, 175–76 (2d Cir. 2008), *reh'g en banc granted* (Aug. 12, 2008). Courts have similarly declined to recognize claims brought under the Geneva Conventions, see *Rasul v. Myers*, 512 F.3d 644, 662–63 (D.C. Cir. 2008), and claims brought under the RFRA have failed because Congress's stated purpose in enacting the RFRA was to restore strict scrutiny review to Free Exercise Clause jurisprudence, not to deter torture, see *id.* at 670–71.

²⁹ *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

³⁰ *Cf. Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 70 (2001) ("The purpose of *Bivens* is to deter individual federal officers from committing constitutional violations.").

³¹ *Schweiker v. Chilicky*, 487 U.S. 412, 421 (1988).

³² See *Carlson v. Green*, 446 U.S. 14 (1980) (expanding *Bivens* to violations of the Eighth Amendment by federal prison officials); *Davis v. Passman*, 442 U.S. 228, 234–36, 242–44 (1979) (expanding *Bivens* to employment discrimination in violation of the equal protection component of the Due Process Clause). A threshold question for the courts is thus whether the plaintiffs' claims fit within existing *Bivens* remedies or whether they reflect an extension of *Bivens* to a new context. The majority in *Arar* took the latter approach, see 532 F.3d at 177 ("Arar effectively invites us to . . . extend[] *Bivens* . . . to a new context requiring the courts to intrude deeply into the national security policies and foreign relations of the United States."), while Judge Sack's *Arar* dissent embraced the former, see *id.* at 209–10 (Sack, J., dissenting) ("[T]he word 'context' . . . is best understood to mean *legal* context — in this case a substantive due process claim by a federal detainee — and not . . . the *fact-specific* 'context' of Arar's treatment.").

³³ *Wilkie v. Robbins*, 127 S. Ct. 2588, 2598 (2007) (quoting *Bush v. Lucas*, 462 U.S. 367, 378 (1983)).

³⁴ See, e.g., *Arar*, 532 F.3d at 183–84 ("The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative . . . Departments of the Government." (quoting *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 766 (1972) (plurality opinion)) (internal quotation marks omitted and initial capital restored)). *But cf., e.g., Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) ("Whatever power the . . . Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.").

Constitution.³⁵ But even if plaintiffs win this argument, they will still need to overcome at least two additional legal barriers, either of which could scuttle their claims: qualified immunity and the state secrets doctrine.³⁶ Qualified immunity protects government officials from suit insofar as the right they are accused of violating was not a “clearly established . . . right[] of which a reasonable person would have known” at the time of the alleged violation.³⁷ A court might conclude, for example, that the detainees at Guantánamo have Fifth Amendment due process rights, but that at the time of their torture those rights were not yet “clearly established” because the seminal Supreme Court opinion recognizing constitutional rights for Guantánamo detainees, *Boumediene v. Bush*,³⁸ was not decided until 2008.³⁹ For its part, the state secrets privilege allows the government to withhold evidence from a trial — or get a claim dismissed altogether⁴⁰ — if the court concludes, “from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged.”⁴¹ So far, the government has invoked the state secrets privilege primarily in rendition cases, and the courts have been manifestly deferential.⁴²

In summary, detainees face daunting legal challenges to having their claims of wrongful detention, torture and abuse heard in federal court. There is an outside chance that a few such claims will go forward,⁴³ but the large-scale judicial course correction necessary to enable the recognition of most detainees’ claims will almost certainly be left for another Court, at another historical moment.

³⁵ For example, the D.C. Circuit is reconsidering the constitutional rights available to plaintiffs in *Rasul* in light of the Supreme Court’s decision in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

³⁶ Courts might also invoke the political question doctrine to shield officials from liability. See *Baker v. Carr*, 369 U.S. 186, 217 (1962), for a description of six categories of nonjusticiable cases that involve “a political question.” See also *infra* section V.A.

³⁷ *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

³⁸ 128 S. Ct. 2229 (2008).

³⁹ A court might instead focus not on the extraterritorial reach of the relevant legal right but on “the unconstitutional nature of the *conduct*,” *Arar*, 532 F.3d at 215 (Sack, J., dissenting) — whether the defendant’s behavior “would be understood by a reasonable officer to be beyond the constitutional pale,” *id.* at 214 — and decline to grant qualified immunity to alleged torturers.

⁴⁰ See *Sterling v. Tenet*, 416 F.3d 338, 348 (4th Cir. 2005).

⁴¹ *United States v. Reynolds*, 345 U.S. 1, 10 (1953).

⁴² See, e.g., *El-Masri v. United States*, 479 F.3d 296, 310 (4th Cir. 2007) (“[V]irtually any conceivable response to El-Masri’s allegations would disclose privileged information.”); *Mohamed v. Jeppesen Dataplan, Inc.*, 539 F. Supp. 2d 1128, 1136 (N.D. Cal. 2008) (“[A]t the core of Plaintiffs’ case . . . are ‘allegations’ of covert U.S. military or CIA operations in foreign countries against foreign nationals — clearly a subject matter which is a state secret.”).

⁴³ For example, the D.C. Circuit could hold that plaintiffs in *Rasul* have a *Bivens* remedy, see *supra* note 35, or the Second Circuit could overturn its decision in *Arar* upon rehearing the case en banc, see Order for Rehearing En Banc, *Arar*, No. 06-4216-cv (filed Aug. 12, 2008).

B. Alternatives to U.S. Federal Court

If not through the courts, prisoners can still conceivably seek remedies through administrative mechanisms. In Iraq and Afghanistan, the U.S. military has set up a number of foreign claims commissions (FCCs), which investigate and decide on claims submitted by Iraqi and Afghan civilians.⁴⁴ Authorized by the Foreign Claims Act⁴⁵ (FCA) to settle claims up to \$100,000,⁴⁶ each FCC consists of either one or three members who are typically commissioned officers or military claims attorneys.⁴⁷ Soldiers frequently hand out instruction cards following accidents informing victims how to file claims.⁴⁸ In ruling on claims, FCCs apply “the law, customs and standards of the country where an incident occurs.”⁴⁹ Because the FCA does not cover injury, death, or property damage resulting from combat-related activities, the military offers “condolence” or “solatia” payments in such cases at the discretion of military commanders “in accordance with local custom.”⁵⁰ In Iraq, condolence payments are capped at \$2500⁵¹ and serve as “an expression of remorse,” but do not indicate an admission of legal liability or fault.⁵² The Department of Defense (DoD) paid out roughly \$26 million to settle approximately 21,450 FCA claims by Iraqi and Afghan civilians between fiscal years 2003 and 2006,⁵³ and roughly \$31 million in condolence and solatia payments during the same period.⁵⁴

Based on the limited information available, it appears that very little of this compensation has been directed to prisoners alleging wrong-

⁴⁴ See Paul von Zielbauer, *Civilian Claims on U.S. Suggest the Toll of War*, N.Y. TIMES, Apr. 12, 2007, at A1. The FTCA also includes a mechanism for administrative remedies but, as discussed at *supra* note 13, the FTCA does not apply to actions of the U.S. government abroad. See 28 U.S.C. § 2680(k) (2006).

⁴⁵ 10 U.S.C. § 2734 (2006).

⁴⁶ *Id.* § 2734(d).

⁴⁷ U.S. DEP'T OF THE ARMY, ARMY REGULATION 27-20, at 53-54 (2008), available at <http://www.usapa.army.mil/pdffiles/r27%5F20.pdf>. Claimants must be “friendly to the United States,” 10 U.S.C. § 2734(b)(2), and accept FCA remedies “in full satisfaction,” forgoing their right to file a federal lawsuit, *id.* § 2734(e).

⁴⁸ Von Zielbauer, *supra* note 44.

⁴⁹ U.S. DEP'T OF THE AIR FORCE, AIR FORCE INSTRUCTION 51-501, at 29 (2005), available at <http://www.e-publishing.af.mil/shared/media/epubs/AFI51-501.pdf>.

⁵⁰ GOV'T ACCOUNTABILITY OFFICE, MILITARY OPERATIONS: THE DEPARTMENT OF DEFENSE'S USE OF SOLATIA AND CONDOLENCE PAYMENTS IN IRAQ AND AFGHANISTAN 13 (2007), available at <http://www.gao.gov/new.items/do7699.pdf>.

⁵¹ *Id.* at 23.

⁵² *Id.* at 13.

⁵³ *Id.* at 50.

⁵⁴ See *id.* at 1. Congress funds condolence payments through the Commander's Emergency Relief Program (CERP), *id.* at 1-2, and congressional authorizations for CERP have increased steadily since the beginning of hostilities in Iraq and Afghanistan to more than \$977 million in 2008, James Foley, *The Price of One Iraqi Life*, IN THESE TIMES, June 25, 2008, at 30.

ful detention, torture, and abuse.⁵⁵ Typical claims involve inadvertent killings at checkpoints, for example, or claims for property damage based on collisions with military vehicles.⁵⁶ The U.S. Army reports that thirty-three Iraqi and Afghan detainees had filed claims alleging torture or ill treatment as of April 2006.⁵⁷ Of these claims, 23 were still being investigated, eight were either denied or transferred, and two were approved.⁵⁸ The first successful claimant sought \$3,582,000; the Army recommended \$5000 for “lost wages and exacerbation of pre-existing post-traumatic stress disorder.”⁵⁹ The second successful claimant sought \$350,000; the Army recommended \$350 for “lost cash” and “lost documents.”⁶⁰ A third detainee from Abu Ghraib was offered an undisclosed “sympathy payment.”⁶¹ There are no reports that detainees at Guantánamo or CIA blacksites have been offered compensation through the FCA or any other administrative mechanism.

C. Possible Reforms

There are strong reasons that the United States should improve its existing compensation regime. First and foremost, notwithstanding the practical advantages of such measures, the United States should do justice to victims by offering them a public forum to tell their stories and by making them whole through compensation and official apologies.⁶² Second, the lack of an adequate legal mechanism to pass judgment on claims of torture harms the United States’s international reputation; when other states perceive the United States as failing to fulfill its international obligations⁶³ or acting unjustly, they are less likely to assist the United States in pursuing its interests. Compensation also benefits U.S. military efforts on the ground by helping to win the local hearts and minds so critical to U.S. success in combating terrorism. Lastly, allowing victims to air their grievances serves an information-forcing function — it helps the government to learn of oth-

⁵⁵ See Am. Civil Liberties Union, Claims Filed Under the Foreign Claims Act by Civilians in Afghanistan and Iraq (Apr. 12, 2007), <http://www.aclu.org/natsec/foia/log.html>, for a database of records related to civilian claims released to the ACLU.

⁵⁶ Von Zielbauer, *supra* note 44.

⁵⁷ See U.S. CAT RESPONSE, *supra* note 2, at 183–84.

⁵⁸ See *id.*

⁵⁹ *Id.* at 79.

⁶⁰ *Id.*

⁶¹ *Id.* at 183.

⁶² See Roger Cohen, *A Command of the Law*, INT’L HERALD TRIB., Nov. 27, 2008, at 8.

⁶³ Article 14 of the United Nations Convention Against Torture, of which the United States is a state party, obliges state parties to “ensure in [their] legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible.” Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 108 Stat. 382, 1465 U.N.T.S. 85.

erwise hidden actions of U.S. officials, spurs public debate, and thus improves U.S. detention policy.

Of course, there are downsides to a ramped-up compensation regime as well: It might encourage false claims and create a forum for enemies of the United States to spread propaganda. Even the public airing of truthful claims might on balance *harm* the reputation of the United States to the extent it exposes otherwise hidden wrongs and compensation is seen as inadequate. Moreover, increased transparency and financial penalties might discourage government officials from utilizing aggressive, but legal and ethical, interrogation techniques, or from detaining individuals who then attack the United States.⁶⁴

It is beyond the scope of this Part to analyze the relative strength of these assertions. It seems likely, however, that the current system of providing almost no compensation, despite acknowledged abuses,⁶⁵ fails to strike the appropriate balance between these competing interests.⁶⁶ Proposed reforms fall into three categories: they seek to create a judicial remedy by establishing a cause of action in federal court, they attempt to establish ad hoc legislative oversight mechanisms and reparations, or they attempt to strengthen existing administrative compensation regimes. There are strong arguments in favor of the first two proposals.⁶⁷ However, this Part argues that *regardless* of what one thinks of these broader reforms, expanding administrative remedies is a straightforward, feasible reform that would serve at least some of the positive interests identified above without many of the downsides.

If courts continue to dismiss torture lawsuits under existing law, Congress could create a cause of action against government officials by amending the TVPA so that it imposes liability for torture committed under domestic U.S. law. Alternatively, to allow suits against the U.S. government, it could amend the FTCA or create a federal analogue to

⁶⁴ Cf. *Arar v. Ashcroft*, 532 F.3d 157, 181 (2d Cir. 2008) (concluding that “the effective functioning of U.S. foreign policy would be affected, if not undermined” if Arar’s suit went forward); *reh’g en banc granted* (Aug. 12, 2008); *In re Iraq and Afg. Detainees Litig.*, 479 F. Supp. 2d 85, 105 (D.D.C. 2007) (“[A]uthorizing monetary damages remedies against military officials engaged in an active war would invite enemies to use our own federal courts to obstruct the Armed Forces’ ability to act decisively and without hesitation in defense of our liberty and national interests . . .”).

⁶⁵ See, e.g., HINA SHAMSI, *COMMAND’S RESPONSIBILITY: DETAINEE DEATHS IN U.S. CUSTODY IN IRAQ AND AFGHANISTAN* 1–27 (Deborah Pearlstein ed., 2006), available at <http://www.humanrightsfirst.info/pdf/06221-etn-hrf-dic-rep-web.pdf> (describing detainee deaths due to abuse both acknowledged and unacknowledged by the U.S. military).

⁶⁶ Cf. CIVIC, *ADDING INSULT TO INJURY: US MILITARY CLAIMS SYSTEM FOR CIVILIANS* 2–4 (2006), available at <http://www.civicworldwide.org/storage/civic/documents/civic%20military%20claims%20white%20paper.pdf> (criticizing FCCs for nonuniform application of FCA standards, overreliance on the combat exclusion, low valuation of life, and evidentiary problems); *id.* at 29–34 (detailing the military’s failure to properly investigate detainee deaths).

⁶⁷ See Michael German, *Trying Enemy Combatants in Civilian Courts*, 75 GEO. WASH. L. REV. 1421, 1426 (2007) (advocating the use of civilian courts in the war on terror because they are “effective,” “fair,” and “open,” and would undermine “terrorists’ propaganda credibility”).

the civil rights statute, 42 U.S.C. § 1983, which currently allows plaintiffs to recover against state and local governments for violations of their constitutional rights.⁶⁸ But most signs point to Congress's desire to *limit* judicial remedies for torture victims abroad rather than expand them. For example, although the Supreme Court ruled certain of its provisions unconstitutional in *Boumediene*, the Military Commissions Act of 2006⁶⁹ limits judicial oversight of detention at Guantánamo and elsewhere⁷⁰ and narrows the definition of "torture" and "cruel or inhuman treatment."⁷¹ Few policymakers appear anxious to encourage potentially embarrassing lawsuits against high-level government officials or to face the stigma of compensating individuals who go on to take part in terrorist attacks.

Instead of — or in addition to — these legal reforms, Congress could establish an independent legislative commission to investigate allegations of abuse and offer case-by-case reparations to individual victims. The Canadian government pioneered this model in February 2005, when it established the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, headed by prominent jurist Dennis O'Connor.⁷² After the Commission issued a report finding that the Royal Canadian Mounted Police provided inaccurate information to the United States, which likely led to Arar's rendition and torture,⁷³ Prime Minister Stephen Harper issued an apology and agreed to a mediated settlement of \$8.9 million.⁷⁴

⁶⁸ 42 U.S.C. 1983 (2000); *cf.* Seamon, *supra* note 5, at 803–04 (offering reasons for a federal § 1983 analogue). Congress could also enact legislation making the U.S. government liable more broadly for "grave breaches" of the law of nations. *Cf.* David Golove, The Case for Incorporating Global Justice into the U.S. Constitution (Sept. 2008) (unpublished manuscript, on file with the Harvard Law School Library) (arguing for incorporation of "global justice" into the Constitution).

⁶⁹ Pub. L. No. 109-366, 120 Stat. 2600 (codified in scattered sections of 10, 18, 28, and 42 U.S.C.).

⁷⁰ *See id.* § 7(e)(2).

⁷¹ *See id.* §§ 6(b)(1)(B), 6(b)(2), 6(c)(2). Similarly, only one piece of legislation to effectively expand torture claimants' access to courts has been introduced in Congress since the Sept. 11, 2001 attacks — the State Secrets Protection Act of 2008, H.R. 5607, 110th Cong. (2008) — which would have increased judicial oversight of the government's use of the state secrets privilege but stalled in the House Judiciary Committee, Govtrack.us, H.R. 5607: State Secrets Protection Act of 2008, <http://www.govtrack.us/congress/bill.xpd?bill=h110-5607> (last visited Jan. 10, 2009).

⁷² *See* COMM'N OF INQUIRY INTO THE ACTIONS OF CANADIAN OFFICIALS IN RELATION TO MAHER ARAR, REPORT OF THE EVENTS RELATING TO MAHER ARAR: ANALYSIS AND RECOMMENDATIONS 11–13 (2006) (outlining the Commission's mandate). Arar is a Canadian whom the United States deported to Syria, where he was tortured. *Id.* at 11–12.

⁷³ *Id.* at 13–16, 59.

⁷⁴ Press Release, Office of the Prime Minister of Can., Prime Minister Releases Letter of Apology to Maher Arar and His Family and Announces Completion of Mediation Process (Jan. 26, 2007), *available at* <http://pm.gc.ca/eng/media.asp?id=1509> (compensation converted to U.S. dollars). Following Canada's lead, the United Kingdom Ministry of Defense held a public inquiry into the torture of ten men and provided \$5.59 million to the victims and their families in July 2008. Press Release, Amnesty Int'l, UK Ministry of Defence Agrees To Compensate Iraqi Torture

Congress could set up a similar legislative commission⁷⁵ or create something even larger, akin to South Africa's Truth and Reconciliation Commission,⁷⁶ with subpoena power and authority to investigate and report on government abuse. Following an investigation, Congress could enact separate legislation to compensate any victims. As an independent entity, such a commission could serve as an important check on executive overreach.⁷⁷ On its own, however, the commission would fail to take advantage of preexisting institutional structures, such as FCCs. Due to its ad hoc nature, it might also be less than ideal for addressing persistent wrongs — even under a different Administration, the Executive is likely to be proactive in its approach to addressing terrorism due to the unpredictable nature of terrorist attacks and the relative ineffectiveness of deterrence. An optimal compensation regime would thus *institutionalize* the appropriate government response to claims of wrongful imprisonment and abuse and have a shelf life to match that of the “long war.”

A third option is for Congress to strengthen existing administrative compensation regimes like the FCA. Congress could, for example, call on DoD to create new claims commissions with more robust investigative procedures and increased transparency, offering compensation significantly above local standards and prominent public apologies to any victims of torture and abuse in recognition of the severity of the crime.⁷⁸ Compared with Article III courts, such commissions would be better able to specialize in dealing with torture claims and, by operating *in situ*, would have easier access to relevant evidence. Any interference with U.S. military operations would be limited, since presuma-

Victims (July 14, 2008), available at <http://www.amnesty.org/en/news-and-updates/good-news/uk-ministry-defence-agrees-compensate-iraqi-torture-victims-20080714>.

⁷⁵ See LAUREL E. FLETCHER ET AL., HUMAN RIGHTS CTR. ET AL., GUANTÁNAMO AND ITS AFTERMATH: U.S. DETENTION AND INTERROGATION PRACTICES AND THEIR IMPACT ON FORMER DETAINEES 78 (2008) (recommending “the establishment of an independent, non-partisan commission,” with subpoena power, “to investigate and publicly report on the detention and treatment of detainees” in U.S. custody); Laura N. Pennelle, Comment, *The Guantanamo Gap: Can Foreign Nationals Obtain Redress for Prolonged Arbitrary Detention and Torture Suffered Outside the United States?*, 36 CAL. W. INT'L L.J. 303, 341–52 (2006) (arguing that such a commission would serve valuable investigative, remedial, and informative functions).

⁷⁶ See Nicholas D. Kristof, *The Truth Commission*, N.Y. TIMES, July 6, 2008, § 4, at 12; cf. MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 57–60 (1998) (discussing the ability of truth commissions to serve as a forum for victims and witnesses of atrocities to tell their stories).

⁷⁷ There is some precedent for such legislation: the U.S. government has offered reparations for a variety of historic injustices, including Japanese internment, radiation exposure, the destruction of Rosewood, and syphilis experiments. See Eric A. Posner & Adrian Vermeule, *Reparations for Slavery and Other Historical Injustices*, 103 COLUM. L. REV. 689 (2003).

⁷⁸ Analogous innovations in tort law, for example, promote the use of apologies to limit malpractice suits. See Peter Geier, *Emerging Med-Mal Strategy: 'I'm Sorry'*, LAW.COM, July 24, 2006, <http://www.law.com/jsp/article.jsp?id=900005550355>.

bly the military would retain significant discretion over rules of evidence and public access to proceedings.

Administrative compensation has a number of important downsides, however. First, FCCs offer fewer procedural protections than Article III courts and, because they form part of the same institution that stands accused of torture, may have incentives to limit investigations and remedies. Even an improved administrative regime would have a limited deterrent and nonexistent punitive effect — it would serve only one side of the justice equation, making victims whole without punishing the tortfeasor. To the extent such a regime would limit public access and impose heightened evidentiary restrictions, it would also have limited benefits in terms of the justice, reputational, military, and information-forcing interests identified above. Second, by treating torture and abuse as inevitable, if unfortunate, occurrences, and by failing to hold wrongdoers individually liable, using claims commissions to compensate torture victims might undermine the norm against torture. Under such a regime, torture becomes akin to collateral damage: neither is a cognizable claim in U.S. federal court; both are compensated through a “no fault” administrative remedy; both are regrettable but, importantly, also *acceptable*.⁷⁹

Despite these objections, the argument for reforming administrative remedies holds up. Such remedies are unlikely to undermine the norm against torture or alienate the Muslim world any more than having almost no such remedies *at all*. Even absent broader reforms, administrative remedies could do much to deter torture and abuse — presuming improvements in the transparency of the administrative regime, government officials would fear that abusive practices would be made public in an embarrassing fashion and would likely improve oversight policies.⁸⁰ Even as the United States declines to admit legal liability, combining compensation with public apologies would underscore U.S. disapproval of torture and other violations of basic rights.⁸¹

D. Conclusion

For any compensation regime to serve the interests identified above, it cannot evaluate claims in total secrecy. To do justice to claimants, a compensation regime must provide them with a public fo-

⁷⁹ At its worst, through serving as an implicit institutional recognition of torture, such a system could undermine the status of the prohibition against torture as *jus cogens*.

⁸⁰ *But see* Daryl Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345 (2000) (arguing that government responds only imperfectly to fiscal incentives).

⁸¹ Moreover, expanding FCA remedies would not foreclose the continued evolution of the case law in Article III courts. If the Supreme Court were to decide to create a *Bivens* remedy for detainees at Guantánamo, for example, this remedy could operate in conjunction with strong FCA remedies for detainees in Iraq and Afghanistan.

rum to tell their stories; to improve the United States's detention policy and international reputation, the public must know what the United States is doing and see that it is trying to correct past wrongs. But as discussed above, excessive transparency has costs as well, in particular if false claims become a serious problem. For those who would worry about too much transparency, then, improving administrative remedies is an attractive option because it provides some compensation but gives the military leeway to design a system that protects U.S. security interests. For those who worry about too much secrecy, however, improving administrative mechanisms is a good first step toward broader reforms and a necessary supplement to any appropriately robust compensation regime involving U.S. federal courts. For example, even if a future legislative commission were to recommend compensation and apologies for some Guantánamo detainees, a large number of detainees in Iraq and Afghanistan might still have recourse only to administrative remedies. Legislators can disagree about broader secrecy issues, but there are few convincing reasons for failing to improve the administrative regime in the interim.

III. MANDATORY ARBITRATION CLAUSES: PROPOSALS FOR REFORM OF CONSUMER-DEFENDANT ARBITRATION

Over the past twenty years, the Supreme Court has made arbitration agreements easier to enforce and arbitration proceedings harder to review.¹ Simultaneously, mandatory preconflict arbitration agreements have proliferated in consumer contracts, becoming more common throughout a wider and wider variety of fields. Such agreements have increasingly forced a segment of consumer cases out of the court system. During the past two years, however, Congress has been considering the proposed Arbitration Fairness Act of 2007² (AFA), which would render inoperative the arbitration clauses that suffuse consumer contracts.³ Concerns about the state of arbitration law stem from the

¹ See, e.g., *Buckeye Check Cashing, Inc. v. Cardegna*, 126 S. Ct. 1204 (2006) (holding that validity of contract requiring arbitration is itself to be decided in arbitration); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995) (finding that federal arbitration law preempts state law); *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984) (“[The Federal Arbitration Act] withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.”). But for an example of legislation that runs counter to this trend, see *Motor Vehicle Franchise Contract Dispute Resolution Process*, Pub. L. No. 107-273, § 11028, 116 Stat. 1835 (2002) (codified at 15 U.S.C. § 1226 (2006)), which enforces arbitration clauses in motor vehicle franchise contracts only when the parties consent after a dispute.

² S. 1782, 110th Cong. (2007); H.R. 3010, 110th Cong. (2007).

³ See *The Arbitration Fairness Act of 2007: Hearing on S. 1782 Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 110th Cong. 1-3 (2007) [hereinafter *Hearing on the AFA*] (statement of Sen. Russell D. Feingold, Chairman, Senate Subcomm. on the Constitution); see also Melissa Maleske, *Arbitration Attack*, INSIDECOUNSEL, Oct. 2008, at 16 (“As the

essential conflict between legitimate and illegitimate motives for its use. On the one hand, corporations have every reason to reduce legal costs by fashioning arbitration procedures specifically tailored to recurring conflicts;⁴ on the other, they also have every reason to use arbitration to limit substantive rights of consumers that might be vindicated by a court.⁵ Bargains between corporations typically involve equally sophisticated parties, but consumer contracts are often contracts of adhesion with arbitration clauses buried in unread fine print, leaving significant room for abuse.⁶ The major issue that the AFA presents is whether the illegitimate uses to which arbitration may be put are so endemic to consumer arbitration contracts that they necessitate doing away altogether with any contract that binds consumers to arbitrate claims that have not yet arisen. This Part takes a subset of consumer arbitration disputes — those involving corporate plaintiffs and consumer defendants — and shows that preconflict arbitration is worth preserving if reforms are made to allow reasonable procedural checks on arbitral discretion that would be enforced by third-party private actors.

The scholarly literature on binding consumer arbitration has largely focused on its use by corporations to prevent consumers from bringing class action lawsuits.⁷ A smaller yet still important corporate use of arbitration clauses, however, has received less attention — not as a shield against consumer plaintiffs but as a sword against consumer defendants, particularly in the creditor-debtor context.⁸ Although proposals for policy reform have generally treated these two

Arbitration Fairness Act of 2007 continues its slow journey through Congress, debate over the bill is escalating. . . . Introduced in July 2007 in the House, with an identical bill in the Senate, the bill has gained momentum and support in Congress”)

⁴ See Keith N. Hylton, *Agreements To Waive or To Arbitrate Legal Claims: An Economic Analysis*, 8 SUP. CT. ECON. REV. 209, 223–26 (2000); Steven Shavell, *Alternative Dispute Resolution: An Economic Analysis*, 24 J. LEGAL STUD. 1, 2–3, 5–9 (1995).

⁵ See Theodore Eisenberg et al., *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871 (2008) (finding that a much higher percentage of companies' contracts with consumers contain arbitration clauses than do their material contracts with other corporations); see also Samuel Issacharoff & Erin F. Delaney, *Credit Card Accountability*, 73 U. CHI. L. REV. 157, 173 (2006) (“Every indication is that the imposed arbitration clauses are nothing but a shield against legal accountability by the credit card companies.”); *id.* at 173–75.

⁶ See Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1200–01 (1983).

⁷ See, e.g., Edward Wood Dunham, *The Arbitration Clause as Class Action Shield*, 16 FRANCHISE L.J. 141 (1997); Issacharoff & Delaney, *supra* note 5, at 170–75; Jean R. Sternlight & Elizabeth J. Jensen, *Using Arbitration To Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?*, LAW & CONTEMP. PROBS., Winter–Spring 2004, at 75.

⁸ Specifically, the plaintiffs bringing these claims have often bought the claims from financial services companies at a relatively low price. *MBNA Am. Bank, N.A. v. Nelson*, No. 13777/06, 2007 WL 1704618, at *1–2 (N.Y. Civ. Ct. May 24, 2007).

types of cases as if they were the same, they actually present different concerns. Class action waivers pertaining to consumer-plaintiff actions seem to stem from illegitimate motives insofar as they raise the average litigation cost for an individual case and consequently render such cases negative-value.⁹ The problem with consumer-plaintiff arbitrations, then, is that they essentially never occur.¹⁰ By contrast, the major problem with consumer-defendant arbitrations is that corporations predominantly use them as a biased debt collection apparatus. The one salutary feature of consumer-defendant mandatory arbitration is that it may reduce costs for corporate plaintiffs to allow them to vindicate legal claims that would otherwise go unlitigated. A working arbitration regime ought to address the former concern while still incorporating the latter cost-avoidance goal.

This Part is divided into five sections. Section A provides arbitration's recent history. Section B proceeds by exploring the recent development of concerns with the fairness of arbitrations in which corporate plaintiffs bring claims against consumer defendants and by examining the logic behind anti-arbitration arguments. Section C argues that the solution proposed by the AFA is overly harsh and would preclude positive uses for arbitration. Section D then examines potential alternative reforms and suggests granting private actors an incentive to enforce procedural safeguards for arbitration. Finally, Section E concludes the Part.

A. Consumer Arbitration Background

In 1984, the Supreme Court issued a landmark decision concerning arbitration, *Southland Corp. v. Keating*,¹¹ which interpreted the 1925 Federal Arbitration Act¹² (FAA) to mean that "Congress [had] declared a national policy favoring arbitration."¹³ This ultimately gave arbitration clauses nearly universal enforcement. In *Allied-Bruce Terminix Cos. v. Dobson*,¹⁴ the Court gave the FAA preemptive force over state contract law,¹⁵ and in *Buckeye Check Cashing, Inc. v. Cardegna*,¹⁶ it held that challenges to the overall validity of contracts that require ar-

⁹ See Issacharoff & Delaney, *supra* note 5, at 177.

¹⁰ For example, only a tiny minority of National Arbitration Forum cases in California between January 1, 2003 and March 31, 2007 were consumer-plaintiff. PUBLIC CITIZEN, THE ARBITRATION TRAP: HOW CREDIT CARD COMPANIES ENSNARE CONSUMERS 1-2, 15 (2007), available at <http://www.citizen.org/documents/ArbitrationTrap.pdf>.

¹¹ 465 U.S. 1 (1984).

¹² 9 U.S.C. §§ 1-16 (2006).

¹³ *Southland*, 465 U.S. at 10.

¹⁴ 513 U.S. 265 (1995).

¹⁵ *Id.* at 272-73.

¹⁶ 126 S. Ct. 1204 (2006).

bitration should themselves be decided in arbitration.¹⁷ Taken together, these cases require courts to be extremely deferential toward arbitration rulings. While some courts have found a level of procedure in an arbitration so low that the resulting ruling is not binding,¹⁸ an arbitration's procedural safeguards have been upheld even in cases where they were clearly lower than what a court would have provided.¹⁹ Courts cannot review the substantive grounds for an arbitrator's decision; they can only inquire into the validity of a challenged arbitration clause.²⁰

The FAA's expansive interpretation in *Southland* and its progeny led to a long-term increase in the number of contracts that include binding arbitration provisions. In particular, arbitration provisions became prevalent in two major fields: employment and consumer contracts. In the mid-1980s, in response to the high cost of defending lawsuits in court, some financial services companies began to include arbitration provisions in their standard contracts.²¹ The general prevalence of arbitration clauses grew through the 1990s,²² and in 2004 a survey found that 69.2% of respondent financial service providers included arbitration clauses in their consumer contracts.²³ Many of these credit card companies turned to the National Arbitration Forum (NAF), a private corporation that aggressively advertised its arbitration services to creditors.²⁴ NAF has become a focus of the anti-arbitration movement that has surfaced in the consumer context.²⁵

Congress has become a player in the new anti-arbitration movement;²⁶ recently, Senator Russell D. Feingold sponsored and held hear-

¹⁷ *Id.* at 1210.

¹⁸ *See, e.g.,* *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 941 (4th Cir. 1999) ("By promulgating this system of warped rules, Hooters so skewed the process in its favor that Phillips has been denied arbitration in any meaningful sense of the word.")

¹⁹ *See, e.g.,* *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30-32 (1991) (holding that diminished procedural safeguards do not make arbitration an inappropriate venue to decide an age discrimination claim); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (noting that parties that agree to arbitration "trade[] the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.")

²⁰ *See* 9 U.S.C. § 2 (2006) ("[Arbitration provisions] shall be valid, irrevocable, and enforceable, save upon such grounds as exist . . . for the revocation of any contract.")

²¹ JEROME T. BARRETT WITH JOSEPH P. BARRETT, *A HISTORY OF ALTERNATIVE DISPUTE RESOLUTION* 228 (2004).

²² *See id.* at 239 (describing the 1990s as "the go-go years" for arbitration).

²³ Linda J. Demaine & Deborah R. Hensler, "Volunteering" To Arbitrate Through Predispute Arbitration Clauses: The Average Consumer's Experience, *LAW & CONTEMP. PROBS.*, Winter-Spring 2004, at 55, 62-63.

²⁴ *See* Robert Berner & Brian Grow, *Banks vs. Consumers (Guess Who Wins)*, *BUS. WK.*, June 16, 2008, at 72, 72.

²⁵ *See, e.g.,* Simone Baribeau, *Consumer Advocates Slam Credit-Card Arbitration*, *CHRISTIAN SCI. MONITOR*, July 16, 2007, at 13; Berner & Grow, *supra* note 24, at 72-78.

²⁶ Maleske, *supra* note 3, at 16.

ings on the AFA, which would require that “[n]o predispute arbitration agreement shall be valid or enforceable if it requires arbitration of . . . an employment, consumer, or franchise dispute.”²⁷ In other words, arbitration could be agreed to only after a dispute had arisen. This proposed statute would obviously represent a significant shift in the law, and it would affect equally consumer-plaintiff and consumer-defendant arbitrations.

B. Concerns with Consumer Arbitration

This section will examine two broad problems with consumer-defendant arbitration: first, the incentives for bias by the arbitrator in favor of the repeat-player corporation, and second, the structural disadvantage that accrues to the less sophisticated consumer defendant when a more minimal set of procedures is used. Most data on consumer arbitration is derived from a 2002 California law mandating reporting of arbitration hearings beginning in January 2003.²⁸ A Public Citizen statistical analysis of California NAF cases showed seeming pro-corporate bias in consumer-defendant arbitrations.²⁹ In particular, the study found that the corporate plaintiff won its claims 94% of the time;³⁰ this finding was compounded by narrative reports of problematic NAF practices. For instance, in an episode that has received much attention,³¹ Harvard Law School Professor Elizabeth Bartholet, who had served as an arbitrator for NAF in twenty-four cases,³² was not chosen to arbitrate more cases after finding a corporate plaintiff liable for forty-eight thousand dollars on a defendant’s counterclaim.³³ Retired West Virginia Supreme Court Justice Richard Neely had a similar experience: after he declined to award litigation-related fees to

²⁷ Arbitration Fairness Act of 2007, S. 1782, 110th Cong. § 4(4) (2007).

²⁸ CAL. CIV. PROC. CODE § 1281.96 (West Supp. 2007).

²⁹ See PUBLIC CITIZEN, *supra* note 10.

³⁰ *Id.* at 4; see also Baribeau, *supra* note 25, at 13 (providing a 96% estimated win rate for creditors and debt buyers). *But cf.* PETER B. RUTLEDGE, U.S. CHAMBER INST. FOR LEGAL REFORM, ARBITRATION — A GOOD DEAL FOR CONSUMERS: A RESPONSE TO PUBLIC CITIZEN (2008) (study demonstrating positive results for consumers from arbitration).

³¹ See, e.g., PUBLIC CITIZEN, *supra* note 10, at 17, 30–31; Baribeau, *supra* note 25, at 13.

³² *Courting Big Business: The Supreme Court’s Recent Decisions on Corporate Misconduct and Laws Regulating Corporations: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. (2008) (statement of Elizabeth Bartholet), available at http://judiciary.senate.gov/hearings/testimony.cfm?id=3485&wit_id=7313.

³³ *Id.* There were other disturbing details reported about Professor Bartholet’s experience as an NAF arbitrator. After she found for the consumer defendant (on her twentieth case, with the first eighteen decided for the plaintiff and the nineteenth dismissed), apparently NAF removed her from some of the future arbitrations for which she had been scheduled, claiming that she had a scheduling conflict that she maintained did not, in fact, exist. Bartholet resigned after it became clear to her that arbitrators who found for the consumer would be penalized. See *id.*

a bank plaintiff, he “never got another case.”³⁴ Beyond individual anecdotes of bias, the high-volume practice of certain arbitrators may be cause for further concern. In the California sample, twenty-eight arbitrators handled 17,265 cases over the course of four years — 89.5% of the total cases handled by NAF.³⁵ This raises obvious questions about the size of those twenty-eight arbitrators’ practices with NAF relative to their total incomes; were corporate plaintiffs to cease to require one of those arbitrators’ services, she could be out of a lucrative job.³⁶ If a party that is a repeat player is allowed to reject arbitrators or otherwise influence the selection process, the arbitrator will have a strong incentive to find for the repeat player consistently. A private company that sells its arbitration services to creditors will also have a natural incentive to satisfy its customers.

The second broad fault that advocates find with consumer arbitration is the disadvantage that limited procedures may impose on the less sophisticated party.³⁷ Arbitrators might forgo even low-cost procedural safeguards if they increase the consumer’s chance of successfully making a claim. For example, in several cases, arbitration services have cut corners by sending notices by mail rather than through personal service.³⁸ This procedural deviation from civil litigation, with its concomitant potential to systematically disadvantage the less sophisticated, is exacerbated by the minimal role of judicial oversight over arbitration in practice.³⁹

C. Problems with Banning Pre-Dispute Arbitration Clauses

Although the AFA may in fact be an improvement over the consumer-defendant arbitration status quo, this section argues that the Act fails to take into account the useful cost-reducing effect of arbitration and the inability to achieve these benefits through post-dispute agreement. As discussed above, it seems likely that corporate plaintiffs have used arbitration partly to secure an unfair advantage over con-

³⁴ Richard Neely, *Arbitration and the Godless Bloodsuckers*, W. VA. LAW., Sept.–Oct. 2006, at 12, 12.

³⁵ PUBLIC CITIZEN, *supra* note 10, at 14–15. After the top twenty-eight arbitrators, the next 120 arbitrators most frequently utilized handled about ten percent of the total caseload. *Id.* at 15.

³⁶ The twenty-eight NAF arbitrators who handled the most cases ruled for businesses 95% of the time, but the next most active 120 arbitrators (who handled only ten percent of the total caseload) ruled for businesses in only 86% of the cases brought before them. *Id.*

³⁷ EDWARD BRUNET ET AL., *ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT* 131 (2006).

³⁸ MBNA Am. Bank, N.A. v. Credit, 132 P.3d 898, 901 (Kan. 2006); MBNA Am. Bank, N.A. v. Barben, No. 92,085, 2005 WL 1214244, at *4 (Kan. Ct. App. May 20, 2005).

³⁹ See *supra* pp. 1172–73; see also *Mandatory Binding Arbitration Agreements: Are They Fair to Consumers?: Hearing Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary*, 110th Cong. 26–30 (2007) (statement of F. Paul Bland, Jr., Staff Attorney, Public Justice).

sumer debtors via biased arbitrators and faulty mechanisms.⁴⁰ Nevertheless, creditors have a legitimate reason to prefer arbitrating consumer debt cases. This ironically parallels consumer plaintiffs' interest in breaking out of arbitration to file class actions. In consumer-plaintiff class actions, a claim that on its own has negative value becomes profitable when aggregation with similar claims brings about economies of scale. Some scholars argue that the very point of consumer arbitration clauses as they affect consumer plaintiffs is to remove the possibility of class actions and thereby create a situation in which no individual claim is worth filing.⁴¹ Removing this procedural mechanism decreases the plaintiff's ability to actualize her substantive rights.⁴² This is directly analogous to mandatory arbitration in corporate plaintiff litigation. If mandatory arbitration is abolished, then relatively low-value claims will need to be pursued by creditors in a more expensive forum. This, in turn, would make the substantive legal right they seek to enforce less realizable.

There is at least some evidence to suggest that, as currently constituted, the legal system does not enforce consumer credit claims cheaply enough. The typical debt collection action is brought not by the original financial services company to which a debt is owed but instead by a third party assignee who bought the claim, often for pennies on the dollar of debt owed.⁴³ This practice suggests that the claim to a dollar

⁴⁰ An important recent study may belie corporate claims of the general superiority of arbitration to judicial enforcement. See Theodore Eisenberg & Geoffrey P. Miller, *The Flight from Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in the Contracts of Publicly Held Companies*, 56 DEPAUL L. REV. 335, 373-74 (2007). This study compares the prevalence of arbitration provisions incorporated into companies' consumer contracts to those incorporated into their major commercial contracts. Perhaps unsurprisingly, corporations create clauses forcing consumers into arbitration far more often than they mutually agree with each other to enter into binding pre-dispute arbitration.

⁴¹ See Eisenberg et al., *supra* note 5, at 876; see also Issacharoff & Delaney, *supra* note 5, at 177. In jurisdictions that hold class action waivers unconscionable (without voiding the underlying arbitration provision), consumer contracts often indicate that, if an arbitrator certifies a class action, then that arbitration is no longer binding and the case reverts back to the court system. *Id.* at 179. This might be taken to indicate hypocrisy on the part of corporate defendants, or it might merely reflect a belief that the extra procedure provided by a court is worthwhile in the larger class action case without being useful for an individual consumer case. See Jack Wilson, "No-Class-Action Arbitration Clauses," *State-Law Unconscionability, and the Federal Arbitration Act: A Case for Federal Judicial Restraint and Congressional Action*, 23 QUINNIPIAC L. REV. 737, 777-79 (2004).

⁴² See Cynthia L. Estlund, *Between Rights and Contract: Arbitration Agreements and Non-Compete Covenants As a Hybrid Form of Employment Law*, 155 U. PA. L. REV. 379, 426-29 (2006) (discussing situations in which procedural limitations of arbitration and noncompete covenants impinge upon substantive rights).

⁴³ *Zombie Debt: The Bills That Won't Die*, ABC News, Feb. 28, 2008, <http://abcnews.go.com/GMA/Story?id=4358702&page=1>; see also *MBNA Am. Bank, N.A. v. Nelson*, No. 13777/06, 2007 WL 1704618, at *2 (N.Y. Civ. Ct. May 24, 2007).

of debt is in fact worth far less than a dollar, likely due to the inability to pay of credit card debtors who have judgments filed against them.⁴⁴

Achieving cost efficiencies requires that parties already be bound to arbitrate before a conflict arises, and this is precisely the type of arbitration agreement that the AFA would void. The necessity of requiring arbitration pre-dispute arises for three reasons. First, assuming that arbitration is a cheaper way of enforcing legal rights, rational defendants might not want to enter into it post-dispute if they know they are likely to lose.⁴⁵ Such a defendant might hope that, faced with the significantly greater costs of pursuing litigation, the corporate plaintiff would simply drop the claim. Second, the use of a loser-pays rule in some arbitrations can further amplify the disincentive for a defendant to accede to arbitration. Third, even if it were economically rational for the consumer to enter into a post-conflict arbitration agreement (perhaps if her legal fees were paid), the transaction cost of bargaining might itself be overly expensive,⁴⁶ and given the high stakes for the individual consumer, she might be too hostile to agree to anything that her creditor is requesting of her. Contrariwise, if arbitration were in fact a cheaper and more efficient way of enforcing legal rights, a consumer entering into an initial contract with a creditor would have an interest in consenting to mandatory binding arbitration in the event of a dispute, since at least some of the benefits would likely be passed on to the consumer in the form of lower costs. These reasons all argue for allowing consumers to make a binding choice pre-dispute rather than forcing arbitration choices to be made after a conflict has arisen.⁴⁷

⁴⁴ See Richard M. Hynes, *Broke but Not Bankrupt: Consumer Debt Collection in State Courts*, 60 FLA. L. REV. 1, 1 (2008) (noting that most of the nearly one million civil judgments for debt collection each year in Virginia go unpaid).

⁴⁵ This is true generally because once a party knows the dispute in which it will engage, its incentives are changed. Peter B. Rutledge, *Who Can Be Against Fairness? The Case Against the Arbitration Fairness Act*, 9 CARDOZO J. CONFLICT RESOL. 267, 278–79 (2008).

⁴⁶ One way this cost might manifest itself is in the simple inertia of many debtor defendants. It is particularly common under the status quo for debtors to receive a complaint for arbitration and simply disregard it because they do not realize it is an official legal proceeding and because it likely is only one in a long string of pieces of debt collection correspondence. See, e.g., *Credigy Receivable, Inc. v. Day*, No. CV-06-880, 2008 WL 2942089, at *2 (Ala. Civ. App. Aug. 1, 2008); *MBNA Am. Bank, N.A. v. Bowling*, No. 2007-CA-000956-MR, 2008 WL 3547649, at *1 (Ky. Ct. App. Aug. 15, 2008).

⁴⁷ Interestingly, focusing arbitration reform efforts on the elimination of preconflict mandatory arbitration may hurt some consumers because it will shift the focus away from efforts to regulate the existing arbitration procedures. Some creditors will still attempt to induce defendants into unregulated — and likely biased — arbitrations post-conflict. Unsophisticated defendants — see the cases cited *supra* note 46 for examples of defendants who represent themselves pro se and fail to show up at the arbitration hearing or challenge it in a timely fashion — may assent and suffer.

D. Possible Paths for Improvement

Even if pre-dispute arbitration agreements are worthwhile theoretically, the current state of consumer arbitration seems highly flawed, and reform is necessary. This section aims to sketch out the major alternatives for reform of the AFA and to provide a recommendation as to the appropriate choice.

As argued above, an essential problem with arbitration is the power imbalance between the repeat player and the consumer. Once arbitration is upheld as a cost-reducing mechanism, the question then becomes how it can be adjusted in such a way as to substantially remove this power imbalance. Perhaps the most intuitive option would be to increase judicial scrutiny of arbitration decisions.⁴⁸ Some have suggested allowing the judiciary to overturn an award if the decision is arbitrary and capricious.⁴⁹ Requiring a reasoned explanation for an arbitrator's decision would likely improve the average accuracy of arbitration decisions, but it would also increase the costs of pursuing a claim in arbitration. Under this proposed solution, the facts in dispute would essentially need to be examined twice — first by the arbitrator and then again by a judge checking over the arbitrator's work. If the concern were simply to produce fair outcomes at any cost, this solution might be superior to the current system of arbitration, but, if that is the goal, both would be inferior to simply relying on courts in the first place. The essential goal of arbitration is to provide fair outcomes at a socially affordable price.

A different route for imposing judicial review might be to raise the basic procedural standards that arbitration must meet for it to be enforced.⁵⁰ This would solve the problem of double review of substance that is inherent in the judicial solution mentioned above, since the arbitrator's substantive determination of fact and law would be sacrosanct unless she failed to follow proper procedure. Although approaching the problem from a procedural angle is indeed an appropriate part of the solution, the court system still does not seem like the best actor for several reasons. First, an increased level of procedural review would affect only litigants who can afford to hire a lawyer and pursue their claims in court. Given the fact that these are people who cannot pay their credit cards, most will likely fail to chal-

⁴⁸ See Recent Proposed Legislation, 121 HARV. L. REV. 2262, 2267 (2008).

⁴⁹ Sarah Rudolph Cole, *Revising the FAA To Permit Expanded Judicial Review of Arbitration Awards*, 8 NEV. L.J. 214, 231–32 (2007).

⁵⁰ See Russell D. Feingold, Policy Essay, *Mandatory Arbitration: What Process Is Due?*, 39 HARV. J. ON LEGIS. 281, 298 (2002); cf. Shelly Smith, Note, *Mandatory Arbitration Clauses in Consumer Contracts: Consumer Protection and the Circumvention of the Judicial System*, 50 DEPAUL L. REV. 1191, 1248–51 (2001) (arguing for checks on entering into arbitration agreements in the first place).

lenge their arbitration, leaving the judicial solution, while perhaps salutary in theory, ineffectual in fact. Second, even under the assumption that a significant number of cases would be appealed to the courts, the penalty to the corporate plaintiff would be low (since it could simply refile the case in a more procedurally appropriate venue), so corporations would still have an incentive to push the limits of procedural fairness. Finally, the above solution would be politically vulnerable to interest group lobbying. Judges currently review arbitration on a procedural basis, so the new change would be one of degree rather than of kind, making changes possibly less noticeable by the public. At the same time, by providing a sporadic benefit to a disorganized and vulnerable class of debtors, the policy change would not create a strong natural constituency to lobby on its behalf, leaving it susceptible to legislative backsliding.

If the solution is not judicial review, then the question becomes what regulatory actor could best oversee arbitrations. One proposal has been to push arbitration into the public sector, removing private arbitrators from the system and requiring that any arbitrator be employed by the government.⁵¹ This seems an extreme solution and one that would remove the benefits that result from allowing parties to have a full range of dispute resolution choices, but it points to a broader direction that regulation of arbitration could take — monitoring by administrative agencies. Assuming that, as a basis for monitoring, procedure is preferable to substance, the benefits of administrative agency monitoring of arbitration are quite typical of administrative oversight in general. Agency employees would develop an expertise in arbitration cases; their procedures could be more flexible and fine-tuned to this particular problem; and they would be more accountable to public oversight than the judiciary.

At the same time, the general infirmities of administrative regulation would also be present, and these would likely outweigh the benefits in this particular case. Administrative agencies are vulnerable to regulatory capture,⁵² which seems a concern that might be especially implicated in this case: financial services companies have proven to be capable in lobbying Congress for changes in laws protecting debtors⁵³

⁵¹ Cf. Jean R. Sternlight, *Creeping Mandatory Arbitration: Is it Just?*, 57 STAN. L. REV. 1631, 1673–75 (2005) (“[I]n rejecting mandatory private arbitration we must not endorse our current mode of public litigation as the only just form of dispute resolution. Rather, we must continue to search for an array of dispute resolution processes that, together, will best help us achieve justice.”).

⁵² See generally George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 3, 6–12 (1971) (arguing that private interests are likely to attempt to use public regulation as a source of profit by coopting the legal regime).

⁵³ For example, some commentators have claimed that recent amendments to consumer bankruptcy law were motivated by lobbying from the financial services industry. See Catherine E.

and may bring their power equally to bear on agencies. Moreover, since the central problem with arbitration is that debtors have far fewer resources to challenge arbitration agreements than creditors do, it might be particularly unwise to force them to vindicate their rights in an arena where repeat-player influence can be especially prevalent.⁵⁴ Finally, agencies are also sometimes understaffed relative to the scope of their regulation,⁵⁵ so an agency might be unable to adequately enforce its regulation of arbitration.

General criteria for the optimal arbitration regulation regime can be extrapolated from the difficulties with the above proposed solutions. To allow the benefits of arbitration, review must be cheap, but to overcome the harms, there needs to be an interest on the debtor side sufficient to countervail the preexisting sophistication of corporate plaintiffs. One possibility would be to farm out oversight to private enforcement. This could be done by establishing a system of penalties imposed on procedurally infirm arbitrators and allowing third parties like law firms to sue (either on behalf of the defendant in the arbitration or on their own) to collect those penalties. Such a scheme would require a baseline rule of transparency concerning consumer arbitrations, their outcomes, and the procedures used to derive them; but, while confidentiality has been a useful aspect of arbitration in other contexts, similar concerns do not apply to the disputes between credit card providers and their customers. A system of private enforcement would have several beneficial effects vis-à-vis other possible solutions. The private actor framework would be cheap to enforce, since it would only incentivize economically rational law firms to sue in cases where recovery was likely. It would also create an economic interest (that of the third-party firms) to oppose the financial interest of the corporate creditor, and in so doing, it would help even the playing field. A potential problem with the system is that it might underenforce arbitration standards in cases where violations are not clear; however, if the penalties are set at an appropriate level, then the risk of suit in borderline cases will be enough to disincentivize bad action.⁵⁶

Vance & Paige Barr, *The Facts & Fiction of Bankruptcy Reform*, 1 DEPAUL BUS. & COM. L.J. 361, 367-68 (2003).

⁵⁴ See Carrie Menkel-Meadow, *Do the "Haves" Come Out Ahead in Alternative Judicial Systems?: Repeat Players in ADR*, 15 OHIO ST. J. ON DISP. RESOL. 19, 33-37 (1999).

⁵⁵ See Marc T. Law, *How Do Regulators Regulate? Enforcement of the Pure Food and Drugs Act, 1907-38*, 22 J.L. ECON. & ORG. 459, 475 (2006) (arguing that the FDA in the early twentieth century was understaffed given the large size of its administrative portfolio).

⁵⁶ Cf. Steven Shavell, *The Fundamental Divergence Between the Private and the Social Motive To Use the Legal System*, 26 J. LEGAL STUD. 575 (1997) (arguing that the private incentive to sue inevitably diverges from the social optimum).

E. Conclusion

Although pre-dispute binding arbitration has a place in a legitimate and fair debt collection system, the American experience with arbitration up to this point shows that it is a source for bias and unfair decisionmaking. Nevertheless, if arbitration proceedings were fair, then it would be worthwhile to enforce pre-dispute mandatory binding arbitration clauses in consumer-defendant disputes. The creation of a fair system of arbitration is thus an important and difficult precondition. The best solution may be to create a private market by establishing monetary penalties collectable by private actors when they prove procedural deficiencies.

IV. ACCESS TO COURTS AND VIDEOCONFERENCING IN IMMIGRATION COURT PROCEEDINGS

For many people, access to federal courts is constrained by the limited administrative resources of the judiciary, and not by legal principles or legislative determinations. To address this limitation, videoconferencing has been seized upon as an alternative means of providing access, ostensibly expediting trials by enabling remote access to the finite pool of judicial resources.¹ This technology has penetrated only the fringes of most legal proceedings² and, where permitted, its substitution for actual presence has been severely circumscribed.³ In immigration removal proceedings, however, videoconferencing is much more prominent and serves as an alternate means for conducting immigration merits hearings in their entirety.⁴ This Part examines the

¹ Among the asserted benefits of videoconferencing are “effective case management” through the sharing of dockets across locations and “more expedient hearing[s]” for respondents. EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, U.S. DEP’T OF JUSTICE, FACT SHEET: EOIR’S VIDEO CONFERENCING INITIATIVE 1 (2004) [hereinafter VC FACT SHEET], available at <http://www.usdoj.gov/eoir/press/VCFactSheetSep04.pdf>; see also FED. R. CRIM. P. 5(f) advisory committee’s note.

² See, e.g., FED. R. CIV. P. 43(a) (allowing a good cause exception for witness testimony presented via “contemporaneous transmission from a different location”); FED. R. CRIM. P. 5(f) (allowing the use of videoconferencing for the initial appearance of criminal defendants); FED. R. CRIM. P. 10(c) (allowing the use of videoconferencing for arraignments of criminal defendants).

³ In the pretrial phases of criminal proceedings, where the defendant’s presence is not explicitly required under Rule 43 of the Federal Rules of Criminal Procedure, some federal courts have allowed defendants to attend via videoconference. See, e.g., *United States v. Burke*, 345 F.3d 416, 420–26 (6th Cir. 2003).

⁴ Videoconference hearings are allowed for all proceedings involving the inadmissibility or removability of aliens. 8 U.S.C. § 1229a(b)(2)(A)(iii) (2006). Removal proceedings accounted for 266,140 — or 97.5% — of the 272,879 proceedings completed by immigration courts in fiscal year (FY) 2007. See EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, U.S. DEP’T OF JUSTICE, FY 2007 STATISTICAL YEAR BOOK, at C4 (2008) [hereinafter STATISTICAL YEAR BOOK], available at <http://www.usdoj.gov/eoir/statspub/fy07syb.pdf>. While there were only 994 asylum-only hearings, *id.*, 55,573 of the completed proceedings (19.8%) involved affirmative or defensive

use of videoconferencing as a wholesale replacement for in-person proceedings within the immigration context and argues that it fails to provide access for immigrant respondents because it obstructs the fact-finding process and prevents immigration courts from fulfilling the adjudicative functions for which they were designed.

The logic of this Part proceeds simply. The factfinding process is consistently defined to include evaluations of credibility and demeanor. Research on video-mediated communications strongly suggests that videoconferencing prevents the accurate assessment of customary indices of these characteristics. Therefore, videoconferencing fails as a factfinding method in contexts such as immigration courts where determinations rely heavily on observational assessments of credibility.

A. *Demeanor and Credibility in the Factfinding Process*

1. *Historical Role of the Factfinder.* — Courts have traditionally viewed observations of demeanor and evaluations of credibility as defining elements of the factfinding process. The Supreme Court has observed that “the manner of the [speaker] while testifying is oftentimes more indicative of the real character of his opinion than his words,”⁵ and has recognized that “only the [factfinder] can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener’s understanding of and belief in what is said.”⁶ The significant deference granted the initial factfinder flows directly from this principle. For instance, the Supreme Court has explained that “[f]ace to face with living witnesses, the original trier of the facts holds a position of advantage [T]he exercise of his power of observation often proves the most accurate method of ascertaining the truth.”⁷

2. *Federal Adoption of Videoconferencing Technology.* — Despite early acceptance of videoconferencing within some state court sys-

asylum claims, *see id.* at 12. This Part uses the term “immigration court proceedings” to refer to all proceedings under 8 U.S.C. § 1229a, many of which entail the assessment of subjective factors such as fear, STATISTICAL YEAR BOOK, *supra*, at C1–C2, or hardship, *id.* at R2.

⁵ Reynolds v. United States, 98 U.S. 145, 156–57 (1879).

⁶ Anderson v. City of Bessamer, 470 U.S. 564, 575 (1985).

⁷ United States v. Or. State Med. Soc’y, 343 U.S. 326, 339 (1952) (quoting Boyd v. Boyd, 169 N.E. 632, 634 (N.Y. 1930)) (internal quotation mark omitted). The inherent difficulties in “review[ing] a demeanor finding from a paper record,” *In re A-S-*, 21 I. & N. Dec. 1106, 1111 (B.I.A. 1998), are recognized outside of the Article III court context as well, and a substantial level of deference therefore accrues to the administrative judge and his first-hand evaluations. The Bureau of Immigration Appeals, for instance, “accord[s] a high degree of deference” to an immigration judge’s “credibility finding which is supported by an adverse inference drawn from an alien’s demeanor.” *Id.*; *see also* Universal Camera Corp. v. NLRB, 340 U.S. 474, 495 (1951) (recognizing that deference should be given to administrative judges and their assessments of demeanor in cases where credibility is relevant to the outcome).

tems,⁸ the federal court system formally adopted videoconferencing only recently. In 1996, the Federal Rules of Civil Procedure were amended to allow for the “contemporaneous transmission [of testimony] from a different location,” but only “[f]or good cause in compelling circumstances.”⁹ While allowing this change, the advisory committee reasserted that “[t]he importance of presenting live testimony in court cannot be forgotten,”¹⁰ and recognized that “[t]he opportunity to judge the demeanor of a witness face-to-face is accorded great value in our tradition. [Therefore, t]ransmission cannot be justified merely by showing that it is inconvenient for the witness to attend the trial.”¹¹ This limiting principle illustrates that videoconferencing was not intended as the default procedure, but rather as an exception — and not one that can be justified merely on convenience grounds.¹²

Videoconferencing was codified even more recently in the 2002 Federal Rules of Criminal Procedure, which permitted videoconferencing in criminal proceedings, but limited its use to a defendant’s initial appearance and arraignment.¹³ The advisory committee recognized that “[m]uch can be lost when video teleconferencing occurs”¹⁴ and noted the potential for consequences such as the erosion of public confidence in the criminal legal system, the limitation of attorney-client contact, and the impairment of judicial assessments of defendants’ “physical, emotional, and mental condition[s] . . . [relevant to] pretrial decisions, such as release.”¹⁵ Weighing these costs against potential benefits, the committee ultimately allowed videoconferencing in limited circumstances, and *only* with the defendant’s consent.¹⁶

The adoption of videoconferencing in the immigration court context sharply contrasts with this limited acquiescence. The 1996 amendments to the Immigration and Nationality Act¹⁷ (INA) introduced videoconferencing as an alternate and undifferentiated means of

⁸ In 1972, for example, Illinois conducted bail hearings via videophone, a precursor to videoconferencing, and by 1983, Dade County, Florida, was processing misdemeanor arraignments through a closed-circuit videoconferencing system. NAT’L CTR. FOR STATE COURTS, BRIEFING PAPERS: VIDEOCONFERENCING 2–3 (1995), available at http://www.ncsconline.org/WC/Publications/KIS_VidConBriefPub.pdf.

⁹ FED. R. CIV. P. 43(a).

¹⁰ FED. R. CIV. P. 43(a) advisory committee’s note.

¹¹ *Id.*

¹² See, e.g., *Air Turbine Tech., Inc. v. Atlas Copco AB*, 217 F.R.D. 545, 546 (S.D. Fla. 2003) (excluding witness testimony via videoconference in part where the plaintiff failed to meet the “compelling circumstances” prong of Rule 43(a)).

¹³ FED. R. CRIM. P. 5; FED. R. CRIM. P. 10. But some scholars have argued that even the limited use of videoconferencing harms defendants. See Anne Bowen Poulin, *Criminal Justice and Videoconferencing Technology: The Remote Defendant*, 78 TUL. L. REV. 1089 (2004).

¹⁴ FED. R. CRIM. P. 5 advisory committee’s note.

¹⁵ *Id.*

¹⁶ FED. R. CRIM. P. 5(f).

¹⁷ 8 U.S.C. § 1229a (2006).

conducting previously in-person removal hearings, without requiring the respondent's consent.¹⁸ Videoconferencing thus may provide the sole means of interaction between the immigrant respondent and the immigration judge who determines "whether [the] alien may be admitted to . . . [or] removed from the United States."¹⁹

This unmitigated acceptance of videoconferencing does not reflect the view that demeanor and credibility assessments are unimportant in the immigration context. To the contrary, the INA explicitly codified assessments of credibility based on "demeanor, candor, or responsiveness" as central facts in evaluating an immigrant's claim for relief.²⁰ In addition, the Bureau of Immigration Appeals (BIA) and federal courts afford an almost insurmountable level of deference to the immigration judge's credibility findings "primarily because the [judge has] an opportunity to personally observe the petitioner's testimony."²¹ Thus, in light of these analogous understandings of the factfinding process and the centrality of demeanor and credibility across judicial contexts, the blanket adoption of videoconferencing in immigration appears to be an anomalous development.

B. Videoconferencing in Research and Practice

Although the Executive Office for Immigration Review (EOIR) has never formally studied the effectiveness of videoconferencing,²² it nonetheless contends that videoconferencing "does not change adjudicative quality or . . . decisional outcomes."²³ Research on mediated communication generally, and videoconference hearings specifically,²⁴

¹⁸ *Id.* § 1229a(b)(2)(A) ("The proceeding may take place (i) in person [or] . . . (iii) through video conference . . .").

¹⁹ *Id.* § 1229a(a)(3).

²⁰ *Id.* § 1229a(c)(4)(B)–(C).

²¹ *Rusu v. INS*, 296 F.3d 316, 323 (4th Cir. 2002).

²² See LEGAL ASSISTANCE FOUND. OF METRO. CHI. & CHI. APPLESEED FUND FOR JUSTICE, VIDEOCONFERENCING IN REMOVAL HEARINGS: A CASE STUDY OF THE CHICAGO IMMIGRATION COURT 11 (2005) [hereinafter CHICAGO STUDY], available at http://www.chicagoappleseed.org/projects/immigration/VideoConfReport_080205.pdf.

²³ EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, EOIR HEADQUARTERS IMMIGRATION COURT FACT SHEET 1 (2004) [hereinafter HQIC FACT SHEET], available at <http://www.usdoj.gov/eoir/press/04/HQICFactSheet.pdf>. The EOIR and supporters of videoconferencing maintain that videoconferencing is the "functional[] duplicate" of in-person proceedings, Frank M. Walsh & Edward M. Walsh, *Effective Processing or Assembly-Line Justice? The Use of Teleconferencing in Asylum Removal Hearings*, 22 GEO. IMMIGR. L.J. 259, 263 (2008) (quoting Interview with the Hon. Frederic Lederer, Chancellor Professor of Law and Director of the Center for Legal and Court Technology in Washington, D.C. (Mar. 28, 2007)) (internal quotation marks omitted), "permit[ting] individuals to see, hear, and speak with each other as though they are at the same location," HQIC FACT SHEET, *supra*, at 1.

²⁴ See generally Mark Federman, *On the Media Effects of Immigration and Refugee Board Hearings via Videoconference*, 19 J. REFUGEE STUD. 433 (2006); Aaron Haas, *Videoconferencing in Immigration Proceedings*, 5 PIERCE L. REV. 59 (2006).

however, suggests otherwise. Communication is well-recognized as encompassing more than just the words uttered by the speaker. Rather, meaning is conveyed through inflection and nonverbal cues such as body language and facial expression.²⁵ Mediating communication through videoconferencing “inevitably skews the perceptions of others [by] . . . strip[ping] some nonverbal cues . . . or overemphasiz[ing] them[,] . . . [failing to] replicate normal eye contact,”²⁶ and “exaggerat[ing] or flatten[ing] . . . affect.”²⁷ Experiments testing the effectiveness of video-mediated communication suggest that its “visual signals . . . are simply less effective than those in face-to-face interaction . . . [and] nonverbal information does not have the same effect in this medium.”²⁸ Experimental research has suggested that factfinders evaluate televised testimony as less credible than in-court testimony,²⁹ and that “testify[ing] through a video monitor is less persuasive because it is a less direct form of communication.”³⁰

Research indicates that these problems persist in actual videoconference proceedings. For instance, a debriefing session found that jurors had difficulty following the videoconferenced testimony of a non-English speaker.³¹ In a study of videoconferenced immigration hearings, attorneys expressed concern that “videoconferencing undermined the judge’s ability to assess the immigrant’s credibility” and complained that “split-second delays in the video transmission made the image ‘choppier’ in a subtle way and made the immigrant appear less truthful.”³² Attorneys and observers similarly noted that “emotions were less clearly communicated,” and “judges were likely to feel more emotionally distant from and apathetic to an immigrant on a

²⁵ See, for example, PETER A. ANDERSEN, *NONVERBAL COMMUNICATION: FORMS AND FUNCTIONS* (1999), which surveys communication research and contends that nonverbal communication is “a vital part of the communication process,” *id.* at 2, and may account for 65 to 93% of social meaning conveyed during interpersonal communication, *id.* at 1.

²⁶ Poulin, *supra* note 13, at 1108.

²⁷ Walsh & Walsh, *supra* note 23, at 268.

²⁸ Gwyneth Doherty-Sneddon et al., *Face-to-Face and Video-Mediated Communication: A Comparison of Dialogue Structure and Task Performance*, 3 *J. EXPERIMENTAL PSYCHOL.: APPLIED* 105, 120 (1997).

²⁹ See Gail S. Goodman et al., *Face-to-Face Confrontation: Effects of Closed-Circuit Technology on Children’s Eyewitness Testimony and Jurors’ Decisions*, 22 *LAW & HUM. BEHAV.* 165, 195–96 (1998).

³⁰ David F. Ross et al., *The Impact of Protective Shields and Videotape Testimony on Conviction Rates in a Simulated Trial of Child Sexual Abuse*, 18 *LAW & HUM. BEHAV.* 553, 565 (1994); see *id.* at 564–65 (noting that mock-trial defendants were less likely to be convicted when a child’s testimony was the sole piece of evidence and testimony was given over a closed-circuit television).

³¹ Nancy Gertner, *Videoconferencing: Learning Through Screens*, 12 *WM. & MARY BILL RTS. J.* 769, 788 & n.108 (2004).

³² CHICAGO STUDY, *supra* note 22, at 45.

television screen.”³³ Thus, even without significant technological difficulties, videoconferencing is likely to affect the factfinding process in ways that are detrimental to the immigrant respondent. The limited existing research supports this contention. The only study to examine outcome disparities in immigration proceedings found a significant difference in the rate of asylum grants based on procedural form.³⁴ In Fiscal Year (FY) 2005, the grant rate for represented aliens³⁵ with in-person hearings was nearly 15 percentage points higher than for those with videoconference hearings.³⁶ In FY 2006, it was over 17 percentage points higher.³⁷

As of 2005, forty-six immigration courtrooms utilized videoconferencing equipment.³⁸ Despite this widespread use, neither the INA nor the regulations promulgated under its authority specify standards for the videoconferencing technology or procedures used in immigration hearings,³⁹ and therefore such hearings may take a number of forms.⁴⁰

³³ *Id.* at 45–46. One observer was “alarmed by the degree of indifference displayed by judges and attorneys” when an immigrant was sobbing onscreen but “no one even noticed her.” *Id.* at 46; see also Haas, *supra* note 24, at 60 (“[T]he videoconferencing technology mediated the interaction and communication between the judge and the respondent, subtly but significantly affecting the conduct of the hearing, the respondent’s ability to present his case before the court, and ultimately the verdict itself.”). Such observations are consistent with criticisms of videoconferencing leveled from the bench in other contexts, including an observation that “[t]he immediacy of a living person is lost’ with video technology.” *Thornton v. Snyder*, 428 F.3d 690, 697 (7th Cir. 2005) (quoting *Stoner v. Sowders*, 997 F.2d 209, 213 (6th Cir. 1993)).

³⁴ See Walsh & Walsh, *supra* note 23, at 272.

³⁵ There are observed outcome differences between represented and unrepresented aliens. Because a greater number of unrepresented aliens receive hearings via videoconference, these numbers reflect only the difference among the represented population. Among *all* asylum petitioners in FY 2005 and FY 2006, the in-person grant rates were higher by 14.5% and 23% respectively. *Id.* at 271 tbl.1.

³⁶ *Id.* at 272 tbl.2.

³⁷ See *id.* In both years the difference was statistically significant, with less than a 2% likelihood that the observed differences were due to chance. The z-scores for the observed difference among represented immigrants were -5.8 and -6.16 in FY 2005 and FY 2006 respectively. *Id.* app. C at 283.

³⁸ CHICAGO STUDY, *supra* note 22, at 11.

³⁹ See *id.* at 51 (noting the absence of guidelines for the use of videoconferencing); see also 8 C.F.R. § 1003.259(c) (2008). The Immigration Court Practice Manual similarly neglects to specify any standard procedure or equipment for conducting hearings via videoconference. See OFFICE OF THE CHIEF IMMIGRATION JUDGE, IMMIGRATION COURT PRACTICE MANUAL 58–59 (2008), available at <http://www.usdoj.gov/eoir/vll/OCIJPracManual/Chap%204.pdf>.

⁴⁰ One common variation involves the location of the parties involved. For instance, all participants except for the judge may be present in one location, the immigrant respondent may be the only remote participant, see, e.g., *Rusu v. INS*, 296 F.3d 316, 319 (4th Cir. 2002), or the judge, respondent, and counsel may each participate from separate locations, see Haas, *supra* note 24, at 59. Determining where to appear presents a “Catch-22” for a respondent’s attorney: choose to be “present with [the] client — thereby able to confer privately . . . [but unable to] interact as effectively with the [immigration judge —] . . . [or] decide[] to be with the [judge] . . . [and] forfeit[] the ability to privately advise . . . [the] client.” *Rusu*, 296 F.3d at 323.

Regardless of the particular configuration, in all instances the immigrant and judge interact remotely, and the videoconferencing technology provides their sole means of communication. The “image of the [respondent] on the screen is small, and contrast and focus seem to present problems[,] . . . [making it] difficult to observe facial expressions or emotion.”⁴¹ A picture-in-picture feature allows the judge to see both the immigrant and the image of herself that the respondent receives (and vice versa)⁴² — further reducing the size of the respondent’s image. The limited camera angles can also impair the respondent’s ability to see the individual speaking at any given time, and can cause disorientation.⁴³ Images relayed may freeze⁴⁴ or suffer from transmission delays and poor sound quality.⁴⁵ An observational study of 110 videoconference hearings in a single Chicago courthouse found that twenty percent of hearings experienced technical problems and nearly forty-five percent suffered from one or more problems specifically *created or exacerbated* by the videoconferencing procedures.⁴⁶ Evidence review is also complicated by videoconferencing because it relies on equipment to transfer documents between locations, and when such technology is present it is not always functional, leaving participants to “just h[o]ld documents up to the camera” for others to review.⁴⁷ There is no verification that the content of these documents is actually discerned,⁴⁸ and examining the evidence even in this man-

⁴¹ Peggy Gleason, *Reality TV for Immigrants: Representing Clients in Video Conference Hearings*, 5 BENDER’S IMMIGR. BULL. 732, 733 (2000).

⁴² See *id.*

⁴³ See, e.g., *Rusu*, 296 F.3d at 319 (noting immigrant’s confusion “when the person addressing him was not the one on camera”); Cormac T. Connor, Note, *Human Rights Violations in the Information Age*, 16 GEO. IMMIGR. L.J. 207, 207–08 (2001) (describing an immigrant’s confusion when he was only able to view “an image of the judge’s hands . . . and his attorney and brother — dimly lit and out of focus — in the background”).

⁴⁴ See CHICAGO STUDY, *supra* note 22, at 37; Gleason, *supra* note 41, at 733.

⁴⁵ See CHICAGO STUDY, *supra* note 22, at 37.

⁴⁶ *Id.* at 36. Respondents relying on interpreters had a greater frequency of problems created or exacerbated by videoconferencing and were more likely to receive negative dispositions. See *id.* at 42. Interpreters typically participate via speakerphone from the judge’s courtroom, forcing their communication with the respondent to be mediated through both the telephonic and videoconferencing equipment. See *id.* at 26, 44. If interpreters are physically present, they are frequently with the judge and not the immigrant respondent. See *id.* at 26. Thus, while interpretive difficulties generally affect the quality and ultimate outcomes of immigration proceedings, see, e.g., Deborah E. Anker, *Determining Asylum Claims in the United States: A Case Study on the Implementation of Legal Norms in an Unstructured Adjudicatory Environment*, 19 N.Y.U. REV. L. & SOC. CHANGE 433, 505–15 (1992); see generally Walter Kälin, *Troubled Communication: Cross-Cultural Misunderstandings in the Asylum-Hearing*, 20 INT’L MIGRATION REV. 230 (1986), these problems are worsened by the use of videoconferencing.

⁴⁷ CHICAGO STUDY, *supra* note 22, at 45.

⁴⁸ See *id.*

ner may be impossible.⁴⁹ Moreover, some forms of evidence, such as injuries inflicted through torture in an asylum-seeker's home country, may not be transmitted at all.⁵⁰

C. *Federal Court Review of Videoconferencing in Immigration*

Respondents challenging the use of videoconferencing in immigration court proceedings frequently allege violations of due process.⁵¹ They neglect, however, to ground this due process claim in the understanding of the fundamental *purpose* of the factfinding process developed here. It is precisely because immigrants do in fact have a protected due process right to a meaningful opportunity to be heard that Congress cannot adopt procedures recognized as failing (by the judiciary and legislature's own standards⁵²) to provide a meaningful opportunity to find the facts relevant to the resolution of their claims.

Although Congress's plenary power to regulate immigration is well established,⁵³ equally established is the constitutional right of the immigrant to be free from the arbitrary exercises of that power.⁵⁴ Therefore, even allegedly illegal immigrants must be afforded "all opportunity to be heard upon the questions involving [their] right[s] to be and remain in the United States."⁵⁵ While this right does not specify a procedural form, the procedures must satisfy government interests and "at the same time be appropriate to the nature of the case."⁵⁶ Moreover, "to ensure fairness, [they] must provide [the immigrant] an opportunity to present her case effectively . . . [without] impos[ing] an undue burden on the Government."⁵⁷ Thus, to an extent, courts must consider the quality of adjudicative methods used to determine if due process standards have been met. As discussed above, both the practice of reviewing courts and the text of the INA render demeanor evi-

⁴⁹ See *id.*; see also *Rapheal v. Mukasey*, 533 F.3d 521, 533 (7th Cir. 2008) (granting a new hearing due to respondent's inability to examine a contested document in the possession of the immigration judge).

⁵⁰ See *Mohamed v. Gonzales*, 477 F.3d 522, 527 (8th Cir. 2007) (finding no prejudice resulting from asylum-seeker's claim that he was unable to show an immigration judge scars on his back to support his claim of prior torture).

⁵¹ See, e.g., *Aslam v. Mukasey*, 537 F.3d 110, 114–15 (2d Cir. 2008).

⁵² See *supra* notes 5–21 and accompanying text.

⁵³ See, e.g., *Mathews v. Diaz*, 426 U.S. 67, 79–80 (1976) (recognizing Congress's "broad power over naturalization and immigration").

⁵⁴ See *Yamataya v. Fisher* (The Japanese Immigrant Case), 189 U.S. 86, 100–01 (1903) (recognizing that the removal of aliens involves the loss of liberty, and therefore must conform to the fundamental principles of due process).

⁵⁵ *Id.* at 101.

⁵⁶ *Id.*

⁵⁷ *Landon v. Plasencia*, 459 U.S. 21, 36 (1982) (remanding to determine if the procedures in respondent's exclusion hearing met the requisite standard of due process under *Mathews v. Eldridge*, 424 U.S. 319 (1976)); see *infra* note 69.

dence and credibility determinations germane to factfinding. Therefore, if videoconferencing does in fact exclude or distort this evidence, as the research suggests, its use as a factfinding method is a violation of immigrants' due process rights.

Thus far, reviewing courts have failed to recognize the use of videoconferencing by immigration courts as fundamentally incompatible with the factfinding process. The first significant challenge reached the U.S. Courts of Appeals in 2002. In *Rusu v. INS*,⁵⁸ the Fourth Circuit held that an asylum hearing admittedly "plagued by communication problems"⁵⁹ did not prejudice the outcome of Rusu's hearing.⁶⁰ In *Rusu*, the respondent participated in his hearing from a detention center while counsel and the immigration judge convened in an Arlington courtroom.⁶¹ The reviewing court recognized a host of problems, including respondent's obvious confusion when the person speaking was not the individual appearing onscreen,⁶² the immigration judge's difficulty seeing the respondent,⁶³ and the participants' mutual inability to understand each other at times.⁶⁴ Notwithstanding these difficulties, the immigration judge ultimately determined that she was able to "glean the asserted factual basis of Rusu's [a]pplication."⁶⁵ The Fourth Circuit suggested that despite the numerous communication problems, "Rusu nevertheless seem[ed] to have had an opportunity to be heard 'at a meaningful time and in a meaningful manner.'"⁶⁶

The Fourth Circuit ultimately concluded that it need not reach the due process claim raised by Rusu because he failed to meet the criteria for asylum "even if his testimony had been fully credited."⁶⁷ It therefore determined that the outcome had not been prejudiced by the use of videoconferencing.⁶⁸ Still, the court recognized that the *Mathews v. Eldridge*⁶⁹ balancing test controlled judicial review of procedures used in removal proceedings⁷⁰ and noted that despite technological advances, "the Government remains obliged to ensure that asylum peti-

⁵⁸ 296 F.3d 316 (4th Cir. 2002).

⁵⁹ *Id.* at 319.

⁶⁰ *Id.* at 324–25.

⁶¹ *Id.* at 319.

⁶² *Id.*

⁶³ *Id.* at 323.

⁶⁴ *Id.* at 319.

⁶⁵ *Id.*

⁶⁶ *Id.* at 324 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)).

⁶⁷ *Id.* at 325.

⁶⁸ *Id.* at 324–25.

⁶⁹ 424 U.S. 319. The *Mathews* analysis determines the necessary due process protections by balancing (1) the private interest affected, (2) the "risk of an erroneous deprivation of such interest . . . and the probable value . . . [of] substitute procedural safeguards," and (3) the countervailing government interests at stake. *Id.* at 335.

⁷⁰ *Rusu*, 296 F.3d at 321 & n.8.

tioners are accorded a meaningful opportunity to be heard”⁷¹ The court further noted that videoconferencing, “although enhancing the efficient conduct of the . . . administrative process, also has the potential of creating certain problems in adjudicative proceedings,” specifically “render[ing] it difficult for a factfinder . . . to make credibility determinations and to gauge demeanor.”⁷² The court recognized this as particularly problematic in cases where “findings made with respect to a petitioner’s credibility are usually central to the resolution of the . . . claim.”⁷³ Despite this dicta, the Fourth Circuit nonetheless indicated that Rusu had been provided the requisite “opportunity to present his claim”⁷⁴ because in this instance, the court did not believe that better procedures would have produced a different result.⁷⁵ This summary conclusion, however, does not reflect the *analysis* of *Mathews*, which requires weighing the significance of Rusu’s interest in not being deported,⁷⁶ and the possibility of an increased likelihood of an erroneous outcome,⁷⁷ against the government’s purported efficiency claim.⁷⁸ While the *Rusu* court may have reached the correct disposition, a proper application of the *Mathews* test would have illustrated that in some instances the potential constitutional infirmities it acknowledged can result in a violation of due process.

Additionally, while the court indicated that credibility was not at issue in *Rusu*, it is important to acknowledge that “facts” frequently cannot be divorced from the perceived authenticity of the speaker.⁷⁹ The only evidence in immigration hearings is often the respondent’s

⁷¹ *Id.* at 322.

⁷² *Id.*

⁷³ *Id.*; *cf.* *United States v. Baker*, 45 F.3d 837, 844–45 (4th Cir. 1995) (reasoning that because civil commitment hearings do not usually require judicial assessments of witness demeanor, the use of videoconference testimony does not impair the court’s adjudicative function).

⁷⁴ *Rusu*, 296 F.3d at 324 (emphasis omitted).

⁷⁵ *Id.*

⁷⁶ *Cf.* *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987) (recognizing that “[d]eportation is always a harsh measure[, and] it is all the more replete with danger when the alien makes a claim that he . . . will be subject to death or persecution if forced to return to his . . . home country”).

⁷⁷ *See supra* notes 34–37 and accompanying text. The Walsh study, for instance, observes a difference in outcomes between in-person and videoconferenced proceedings. While it does not conclude that the in-person proceedings were necessarily the more accurate of the two, the long-standing presumption that in-person evaluations are indeed superior supports privileging the non-videoconferenced testimony as more accurate unless shown to be otherwise.

⁷⁸ The use of videoconferencing has been heralded as “beneficial to both the Immigration Courts and the alien respondent in immigration proceedings.” VC FACT SHEET, *supra* note 1, at 1. The court in *Rusu*, however, referenced no government evidence supporting this efficiency claim. *See also* discussion *infra* note 86 (asserting that the alleged efficiency claims may not be substantiated in practice).

⁷⁹ *See, e.g.,* *Lin v. Gonzales*, 446 F.3d 395, 402 (2d Cir. 2006) (“Fact-finding is . . . [an] assimilative, layered, instinctive process that is based on signs that are both objective (such as factual discrepancies) and subjective (such as demeanor).”).

own testimony,⁸⁰ and whether the immigration judge views an inconsistent statement as a reflection of deceit or as a result of trauma is the direct consequence of his credibility assessment.⁸¹ Federal courts have recognized a respondent's cadence of speech, body language, and gaze as sufficient bases for finding a respondent not credible.⁸² Accurate evaluations of such cues are not possible in videoconferencing and become even more improbable when the witness is only intermittently visible or comprehensible, as in *Rusu*.

Among immigrants' rights advocates *Rusu* is not seen as an unmitigated defeat because it recognizes the potential for due process violations.⁸³ Unfortunately, courts following *Rusu* have generally held that absent extreme technological difficulties, assertions that videoconferencing adversely affects the immigration judge's credibility determinations and dispositions are untenable.⁸⁴ Therefore, despite *Rusu*'s recognition that the government is obliged to provide an opportunity for a meaningful hearing, the possibility that videoconferencing *per se* prevents such an opportunity is absent from the caselaw.

D. Conclusion: The Future of Videoconferencing

The current use of videoconferencing in immigration hearings, at the expense of highly valued contextual information, is not representative of an overall adjudicative trend that recognizes digital contact as

⁸⁰ See, e.g., Katherine E. Melloy, Note, *Telling Truths: How the REAL ID Act's Credibility Provisions Affect Women Asylum Seekers*, 92 IOWA L. REV. 637, 646 (2007).

⁸¹ See *Chen v. Dep't of Justice*, 426 F.3d 104, 113 (2d Cir. 2005) ("[T]he [immigration judge]'s ability to observe the witness's demeanor places her in the best position to evaluate whether apparent problems in the witness's testimony suggest a lack of credibility or, rather, can be attributed to an innocent cause . . ."); *Zhang v. INS*, 386 F.3d 66, 73 (2d Cir. 2004) ("A fact-finder who assesses testimony together with witness demeanor is in the best position to discern . . . whether inconsistent responses are the product of innocent error or intentional falsehood.")

⁸² See, e.g., *Paredes-Urrestarazu v. INS*, 36 F.3d 801, 818 (9th Cir. 1994) (identifying "all aspects of the witness's demeanor — including [his] expression[,] . . . how he sits or stands, whether he is inordinately nervous, his coloration during critical examination, the modulation or pace of his speech and other non-verbal communication" as relevant to credibility determinations (quoting *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074, 1078–79 (9th Cir. 1977))); see also *Lin v. Att'y Gen.*, 193 F. App'x 26, 28 (2d Cir. 2006) (holding that immigration judge's observation that the respondent "testified in a halting manner and . . . looked to his counsel . . . for a cue of some sort" was a "reasonable basis for finding [respondent] not credible"); *Xue v. Gonzales*, 186 F. App'x 139, 140–41 (2d Cir. 2006) (holding that the immigration judge's observations of respondent's "halting" demeanor, and "voice [that] lacked conviction" substantiated a finding that the respondent was not credible (internal quotation marks omitted)).

⁸³ See TRACY HONG & MARY KENNEY, AM. IMMIGRATION LAW FOUND. PRACTICE ADVISORY — OBJECTING TO VIDEO MERITS HEARINGS 1 (2003), available at http://www.aifl.org/lac/pa/lac_pa_121203.pdf.

⁸⁴ See, e.g., *Rapheal v. Mukasey*, 533 F.3d 521, 531 (7th Cir. 2008); *Eke v. Mukasey*, 512 F.3d 372, 382–83 (7th Cir. 2008); *Brienza-Schettino v. Att'y Gen.*, 221 F. App'x 140, 145 (3d Cir. 2007).

substantively equal to direct interpersonal communication.⁸⁵ Moreover, despite the fact that videoconferencing is defended on efficiency grounds, the actual experience of immigrants often belies this rationale.⁸⁶ Therefore, even as government actors complacently compromise the quality of immigrants' access to courts in order to reap administrative benefits, this technology may not significantly reduce costs and may actually generate additional expenses.⁸⁷

For those concerned about the *quality* of access to courts, it is necessary to cabin the expansion of videoconferencing and ensure that its use is not at odds with the fundamental purpose of the access it ostensibly provides. Improving the technology used,⁸⁸ limiting use to preliminary hearings, and requiring the respondent's consent⁸⁹ could help balance the efficiency videoconferencing purportedly provides with the substantive requirements of the immigration court system.

The full adoption of videoconferencing in immigration proceedings may be a harbinger of future expansions in Article III courts as well.⁹⁰

⁸⁵ See, e.g., *United States v. Lawrence*, 248 F.3d 300, 304 (4th Cir. 2001) (“[E]ven in an age of advancing technology, watching an event on the screen remains less than the complete equivalent of actually attending it.”).

⁸⁶ Although videoconferencing purportedly reduces the costs and safety concerns involved in the transportation of detainees, many are still transported significant distances to participate in their hearings. For instance, detainees under the jurisdiction of the Chicago Immigration Court may be transported over five hours to a facility only a few miles from the physical courthouse in Chicago to participate in video hearings. See CHICAGO STUDY, *supra* note 22, at 21 n.35, 23 n.40. In *Rapheal*, the immigrant respondent was transferred to a videoconferencing center that was further from her detention center than was the courthouse where her judge was located. See *Rapheal*, 533 F.3d at 534. Additionally, videoconferencing may create delays due to the inability of parties to simultaneously evaluate evidence, see *id.* at 533, or through technological difficulties that “slow[] the process down and le[ad] to continuances that could have been avoided if the hearings had been held in person,” CHICAGO STUDY, *supra* note 22, at 37.

⁸⁷ See CHICAGO STUDY, *supra* note 22, at 60 (“[W]e found little evidence to support the claim that videoconferencing enhances efficiency.”).

⁸⁸ However, the EOIR is unlikely to make the financial outlays to purchase cutting-edge equipment for these proceedings, particularly given that they have already privileged financial considerations over the quality of immigrants' access and have asserted that the current equipment is sufficient. Cf. Poulin, *supra* note 13, at 1096 n.14, 1105–06 (noting that the hesitancy of governments to spend money on resources for indigent criminal defendants makes it unlikely that these limited funds will be spent to acquire “high quality, cutting edge [video] equipment”).

⁸⁹ It is possible that a system based on consent may ultimately devolve into a coercive arrangement, particularly if acquiescing to the use of videoconferencing expedites respondents' hearings. Additionally, videoconferencing is already more commonly used in asylum hearings involving unrepresented aliens, see *supra* note 35, so one potential outcome of a consent-based system may be that unrepresented aliens unaware of the possible negative consequences of videoconferencing end up being funneled into this less-favorable procedure.

⁹⁰ LEONIDAS RALPH MECHAM, ADMIN. OFFICE OF THE U.S. COURTS, REPORT TO CONGRESS ON THE OPTIMAL UTILIZATION OF JUDICIAL RESOURCES 10–12 (2001), available at <http://www.uscourts.gov/optimal2001.pdf> (noting the judiciary's support for the use of videoconferencing technology and its expansion to additional courtrooms). In addition to the concerns raised here, the use of videoconferencing in other types of courts may raise other concerns, such as a potential violation of the Confrontation Clause in criminal cases. See, e.g., Order of the

Although the further integration of law and technology may in some instances expedite court access, it may also result in an ineffectual court system, in which individuals gain speedier entrance, but fewer receive the opportunity to be heard in a meaningful manner. Although the costs are currently being borne by those who cannot complain,⁹¹ the development of a jurisprudence that fails to recognize the fundamental difference between in-person and remote proceedings may ultimately affect non-citizens and citizens alike in their respective pursuits of justice.

V. THE POLITICAL QUESTION DOCTRINE, EXECUTIVE DEFERENCE, AND FOREIGN RELATIONS

With the globalization of the American economy, the increasing legal recognition of human rights, and the expansion of the War on Terror has come increased attention to lawsuits filed in the United States that might affect American policy abroad. Courts recognize their comparative disadvantage vis-à-vis the executive branch in conducting foreign relations¹ and have successfully² erected a number of common law roadblocks meant to prevent hearing these suits on their merits.³ Among these roadblocks, the political question doctrine has broadened beyond its traditional limits to assume a more prominent position in recent years, as courts struggle to come to terms with a pair of oblique suggestions from the Supreme Court's 2003 Term. Many courts have

Supreme Court, 207 F.R.D. 89, 93 (2002) (statement of Scalia, J.) (doubting that videoconferencing's "[v]irtual confrontation . . . is sufficient to protect real [rights]").

⁹¹ Cf. Poulin, *supra* note 13, at 1093 (recognizing that the costs of videoconferencing in criminal trials are primarily shouldered by indigent defendants, who lack the resources to challenge videoconferencing policy).

¹ See, e.g., *Gonzalez-Vera v. Kissinger*, 449 F.3d 1260, 1264 (D.C. Cir. 2006) ("[C]ourts are fundamentally underequipped to formulate national policies or develop standards for matters not legal in nature . . ." (quoting *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986)) (internal quotation mark omitted)).

² It is difficult to measure "success" in keeping suits that will affect foreign relations out of court precisely because, as this Part shows, it is difficult to describe a priori which suits they are. Nevertheless, one category that might well be implicated is that of suits brought by foreign plaintiffs against domestic defendants in federal courts, and fewer of these reach judgment today than did twenty years ago. See Kevin M. Clermont & Theodore Eisenberg, *Xenophilia or Xenophobia in U.S. Courts? Before and After 9/11*, 4 J. EMPIRICAL LEGAL STUD. 441, 461 tbl.3, 462 tbl.4 (2007) (noting that 2592 of 7122, or 36.4%, of such claims reached judgment in 1986, compared with only 113 of 1101, or 10.3%, in 2005). Professors Clermont and Eisenberg ascribe the difference to an increase in the rates of dismissal and settlement. *Id.* at 462–63. (The evident decline in the absolute number of judgments largely reflects extraneous factors such as changes in the Department of Justice's own taxonomy. See Kevin M. Clermont & Theodore Eisenberg, Commentary, *Xenophilia in American Courts*, 109 HARV. L. REV. 1120, 1124 n.15 (1996).)

³ See generally CURTIS A. BRADLEY & JACK L. GOLDSMITH, *FOREIGN RELATIONS LAW* 39–137 (2d ed. 2006) (describing, among other concepts, the political question doctrine, foreign sovereign immunity, the act of state doctrine, standing, ripeness, and mootness).

seemingly taken the Court's references to "deference" in *Republic of Austria v. Altmann*⁴ and *Sosa v. Alvarez-Machain*⁵ as invitations to defer to the executive branch's opinions on justiciability.⁶ Unfortunately, this Part argues, this expansion of the political question doctrine's scope goes beyond its purposes; in misapplying the doctrine, the judiciary ironically abdicates its own constitutional role in the name of protecting the separation of powers.⁷ At the same time, expanding the application of the political question doctrine means expanding the set of cases the courts cannot hear, reducing claimants' access to the courts.⁸ This Part first describes the doctrine's expansion as seen in a number of recent decisions. It then suggests two remedies: first, that courts return to the political question doctrine as it was originally conceived; and second, that they apply an international comity analysis to any claim that appears likely to impact foreign relations. Taken together, these changes should vindicate more rights by providing more plaintiffs with access to a competent court (be it American or foreign) while maintaining courts' flexibility to avoid hearing the most dangerous cases.

A. Baker's *Limited Doctrine*

At its most basic, the political question doctrine forbids the federal courts from hearing cases that would require them to rule on matters not fit for judicial determination. It traces its roots to *Marbury v.*

⁴ 541 U.S. 677 (2004).

⁵ 542 U.S. 692 (2004).

⁶ To be clear, every political question dismissal is an act of deference to the political branches on the political issue presented in the plaintiff's claim. That deference is "substantive"; in contrast, this Part discusses "*procedural*" deference, under which courts fail to evaluate the Executive's stated interest in the first place. When this occurs, courts essentially defer entirely on the issue of whether a question is political. Cf. Recent Case, 121 HARV. L. REV. 898, 902 & n.39 (2008) (arguing that the dissent's theory in *Doe v. Exxon Mobil Corp.*, 473 F.3d 345 (D.C. Cir. 2007), was overly broad).

⁷ See, e.g., *Lane v. Halliburton*, 529 F.3d 548, 559 (5th Cir. 2008) ("[T]he purpose of the political question doctrine is to bar claims that have the potential to undermine the separation-of-powers design of our federal government.").

⁸ This Part uses "access to the courts" to mean the availability of a legitimate forum in which one may test claims for violations of one's rights. In this sense, the principle lies in the background of every society ruled by law. See The Rt. Hon. Lord Bingham of Cornhill, Senior Law Lord, Sixth Sir David Williams Lecture: The Rule of Law (Nov. 16, 2006) (transcript available at http://www.cpl.law.cam.ac.uk/past_activities/the_rule_of_law_text_transcript.php) (describing as an "obvious corollary" to the rule of law "that people should be able, in the last resort, to go to court to have their rights and liabilities determined"). For an interesting argument that the political question doctrine as applied to foreign plaintiffs may violate the guarantee of access to the courts granted by the International Covenant on Civil and Political Rights (ICCPR) (but recognizing that United States courts have held the ICCPR to be without domestic effect), see Posting of Tobias Thienel to The Core, <http://corelaw.blogspot.com/2006/06/political-question-doctrine-in.html> (June 12, 2006, 13:54).

Madison,⁹ but the Supreme Court announced the doctrine's modern contours in 1962 in *Baker v. Carr*.¹⁰ *Baker* described six factors to weigh in considering justiciability:

Prominent on the surface of any case held to involve a political question is found [1.] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2.] a lack of judicially discoverable and manageable standards for resolving it; or [3.] the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or [4.] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5.] an unusual need for unquestioning adherence to a political decision already made; or [6.] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.¹¹

Two points about the *Baker* framework are crucial. First, the Court set out its six clauses as individually sufficient and collectively necessary to render a given claim a nonjusticiable political question.¹² In its foreign relations jurisprudence following the decision, the Supreme Court has clarified these categories¹³ but never increased their number.¹⁴ Second, although it might seem unremarkable, the Court in *Baker* not only handed down six factors, it also applied them to the case's facts.¹⁵ It has done the same in the few foreign relations cases that have reached it since: even when concurring with the Executive that a given suit poses a nonjusticiable political question, the Court has never actually deferred to the Executive's judgment on that issue outright. Instead, it has always measured for itself the specific claims against the specific categories.¹⁶ In the years following *Baker*, lower

⁹ 5 U.S. (1 Cranch) 137, 170 (1803) ("Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court."). The Court held that President Jefferson's decision to withhold Marbury's commission was reviewable before it (more famously) concluded that the statute upon which the plaintiff rested his claim of jurisdiction was nevertheless unconstitutional. *See id.* at 171.

¹⁰ 369 U.S. 186 (1962).

¹¹ *Id.* at 217.

¹² *Id.* ("Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for nonjusticiability on the ground of a political question's presence.")

¹³ *See, e.g., Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986) (citing *Baker*, 369 U.S. 186, for the proposition that the interpretation of treaties is not a political question).

¹⁴ *See, e.g., Vieth v. Jubelirer*, 541 U.S. 267, 277–78 (2004) (plurality opinion).

¹⁵ *Baker*, 369 U.S. at 226–27.

¹⁶ *See, e.g., Japan Whaling Ass'n*, 478 U.S. at 229–30; *Goldwater v. Carter*, 444 U.S. 996, 996–1002 (1979) (Powell, J., concurring) (finding no political question after reviewing each of the *Baker* factors); *cf., e.g., Kadic v. Karadžić*, 70 F.3d 232, 250 (2d Cir. 1995) ("[E]ven an assertion of the political question doctrine by the Executive Branch, entitled to respectful consideration, would not necessarily preclude adjudication . . ."). As to foreign relations questions specifically, the *Baker* Court itself favored a "discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in

courts largely adhered to this carefully circumscribed conception of the doctrine (hereinafter called the “limited political question doctrine”) and eventually allowed the doctrine’s use to diminish.¹⁷

In 2004, however, the Supreme Court issued two opinions that have spurred some courts to award the Executive greater deference in the foreign relations sphere. The first, *Republic of Austria v. Altmann*, noted in dicta that the State Department’s opinion on the policy effects of exercising jurisdiction over particular claims against foreign sovereigns “might well be entitled to deference.”¹⁸ Three weeks later, the Court issued a second opinion, *Sosa v. Alvarez-Machain*, which observed in a widely analyzed footnote that “case-specific deference” might be appropriate in evaluating claims for violations of customary international law.¹⁹ Although neither *Altmann* nor *Sosa* applied the political question doctrine itself, courts in the four years since have frequently looked to it as a vessel for this increased deference. Not surprisingly, this has increased the doctrine’s use dramatically.²⁰

B. Squeezing Deference into Baker: Expanding the Doctrine

The courts that have expanded the political question doctrine have done so nominally within the bounds of *Baker*’s categories, particularly favoring the last three.²¹ However, they have looked to these categories almost as an afterthought; in each of the decisions presented below, the real actuating force was a State Department determination that the suit in question should not proceed. Naturally, this has yielded awkward fits between fact and doctrine, as the *Baker* inquiry is dramatically relaxed to accommodate the deference granted to the executive branch.

the light of its nature and posture in the specific case, and of the possible consequences of judicial action.” *Baker*, 369 U.S. at 211–12.

¹⁷ See Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 267 n.158 (2002); Jack L. Goldsmith, *The New Formalism in United States Foreign Relations Law*, 70 U. COLO. L. REV. 1395, 1427–28 (1999); see also HOWARD P. FINK & MARK V. TUSHNET, FEDERAL JURISDICTION 231 (2d ed. 1987) (“[W]hen the political questions doctrine fell into desuetude after *Baker v. Carr*, it was replaced as an avoidance device by the standing doctrine.”).

¹⁸ 541 U.S. 677, 702 (2004).

¹⁹ 542 U.S. 692, 733 n.21 (2004).

²⁰ See *Bancoult v. McNamara*, 445 F.3d 427, 435 (D.C. Cir. 2006) (“[T]he judiciary properly defers to the political branches in *most* [cases touching foreign relations]” (emphasis added)); see also *Turedi v. Coca Cola Co.*, 460 F. Supp. 2d 507, 519 (S.D.N.Y. 2006) (generalizing that cases in which foreign plaintiffs sue domestic corporations for violations of international law are, “[f]or the most part,” political questions).

²¹ Although each of *Baker*’s categories is sufficient to render a claim nonjusticiable, they “are probably listed in descending order of both importance and certainty.” *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (plurality opinion).

1. “*Respect Due.*” — The Third Circuit presented a straightforward example of this tendency when it deferred to the Executive’s opinion that a number of claims met *Baker’s* fourth prong in *In re Nazi Era Cases Against German Defendants Litigation*.²² In *Nazi Era Cases*, plaintiff Simon Rozenkier asked the court to hear common law claims against two German corporations that he alleged had aided the Nazi government in conducting barbarous medical experiments on him.²³ At trial, the defendants had won dismissal on the ground that Rozenkier’s claims were precluded by his previous participation in a claims tribunal established by the United States and German governments.²⁴ The appellate court found dispositive that agreement’s declaration that it represented the culmination of the Executive’s efforts at resolving claims against the erstwhile German government.²⁵ Thus, it determined that the government’s statement of interest reflected a policy decision. Precisely because the Executive had undertaken many years’ efforts to reach an objective, the Third Circuit reasoned, a suit that sought to sidestep the final phase of that undertaking would impermissibly disrespect it.²⁶ In so holding, the court seemed to accede to the Executive’s claim that the latter could grant itself the power to determine which cases the judicial branch may hear so long as a party to the relevant executive agreement agrees.²⁷

2. “*Unquestioning Adherence.*” — At first blush, *Baker’s* fifth factor would seem to provide the most straightforward way to defer to the Executive’s judgment on whether a claim should be heard. Yet “unquestioning adherence” dismissals are rarely seen in the wild. The United States District Court for the Central District of California used the prong, however, when it dismissed *Mujica v. Occidental Petroleum Corp.*,²⁸ an Alien Tort Statute case brought against an American corporation alleged to have conspired with the Colombian military to

²² 196 F. App’x 93 (3d Cir. 2006).

²³ See *id.* at 94, 96.

²⁴ *Id.* at 95–96. Per the terms of the executive agreement that created the tribunal, the State Department submitted a “statement of interest” in the suit recommending dismissal. *Id.*

²⁵ *Id.* at 98 (citing Agreement Concerning the Foundation “Remembrance, Responsibility and the Future,” U.S.-F.R.G., pmbL, July 17, 2000, 39 I.L.M. 1298).

²⁶ See *id.* at 99. The Second Circuit ruled similarly a year earlier in *Whiteman v. Dorotheum GmbH & Co.*, 431 F.3d 57 (2d Cir. 2005), which presented claims resulting from Austria’s expropriation of Jewish assets during the Second World War, *id.* at 60. In this case, as in *Nazi Era Cases*, the United States had recently concluded an executive agreement with the targeted country meant to resolve claims arising from its involvement in the Holocaust. See *id.* at 65. Like the Foundation in *Nazi Era Cases*, the General Settlement Fund did not itself require dismissal, but rather mandated that the State Department submit a statement of interest to that end. See *id.* at 59. On appeal, the Second Circuit expressly deferred to the Executive’s stated interests, concerned that hearing the claim would violate *Baker’s* fourth, “respect due” test. See *id.* at 72–73.

²⁷ Because the United States and Germany established the tribunal with an executive agreement rather than a treaty, the legislature’s opinion was not heard on the matter.

²⁸ 381 F. Supp. 2d 1164 (C.D. Cal. 2005).

bomb a village. In that case, the State Department filed a statement of interest indicating that the United States opposed the litigation based on its potential to harm American policy regarding the bombing.²⁹ The court rolled its analysis of the fifth factor into its analysis of the fourth, “respect due” factor and concluded that the Executive’s preference for resolving the issue diplomatically rather than legally was sufficient to dispose of the matter.³⁰ Certainly, this finding met part of *Baker*’s fifth factor, in that the Executive’s official statement was a “political decision.” The court neglected the remaining two parts, however: first, it did not consider the existence *vel non* of “an unusual need for unquestioning adherence” to that decision at all. Other courts have been much stricter in determining whether an “unusual need” is present.³¹ Second, the court also glossed over *Baker*’s statement that the decision be “already made.” In fact, eleven months after the plaintiffs filed their suit, the State Department represented “that it did not yet have a position on the foreign policy implications of [the] case.”³² Only after eight more months did the Department file its second statement, urging dismissal.³³

3. “*Potentiality of Embarrassment.*” — Finally, executive interest statements similar to those in the cases mentioned above have also prompted political question dismissals based on *Baker*’s sixth test. The Ninth Circuit evinced this approach in affirming the dismissal of *Corrie v. Caterpillar, Inc.*,³⁴ a suit brought by the families of an American and several Palestinians injured or killed by bulldozers operated by the Israel Defense Force in the Gaza Strip.³⁵ The court found one fact decisive: that the United States had funded the defendant’s sale of bulldozers to Israel.³⁶ Second-guessing the Executive’s conclusion “that Israel should purchase Caterpillar bulldozers,” the court held, could disrupt United States efforts in the Middle East.³⁷ A court in

²⁹ *Id.* at 1169, 1194.

³⁰ *Id.* at 1194 n.25. Citing *Sosa*, the court declined to scrutinize the Executive’s statement because the issue related to foreign policy (although it was not “a ‘pure issue’” thereof). *See id.* at 1194 & n.24.

³¹ *See, e.g.*, *Gross v. German Found. Indus. Initiative*, 456 F.3d 363, 390 (3d Cir. 2006) (“As *Baker* makes clear, the fifth factor contemplates cases of an ‘emergency[] nature’ that require ‘finality in the political determination,’ such as the cessation of armed conflict.” (quoting *Baker*, 369 U.S. at 213–14) (alteration in original)).

³² *Mujica*, 381 F. Supp. 2d at 1169.

³³ *See id.*

³⁴ 503 F.3d 974 (9th Cir. 2007).

³⁵ *Id.* at 977.

³⁶ *Id.* at 982. Though the United States did not file a statement of interest as such, *see id.* at 978 n.3, it introduced information about its funding and policy interests in an appellate amicus brief, in which the Ninth Circuit took “considerable interest,” *id.* (quoting *Republic of Austria v. Altmann*, 541 U.S. 677, 701 (2004)) (internal quotation marks omitted).

³⁷ *See id.* at 983–84.

the Southern District of New York ruled similarly in *Matar v. Dichter*,³⁸ in which a putative class challenged an Israeli security action that killed a number of Palestinians in Gaza. There again, the State Department filed a statement urging a dismissal on political question grounds,³⁹ and the court in fact dismissed, basing its ruling on the risk of embarrassment inherent in second-guessing the State Department's classification of Israel as a United States ally.⁴⁰ Neither court particularly traced the chain of logic by which hearing the case in question would foster "embarrassment"; instead they merely followed the State Department's advice that it would.

4. *Restoring the "Limited" Doctrine.* — All of the *Baker* categories mentioned above invoke separation of powers concerns, and there can be no doubt that the Constitution places primary power to conduct foreign relations in the executive branch.⁴¹ Nevertheless, the Constitution grants unreviewable authority only in tightly defined areas — never for the entire swath of "foreign relations."⁴² In the absence of extenuating circumstances, litigation that carries the simple possibility (or probability, or even certainty) of impeding one of the Executive's international relations interests is no less justiciable than litigation that might impede, say, one of its domestic regulatory interests. Because both the Constitution and Congress can constrain the Executive's pursuit of its interests, the judiciary must be ready to judge those interests if it aims to act as a meaningful check on the Executive's power.⁴³ Even if the Executive was right in urging dismissal in each of these claims, the judiciary has been untrue to the political question doc-

³⁸ 500 F. Supp. 2d 284 (S.D.N.Y. 2007).

³⁹ *Id.* at 287.

⁴⁰ *See id.* at 294–96. The court distinguished three cases brought against Palestinian organizations and one brought by Israeli Defense Minister Ariel Sharon against an American corporation (all of which proceeded to a judgment on the merits) as not having been brought against a sovereign or an ally. *See id.* at 295.

⁴¹ *See, e.g.,* First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 767 (1972) ("[T]his Court has recognized the primacy of the Executive in the conduct of foreign relations . . .").

⁴² *Baker v. Carr*, 369 U.S. 186, 211 (1962) ("[I]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."). Where Congress shares foreign relations powers, it has likewise carefully delineated the Executive's areas of unreviewable authority. *See, e.g.,* 22 U.S.C. § 1631a(c) (2006) ("The determination . . . that any vested property was not directly owned [for purposes of liquidation, after the property was seized from Bulgarian, Hungarian, or Romanian nationals during World War II] shall be within the sole discretion of the President . . . and shall not be subject to review by any court."); *id.* § 6723(b)(3)(B) ("Any objection by the President to an individual serving as an inspector [for purposes of the Chemical Weapons Convention] . . . shall not be reviewable in any court.").

⁴³ *See* Derek Jinks & Neal Kumar Katyal, *Disregarding Foreign Relations Law*, 116 YALE L.J. 1230 *passim* (2007) (arguing against deference for Executive acts that fall within the "executive-constraining zone" of federal law). *See generally* ERWIN CHEMERINSKY, INTERPRETING THE CONSTITUTION 95–105 (1987) (defending the judiciary's role as "final arbiter" of the structural Constitution).

trine's purpose by so readily acceding to the Executive's views. As Justice Frankfurter famously warned, although "[t]he accretion of dangerous power does not come in a day," it may nevertheless develop gradually where the Constitution's strictures are not enforced.⁴⁴

The separation of powers problem has a second aspect: by deferring to the Executive on the question of which suits it will hear, the judiciary is entrusting to the Executive its own duty to recognize violations of individuals' rights. *Marbury v. Madison* distinguished political questions as such, which the courts could not hear, from those involving individual rights, which they emphatically *should*.⁴⁵ The distinction is intuitively sound — no one would doubt that courts are expert at remedying individual wrongs, and it is scarcely more controversial to point out that judicial review makes the judiciary a natural agent to protect constitutional guarantees against the tyranny of the majority.⁴⁶ Yet when the courts defer to the State Department's judgment on which cases should be dismissed, they entrust that institution with balancing both foreign relations concerns and access to the courts. There is ample reason for concern about whether the State Department is able to fulfill this duty, however. Besides its mission and culture, which are fundamentally different from those of the courts,⁴⁷ the Department's letters of interest in particular are subject to a level of political pressure (both from the Oval Office and private interests) utterly unknown in the judicial realm.⁴⁸ If courts are unfit to conduct foreign policy, so too are foreign policy experts unfit to vindicate individual rights. When a case implicates both values, allowing one institution to make the decision without the other's input is clearly

⁴⁴ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 594 (1952) (Frankfurter, J., concurring).

⁴⁵ 5 U.S. (1 Cranch) 137, 166 (1803) ("[Political questions] respect the nation, not individual rights But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured has a right to resort to the laws of his country for a remedy."). As a matter of legal doctrine, the special protection for individual rights claims survived at least into the *Baker* era, and is not unknown today. See, e.g., *Alvarez-Machain v. United States*, 331 F.3d 604, 614 n.7 (9th Cir. 2003) (en banc) (finding no political question raised by an alien's claim of kidnapping at the hands of United States agents), *rev'd on other grounds sub nom. Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004); *Halperin v. Kissinger*, 606 F.2d 1192, 1201 n.59 (D.C. Cir. 1979) ("Our duty to decide this [Fourth Amendment claim] is not diminished because we deal with the President's foreign affairs power."), *aff'd by an equally divided Court*, 452 U.S. 713 (1981) (per curiam).

⁴⁶ See CHEMERINSKY, *supra* note 43, at 95–105; Barkow, *supra* note 17, at 240.

⁴⁷ See Carolyn J. Brock, Note, *The Foreign Sovereign Immunities Act: Defining a Role for the Executive*, 30 VA. J. INT'L L. 795, 820 (1990) ("[T]he State Department is biased towards finding that policy considerations outweigh private interests, because the State Department exists to maintain, and improve foreign relations.").

⁴⁸ See Derek Baxter, *Protecting the Power of the Judiciary: Why the Use of State Department "Statements of Interest" in Alien Tort Statute Litigation Runs Afoul of Separation of Powers Concerns*, 37 RUTGERS L.J. 807, 829–35 (2006).

not the solution. Instead, this section argues, the limited political question doctrine lets both the State Department and the courts act in their areas of expertise.

C. *Going Further: International Comity*

It is almost certainly true that, if the limited political question doctrine is restored, as this Part advocates, more cases will proceed to judgment on the merits. Indeed, shifting the balance between foreign policy and access to the courts is the proposal's chief purpose. But what about functional concerns? There is nothing illiberal in observing that full trials for some claims will harm United States interests abroad, and some theories would find that the harm from hearing any or all of the cases cited above outweighed their plaintiffs' interests in having their claim heard in a United States court. If those theories are to be believed, the limited political question doctrine alone permits too many claims into American courts. Fortunately, however, the American judiciary is frequently not a plaintiff's only choice. The remainder of this Part briefly describes the doctrine of international comity, by which courts may dismiss a claim in deference to another state's interest in resolving it. It concludes by advocating that comity be applied as a first-level filter, before political question analysis, for two important reasons.

Comity among nations as a concept predates even *Marbury's* prohibition on deciding political questions. The Western law of nations first encountered the idea of respect among sovereigns in the work of the great seventeenth-century Dutch jurists,⁴⁹ and the principle (if not the modern doctrine) was incorporated into American law in 1797.⁵⁰ In American foreign relations law, the principle is given content by a balancing test that considers "the interests of our government, the foreign government and the international community in resolving the dispute in a foreign forum."⁵¹ The analysis self-consciously resembles that used for *forum non conveniens*: courts consider both potential fo-

⁴⁹ See Hessel E. Yntema, *The Comity Doctrine*, in 2 VOM DEUTSCHEN ZUM EUROPÄISCHEN RECHT 65 (von Caemmerer, Nikisch & Zweigert eds., 1962), reprinted in 65 MICH. L. REV. 9, 19–28 (1966).

⁵⁰ See Kurt H. Nadelmann, *Introduction*, 65 MICH. L. REV. 1, 3 (1966) (tracing the principle's American adoption to *Emory v. Grenough*, 3 U.S. (3 Dall.) 369 (1797)). The classic formulation comes from 1895:

[Comity] is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

Hilton v. Guyot, 159 U.S. 113, 164 (1895).

⁵¹ *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1238 (11th Cir. 2004).

rum states' relative interests in resolving the suit, as well as the adequacy of the alternative forum.⁵²

This focus gives comity two chief advantages over the expanded political question doctrine. First, it is important to assess not only how *many* suits are dismissed under a competing doctrine, but also what *kinds* are likely to be dismissed. Comity dismisses only those suits whose plaintiffs have an adequate alternative forum in which to press their claim.⁵³ Therefore, it acts as a ratchet, never permitting plaintiffs' access to the courts to decrease. At the same time, it furthers a baseline foreign policy with the alternative forum state.⁵⁴ Thus, the combination of comity and limited political question doctrine avoids one of the disadvantages of the expanded doctrine (namely, its overbroad restriction on access to the courts) while to some extent upholding its chief advantage (sensitivity to foreign policy concerns).

Second, comity is a more flexible filter than the expanded political question doctrine. Many suits barred by the political question doctrine may not be heard by federal courts because they fall outside of the Constitution's "case or controversy" requirement.⁵⁵ This is especially common among cases from foreign affairs, which can present parties, causes of action, and prayers for relief that resemble nothing else on a court's docket. Thus, finding a political question often means finding that the court lacks subject matter jurisdiction. For the same reasons

⁵² *Id.* at 1238–39.

⁵³ Importantly, however, a comity dismissal does not require that the alternative forum provide an actual remedy. *Id.* at 1239–40; *cf.* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254 (1981) (permitting *forum non conveniens* dismissal despite the probability of a different remedy under the alternative forum's law). The petitioner in *Ungaro-Benages* pressed her claim in federal court, after all, because she recognized that the Foundation tribunal effectively barred it. Comity dismissals in these cases are nevertheless justifiable on two grounds. First, access to the courts carries philosophic and concrete value separate from any recovery it may generate. *See* Alon Harel & Tsvi Kahana, *The Easy Core Case for Judicial Review* 32 (Hebrew Univ. of Jerusalem Ctr. for the Study of Rationality, Discussion Paper No. 489, 2008); *cf.* KENNETH FEINBERG, WHAT IS LIFE WORTH? 79 (2005) ("The right to a hearing made the [September 11 Victim Compensation] Fund more personal, more friendly, and more attuned to the needs of the 9/11 families."). Second, in most such cases, the decision on the part of the forum state (or, in *Ungaro-Benages*, the forum states, acting jointly through their agreement) to deny a remedy represents part of a deliberate and legitimate public policy. *See, e.g.,* Bi v. Union Carbide Chems. & Plastics Co., 984 F.2d 582, 586 (2d Cir. 1993) (deferring to India's determination of the best way to remedy the Bhopal disaster expressly because it was a legitimate democracy); *cf.* William W. Burke-White, *Reframing Impunity: Applying Liberal International Law Theory to an Analysis of Amnesty Legislation*, 42 HARV. INT'L L.J. 467, 532 n.316 (2001) (collecting cases in which courts have made *forum non conveniens* determinations based on the alternative forum state's legitimacy).

⁵⁴ It seems fair to assume that situations in which it is the United States's policy *not* to promote comity with a nation that would otherwise qualify as an adequate alternative will be sufficiently rare that the State Department can give clear reasons for opposing dismissal.

⁵⁵ U.S. CONST. art III, § 2; *see* Barkow, *supra* note 17, at 241.

courts prefer not to interpret the Constitution,⁵⁶ they should prefer not to set these hard limits on their jurisdiction over future cases. Comity, by contrast, does not claim a constitutional pedigree; instead, it lies somewhere between “absolute obligation” and “mere courtesy.”⁵⁷ It thus has more moving parts than a political question analysis; this makes comity precedents easier to distinguish when circumstances change. An example illustrates the point.

When presented with claims arising out of the 1973 Chilean coup in *Schneider v. Kissinger*,⁵⁸ the D.C. Circuit employed the *Baker* framework to conclude that the suit was nonjusticiable. Specifically, it looked to the distribution of externally focused powers within the Constitution, found that most such clauses applied to the political branches, and finally held that this meant that “decision-making in the fields of foreign policy and national security is textually committed to the political branches of government.”⁵⁹ This was enough to find the claims at bar nonjusticiable, of course (per *Baker*’s first factor), but it was a very broad rule as well. When the same court reached *Bancoult v. McNamara*⁶⁰ (presenting tort claims arising out of the construction of a United States military base on the island of Diego Garcia in the Indian Ocean), it ran into *Schneider*’s holding immediately. Despite clear differences between the claims presented and the state interests that hearing them might impede, the court in *Bancoult* had no choice: unless it could find that establishing a military base on Diego Garcia was not a foreign policy decision as such, it would have to rule that the Constitution forbade hearing the case.⁶¹ In *Bancoult*, a dismissal might well have made good sense from the State Department’s perspective, but what about a future foreign relations case in which a hearing would not harm United States policies?⁶² In these situations, courts gain flexibility by using comity instead: it is much easier to find a change in one of the terms of comity analysis (perhaps the United

⁵⁶ See *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346–48 (1936) (Brandeis, J., concurring) (describing seven rules under which the Supreme Court will decline to interpret the Constitution).

⁵⁷ *Hilton v. Guyot*, 159 U.S. 113, 163–64 (1895).

⁵⁸ 412 F.3d 190 (D.C. Cir. 2005).

⁵⁹ *Id.* at 194; see *id.* at 194–96.

⁶⁰ 445 F.3d 427 (D.C. Cir. 2006).

⁶¹ *Id.* at 436–37.

⁶² Not every State Department submission urges dismissal, after all. See, e.g., Letter from Michael J. Matheson, Acting Legal Advisor, U.S. Dep’t of State, to Frank W. Hunger, Assistant Atty Gen., U.S. Dep’t of Justice (July 9, 1997), exhibited in *Burma v. Unocal, Inc.*, 176 F.R.D. 329, 361–62 (C.D. Cal. 1997). Arguably, hearing some cases can actually further American foreign policy. See, e.g., Brief of Amici Curiae Career Foreign Service Diplomats in Support of Neither Party at 7–26, *Corrie v. Caterpillar, Inc.*, 503 F.3d 974 (9th Cir. 2007) (No. 05-36210), 2006 WL 2952508.

States's interest, or the adequacy of the alternative forum) than in the Constitution itself.⁶³

Because comity is not a jurisdictional limit, but rather a discretionary one, it could not wholly displace political question analyses. A plaintiff for whom no other forum is an adequate alternative might not be able to bring his case in the United States, either — after all, some claims simply cannot be heard in any forum.⁶⁴ Nevertheless, this Part suggests that comity be applied first, as a “filter,” when courts find themselves urged to apply a political question analysis.⁶⁵ This will avoid more suits than the limited political question doctrine alone, of course, but just as importantly it will do so without the separation of powers problems posed by the expanded doctrine. Not least, it will also do so on a case-by-case basis. If the Supreme Court urged anything with its language in *Altmann* and *Sosa*, after all, it was this very kind of attentiveness to the specifics of each petitioner's case.

VI. AESTHETIC INJURIES, ANIMAL RIGHTS, AND ANTHROPOMORPHISM

Over the last forty years, federal law has conferred a wide range of rights on animals. This Part explores one way in which private suits to enforce these rights gain access to federal courts: by alleging that the unlawful treatment of animals is causing “aesthetic injury” to a human plaintiff. This type of suit has long been used to enforce regulatory

⁶³ Had the D.C. Circuit considered comity in *Bancoult*, it would probably have looked to the United Kingdom as an alternative forum. The archipelago in question lies in Britain's sovereign territory, and Britain enjoys joint use of the military base built there. See *Bancoult*, 445 F.3d at 429–30; CENT. INTELLIGENCE AGENCY, THE CIA WORLD FACTBOOK 2008, at 90 (2008). Further, substantially the same set of plaintiffs was at the time embroiled in an appeal on the same issues in the United Kingdom's courts. See *R (on the application of Bancoult) v. Sec'y of State for Foreign & Commonwealth Affairs* [2006] EWHC (Admin) 1038, [2006] A.C.D. 81 (ruling for claimants on the merits less than a month after the D.C. Circuit's decision), *aff'd* [2007] EWCA (Civ) 498, [2008] Q.B. 365, *rev'd*, [2008] UKHL 61. These facts might well have justified deference to the United Kingdom's interest in resolving the matter.

⁶⁴ For example, a suit challenging the legality of the United States's invasion of Iraq could never be heard in a foreign court, but it is also a textbook example of a political question, even under the limited doctrine. Cf. *Holtzman v. Schlesinger*, 484 F.2d 1307, 1309–11 (2d Cir. 1973) (ordering dismissal of challenge to bombing of Cambodia). Thus, such a claim cannot be heard at all.

⁶⁵ Traditional civil procedure assumes that jurisdiction must properly lie before a court can rule on any other aspect of a case. Because courts lack subject matter jurisdiction to hear political questions, it might appear that they must reach that question before turning to comity. However, the Supreme Court recently clarified that courts may reach “threshold, nonmerits issue[s]” before deciding whether they have jurisdiction to decide the merits. *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 127 S. Ct. 1184, 1192 (2007). Because comity analyses resemble those of *forum non conveniens*, see *supra* pp. 1201–02, *Sinochem* almost certainly permits comity as well. See Posting of Greg Castanias & Victoria Dorfman to *Opinio Juris*, <http://opiniojuris.org/2007/03/16/preliminary-reflections-on-sinochem/> (Mar. 16, 2007, 12:59).

and statutory protections of ecosystems and species. But it is only in the last decade that courts have recognized this type of injury in suits aimed at protecting *individual* animals. If only individuals, and not groups, can have rights — as many rights theorists argue — this development may be significant, marking the beginning of a new form of judicial access for animals: via human proxy. However, there is a tension here, as the doctrinal development nominally pertains to persons alone. It is only through their transformation into harms to persons that violations of animal rights are remedied by the courts. Although classical animal rights theorists may see this as a crude legal device that fails to truly extend the protection of U.S. courts to animals, it is possible that such protection cannot, as these theorists suggest, be brought about by a change in the legal status of animals alone. What might also be necessary is a change in our human sensibilities. And this type of change might underlie the expansion of the “aesthetic injury” doctrine that can be seen in the cases discussed in this Part.

Section A provides an overview of the legal status of animals and the requirements for bringing suit in federal court that limit their access. Section B addresses a development in Article III standing jurisprudence: the recognition that human plaintiffs’ aesthetic interests in the humane treatment of individual animals can provide the basis for claims of legal injury. Section C explores the ways in which this development relates to the rights of animals. Section D discusses its significance in the context of animal rights theory. Section E concludes.

A. *Animals in Court: Causes of Action and Standing*

In 1386, a female pig was put on trial in France for causing the death of a child by tearing his face and arms.¹ Trials such as this were not uncommon in medieval Europe.² The same procedural rules applied to human and animal defendants, and the defense counsel for animals often “raised complex legal arguments” on their behalf.³ In this case, the sow was found guilty, and true to *lex talionis* — the law of “eye-for-an-eye” — the tribunal ordered that she be maimed in the head and upper limbs; after this, she was hanged in the public square.⁴

Today, animals hold a very different place in our law: as the subjects of extensive federal protection⁵ and the beneficiaries of private

¹ E.P. EVANS, *THE CRIMINAL PROSECUTION AND CAPITAL PUNISHMENT OF ANIMALS* 140 (The Lawbook Exchange 1998) (1906).

² See generally *id.* at 1–192 (providing detailed accounts of many of these trials).

³ Jen Girgen, *The Historical and Contemporary Prosecution and Punishment of Animals*, 9 ANIMAL L. 97, 99 (2003).

⁴ EVANS, *supra* note 1, at 140.

⁵ See Henry Cohen, *Federal Animal Protection Statutes*, 1 ANIMAL L. 153 (1995).

trusts,⁶ they are no longer defendants, but rather, aspiring plaintiffs in U.S. courts. In *Palila v. Hawaii Department of Land & Natural Resources*,⁷ for example, an endangered bird species brought suit, along with environmental organizations,⁸ to enforce the Endangered Species Act.⁹ On appeal, the Ninth Circuit stated: “As an endangered species under the Endangered Species Act . . . , the bird . . . has legal status and wings its way into federal court as a plaintiff in its own right.”¹⁰ Turtles,¹¹ bears,¹² squirrels,¹³ and various other bird species¹⁴ have likewise had their day in court. However, in these cases, human plaintiffs were also involved.

When courts have confronted cases in which animals were the sole plaintiffs, such as in *Cetacean Community v. Bush*,¹⁵ they have often held that animals were not authorized to bring suit in their own right.¹⁶ In *Cetacean Community*, the problem for the animal plaintiffs was that the statutes cited for causes of action authorize only “persons” to bring enforcement suits, and the court determined that animals do not fall into these statutes’ definitions of “person.”¹⁷

This conclusion was not tautological, for one need not be a human to be a legal person: corporations¹⁸ and cities,¹⁹ for example, can be le-

⁶ See Jeffrey Toobin, *Rich Bitch: The Legal Battle over Trust Funds for Pets*, NEW YORKER, Sept. 29, 2008, at 38.

⁷ 852 F.2d 1106 (9th Cir. 1988).

⁸ *Id.* at 1107.

⁹ 16 U.S.C. §§ 1531–1544 (2006).

¹⁰ *Palila*, 852 F.2d at 1107. The court explained that the bird, “[t]he Palila (which has earned the right to be capitalized since it is a party to [the] proceeding),” was being “represented by attorneys for the Sierra Club, Audubon Society, and other environmental parties.” *Id.*

¹¹ *Loggerhead Turtle v. County Council*, 148 F.3d 1231 (11th Cir. 1998).

¹² *Cabinet Mountains Wilderness/Scotchman’s Peak Grizzly Bears v. Peterson*, 685 F.2d 678 (D.C. Cir. 1982).

¹³ *Mount Graham Red Squirrel v. Yeutter*, 930 F.2d 703 (9th Cir. 1991).

¹⁴ *Marbled Murrelet v. Babbitt*, 83 F.3d 1068 (9th Cir. 1996); *N. Spotted Owl v. Lujan*, 758 F. Supp. 621 (W.D. Wash. 1991).

¹⁵ 386 F.3d 1169 (9th Cir. 2004).

¹⁶ In *Cetacean Community*, the court held that the global community of whales, dolphins, and porpoises were not authorized to sue under the citizen suit provisions of the Administrative Procedure Act and various animal protection statutes, including the Endangered Species Act. *Id.* at 1176–79; see also *Citizens To End Animal Suffering & Exploitation, Inc. v. New England Aquarium*, 836 F. Supp. 45, 49–50 (D. Mass. 1993) (holding that a dolphin lacked standing to sue under the Marine Mammal Protection Act); *Hawaiian Crow v. Lujan*, 906 F. Supp. 549, 551–52 (D. Haw. 1991) (holding that Hawaiian Crow is not a “person” within the meaning of the citizen suit provision of the Endangered Species Act). The *Cetacean Community* court concluded that its statements to the contrary in *Palila* were “little more than rhetorical flourishes.” *Cetacean Cmty.*, 386 F.3d at 1174.

¹⁷ *Cetacean Cmty.*, 386 F.3d at 1177–79. On the status of animals as “legal things” that are often “invisible to civil law,” see STEVEN M. WISE, *RATTLING THE CAGE: TOWARD LEGAL RIGHTS FOR ANIMALS* 4 (2000).

¹⁸ See, e.g., *Walker v. City of Lakewood*, 272 F.3d 1114, 1123 n.1 (9th Cir. 2001).

¹⁹ See, e.g., *City of Sausalito v. O’Neill*, 386 F.3d 1186, 1200 (9th Cir. 2004).

gal persons.²⁰ But so far, the only animals that are “persons” are humans.²¹ Thus, although federal law recognizes “a wide range of animal rights,”²² these rights are unlike the common law rights of humans in that animals cannot sue to enforce them. Enforcement is left primarily to governmental action, which may be supplemented by private claims when these are authorized by “citizen suit” provisions.²³

In addition to having a cause of action, a plaintiff must meet the requirements of constitutional and prudential standing. Under the Supreme Court’s interpretation of Article III, a plaintiff must demonstrate that he has “suffered an ‘injury in fact’ that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical”; that the injury is “fairly traceable to the challenged action of the defendant”; and that it is “likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.”²⁴ The courts have also created “prudential” requirements, which Congress can eliminate when drafting a statute. The most important of these requires allegation of more than “a generally available grievance”²⁵ shared by all or most citizens, and that this injury “falls within the ‘zone of interests’ sought to be protected by the statutory provision whose violation forms the legal basis for [the] complaint.”²⁶

B. *Developments in the Law of Aesthetic Injury*

In the past decade, the law of standing as it relates to claims about animal rights has undergone significant development through a series

²⁰ Drawing on this fact, Justice Douglas famously suggested that ecosystems should be granted causes of action, or “statutory standing.” See *Sierra Club v. Morton*, 405 U.S. 727, 741–43 (1972) (Douglas, J., dissenting) (“Contemporary public concern for protecting nature’s ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation. . . . Inanimate objects are sometimes parties in litigation. . . . So it should be as respects valleys, alpine meadows, rivers, lakes . . .”). This line of argument is further developed in Christopher D. Stone, *Should Trees Have Standing? — Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972). Addressing the constitutional issues that might be raised, Professor Cass Sunstein argues that nothing in Article III limits Congress’s power to grant animals statutory standing to bring suit to protect their legal interests. Cass R. Sunstein, *Standing for Animals (with Notes on Animal Rights)*, 47 UCLA L. REV. 1333, 1360–61 (2000).

²¹ Sunstein, *supra* note 20, at 1359.

²² *Id.* at 1333–34. The Animal Welfare Act creates what Professor Sunstein has deemed “an incipient bill of rights for animals.” *Id.* at 1334. *But cf.* GARY FRANCIONE, ANIMALS, PROPERTY, AND THE LAW 185–249 (1995) (arguing that the Animal Welfare Act does not confer rights on animals).

²³ The statute creating the rights may contain such a provision. See, e.g., Endangered Species Act, 16 U.S.C. § 1540(g) (2006). When it does not — as is the case with the Animal Welfare Act, 7 U.S.C. §§ 2131–2159 (2006) — plaintiffs may be able to rely on the citizen suit provision of the Administrative Procedure Act (APA), 5 U.S.C. § 702 (2006).

²⁴ *Friends of the Earth, Inc. v. Laidlaw Env’tl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000).

²⁵ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573 (1992).

²⁶ *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 883 (2000).

of appellate court cases. In *Animal Legal Defense Fund v. Glickman*²⁷ and *Animal Legal Defense Fund v. Veneman*,²⁸ the plaintiffs sued the U.S. Department of Agriculture on the grounds that its regulation of the treatment of particular primates in zoos violated the agency's statutory mandate under the Animal Welfare Act²⁹ (AWA). And in *American Society for the Prevention of Cruelty to Animals v. Ringling Brothers & Barnum & Bailey Circus*,³⁰ the plaintiffs sued a circus owner under the citizen suit provision of the Endangered Species Act³¹ (ESA), alleging that the circus mistreated particular elephants in violation of the statute. On the issue of standing, the plaintiffs in all three cases alleged particularized and concrete injury by virtue of the fact that they had developed personal attachments to the specific animals at issue.³² Thus, a central question in all of these cases was whether the plaintiffs could have a legally cognizable interest in the treatment of an individual animal.

In the core cases establishing the scope of aesthetic interests — cases building on the Supreme Court's 1972 holding in *Sierra Club v. Morton*³³ — species and ecosystems, not particular animals, were at issue. As a result, the legally cognizable aesthetic interest in observing animals established by these cases was one of observing species: plaintiffs gained access to the court by virtue of the injuries they incurred as the result of defendants' actions that threatened to significantly diminish the species of animal.³⁴ It was by characterizing their injury as “an increased probability of one kind or another,” such as an increased chance that there would be fewer animals available for viewing, that the plaintiffs in these suits satisfied the standing requirement.³⁵ And

²⁷ 154 F.3d 426 (D.C. Cir. 1998) (en banc).

²⁸ 469 F.3d 826 (9th Cir. 2006), vacated en banc at the request of the parties, 490 F.3d 725 (9th Cir. 2007). The parties requested the opinion be vacated as part of their settlement of the case, after a sua sponte call in which the court voted to rehear the case en banc. See 490 F.3d at 726.

²⁹ 7 U.S.C. §§ 2131–2159 (2006).

³⁰ 317 F.3d 334 (D.C. Cir. 2003); see also *Am. Soc'y for the Prevention of Cruelty to Animals v. Ringling Bros. & Barnum & Bailey Circus*, 246 F.R.D. 39 (D.D.C. 2007).

³¹ 16 U.S.C. § 1540(g) (2006).

³² See *Veneman*, 469 F.3d at 832–33; *Ringling Brothers*, 317 F.3d at 337; *Glickman*, 154 F.3d at 431–32.

³³ 405 U.S. 727 (1972); *id.* at 734 (“Aesthetic and environmental well-being, like economic well-being, are . . . deserving of legal protection through the judicial process.”).

³⁴ See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562–63 (1992) (noting that “the desire to use or observe an animal species . . . is undeniably a cognizable interest for purpose of standing”); *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 231 n.4 (1986) (holding that plaintiffs “alleged a sufficient ‘injury in fact’ in that the whale watching and studying of their members will be adversely affected”); *Sierra Club*, 405 U.S. at 734 (holding that plaintiffs alleged sufficient injury in claiming that a development “would destroy or otherwise adversely affect the scenery, natural and historic objects and wildlife of the park” (internal quotation mark omitted)).

³⁵ Sunstein, *supra* note 20, at 1356.

in the view of some judges, diminution of the species was the “touchstone” of the law.³⁶

However, the courts in three recent cases reasoned that there could be no relevant distinction between harm to a species and harm to a particular animal. In the *Glickman* court’s discussion of the standing of one plaintiff, it explained: “The key requirement . . . is that the plaintiff have suffered his injury in a personal and individual way — for instance, by seeing with his own eyes the particular animals whose condition caused him aesthetic injury.”³⁷ Thus, the *Glickman* court held that the inhumane treatment of particular primates at the zoo could be the predicate of a legally cognizable aesthetic injury. And in *Veneman*, the court expressly articulated this point: “For purposes of injury-in-fact, a distinction between harm to individual animals, on the one hand, and harm to an animal species through diminution or extinction, on the other, is illogical. The injury at issue is not the animals’ but the human observer’s.”³⁸

While *Veneman* is primarily significant for its support of the *Glickman* holding,³⁹ the *Ringling Brothers* court made a further impact on federal standing jurisprudence in the context of what might be considered animal rights cases. Unlike the plaintiff at issue in *Glickman*, the plaintiff in *Ringling Brothers* did not have concrete plans to continue seeing the elephants whose treatment caused his injury.⁴⁰ He merely *wanted* to see them, and this fact is significant. When seeking injunctive relief, “harm in the past . . . is not enough to establish a present controversy, or in terms of standing, an injury in fact.”⁴¹ The D.C. Circuit concluded, however, that this difference in imminence was not an insurmountable obstacle. The court drew on *Friends of the Earth v. Laidlaw Environmental Services*,⁴² a Supreme Court case holding that the plaintiffs suffered injury in fact when they desired to use and enjoy one of their favorite rivers for recreation but could not because it was polluted. The court concluded that “an injury in fact can be found when a defendant adversely affects a plaintiff’s enjoyment of

³⁶ See, e.g., *Glickman*, 154 F.3d at 448 (Sentelle, J., dissenting).

³⁷ *Id.* at 433 (majority opinion).

³⁸ *Animal Legal Def. Fund v. Veneman*, 469 F.3d 826, 834 (9th Cir. 2006), *vacated en banc at the request of the parties*, 490 F.3d 725 (9th Cir. 2007).

³⁹ In *Veneman*, the Ninth Circuit followed the D.C. Circuit’s reasoning, finding standing on the basis that the alleged injury was “virtually indistinguishable from the injury the D.C. Circuit found constitutionally sufficient in *Glickman*.” *Veneman*, 469 F.3d at 833.

⁴⁰ *Am. Soc’y for the Prevention of Cruelty to Animals v. Ringling Bros. & Barnum & Bailey Circus*, 317 F.3d 334, 337 (D.C. Cir. 2003).

⁴¹ *Id.* at 336.

⁴² 528 U.S. 167 (2000).

flora or fauna, which the plaintiff *wishes* to enjoy again upon the cessation of the defendant's actions."⁴³

As the following sections demonstrate, the development in the doctrine of aesthetic injury in these three cases can be read as providing judicial access to a new type of suit in which the rights of animals are adjudicated. But there are tensions in such a reading, as features of the cases cut against such a clear conclusion.

C. *Animal Rights and Human Proxies*

The fact that these cases involved individual animals, rather than species, is important, for it means that courts' doors are now open to citizen suits that might lead to the enforcement of animal rights. Although the aesthetic injury cases of the 1970s–1990s created and enforced new duties towards species and ecosystems — by either requiring the promulgation of new regulations or the enforcement of existing ones — these duties were not necessarily the correlatives of animal rights. The reason for this potential divergence is that a species, unlike an individual, is not an entity with coherent interests. For example, if an animal species will benefit from the selective killing of its members that are carrying a deleterious gene, the species and some of its members will have conflicting interests. In this case, as a practical matter, a duty to protect the species will not confer rights upon all of its members.⁴⁴ Moreover, as a conceptual matter, the idea of “species rights” is — according to many rights theorists — nonsensical, the problem being that “[s]pecies and ecosystems are the names for global entities, to which the theory of rights is inapplicable.”⁴⁵ On this account, judicial enforcements of statutory duties to animals in the core aesthetic injury cases did not enforce animal rights. Seen in this context, *Glickman* and the cases following it are significant in that they open U.S. courts' doors to citizen suits in which animal rights are adjudicated. Whether this development should be seen as an advance in

⁴³ *Ringling Brothers*, 317 F.3d at 337 (emphasis added).

⁴⁴ This is not to say that a law created with the intention of protecting a species cannot do so by conferring rights on individual animals. One might, for example, make it illegal to kill individual bald eagles as a way of protecting the entire species. But this approach would create group rights from individual rights, not vice versa. See also LISA H. SIDERIS, ENVIRONMENTAL ETHICS, ECOLOGICAL THEOLOGY, AND NATURAL SELECTION 159 (2003) (noting that when a species is protected, it is not the individual members of the species that are protected — although some of them will be protected indirectly — but rather the form of life that they represent).

⁴⁵ Mariachiara Tallacchini, *Human Right to the Environment or Rights of Nature?*, in 1 CHALLENGES TO LAW AT THE END OF THE 20TH CENTURY: RIGHTS 125, 131 (Rex Martin & Gerhard Sprenger eds., 1997) (citation omitted). For a general discussion of the problem of attaching rights to groups, see Christopher Heath Wellman, *Liberalism, Communitarianism, and Group Rights*, 18 LAW & PHIL. 13, 15–27 (1999).

animals' access to the courts, however, is arguable. There are two very different ways to conceptualize this development.

On one account, these cases speak only to human interests and their enforcement by the courts. As Professor Cass Sunstein notes, having a legal interest in a dispute can be thought of as having a property interest at stake.⁴⁶ Thus, one might suggest the legal effect of these cases is comparable to that of creating a new property right in animals that belongs not to the owner, but to the community — to those who view the animal (in the case of *Glickman*) and even to those who want to view the animal (in the case of *Ringling Brothers*). From this perspective, the development of the law in these cases is a further commodification of animals as legal things, not a shift to a recognition of them as rights-bearers. Given that these cases do not actually grant judicial access to animals, but rather to new classes of persons, one might argue that their only significance is that they expand the scope of the “aesthetic injury” field of the “injury in fact” test.

Although perhaps doctrinally correct, this formalistic view fails to recognize crucial functional aspects of the cases. If the development were truly comparable to an extension of property rights in animals, the origin of an owner's new duties to his animals — the ultimate source of law — would be his common-law or statutory duties to those persons who had aesthetic interests in them. However, the relevant laws in these aesthetic injury suits do not give rights to persons, but rather impose duties on agencies. The AWA, for example, requires that the Secretary of Agriculture promulgate standards governing the treatment of animals in order to “insure that animals intended for use in research facilities or for exhibition purposes or for use as pets are provided humane care and treatment.”⁴⁷ The AWA and ESA are first and foremost public law. If these aesthetic injury suits are ultimately successful, they will result in the creation and enforcement of duties to animals, not persons. In the classic Hohfeldian framework,⁴⁸ this judicial enforcement of duties to animals involves the creation of animal rights. Thus, when seen functionally — with an eye to what is at stake and can be achieved — these cases impact not only the access of humans to courts, but also that of animals: through these developments in standing law, judges come to adjudicate a new class of claims about the statutory rights of privately owned animals and the adequacy of the regulations protecting them.

⁴⁶ See Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 191–92 (1992).

⁴⁷ 7 U.S.C. § 2131 (2006).

⁴⁸ See Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 30–33 (1913) (arguing that rights and duties are “jural correlatives,” so that owing a duty to an entity provides that entity with a right and vice versa).

There is, moreover, a sense in which the plaintiffs in these cases can be seen as proxies for the animals that they brought suit to protect. In all three cases, the court's recognition of injury in fact was predicated on the specificity not only of the harm to the plaintiffs, but also of that to the animals. In the *Glickman* court's extensive, eight-page analysis of injury in fact,⁴⁹ for example, it repeatedly emphasized the particularity of the animals whose harming gave rise to the plaintiff's aesthetic injuries: "At this particular zoo . . . he saw particular animals enduring inhumane treatment. He developed an interest, moreover, in seeing these particular animals living under humane treatment. As he explained, '[w]hat I observed . . . greatly impaired my ability to observe and enjoy *these captive animals*.'"⁵⁰ In *Ringling Brothers*, the D.C. Circuit went further, treating this particularity as the predicate of the legally cognizable injury.⁵¹ As the district court made clear on remand, the plaintiff only had standing to challenge the treatment of the particular animals with which he had relationships: "[The plaintiff's] standing in this case is based on his emotional attachment to particular elephants — six of which are still at issue in this case."⁵²

Although these courts' focus on the particularity of the animals does not make sense as a matter of law — for it is injury to the plaintiff, not the animal, that must be "concrete and particularized"⁵³ — it points to an important feature of these suits. What seems to be going on in these cases, which did not occur in the earlier aesthetic injury cases regarding species protection, is that the plaintiffs are acting as proxies by which harms suffered by individual animals are translated into human harms. Through the plaintiffs' capacity for empathy with the particular animals, violations of animal rights become violations of human interests, which can then be brought before the court.

D. *Anthropomorphism, Facts, and Human Values*

Although claims about animal rights might have gained access to court in these cases, it was only by being transformed into claims about human interests that this was possible. The plaintiffs gained

⁴⁹ See *Animal Legal Def. Fund v. Glickman*, 154 F.3d 426, 431–38 (D.C. Cir. 1998) (en banc).

⁵⁰ *Id.* at 431–32 (alteration in original) (quoting Affidavit of Marc Jurnove at para. 17, *Animal Legal Def. Fund v. Glickman*, 154 F.3d 426 (D.C. Cir. 1998) (en banc) (Nos. 97-5009, 97-5031 and 97-5074)); see also *id.* at 433, 438 (noting plaintiff's concern for "a large male chimpanzee named Barney").

⁵¹ *Am. Soc'y for the Prevention of Cruelty to Animals v. Ringling Bros. & Barnum & Bailey Circus*, 317 F.3d 334, 337 (D.C. Cir. 2003) (holding that "emotional attachment to a particular animal" can form "the predicate of a claim of injury" (quoting *Humane Soc'y v. Babbitt*, 46 F.3d 93, 98 (D.C. Cir. 1995)) (internal quotation marks omitted)).

⁵² *Am. Soc'y for the Prevention of Cruelty to Animals v. Ringling Bros. & Barnum & Bailey Circus*, 246 F.R.D. 39, 42 (D.D.C. 2007).

⁵³ *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000).

standing by turning the physical injury of animals into the aesthetic injury of persons. Thus, it was through a type of anthropomorphism — not of animals themselves, as in the medieval animal trials, but rather of the harms to them — that animal rights were adjudicated by the court. In this light, one might suggest that there are two senses in which the plaintiffs in these cases “represented” animal interests. They did so in the classic legal sense: they brought the animal interests before the court. But before doing so, they represented them in what could be considered an “artistic” sense: they reshaped their appearance, giving them a human form.

This transformation of animal suffering into the aesthetic injuries of humans in *Glickman*, *Ringling Brothers*, and *Veneman* may be troubling to many who advocate for animal rights and standing.⁵⁴ One cause for concern is the potentially significant limitations of aesthetic injury suits: plaintiffs might be able to gain standing to challenge only the treatment of animals that they can see⁵⁵ and will be able to continue seeing in the future.⁵⁶ Also troubling may be the fact that the animals at issue in these cases are in a sense legally irrelevant: the courts do not require proof of the injury to the animals, but rather proof of the harm that the plaintiffs experience as a result of their *perception* of this injury.⁵⁷ Thus, the transformation leaves the legally protected interests of animals outside the scope of the courts’ concern.

Although the anthropomorphic feature of these cases may seem like a crude legal device from the perspective of classical animal rights theory,⁵⁸ there are other ways of thinking about our ethical duties to animals. Professor Cora Diamond, for example, urges that the solution to our society’s unethical treatment of animals is not the granting of rights, but rather a reconfiguration of human beings’ relationship to animals — a shift in the normative framework from which our rights-

⁵⁴ See, e.g., Lauren Magnotti, Note, *Pawing Open the Courthouse Door: Why Animals’ Interests Should Matter When Courts Grant Standing*, 80 ST. JOHN’S L. REV. 455, 455–56 (2006). The framing of the issues as “aesthetic” may also be duplicitous. See Sunstein, *supra* note 20, at 1349 (“[T]he plaintiff is likely to be concerned ethically or morally, not aesthetically.”).

⁵⁵ Cf. *Animal Lovers Volunteer Ass’n v. Weinberger*, 765 F.2d 937 (9th Cir. 1985) (holding that the plaintiffs, who sought to enjoin aerial shooting of goats on a military enclave, could not have suffered injury in fact because the public was not allowed access to the enclave).

⁵⁶ Cf. *Int’l Primate Prot. League v. Inst. for Behavioral Research, Inc.*, 799 F.2d 934, 938 (4th Cir. 1986) (holding that even though the plaintiffs had developed personal relationships with the monkeys at issue during the trial, they could not allege continued injury in fact in the future, because they could not continue seeing the monkeys if the defendants complied with the law).

⁵⁷ See, e.g., *Am. Soc’y for the Prevention of Cruelty to Animals v. Ringling Bros. & Barnum & Bailey Circus*, 317 F.3d 334, 337 (D.C. Cir. 2003). Here, the D.C. Circuit’s reasoning was based on *Laidlaw*, in which the Supreme Court held that injury in fact could exist merely on the basis of a reasonable perception of an environmental harm regardless of the existence of a harm in fact. See *Laidlaw*, 528 U.S. at 167.

⁵⁸ See, e.g., FRANCIONE, *supra* note 22; WISE, *supra* note 17.

talk emerges — by which humans come to see animals as “fellow creatures.”⁵⁹ In a related vein, Professor Laurence Tribe argues that facts alone cannot demonstrate that animals “have rights and must be allowed, through others as their spokespersons, to press moral claims.”⁶⁰ Rather, he suggests, “[t]he secret to making that case may well reside at a level deeper than rational argument and deeper than provable fact, but, paradoxically, in a visceral appeal to our own common humanity.”⁶¹ From this perspective, *Glickman, Ringling Brothers*, and *Veneman* may have made a step in the right direction. To see the cases in this way, however, it is necessary to take a step back from these particular cases and look at the judicial concept of injury in fact that governs access to U.S. courts.

It is first important to recognize that this requirement is — in the form conventionally articulated by courts, as an inquiry *into fact alone* — essentially meaningless.⁶² The problem, as identified by then-Professor William Fletcher, is that there cannot be a merely factual determination of whether a plaintiff is injured, “except in the relatively trivial sense of determining whether [the] plaintiff is telling the truth about her sense of injury.”⁶³ If injuries in fact were merely facts about the world, and we “put to one side people who lie about their states of mind, we should concede that anyone who claims to be injured is, in fact, injured if she can prove the allegations of her complaint.”⁶⁴ This result would not only be in conflict with the courts’ standing jurisprudence, but also incoherent, negating its function as a limiting criterion.

Thus, it must be the case, as Professor Sunstein argues, that when courts apply the injury in fact test, they actually “rely on some standard that is normatively laden and independent of facts.”⁶⁵ It is only in this way that one can differentiate between injuries in fact and non-cognizable ideological harms. As Professor Sunstein notes,⁶⁶ blacks may feel injured when the government grants tax deductions to segre-

⁵⁹ See Cora Diamond, *Eating Meat and Eating People*, in ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS 101–05 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004).

⁶⁰ Laurence H. Tribe, *Ten Lessons Our Constitutional Experience Can Teach Us About the Puzzle of Animal Rights: The Work of Steven M. Wise*, 7 ANIMAL L. 1, 7–8 (2001).

⁶¹ *Id.* at 8. For further analysis along these lines, see Laurence H. Tribe, *Ways Not To Think About Plastic Trees: New Foundations for Environmental Law*, 83 YALE L.J. 1315 (1974) (suggesting that the extension of rights to new species entails enlarging the circles of human empathy and identification, *id.* at 1340–46, and that the “homocentric logic of self-interest leads finally not to human satisfaction,” as one might expect, “but to the loss of humanity,” *id.* at 1348).

⁶² See William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 229–39 (1988) (discussing the “incoherence” of the injury in fact requirement); Sunstein, *supra* note 46, at 188–93 (discussing the impossibility of a solely factual inquiry into injury).

⁶³ Fletcher, *supra* note 62, at 231.

⁶⁴ *Id.*

⁶⁵ Sunstein, *supra* note 46, at 189.

⁶⁶ See *id.*

gated schools,⁶⁷ and a person might feel harmed by the destruction of a pristine area that she has visited and plans to visit again, regardless of whether these plans are finalized.⁶⁸ The Supreme Court may deny that these are injuries, and one may be inclined to agree. But in doing so, one must recognize that this denial is a judgment based not on fact, but rather on an inquiry into “our own value-laden ideas about what things ought to count.”⁶⁹ With this recognition in mind, it is worth looking again at the holdings in *Glickman*, *Veneman*, and *Ringling Brothers*, and the norms on which they were based.

In the core aesthetic injury cases, the sources of the norms underlying courts’ recognitions of injury in fact were not the statutes at issue,⁷⁰ but rather the foundational Supreme Court case on aesthetic injury, *Sierra Club v. Morton*, in which the Court stated:

We do not question that this type of harm may amount to an ‘injury in fact’ sufficient to lay the basis for standing Aesthetic and environmental well-being, like economic well-being, *are important ingredients of the quality of life in our society*, and . . . deserving of legal protection through the judicial process.⁷¹

It was on the basis of this statement that the Court later concluded that “the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing.”⁷² Combined, these statements have provided the basis for many of the aesthetic injury suits in the past thirty years. Thus, the foundations of legally cognizable aesthetic injuries are not positive laws or the scope of interests protected by them, but rather the Court’s underarticulated conception of what is basic to human quality of life.

In this context, *Glickman*, *Veneman*, and *Ringling Brothers* take on new significance. What it means for the courts in these cases to con-

⁶⁷ *But cf.* *Allen v. Wright*, 468 U.S. 737, 755–56 (1984) (finding this harm to be “abstract”).

⁶⁸ *But cf.* *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 563–64 (1992) (holding that plaintiffs who had traveled to see an endangered species in the past but had not finalized their plans to do so again did not suffer injury in fact from an increased chance that the species would be lost).

⁶⁹ Sunstein, *supra* note 46, at 189.

⁷⁰ Because courts must rely on some normative source in deciding what counts as an injury in fact, they often look to the language of the statute in question and ask whether the interest is one protected by the statute (although this question technically conflates the “injury in fact” and “zone of interests” tests). *See* Sunstein, *supra* note 20, at 1353–54. The courts in these animal cases, however, did not base their conclusions on the AWA or on the ESA. Only the *Glickman* majority mentioned the language of the AWA to address the scope of legally cognizable injury, and this reference was only as part of a response to a hypothetical case posed by the dissent — not as part of its primary reasoning about the existence of an injury in fact. *See* *Animal Legal Def. Fund v. Glickman*, 154 F.3d 426, 434 n.7 (D.C. Cir. 1998) (en banc). In counter-response, the dissent correctly identified this move as confusing the inquiry into injury in fact with the inquiry into whether the plaintiff was arguably within the zone of protected interests. *See id.* at 449 (Sentelle, J., dissenting).

⁷¹ *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972) (emphasis added).

⁷² *Lujan*, 504 U.S. at 562–63.

clude that a person has an aesthetic interest in the humane treatment of animals is that this interest can be legally cognizable as something basic to one's human identity. When concern for animals in public spaces is seen not as a nonjusticiable ideological interest, but rather as an interest that can be constitutive of human quality of life and thus deserving of judicial protection, we might conclude that animals have entered further into our human world. And this change might be a precondition for true and meaningful access to U.S. courts.

E. Conclusion

The significance of the expansion from species-based to individual animal-based aesthetic injury claims has not yet been recognized — perhaps because in retrospect there appears to be no legally relevant distinction between them. The fact that this distinction is irrelevant as a doctrinal matter does not, however, mean that it is not of legal importance. Rather, the distinction, which the plaintiffs in these cases needed to dissolve in order to gain access to the courts, runs parallel to one that deserves attention. For as this Part demonstrates, it maps onto a real and important underlying philosophical difference. Attention to this difference reveals that these cases mark the beginning of a new form of representation and enforcement of animal rights. This development in the law of standing may appear crude from the perspective of traditional animal rights theory in that it fails to truly provide animal rights with judicial protection. However, it is possible that the troubled place of animal rights in our legal system cannot, as some theorists propose, be solved by positive law alone. What might also be necessary is a change brought about, as Professor Tribe suggests, by an appeal “to our own common humanity” — or in other words, the type of change seen in these cases.