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# Safe-Conduct Theory of the Alien Tort Statute, The

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# THE SAFE-CONDUCT THEORY OF THE ALIEN TORT STATUTE

*Thomas H. Lee\**

*The Alien Tort Statute (ATS), as enacted in September 1789, allowed any alien to sue in federal court for “a tort only in violation of the law of nations or a treaty of the United States.” In 2004 the Supreme Court concluded in *Sosa v. Alvarez-Machain* that the “law of nations” part of the statute targeted piracy, infringements of ambassadorial rights, and violations of “safe conducts,” and held that aliens may bring ATS suits for violations of customary international law with the characteristic features of the three historical violations. In this Article, Professor Lee revisits the ATS’s origins to show that it exclusively concerned safe conducts. Drawing on world and American historical events surrounding enactment, pertinent treatises esteemed by the founding group, and a careful reading of the statute’s text in light of other provisions of the 1789 Judiciary Act, the 1790 Crimes Act, and Article III of the Constitution, the Article demonstrates that the First Congress did not intend the ATS to address piracy or ambassadorial infringements, and explains the meaning of safe conducts—an overlooked key that unlocks the Founders’ views on international law and the role of the newly created national courts in foreign affairs. The safe-conduct theory advances a new modern role for the ATS to redress common law torts committed by private actors—including aliens—with a United States sovereign nexus, and not for international law violations committed by anyone anywhere. In developing this contextual account, Professor Lee resolves uncertainty over the constitutional basis for the ATS and shows how, even with sparse conventional sources, the original meaning of an iconic founding-era enactment might be recovered.*

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All merchants shall have safety and security in going out of England, coming into England, and staying and going through England, as much by land as by water, to buy and to sell free of all malicious tolls, . . . in accord with the ancient and rightful customs, except in time of war, in which case if they are from a land at war with us and . . . found in our land at the start of war, they shall be attached without injury to their persons and things, until it be known . . . how the merchants of our land are treated . . . in [their] land . . . if ours are safe there, theirs shall be safe in our land.

—Clause 41 of Magna Carta (1215)<sup>1</sup>

It is agreed . . . that persons of any . . . description shall have free Liberty to go to any part or parts of any of the thirteen United States and therein to remain twelve months, unmolested in their endeavours to obtain the restitution of such of their estates, rights and properties, as may have been confiscated.

—Article V of the Treaty of Paris (1783)<sup>2</sup>

#### INTRODUCTION

One of Congress's earliest enactments is an oft-discussed but little understood provision known as the Alien Tort Statute (ATS).<sup>3</sup> Like a

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1. Magna Carta, cl. 41 (1215) (translation by Thomas H. Lee); see also Claire Brey, *Magna Carta: Manuscripts and Myths* 52 (2002) (providing original Latin text and more contemporary translation of Magna Carta). References to the provision in this Article will use the more literal Lee translation.

2. Definitive Treaty of Peace, U.S.-Gr. Brit., art. V, Sept. 3, 1783, 8 Stat. 80 [hereinafter 1783 Treaty of Paris].

3. 28 U.S.C. § 1350 (2000). The provision has also been called the Alien Tort Act, *Kadic v. Karadzic*, 70 F.3d 232, 236 (2d Cir. 1995); Alien Tort Claims statute, *Republic of the Philippines v. Marcos*, 806 F.2d 344, 354 (2d Cir. 1986); and Alien Tort Claims Act, *Flores v. S. Peru Copper Corp.*, 253 F. Supp. 2d 510, 512–13 (S.D.N.Y. 2002). The use of Alien Tort Statute in this Article conforms to Supreme Court nomenclature. See, e.g., *Sosa*

true enigma, the provision is laconic, its language plain. Originally a clause of the Judiciary Act of 1789 (1789 Act, Act)—the great Act that forged the national courts of the United States<sup>4</sup>—the ATS provided that federal district courts “shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States.”<sup>5</sup> Essentially dormant for two centuries,<sup>6</sup>

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v. Alvarez-Machain, 542 U.S. 692, 697 (2004); *Argentine Republic v. Amerasia Shipping Corp.*, 488 U.S. 428, 436 (1989).

The subject of the historical origins of the Alien Tort Statute has drawn attention from leading jurists and scholars. See, e.g., *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 812–16 (D.C. Cir. 1984) (Bork, J., concurring); Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 *Va. J. Int'l L.* 587 (2002) [hereinafter Bradley, *Alien Tort Statute*]; Anne-Marie Burley (Slaughter), *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 *Am. J. Int'l L.* 461, 463, 475–88 (1989); William R. Casto, *The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 *Conn. L. Rev.* 467, 488–510 (1986) [hereinafter Casto, *Protective Jurisdiction*]; Michael G. Collins, *The Diversity Theory of the Alien Tort Statute*, 42 *Va. J. Int'l L.* 649 (2002); Anthony D'Amato, *Editorial Comment, The Alien Tort Statute and the Founding of the Constitution*, 82 *Am. J. Int'l L.* 62 (1988); William S. Dodge, *The Constitutionality of the Alien Tort Statute: Some Observations on Text and Context*, 42 *Va. J. Int'l L.* 687 (2002) [hereinafter Dodge, *Constitutionality*]; William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists,"* 19 *Hastings Int'l & Comp. L. Rev.* 221, 225–37 (1996) [hereinafter Dodge, *Historical Origins*]; Kenneth C. Randall, *Federal Jurisdiction over International Law Claims: Inquiries into the Alien Tort Statute*, 18 *N.Y.U. J. Int'l L. & Pol.* 1, 11–31 (1985); John M. Rogers, *The Alien Tort Statute and How Individuals "Violate" International Law*, 21 *Vand. J. Transnat'l L.* 47, 48–57 (1988); Joseph Modeste Sweeney, *A Tort Only in Violation of the Law of Nations*, 18 *Hastings Int'l & Comp. L. Rev.* 445 (1995); Arthur M. Weisburd, *The Executive Branch and International Law*, 41 *Vand. L. Rev.* 1205, 1223–26 (1988). See generally *The Alien Tort Claims Act: An Analytical Anthology* 405–31 (Ralph G. Steinhardt & Anthony D'Amato eds., 1999) (providing annotated bibliography).

4. On the first Judiciary Act of 1789, see generally Wilfred J. Ritz, *Rewriting the History of the Judiciary Act of 1789* (reconsidering longstanding conceptions of Congress's purposes in passing 1789 Act); Maeva Marcus & Natalie Wexler, *The Judiciary Act of 1789: Political Compromise or Constitutional Interpretation, in Origins of the Federal Judiciary: Essays on the Judiciary Act of 1789*, at 13 (Maeva Marcus ed., 1992); Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 *Harv. L. Rev.* 49 (1923) (recounting compromises leading to final form of Judiciary Act based on original draft, amendments to draft, and copy of bill passed by Congress).

5. Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77. Congress first revised the 1789 Act in 1874 to read: “The district courts shall have jurisdiction as follows: . . . Of all suits brought by any alien for a tort ‘only’ in violation of the law of nations, or of a treaty of the United States.” Rev. Stat. § 563 (1874). A more minor 1911 revision clarified that this jurisdiction was “original” and otherwise modified punctuation only: “The district courts shall have original jurisdiction as follows: . . . Of all suits brought by any alien for a tort only, in violation of the laws of nations or of a treaty of the United States.” Act of Mar. 3, 1911, ch. 231, § 24, 36 Stat. 1087, 1093. The present version of the ATS, dating back to 1948, provides that “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” 28 U.S.C. § 1350.

6. District courts upheld jurisdiction under the ATS in only two cases before the landmark decision in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). See *Adra v. Clift*,

the statute, in the past twenty-six years, has become an iconic vehicle for international human rights litigation in U.S. federal courts. Such litigation has included suits by aliens against other aliens for torts committed abroad without any apparent connection to the United States.<sup>7</sup> In *Sosa v. Alvarez-Machain*, the Supreme Court affirmed this newfound role for the ATS, but subject to a historically minded limitation on actionable claims.<sup>8</sup>

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195 F. Supp. 857, 864–65 (D. Md. 1961) (concealing foreign nationality of child to bring her into United States is tort in violation of the law of nations); *Bolchos v. Darrel*, 3 F. Cas. 810, 810–11 (D.S.C. 1795) (No. 1607) (finding jurisdiction to adjudicate legality of seizure of property of neutral aliens seized as prize cargo by French privateer under ATS and admiralty statute); cf. *Nguyen v. Kissinger*, 528 F.2d 1194, 1201 n.13 (1975) (noting that ATS jurisdiction “may be available”). Claims for ATS jurisdiction were rejected in a dozen or so other cases. See, e.g., *O’Reilly de Camara v. Brooke*, 209 U.S. 45, 52 (1908); *Huynh v. Levi*, 586 F.2d 625, 631 (6th Cir. 1978); *Benjamins v. British European Airways*, 572 F.2d 913, 916 (2d Cir. 1978); *Dreyfus v. Van Fink*, 534 F.2d 24, 28 (2d Cir. 1976); *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975); *Abiodun v. Martin Oil Serv., Inc.*, 475 F.2d 142, 145 (7th Cir. 1973); *Khedivial Line S.A.E. v. Seafarers’ Int’l Union*, 278 F.2d 49, 52 (2d Cir. 1960); *Trans-Cont’l Inv. Corp. v. Bank of the Commonwealth*, 500 F. Supp. 565, 569–70 (C.D. Cal. 1980); *Cohen v. Hartman*, 490 F. Supp. 517, 519 (S.D. Fla. 1980); *Akbar v. N.Y. Magazine Co.*, 490 F. Supp. 60, 63 (D.D.C. 1980); *Valanga v. Metro. Life Ins. Co.*, 259 F. Supp. 324, 327 (E.D. Pa. 1966); *Damaskinos v. Societa Navigacion Interamericana, S.A.*, 255 F. Supp. 919, 923 (S.D.N.Y. 1966); *Lopes v. Schroder*, 225 F. Supp. 292, 295 (E.D. Pa. 1963); *Upper Lakes Shipping Ltd. v. Int’l Longshoremen’s Ass’n*, 33 F.R.D. 348, 349–50 (S.D.N.Y. 1963); *Moxon v. The Fanny*, 17 F. Cas. 942, 947–48 (D. Pa. 1793) (No. 9895).

7. See, e.g., *Amerada Hess*, 488 U.S. at 428 (involving Liberian corporations’ ATS action against Argentina for destruction of oil tanker by Argentine military during Falklands War); *Filartiga*, 630 F.2d at 878 (involving ATS suit by citizens of Paraguay against another Paraguayan for torture killing in Paraguay); *Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d 1116, 1120 (C.D. Cal. 2002) (involving ATS suit by current and former residents of Papua New Guinea against British and Australian corporations alleging environmental destruction, inciting civil war, war crimes, and crimes against humanity).

8. See 542 U.S. at 729–32 (establishing limit to ATS jurisdiction based on “historical paradigms familiar when [the ATS] was enacted”). In the brief period since *Sosa* was decided, there has already been an outpouring of scholarship on the decision’s implications. See, e.g., Benjamin Berkowitz, *Sosa v. Alvarez-Machain*: United States Courts as Forums for Human Rights Cases and the New Incorporation Debate, 40 Harv. C.R.-C.L. L. Rev. 289, 290 (2005) (arguing that *Sosa* is unclear in explaining how courts should recognize customary international law claims); William S. Dodge, Bridging *Erie*: Customary International Law in the U.S. Legal System After *Sosa v. Alvarez-Machain*, 12 Tulsa J. Comp. & Int’l L. 87, 101–08 (2004) (reading *Sosa* to confirm that cases arising under customary international law fall within Article III arising-under jurisdiction and that customary international law is federal law for Supremacy Clause purposes); Eugene Kontorovich, Implementing *Sosa v. Alvarez-Machain*: What Piracy Reveals About the Limits of the Alien Tort Statute, 80 Notre Dame L. Rev. 111, 114–15 (2004) (highlighting *Sosa*’s failure to limit actionable ATS claims through comparison to historical standards for violation of piracy laws); Julian Ku & John Yoo, Beyond Formalism in Foreign Affairs: A Functional Approach to the Alien Tort Statute, 2004 Sup. Ct. Rev. 153, 154–55 (suggesting functional analysis as alternative to *Sosa*’s historically minded approach); Gerald L. Neuman, The Abiding Significance of Law in Foreign Relations, 2004 Sup. Ct. Rev. 111, 111 (evaluating *Sosa* and other foreign-law decisions of 2003 Term as indicative of Court’s abiding view that all three branches have role in foreign relations); Brad R. Roth, International Decision, Scope of the Alien Tort Statute—Arbitrary Arrest and Detention as Violation of Custom, 98 Am. J. Int’l L. 798, 798, 804 (2004) (noting ambiguity in *Sosa* as to

A common assumption of ATS analysis to date is that the statute is essentially about a range of violations of substantive international law as set forth in treaties or the law of nations. The Court in *Sosa* did not question that assumption. The primary axes of disagreement before *Sosa* concerned, rather, whether torts in violation of the “law of nations” prong of the statute arise under federal law,<sup>9</sup> and whether the statute is merely jurisdictional or also grants aliens a private right of action to sue for damages.<sup>10</sup>

*Sosa* more or less resolved these questions. First, by recognizing that the First Congress intended—without limitation by any subsequent Congress—the ATS to afford federal jurisdiction over certain suits by aliens alleging claims under customary international law against other aliens,<sup>11</sup> the Court implied that a tort in violation of customary international law—presumptively synonymous with the statutory words “law of nations”—arises under federal law. Second, the Court concluded that the ATS confers jurisdiction only, but “on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time” it was

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scope of customary international law claims actionable under ATS); John K. Setear, *A Forest with No Trees: The Supreme Court and International Law in the 2003 Term*, 91 Va. L. Rev. 579, 585, 663 (2005) (describing *Sosa* as illustrative of Court’s unwillingness to engage seriously international law); Ralph G. Steinhardt, *Laying One Bankrupt Critique to Rest: Sosa v. Alvarez-Machain and the Future of International Human Rights Litigation in U.S. Courts*, 57 Vand. L. Rev. 2241, 2290–301 (2004) (proposing statutory framework to guide federal courts’ recognition of ATS claims after *Sosa*); Beth Stephens, Comment, *Sosa v. Alvarez-Machain: “The Door Is Still Ajar” for Human Rights Litigation in U.S. Courts*, 70 Brook. L. Rev. 533, 548–49 (2005) (approving of Court’s belief that *Erie* has not deprived federal courts of power to recognize common law torts based on violations of customary international law); Genc Trnavci, *The Meaning and Scope of the Law of Nations in the Context of the Alien Tort Claims Act and International Law*, 26 U. Pa. J. Int’l Econ. L. 193, 265 (2005) (arguing for limitation of ATS claims to violations of “ius cogens”); G. Edward White, *A Customary International Law of Torts*, Val. U. L. Rev. (forthcoming 2006) (manuscript at 77, on file with the *Columbia Law Review*) (exploring reconceptualization of law of nations in ATS cases as general common law not precluded by *Erie*); Ehren J. Brav, *Recent Development, Opening the Courtroom Doors to Non-Citizens: Cautiously Affirming Filartiga for the Alien Tort Statute*, 46 Harv. Int’l L.J. 265, 274–75 (2005) (critiquing separation-of-powers problems raised by *Sosa*).

9. Compare, e.g., Bradley, *Alien Tort Statute*, supra note 3, at 590–91 (asserting that law of nations claims under ATS do not arise under federal law), with Casto, *Protective Jurisdiction*, supra note 3, at 510–11 (arguing that law of nations suits under ATS arise under federal law).

10. See Curtis A. Bradley, *Customary International Law and Private Rights of Action*, 1 Chi. J. Int’l L. 421, 424–25 (2000) (arguing that there is no implied private right of action under ATS). Compare, e.g., *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 777–82 (D.C. Cir. 1984) (Edwards, J., concurring) (arguing that ATS provides private right of action), and *In re Estate of Ferdinand Marcos*, 25 F.3d 1467, 1475 (9th Cir. 1994) (“[The ATS] creates a cause of action for violations of specific, universal and obligatory international human rights standards . . . .”), with *Tel-Oren*, 726 F.2d at 801 (Bork, J. concurring) (arguing that assumption that ATS created cause of action was “fundamentally wrong and certain to produce pernicious results”).

11. See *Sosa*, 542 U.S. at 724–25.

enacted.<sup>12</sup> *Sosa* went on to hold that modern federal “courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century” violations the Court believed the First Congress intended to redress when it enacted the statute.<sup>13</sup> These were piracy, infringements of ambassadorial rights, and violations of safe conducts.<sup>14</sup>

The Court, however, left three significant questions unanswered. First, why invoke hazy founding-era history to ascertain the meaning of a statute today, particularly one that was fallow for two centuries? Second, even if one can justify an attempt to divine the statute’s original meaning, why read it as authorizing federal courts to entertain modern violations with features “comparable” to the original three violations rather than limiting it to just those three, which are still common today? Put another way, even assuming the propriety of originalism, what in the text and context of the ATS licenses *flexible* originalism—that is, abstraction to an evolving standard beyond the trio of still pervasive law-of-nations violations the Court identified?

The third question is the most perplexing, for it concerns the constitutionality of the statute. The *Sosa* Court assumed a constitutional basis of federal jurisdiction in the suit before it.<sup>15</sup> That assumption is open to doubt. The troubling question is which of the nine grants of federal judicial power set forth in Article III, Section 2, Clause 1 does the ATS invoke? The answer seems easy as to the treaty half of the statute: A suit by an alien for a “tort . . . in violation of . . . a treaty of the United States”<sup>16</sup> is a case “arising under” a treaty.<sup>17</sup> And there is also an apparent answer for a law-of-nations claim when the defendant tortfeasor is a state<sup>18</sup> or a United States citizen: the foreign parties provision, which extends the judicial power to “Controversies . . . between a State, or the Citizens thereof, and foreign . . . Citizens or Subjects.”<sup>19</sup> Not as apparent but plain enough is a constitutional basis for a law-of-nations tort by an alien tortfeasor on navigable waters: Article III admiralty jurisdiction.<sup>20</sup> Simi-

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12. *Id.* at 724.

13. *Id.* at 725.

14. *Id.* at 715.

15. See *supra* note 11 and accompanying text. The Court suggested that the existence of any constitutional arising-under jurisdiction over law-of-nations suits between aliens cognizable under the ATS did not compel the conclusion that, in enacting the general federal-question jurisdiction statute, 28 U.S.C. § 1331 (2000), Congress similarly authorized federal courts to extend jurisdiction over “some common law claims derived from the law of nations.” See *Sosa*, 542 U.S. at 731 n.19.

16. 28 U.S.C. § 1350.

17. See U.S. Const. art. III, § 2, cl. 1.

18. Sovereign immunity would preclude such suits absent consent. See *id.* amend. XI; *Seminole Tribe v. Florida*, 517 U.S. 44, 54 (1996); *Hans v. Louisiana*, 134 U.S. 1, 13 (1890).

19. U.S. Const. art. III, § 2, cl. 1.

20. “The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction . . .” *Id.*

larly, if the aggrieved foreigner in an ATS suit is an official in a diplomatic capacity, the suit might fall under the “Ambassadors” Subclause of Article III.<sup>21</sup> But what if the violation is not of a treaty but of the law of nations, the tortfeasor is not a citizen of one of the states but rather an alien, the victim is a private alien instead of a public minister, and the tort does not occur on navigable waters? What, then, is the requisite Article III anchor? This may have been a marginal situation for the founding group, but it is not now: Indeed, it is the case presented by the facts in *Sosa*.

This Article has two immediate purposes. The first is to revise *Sosa*’s account of the origins of the ATS—an endeavor that is crucial to answering the questions *Sosa* left open. The basic argument is that the ATS was enacted to allow aliens to sue in federal district court for only one of the three violations *Sosa* identified, namely transgressions of safe conducts. The statute was not enacted to redress piracy or infringements of ambassadorial rights. Safe conducts have been almost entirely neglected in the literature, which is unsurprising given that the late eighteenth-century contours of the safe-conduct right are not easy to discern, contrary to *Sosa*’s presumption of “specificity” in the definition of the historical violations the statute was intended to address.<sup>22</sup>

The available evidence suggests that the First Congress’s conception of a safe-conduct violation likely encompassed three sorts of injuries. The first category was wartime injury to the person or property of an *enemy* alien who was either (1) granted an express safe-conduct document—also called a passport—by the State Department, a U.S. ambassador, or an American military commander in the field, in which case the injury constituted a violation of the law of nations pertaining to war; or (2) even without a safe-conduct document, entitled to an implied safe conduct under the law of nations or a treaty of the United States, such as a noncombatant.

The second category of safe-conduct violations covered injury to the person or property of a *friendly* or *neutral* alien, whose sovereign was “in amity, league or truce”<sup>23</sup> with the United States, in violation of a term of the treaty memorializing the relationship.<sup>24</sup> Article V of the 1783 Treaty of Paris is a good example of a peace treaty provision generating this sort of safe conduct,<sup>25</sup> which might be called a “specific implied safe conduct,” for it did not require an express safe-conduct document but rather was generated by a specific treaty term promising safety to a class of

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21. “The judicial Power shall extend . . . to all Cases affecting Ambassadors, other public Ministers and Consuls . . .” *Id.*

22. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004).

23. 21 Journals of the Continental Congress, 1774–1789, at 1136 (Gaillard Hunt ed., 1912) [hereinafter *Journals of the Continental Congress*].

24. In 1789, the United States had such treaties with six countries: France, Great Britain, the Netherlands, Sweden, Prussia, and Morocco. See *infra* notes 238–243 and accompanying text.

25. See *supra* text accompanying note 2.



aliens. Such implied protections predominantly promised protection within a sovereign's territory; however, some treaty provisions also granted friendly or neutral aliens extraterritorial safe conducts, particularly on the high seas. The latter were more accurately a hybrid of implied and express safe conducts: Although a treaty term promised protection for the designated class, it was typically contingent upon an express safe-conduct document for verification purposes.

The third and largest category of safe conducts involved something that the American Continental Congress in 1781, borrowing from William Blackstone, called a "general implied safe conduct."<sup>26</sup> This species of safe conduct required neither an express safe-conduct document nor a specific treaty term from which to infer a safe-conduct obligation, but rather was a unilateral commitment by a sovereign to protect the person or property of any alien with whose sovereign the host country was not at war. The general implied safe conduct thus constituted an extraordinarily broad protection for aliens, essentially converting any injury to their person or property within a country into an international law violation by virtue of the fact that the victim was a friendly or neutral alien. In America of 1789, this would have covered every citizen or subject of a European state since the United States was not then at war.

The general implied safe conduct had an impeccable pedigree. Article 41 of Magna Carta was a general implied safe conduct "written" into the English constitution. The early American analogue that the ATS was intended to enforce was motivated, like its 574-year-old ancestor, by a desire to encourage alien merchants to resume maritime commerce by promising, to borrow Magna Carta's language, "safety and security in going out of . . . , coming into . . . , and staying and going through" the United States, "as much by land as by water."<sup>27</sup> The specific alien merchants the First Congress likely had in mind were British subjects, whose safety in the United States was also a matter of national security, for any injuries they suffered might give Great Britain cause to refuse to hand over key western outposts promised in the 1783 Treaty of Paris,<sup>28</sup> to cut off trade, or even to wage renewed war.

Once we understand the safe-conduct concept, the cryptic words of the ATS take on a new and clear meaning—one that neatly unifies its "law of nations" and treaty prongs. The key words of the statute authorized jurisdiction for "all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States."<sup>29</sup> A tort, as the word was understood in 1789, was simply a noncontract injury to person or property.<sup>30</sup> A safe-conduct violation was a noncontract injury to an alien's person or property—an alien tort.

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26. 21 Journals of the Continental Congress, *supra* note 23, at 1136.

27. See *supra* text accompanying note 1.

28. See 1783 Treaty of Paris, *supra* note 2, art. II.

29. Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77.

30. See *infra* note 261 and accompanying text.

If the alien were an enemy, he would additionally need to allege either that he had an express safe-conduct document, in which case his tort was "in violation of the law of nations," or that he had an implied safe conduct as a member of a class against whom injury was "in violation of the law of nations" or proscribed by a "treaty of the United States." An enemy alien who could not allege either of these conditions precedent—such as a soldier in combat—could not sue, even if he suffered a noncontract injury to his person or property, because the ATS was available for "a tort only in violation of the law of nations or a treaty of the United States." Similarly, a friendly or neutral alien who suffered an injury on the high seas would need to produce an American safe-conduct document that had been breached or point to a treaty term dispensing with the need for one in order to claim a specific implied safe conduct. If the friendly or neutral alien were injured in the territory of another sovereign or on the high seas without an express safe conduct or a treaty provision implying a safe conduct, his tort would not be "in violation of the law of nations or a treaty of the United States." Finally, any friendly or neutral alien within the United States could sue for a noncontract injury to person or property because he was entitled to a "general implied safe conduct," the breach of which constituted a "violation of the law of nations."

Thus, the essential function of the ATS's reference to a tort "in violation of the law of nations or a treaty of the United States" was to stipulate the legal basis for an alleged safe-conduct violation—the law of nations or a treaty—and not to enlarge (or diminish) the scope of substantive claims redressable under the statute beyond the noncontract injury to person or property actionable under domestic common law marked by the word "tort." Viewed in this light, the ATS was both more expansive—because the substantive wrong addressed was any noncontract injury to person or property—and narrower—because it did not cover substantive violations of international law outside of express or implicit safe conducts granted by the United States—than *Sosa* and many commentators have realized.

The second immediate purpose of this Article is to examine what this revised history might mean for ATS jurisprudence today. On the safe-conduct account, the statute was an enactment designed not to redress substantive international law violations as *Sosa* presumed, but rather, in the interest of the national economy and security, to redress harm—defined by the domestic law of tort—to private aliens for which the United States had assumed responsibility.<sup>31</sup> In light of the proliferation of treaties of amity and commerce triggering specific implied safe conducts, and the number of aliens in the United States with passports—explicit safe conducts—or otherwise entitled to general implied safe conducts, virtually any private alien could sue for a tort under the ATS if the historical

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31. Cf. Randall, *supra* note 3, at 32–39 (interpreting ATS as statute designed to remedy municipal tort causes that also state violations of law of nations without limiting the latter to safe conducts).

understanding were mechanically applied to the present context. Hence, the safe-conduct theory helps to justify *flexible* originalism for the counter-intuitive reason that strict originalism—i.e., construing the statute to cover precisely the same historical violations today—would be overinclusive, not underinclusive as the *Sosa* Court presumed. At the same time, the formal requirement of a U.S. sovereign nexus strengthens the case for a constitutional basis for ATS suits, even in alien-versus-alien law-of-nations cases. Finally, the safe-conduct theory would, in some cases, expand modern liability under the ATS because suits brought by aliens for common law torts with a U.S. sovereign nexus would be actionable even without the allegation of a substantive international law violation.

The Article also has two implicit and broader purposes. The first is to present a case study in how to do originalism. Bereft of conventional legislative history and notable public commentary, the 1789 Act generally, and the ATS specifically, are tougher nuts to crack than the Constitution. The Constitution at least comes with some notes on debates at the drafting convention and major state ratification conventions, as well as *The Federalist* and other published ratification propaganda. To be sure, there are a few private papers, such as letters and a diary, relevant to the 1789 Act,<sup>32</sup> but these do not greatly illuminate the role the ATS was intended to play. Moreover, such confidential sources—as a class—do not deserve probative weight if one's aim is to ascertain public original meaning. Accordingly, the use of private sources in this Article is limited to establishing uncontroversial facts, such as Senator Oliver Ellsworth's authorship of the statute and confirmation of the dates of deliberation and enactment noted in official congressional records.

Rather than resort to hidden history, the preferred method of proof in this Article is to rely on materials and facts readily available to the lawyers in the founding group. These include respected treatises on English law and public international law widely consulted by American lawyers in 1789, unambiguous inferences drawn from the 1789 Act as a whole, the operational characteristics of the national court system that the Act inaugurated, and, most importantly, significant events and conditions in the domestic and international politics of the American Republic in 1789 that help reconstruct the First Congress's worldview. Anyone who has studied founding-era materials can appreciate the complexity of the historical task at hand. This complexity alone is enough to raise questions about originalism as a method of judicial interpretation of founding-era texts, given the time constraints on judges who have to decide actual cases. Nevertheless, it is possible, as this Article attempts to show, for scholars to reconstruct an original meaning by dint of hard, careful work, and, in so doing, to assist judges who seek an originalist answer.

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32. See, e.g., William Maclay, Diary Entry of 29 June 1789, in 9 Documental History of the First Federal Congress of the United States of America 91, 92 (Kenneth R. Bowling & Helen E. Veit eds., 1988) [hereinafter Maclay, Diary] (recounting invocation of Blackstone during Senate debates concerning Judiciary Act of 1789).

Perhaps more relevant for the United States in 2006 is the second implicit purpose of this Article: to illuminate the crucial role the founding group intended the newly created federal courts to play in ensuring national security, economic strength, and the peaceful conduct of the Republic's foreign affairs. From the start, the ATS was more important as a symbol to the rest of the world than as a workhorse jurisdictional statute. Between 1789 and 1794—when the Jay Treaty was negotiated to settle the outstanding debt claims at the root of the specific safe-conduct issue that moved the First Congress to enact the ATS<sup>33</sup>—there was only one published decision in which a British subject sued under the statute, and that suit was without success.<sup>34</sup> And since the statute was reborn in 1980 in *Filartiga v. Pena-Irala*,<sup>35</sup> damage awards have rarely been collected—which may account in part for the growth in ATS suits against corporations. In short, the ATS has achieved worldwide prominence not because of litigation results but rather because of its iconic statement of the United States's commitment to the redress of international human rights violations by anyone anywhere. But is that message still the best face for the statute given the U.S. government's present posture with respect to international law and other nations? If, as this Article aims to show, the ATS was enacted to deploy the federal judicial power to ensure that we, the United States, do no harm against other peoples, not to ensure that others do no harm, then it seems more fitting to focus the statute on its original and once again timely purpose.

This Article has four Parts. The first briefly describes the evolution of modern ATS jurisprudence up to and including the *Sosa* decision. The second examines in detail the text of the ATS in the context of the Judiciary Act of 1789 and argues that, contrary to *Sosa*'s view of the history, the ATS is best construed not to cover piracy or infringements of ambassadorial rights. The third Part describes the state of law and understanding of safe conducts in the late eighteenth century, with an eye to the specific violations of concern in the early Republic. The fourth addresses what it means for the ATS today to be read as a statute historically addressed to safe conducts.

### 1. MODERN ATS JURISPRUDENCE

The Alien Tort Statute exploded into American judicial consciousness in 1980 with the decision by the U.S. Court of Appeals for the Second Circuit in *Filartiga v. Pena-Irala*. Dr. Joel Filartiga and his daughter, both Paraguayan nationals, brought suit in federal district court invoking the ATS against Pena, a former Paraguayan police official. Pena had left

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33. Treaty of Amity, Commerce and Navigation, U.S.-Gr. Brit., art. VI, Nov. 19, 1794, 8 Stat. 116 [hereinafter 1794 Jay Treaty].

34. See *Moxon v. The Fanny*, 17 F. Cas. 942, 947-48 (D. Pa. 1793) (No. 9895) (declining jurisdiction under admiralty statute and ATS to adjudicate legality of capture of British brig in U.S. territorial waters by French privateer).

35. 630 F.2d 876 (2d Cir. 1980).

Paraguay and had been living in Brooklyn, New York, for nine months on an expired visitor's visa. The Filartigas alleged that Pena tortured Dr. Filartiga's son in Paraguay to retaliate for the father's activities against the anticommunist dictatorship of Alfredo Stroessner, that the torture resulted in the son's death, and that the torture violated the law of nations.<sup>36</sup> The Second Circuit upheld the jurisdiction of the district court under the ATS, reasoning that the "constitutional basis of the Alien Tort Statute is the law of nations, which has always been part of the federal common law."<sup>37</sup> Accordingly, the panel reasoned, Dr. Filartiga's claim was one "arising under" federal law, and the fact that constitutional alienage jurisdiction did not extend to alien-versus-alien suits was of no consequence.<sup>38</sup>

*Filartiga* launched a wave of international human rights litigation in U.S. federal courts under the ATS's aegis. Some ATS suitors closely followed *Filartiga's* lead by focusing on physical human rights violations like torture and murder committed by ex-officials of oppressive regimes around the world.<sup>39</sup> More ambitious litigants expanded the scope of international law claims under the ATS by asserting new claims, for instance, against nonstate actors,<sup>40</sup> and by characterizing various sorts of maltreatment and coercion as the functional equivalents of long-settled international law violations like torture and slavery.<sup>41</sup> Encouraged by another Second Circuit decision relaxing the state-action requirement for ATS claims,<sup>42</sup> human rights advocates increasingly filed suits against multinational corporations allegedly complicit in abuses committed by regimes with which the companies were engaged in joint projects.<sup>43</sup>

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36. *Id.* at 878–79. The Filartigas did not invoke federal jurisdiction under the treaty prong of the ATS. See *id.* at 880 & n.7.

37. *Id.* at 885.

38. See *id.* at 887–89.

39. See, e.g., *Abebe-Jira v. Negewo*, 72 F.3d 844, 845 (11th Cir. 1996) (Ethiopia); *In re Estate of Ferdinand Marcos*, 25 F.3d 1467, 1469 (9th Cir. 1994) (Philippines); *Xuncax v. Gramajo*, 886 F. Supp. 162, 169–71, 173–74 (D. Mass. 1995) (Guatemala).

40. See, e.g., *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 775 (D.C. Cir. 1984) (denying claims against Palestinian Liberation Organization for torture).

41. See, e.g., *Doe v. Unocal Corp.*, 248 F.3d 915, 920–21 (9th Cir. 2001) (alleging forced labor, torture, and false imprisonment as violations of "customary international law"); *Wiwa v. Royal Dutch Petrol. Co.*, 226 F.3d 88, 92 (2d Cir. 2000) (arguing that torture and imprisonment by Nigerian government were cognizable under ATS as violations of "law of nations").

42. See *Kadic v. Karadžić*, 70 F.3d 232, 239–40, 245 (2d Cir. 1995) (holding that district court may recognize ATS claims against nonstate, private party presumptively not acting under color of state authority so long as international law norm permits liability against private parties).

43. See, e.g., *Unocal*, 248 F.3d at 920 (alleging that gas companies used Burmese military to intimidate people living in area of companies' pipeline project); *Wiwa*, 226 F.3d at 92 (alleging that oil and gas companies recruited Nigerian police to suppress resistance to development activity and provided money and weapons to Nigerian military to support repression of villagers); *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 163 (5th Cir.

The outburst of ATS litigation was matched by an outpouring of scholarship on the statute's historical origins.<sup>44</sup> Scholarly debate centered on the "law of nations" half of the statute, on the assumption that where a violation of a U.S. treaty was alleged, the claim was clearly one "arising under" federal law.<sup>45</sup> A rough line of battle in this debate was hewn between the majority of scholars who asserted that history generally supported *Filartiga's* approach,<sup>46</sup> and a revisionist group who contended that *Filartiga* had misconstrued history and that federal courts lacked the constitutional authority to hear any claims between aliens arising under the law of nations.<sup>47</sup> These scholars argued more generally that the law of nations was pre-*Erie* "general" common law and thus not federal law for Article III purposes.<sup>48</sup>

Both the litigation and the scholarship came to a head in the Supreme Court's decision in *Sosa v. Alvarez-Machain*. The facts of *Sosa* were not typical of the most publicized recent ATS suits involving claims against multinational corporations. Humberto Alvarez-Machain, a Mexican national, alleged that other Mexicans, including petitioner Jose Francisco Sosa, had abducted him in Mexico at the behest of U.S. Drug Enforcement Agency (DEA) agents. Alvarez alleged that his abductors held him overnight and transported him across the border the next day to stand trial in U.S. federal court for suspected involvement in the murder of a DEA agent in Mexico.<sup>49</sup> He brought claims for false arrest against the United States and DEA agents under the Federal Tort Claims Act (FTCA), and a claim against Sosa under the ATS for his arbitrary deten-

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1999) (alleging that mining company participated in human rights violations by Indonesian government).

44. See *supra* note 3.

45. Moreover, the presence since 1875 of a general federal-question statute authorizing federal jurisdiction over suits "arising under . . . treaties of the United States," 28 U.S.C. § 1331 (2000), has rendered the treaty half of the ATS superfluous.

46. See, e.g., Burley (Slaughter), *supra* note 3, at 475; Casto, Protective Jurisdiction, *supra* note 3, at 480; D'Amato, *supra* note 3, at 63; Dodge, Constitutionality, *supra* note 3, at 702 ("At the time of the Framing, the law of nations was simply considered to be part of the general common law, which was binding on federal and state courts alike."); Randall, *supra* note 3, at 55 & n.271.

47. See, e.g., Bradley, Alien Tort Statute, *supra* note 3, at 637 ("[The First Congress] implicitly intended to limit the Alien Tort Statute to suits involving a U.S. citizen defendant (at least in non-admiralty cases)."); cf. Weisburd, *supra* note 3, at 1223-26 (arguing that ATS "was not intended as a 'federal question' provision" and doubting that "First Congress believed the law of nations to be federal law").

48. See Curtis A. Bradley & Jack L. Goldsmith, Customary International Law as Federal Common Law: A Critique of the Modern Position, 110 Harv. L. Rev. 815, 823-24 (1997).

49. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 697-98, 735-37 (2004). Alvarez did not, however, rest his international law claim "on the cross-border feature of his abduction." *Id.* at 735 & n.24.

tion in alleged contravention of international law.<sup>50</sup> The Court dismissed the FTCA claims.<sup>51</sup>

As to Alvarez's ATS claim against Sosa, the Court endorsed *Filartiga's* core proposition that federal courts may hear certain tort claims of aliens pleading violations of the customary law of nations by other aliens.<sup>52</sup> The Court held that the ATS "bespoke a grant of jurisdiction, not power to mold substantive law," consistent with its enactment as part of section 9 of the first Judiciary Act of 1789—a provision setting forth the jurisdiction of federal district courts.<sup>53</sup> "But," in the Court's words, "holding the ATS jurisdictional raises a new question . . . about the interaction between the ATS at the time of its enactment and the ambient law of the era."<sup>54</sup> If an alien could not obtain relief in federal court under the ATS "without a further statute expressly authorizing adoption of causes of action," then the statute was "stillborn"<sup>55</sup>—"to be placed on the shelf for use by a future Congress or state legislature that might, some day, authorize the creation of causes of action or itself decide to make some element of the law of nations actionable for the benefit of foreigners."<sup>56</sup>

The Court thought it improbable that the First Congress would have passed a stillborn provision given the "anxieties of the preconstitutional period" occasioned by state transgressions of international law against foreigners.<sup>57</sup> The Court accordingly held that the "jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time."<sup>58</sup> At the same time, the Court fired warning shots over the bows of more far-ranging ATS vehicles by rejecting the specific international law claim at issue—arbitrary detention of a day's duration<sup>59</sup>—reciting a litany of doctrinal developments generally curtailing the federal courts' power to

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50. *Id.* at 698.

51. See *id.* at 712 ("We therefore hold that the FTCA's foreign country exception bars all claims based on any injury suffered in a foreign country, regardless of where the tortious act or omission occurred."). Justice Ginsburg, joined by Justice Breyer, agreed with the Court that the foreign country exception barred FTCA claims in this instance, but would have recognized a "last significant act or omission" proviso to the exception, which would have permitted FTCA claims where the last significant act or omission leading to the alleged tort claim occurred within the United States. See *id.* at 751, 760 (Ginsburg, J., concurring in part and concurring in the judgment).

52. See *id.* at 724–25. Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, dissented from this aspect of the Court's holding. *Id.* at 739 (Scalia, J., concurring in part and concurring in the judgment).

53. *Id.* at 713.

54. *Id.* at 714.

55. *Id.*

56. *Id.* at 719.

57. *Id.*

58. *Id.* at 724.

59. See *id.* at 712, 738.

imply private causes of action,<sup>60</sup> emphasizing prudential concerns to be considered by federal courts in hearing ATS cases,<sup>61</sup> and sounding a consistent tone of restraint.<sup>62</sup>

As for the rule that federal courts should apply in identifying the set of international law claims cognizable under the ATS, the Court adopted a test with an originalist bent.<sup>63</sup> The Court directed that the federal “courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms” that the Court believed the First Congress intended to redress when it enacted the ATS.<sup>64</sup>

But what were the violations of international law that the First Congress had in mind? The academy, the Court pointed out, was divided: “[D]espite considerable scholarly attention, it is fair to say that a consensus understanding of what Congress intended has proven elusive.”<sup>65</sup> As judges pressed to decide a case, the *Sosa* Court settled for a next-best

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60. See *id.* at 725 (noting modern jurisprudential understanding that common law is “made” not “found”); *id.* at 726 (citing decision in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), rejecting power of federal courts to formulate substantive rules of decision from “general” common law); *id.* at 727 (recounting Rehnquist Court’s scaling back of federal courts’ power to imply private causes of action); *id.* (noting potential for “collateral consequences” for foreign affairs, particularly when ATS rulings “would go so far as to claim a limit on the power of foreign governments over their own citizens”); *id.* at 728 (noting absence of affirmative “congressional mandate” that federal courts “seek out and define new and debatable violations of the law of nations”).

61. See *id.* at 732 nn.20–21; *id.* at 761 (Breyer, J., concurring in part and concurring in the judgment) (“I would ask whether the exercise of jurisdiction under the ATS is consistent with those notions of comity that lead each nation to respect the sovereign rights of other nations by limiting the reach of its laws and their enforcement.”).

62. See, e.g., *id.* at 712 (majority opinion) (“[W]e think that at the time of enactment the jurisdiction enabled federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law.”); *id.* at 728 (counseling “great caution in adapting the law of nations to private rights”); *id.* at 729 (“[T]he judicial power should be exercised on the understanding that the door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today.”); *id.* at 732 (noting “limit upon judicial recognition” of ATS claims); *id.* at 733 (“Thus Alvarez’s detention claim must be gauged against the current state of international law, looking to those sources we have long, albeit cautiously, recognized.”); *id.* at 738 (“Creating a private cause of action to further [Alvarez’s] aspiration would go beyond any residual common law discretion we think it appropriate to exercise.”).

63. See *id.* at 731–32 (“We must still, however, derive a standard or set of standards for assessing the particular claim Alvarez raises, and for this case it suffices to look to the historical antecedents.”).

64. *Id.* at 725. The Court further stated:

Whatever the ultimate criteria for accepting a cause of action subject to jurisdiction under § 1350, we are persuaded that federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted.

*Id.* at 732.

65. *Id.* at 718–19.



solution—one suggested by William Blackstone’s *Commentaries*,<sup>66</sup> the late eighteenth-century synthesis of English law of singular influence on the American founding group. In the slim fifth chapter of the fourth volume of his treatise, Blackstone recorded “three specific offenses against the law of nations addressed by the criminal law of England: violation of safe conducts, infringement of the rights of ambassadors, and piracy.”<sup>67</sup> The Court read the First Congress’s inaugural criminal statute, enacted in 1790,<sup>68</sup> to single out the same violations.<sup>69</sup> Presuming, logically, that the First Congress would surely have made redressable by civil suit in federal court that which the Court believed it to have criminalized the next year,<sup>70</sup> the *Sosa* Court concluded that “[i]t was this narrow set of violations of the law of nations . . . that was probably on [the] minds of the men who drafted the ATS with its reference to tort.”<sup>71</sup> However, the Court, and commentators generally, did not explain what exactly a safe conduct was, nor what it meant to violate a safe conduct.

## II. THE FIRST CONGRESS, AMBASSADORIAL INFRINGEMENTS, AND PIRACY

### A. *The Senate’s Late Eighteenth-Century Library*

Despite the failure to give a precise meaning to what a safe conduct entailed, the *Sosa* Court was surely justified in turning to Blackstone’s *Commentaries* as the place to start in divining the First Congress’s intent in enacting the Alien Tort Statute. The general influence of Blackstone on

66. 4 William Blackstone, *Commentaries on the Laws of England* (photo. reprint 1983) (1769).

67. *Sosa*, 542 U.S. at 715 (citing 4 Blackstone, *supra* note 66, at 68).

68. Act of Apr. 30, 1790, ch. 9, 1 Stat. 112.

69. *Sosa*, 542 U.S. at 719. Judge Bork appears to have been the first to have suggested that the ATS was intended to address the three violations mentioned by Blackstone. See *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 813–14 (D.C. Cir. 1984) (Bork, J., concurring).

70. See *Sosa*, 542 U.S. at 724 (“[A] ‘mixed approach to international law violations, encompassing both criminal prosecution . . . and compensation to those injured through a civil suit, would have been familiar to the founding generation.’” (quoting Beth Stephens, *Individuals Enforcing International Law*, 52 *DePaul L. Rev.* 433, 444 (2002), using “Cf.” signal)). It is not known for sure whether the First Congress believed that a national criminal statute dealing with the three violations would be drafted in its second session. Indeed, the necessity of enacting a federal statute to criminalize law-of-nations offenses was subject to doubt in the late eighteenth century, for federal courts of the time permitted prosecution of such violations under a federal common law of crimes. See generally William R. Casto, *The Supreme Court in the Early Republic: The Chief Justiceships of John Jay and Oliver Ellsworth 131–41* (1995) (recounting such instances); Kathryn Preyer, *Jurisdiction to Punish: Federal Authority, Federalism, and the Common Law of Crimes in the Early Republic*, 4 *Law & Hist. Rev.* 223 (1986) (same). The Supreme Court foreclosed the practice in *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812) (holding that “exercise of criminal jurisdiction in common law cases . . . is not within [the] implied powers” of federal courts and thus must be “derived from statute”).

71. *Sosa*, 542 U.S. at 715.

the founding group has been long and often asserted.<sup>72</sup> Within the specific context of the ATS, it is known from the eyewitness account of Senator William Maclay of Pennsylvania that Senator Oliver Ellsworth of Connecticut “brought forward Judge Blackstone, and read much out of him” during the debates in the Senate on the bill that would become the first Judiciary Act of 1789.<sup>73</sup> This is significant because Ellsworth, who would become the third Chief Justice of the United States, was the Act’s principal drafter and sponsor. Handwriting analysis confirms that he drafted the ATS, the rest of section 9, and all other sections of the enrolled Act relevant to discerning the ATS’s meaning.<sup>74</sup> Maclay, who was cool toward the Act despite developing a begrudging appreciation of Ellsworth over the course of the Senate’s debates, remarked on Ellsworth’s attachment to it: “[T]his Vile Bill is a child of his, and he defends it with the Care of a parent . . . even with wrath and anger. [H]e kindled as he always does When it was med[d]led with . . . .”<sup>75</sup>

The Court was equally justified in assuming that the First Congress would have sought to provide for federal jurisdiction over civil suits involving the same three offenses when it passed the Judiciary Act of 1789. To be sure, as the *Sosa* Court noted, the same Congress would enact a criminal statute apparently prohibiting and providing punishments for the three offenses in its second session in 1790.<sup>76</sup> But there is no evidence suggesting that Congress would have been disinclined to provide for both civil and criminal remedies for the same offenses.

What is doubtful, however, is the Court’s assumption that the fourth clause of section 9 of the 1789 Act—the ATS—was an omnibus provision designed to cover all three of Blackstone’s law-of-nations offenses: “1. Violation of safe-conducts; 2. Infringement of the rights of ambassadors; and, 3. Piracy.”<sup>77</sup> By contrast, the evidence indicates that the ATS was addressed only to the safe-conduct violation, leaving federal jurisdiction for infringement of ambassadorial rights and piracy to be covered by other parts of the Act. Ambassadorial infringements were addressed by

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72. See, e.g., Dennis R. Nolan, *Sir William Blackstone and the New American Republic: A Study of Intellectual Impact*, 51 N.Y.U. L. Rev. 731, 738–47 (1976) (concluding that Blackstone was widely used as reference by Founders for English legal precedent and definitions of legal terms).

73. Maclay, *Diary*, *supra* note 32, at 92. Ellsworth’s biographer reports the existence of a copy of the first American edition of Blackstone’s *Commentaries* with Ellsworth’s name and the year 1774 inscribed on the fly-leaf. See William Garrott Brown, *The Life of Oliver Ellsworth* 22 (1905).

74. See 4 *The Documentary History of the Supreme Court of the United States, 1789–1800*, at 36 & n.98, 59, 105 (Maeva Marcus et al. eds., 1992) [hereinafter *Documentary History of the Supreme Court*] (“[S]ections 9, 11–25, and 34 [of the enrolled act were authored] by Ellsworth . . .”).

75. Maclay, *Diary*, *supra* note 32, at 92.

76. Act of Apr. 30, 1790, ch. 9, 1 Stat. 112; see also *infra* notes 171–176, 194–198 and accompanying text. It is likely but not certain that the statute criminalized private alien safe-conduct violations. See *infra* notes 176–178, 289–295 and accompanying text.

77. 4 Blackstone, *supra* note 66, at 68.

section 13, which set forth the Supreme Court's original jurisdiction; piracy was addressed by the admiralty statute, a clause preceding the ATS in section 9 of the Act.<sup>78</sup> Nor is there evidence tending to indicate that the ATS was intended at the time of enactment to provide redundant coverage for ambassadorial infringements or piracy. There was an intricate logic to the Judiciary Act's division of labor, which, in general terms, matched court with subject matter according to the sensitivity of the latter and the geographical and operational characteristics of the former.

Before turning to the Act, it is necessary to identify one other vital source, which was the founding group's primary reference for international law issues such as the scope and nature of the safe conduct and the interstate obligations and duties of sovereigns. On Monday, March 10, 1794, during the height of the young Republic's neutrality crisis as the Founders struggled to steer the ship of state between the Scylla of Britain and the Charybdis of France,<sup>79</sup> the Senate ordered "[t]hat the Secretary purchase Blackstone's *Commentaries*, and Vattel's *Law of Nature and Nations*, for the use of the Senate."<sup>80</sup> The purchase order—the first books the Senate bought, and apparently the only ones it ordered during the eighteenth century—not only gives us insight into the sources the First Congress likely consulted for issues relating to the ATS, but also signifies the omnipresent dual influence—sometimes complementary, as in the case of the ATS, at other times at cross-purposes—of English common law and continental "public" law on the founding group's constitutional and subconstitutional work product.

The treatise by the Swiss thinker Emmerich de Vattel, entitled *The Law of Nations or Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns*,<sup>81</sup> was the most valued of the international law texts the founding group used during the crucial decade between 1787 and 1797.<sup>82</sup> The Founders also read and cited other leading authorities, most notably Hugo Grotius and Samuel Pufendorf,<sup>83</sup> but Vattel was

78. Additionally, as discussed in detail below, section 11 gave concurrent jurisdiction to the federal courts of any alien causes of action—including torts—against state citizens involving an amount in controversy exceeding five hundred dollars, section 12 authorized removal of any such suits from state to federal circuit court, and the Act further acknowledged the state courts' concurrent jurisdiction over alien tort claims. See *infra* notes 328–345 and accompanying text.

79. See Stanley Elkins & Eric McKittrick, *The Age of Federalism* 375–76 (1993).

80. 2 *Journal of the Senate of the United States of America* 44 (Washington, Gales & Seaton 1820) [hereinafter *Senate Journal*] (Mar. 10, 1794).

81. Emmerich de Vattel, *The Law of Nations or Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns* (Northampton, Massachusetts, Simeon Butler 4th Am. ed. 1820) (1758).

82. See Thomas H. Lee, *Making Sense of the Eleventh Amendment: International Law and State Sovereignty*, 96 *Nw. U. L. Rev.* 1027, 1061–67 (2002) [hereinafter *Lee, Making Sense*].

83. See Bernard Bailyn, *The Ideological Origins of the American Revolution* 27 (1967) ("In pamphlet after pamphlet, American writers [of the revolutionary period] cited . . . Grotius, Pufendorf, and Burlamaqui, and Vattel on the laws of nature and of nations

their clear favorite.<sup>84</sup> Vattel's work was first published in French in 1758, with the first English translation published in London in 1759.<sup>85</sup> By 1787, there was another English edition and eight more French editions, and the first American edition was published in New York in 1796.<sup>86</sup> Vattel's treatise, according to Benjamin Franklin, was "continually in the hands of the members of our Congress now sitting," as early as 1775.<sup>87</sup> The book was especially treasured for its practical exposition of how a civilized sovereign should behave to ensure peace. Tellingly, at one cabinet meeting in April 1793, Alexander Hamilton cited Vattel for the proposition that the United States could revoke its treaty of alliance with France given the revolution in that country.<sup>88</sup> It is not known if Vattel's book figured directly in the drafting and deliberations over the ATS four years earlier. But at the very least, it seems fair to look to *The Law of Nations*—and secondarily to the foundational treatises by Hugo Grotius and Samuel Pufendorf—when Blackstone and other evidence is silent or lacking on a key point, particularly as to the definition and scope of safe conducts at international law.

#### B. *Private Aliens and Public Ministers*

The inquiry into statutory meaning begins as always with the text, which, as has been noted, provided that the district courts "shall also have cognizance, concurrent with the courts of the several States, or the circuit

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..."); Francis Stephen Ruddy, *International Law in the Enlightenment: The Background of Emmerich de Vattel's Le Droit des Gens* 284 (1975).

84. Esteem for Vattel was a rare point of common ground for Alexander Hamilton and Thomas Jefferson. Hamilton referred to Vattel as one of "the most approved writers on the laws of Nations." Alexander Hamilton, *Remarks on the Treaty of Amity Commerce and Navigation Lately Made Between the United States and Great Britain* (July 9–11, 1795), in 18 *The Papers of Alexander Hamilton* 404, 413 (Harold C. Syrett ed., 1973). Jefferson once remarked that "we will not assume the exclusive right of saying what th[e] law and usage [of nations] is. Let us appeal to enlightened and disinterested judges. None is more so than Vattel." Charles G. Fenwick, *The Authority of Vattel*, 7 *Am. Pol. Sci. Rev.* 395, 410 (1913) (internal quotation marks omitted) (quoting Letter from Thomas Jefferson, Sec'y of State, to Genet, Minister Plenipotentiary of Fr. (June 17, 1793), in *American State Papers* 154, 154 (Walter Lowrie & Matthew St. Clair Clarke eds., Washington, Gales and Seaton 1833).

85. See Lee, *Making Sense*, supra note 82, at 1062–63.

86. See *id.*

87. Letter from Benjamin Franklin to Charles Dumas (Dec. 19, 1775), in 2 *Revolutionary Diplomatic Correspondence of the United States* 64 (Francis Wharton ed., Washington, Gov't Printing Office 1889).

88. Alexander Hamilton, *Cabinet Meeting, Opinion on a Proclamation of Neutrality and on Receiving the French Minister* (Apr. 19, 1793), in 14 *The Papers of Alexander Hamilton*, supra note 84, at 328, 328 n.4 (Harold C. Syrett ed., 1969). As Daniel Lang recounts, "Jefferson was not swayed by the citation, but it did cause Edmund Randolph, the attorney general, to reconsider his opposition to Hamilton's proposal. Unfortunately a copy of Vattel's work was not available at the moment and the meeting soon adjourned . . ." Daniel George Lang, *Foreign Policy in the Early Republic: The Law of Nations and the Balance of Power* 88 (1985).

courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States.”<sup>89</sup>

The enacted language was identical to that of the original Senate bill drafted by Ellsworth except that he used the word “foreigner” rather than “alien.”<sup>90</sup> This is an intriguing and unexamined substitution. Neither word appears in Article III of the Constitution, which the 1789 Act implemented. Rather, the foreign-parties provision of Article III, Section 2, Clause 1, uses the words “foreign . . . Citizens or Subjects.”<sup>91</sup> This constitutional language is keyed to distinctions in the domestic sovereign form of foreign states. A national of a foreign state that was republican in sovereign form, like the United Provinces of Holland or the Swiss Confederation, was a foreign “citizen”; a national of a foreign monarchy, like Great Britain or France in 1787, was a foreign “subject.”<sup>92</sup> Former subjects and self-made citizens, the founding group was sensitive to the distinction in domestic sovereignty embodied by these terms. Ellsworth was a member of the Constitutional Committee of Detail that drafted Article III and a superb technical lawyer who chose words with precision.<sup>93</sup>

It is unclear why Ellsworth departed from the constitutional language. He may have had in mind the developing political situation in France. The Senate committee of the First Congress to draft the federal judiciary bill was formed on April 7, 1789.<sup>94</sup> The first draft of the bill was introduced to the full Senate on June 12.<sup>95</sup> The momentous meeting of

89. Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77.

90. Judiciary Act of 1789, Original Senate Bill § 9, reprinted in 4 Documentary History of the Supreme Court, *supra* note 74, at 38, 54 (Thomas Greenleaf printed version).

91. U.S. Const. art. III, § 2, cl. 1.

92. See *Hennessey v. Richardson Drug Co.*, 189 U.S. 25, 34–35 (1903) (“The term ‘citizen,’ as understood in our law, is precisely analogous to the term ‘subject’ in the common law, and the change of phrase has entirely resulted from the change of government. . . . [H]e who before was a ‘subject of the King’ is now ‘a citizen of the State.’” (citations omitted)); *Penhallow v. Doane’s Adm’rs*, 3 U.S. (3 Dall.) 54, 93 (1795) (Iredell, J.) (“The great distinction between Monarchies and Republics . . . in general is, that in the former the monarch is considered as the sovereign, and each individual of his nation as subject to him . . . [b]ut in a Republic, all the citizens, as such, are equal . . .”).

93. See *Brown*, *supra* note 73, at 30, 32 (noting Ellsworth’s succinct writing style); *id.* at 158 (recounting Ellsworth’s role in drafting constitutional provisions relating to judiciary). Although it is possible, given his penchant for tight drafting, that Ellsworth substituted the word “foreigner” to prune away three words for parsimony’s sake, the revision would have obscured the importance placed by the constitutional words on the different types of sovereignty in foreign states. Additionally, it would not have complicated the ATS’s meaning to have used the constitutional words in the relevant phrasing, i.e., “where a foreign citizen or subject sues for a tort only in violation of the law of nations or a treaty of the United States,” rather than the Senate bill’s “where a foreigner [sic] sues for a tort only in violation of the law of nations or a treaty of the United States.” Judiciary Act of 1789, Original Senate Bill § 9, reprinted in 4 Documentary History of the Supreme Court, *supra* note 74, at 38, 54.

94. 4 Documentary History of the Supreme Court, *supra* note 74, at 22.

95. 1 Senate Journal, *supra* note 80, at 34 (June 12, 1789). Discussions ensued on June 22–24, *id.* at 36; June 26, 27, and 29, *id.* at 37; June 30 to July 1, *id.* at 38; July 2, 3, and

the French Estates-General, which had not convened since 1614, occurred on May 5, 1789.<sup>96</sup> Although Ellsworth and his fellow committee members were likely unaware of that meeting given the transatlantic news lag,<sup>97</sup> they were surely aware that the republican movement in France, inspired in no small part by the American example, was gaining a full head of steam, even if they did not anticipate how pressurized conditions in France actually were. Perhaps Ellsworth used the word “foreigner” to avoid the appearance of concern one way or the other with whether France would remain a monarchy or become a republic. Perhaps his lawyerly instinct recoiled at the false exactness of the citizen-subject distinction given the ambiguous political situation in France, whose people were subjects trying to become citizens. There is no direct evidence on the point, but it is an interesting one that focuses attention on a key, albeit underappreciated, word in the ATS.

Nor is there any direct evidence why the word “foreigner” was changed to “alien” in the ATS and the three other instances where the word occurred in the Act<sup>98</sup> when the House took up the bill, and differences were resolved between the two chambers.<sup>99</sup> Blackstone uses “foreigner” in the most pertinent discussion of safe conducts in Book IV of *Commentaries*,<sup>100</sup> which may be an additional reason why Ellsworth initially used the word. But Blackstone also uses the term “alien” in a subsequent

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6, id. at 39; July 7–11, id. at 40 (third reading; amendments made on July 10 and 11); and July 13, id. at 41 (bill ordered “re-committed”). The bill was voted up 14–6 on July 17, 1789 and carried to the House on that date. Id. at 42; see also William Maclay, *Journal of William Maclay, United States Senator from Pennsylvania 1789–1791*, at 85–133 (Edgar S. Maclay ed., New York, D. Appleton & Co. 1890) (reporting on Senate’s deliberation on judiciary bill).

96. See Lawrence M. Bryant, *Royal Ceremony and the Revolutionary Strategies of the Third Estate*, 22 *Eighteenth Century Stud.* 413, 419–25 (1989). The famous, deliciously ironic, Tennis Court Oath was sworn by the Third Estate of commoners on June 20, 1789. See James Harvey Robinson, *The Tennis Court Oath*, 10 *Pol. Sci. Q.* 460, 461–62 (1895).

97. See Allan R. Pred, *Urban Growth and the Circulation of Information: The United States System of Cities, 1790–1840*, at 26–27 (1973).

98. The same substitution was made as appropriate in sections 11 and 12 pertaining to alienage jurisdiction in federal circuit courts (original and removal jurisdiction, respectively), and Section 13 as to the Supreme Court’s original jurisdiction. See *Judiciary Act of 1789*, ch. 20, §§ 11–13, 1 *Stat.* 73, 78–80.

99. The House passed the bill with proposed amendments and sent it back to the Senate on September 17. 1 *Senate Journal*, supra note 80, at 81 (Sept. 17, 1789); 1 *Journal of the House of Representatives of the United States* 113 (Washington, Gales & Seaton 1826) [hereinafter *House Journal*] (Sept. 17, 1789). The Senate accepted all but four of the House’s amendments, requested modification on another, and sent it back to the House on September 18, 1 *Senate Journal*, supra note 80, at 82–83 (Sept. 19, 1789); the House accepted the Senate’s terms on September 20, 1 *House Journal*, supra, at 115 (Sept. 20, 1789). President George Washington signed the Act into law on September 24, 1789, 1 *House Journal*, supra, at 121 (Sept. 24, 1789); 1 *Senate Journal*, supra note 80, at 87 (Sept. 24, 1789).

100. 4 Blackstone, supra note 66, at 69 (“And as during the continuance of any safe-conduct, either express or implied, the foreigner is under the protection of the king and the law . . .”). In the same section Blackstone also refers to “the injured stranger.” Id.

discussion of piracy in Book IV, and exclusively in Book I, Chapter 10 entitled “Of the People, whether Aliens, Denizens, or Natives” in which he defines “aliens” as people “born out of” the “dominions of the crown of England.”<sup>101</sup> Blackstone’s discussion in Book I, Chapter 10 focuses on aliens’ allegiance to the king in relation to that owed by “natural-born subjects.” One might infer from this that an “alien” is someone with a more lasting presence in a country than a “foreigner,” although that conclusion is cast into question by Blackstone’s use of the word “stranger” as an apparent synonym for “alien.”<sup>102</sup> At the end of the day, it is hard to explain why the House desired to change only the words “a foreigner” to “an alien” of the forty-six words in the Senate bill version of the ATS; all that might be claimed is that the First Congress put some thought into the enacted word “alien.”

Contrary to the Court’s implicit assumption in *Sosa*, the First Congress likely did not intend the word “alien” to include “Ambassadors, other public Ministers, and Consuls.”<sup>103</sup> That an “ambassador” or “public minister” was by definition a “foreigner” or an “alien” has been a unanimous presumption of all ATS scholarship to date,<sup>104</sup> and the presumption is surely valid for purposes of a basic commonsense distinction between citizens and noncitizens or for the purposes of general immigration laws.<sup>105</sup> But the First Congress would just as surely have distinguished a private alien from an ambassador or a public minister<sup>106</sup> for purposes of a jurisdictional statute setting forth foreign parties’ right to sue for torts in the newly established national courts. There are five specific textual and contextual reasons that support this conclusion.

First, it appears that the contemporaneous law of nations treated an act of violence committed against a public minister as separate from and of a greater order of magnitude than violence against a private alien. Vattel summarized the qualitative difference between the offenses under the law of nations: “A violence done to a private person is a common trespass, which, according to circumstances, the prince may pardon[;] but if done to a public minister, it is a crime of state, an offence against the law of nations.”<sup>107</sup> Pufendorf emphasized the distinction in a slightly different way: Because the purpose of ambassadors was the public peace, their

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101. 1 *id.* at 354 (1765).

102. See *id.* at 354–63.

103. U.S. Const. art. III, § 2, cl. 1.

104. See, e.g., Casto, Protective Jurisdiction, *supra* note 3, at 497 (assuming that “ambassadors almost by definition were ‘foreigners’”).

105. For instance, the modern Immigration and Naturalization Act defines an ambassador or public minister as a subset of “alien.” See 8 U.S.C. § 1101(a)(15) (2000).

106. Professor Bradley disavows this textual argument, see Bradley, Alien Tort Statute, *supra* note 3, at 645 n.256, which Professor Collins believed him to have made, see Collins, *supra* note 3, at 675. On the distinction between “ambassador” and “public minister,” but the irrelevance of the distinction in terms of privileges afforded under the law of nations, see Vattel, *supra* note 81, bk. 4, ch. VI, § 74, at 522.

107. Vattel, *supra* note 81, bk. 4, ch. VII, § 82, at 526.

persons were protected by the immutable law of nature, while the safety of private aliens whose purpose in a foreign land was commerce was governed by the customary law of nations which might evolve according to the consensual practice of nations.<sup>108</sup>

There is some preconstitutional evidence supporting Vattel's distinction between the violation of safe conducts held by private foreign subjects and the violation of ambassadorial immunities in a resolution passed by the Continental Congress on November 23, 1781,<sup>109</sup> which is echoed in a statute passed by the Connecticut legislature in May 1782.<sup>110</sup> The resolution, which urged state legislatures to enact laws to redress "offenses against the law of nations," separately enumerated recommendations "to provide expeditious, exemplary and adequate punishment" for: (1) violation of express "safe conducts or passports" granted by Congress "to the subjects of a foreign power in time of war"; (2) "acts of hostility against" foreign subjects "in amity, league or truce with the United States or who are within the same, under a general implied safe conduct"; (3) and "infractions of the immunities of ambassadors and other public ministers, authorised and received as such by the United States."<sup>111</sup> The 1782 Connecticut statute likewise separately listed these violations.<sup>112</sup> Oliver Ellsworth, the principal drafter of the ATS, was both a member of the Continental Congress—although he was not present at the time the resolution was passed<sup>113</sup>—and of the Connecticut General Assembly's upper house when the state statute was enacted.<sup>114</sup>

108. See Samuel Pufendorf, *Of the Law of Nature and Nations* 151 (Basil Kennett trans., London, J. Walthoe et al. 4th ed. 1729) (1672).

109. See 21 *Journals of the Continental Congress*, supra note 23, at 1136–37.

110. See *An Act to Prevent Infractions of the Laws of Nations*, reprinted in 4 *The Public Records of the State of Connecticut* 156, 156–57 (Leonard Woods Labaree ed., 1942) [hereinafter *Public Records*]; *An Act for Securing to Foreigners in This State, Their Rights, According to the Laws of Nations, and to Prevent Any Infractions of Said Laws*, reprinted in *Acts and Laws of the State of Connecticut, in America* 82, 82–83 (New London, Timothy Green 1784). The use of the word "Foreigners" in the wordier 1784 title concededly conflates the distinction between private aliens and public ministers, but that was not the title of the act as it was enacted in 1782, and, in any event, it would be hasty to infer anything from the conflation in the title of a multipart enactment in which violations of private safe conducts and ambassadorial immunities are found in discrete provisions.

111. 21 *Journals of the Continental Congress*, supra note 23, at 1136–37.

112. *An Act to Prevent Infractions of the Laws of Nations*, reprinted in *Public Records*, supra note 110, at 156, 156–57. On the other hand, as discussed below, see infra notes 176–178, 289–295 and accompanying text, a single section of the 1790 Crimes Act provides for punishment "if any person shall violate any safe-conduct or passport duly obtained and issued under the authority of the United States, or shall assault, strike, wound, imprison, or in any other manner infract the law of nations, by offering violence to the person of an ambassador or other public minister . . ." Act of Apr. 30, 1790, ch. 9, § 28, 1 Stat. 112, 118. However, joint reference in an after-enacted criminal statute does not necessarily mean that Congress would have similarly allotted civil jurisdiction to federal courts in the same way.

113. Brown, supra note 73, at 53.

114. 4 *Public Records*, supra note 110, at 130.



Second, Article III of the Constitution uses “foreign . . . Citizens or Subjects”—the only possible constitutional antecedent for “alien” in the 1789 Act—in a manner suggesting that the individuals contemplated were not “Ambassadors, other public Ministers and Consuls.”<sup>115</sup> Article III, Section 2, Clause 1 extends judicial power to “*all Cases* affecting Ambassadors, other public Ministers and Consuls” and separately to “Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.”<sup>116</sup> In light of the all-encompassing phrasing of the former grant—“all Cases affecting”—it seems implausible, indeed no one has ever argued, that the Framers intended the latter grant—“Controversies . . . between a State, or the Citizens thereof, and foreign . . . Citizens or Subjects”—to include some quantum of federal power over “foreign . . . Citizens or Subjects” dispatched by their sovereign to the United States as “Ambassadors, other public Ministers and Consuls.”<sup>117</sup> There is no evidence suggesting that the First Congress departed from Article III’s mutually exclusive distinction between the two categories of private and public foreign parties when it implemented federal judicial power in the 1789 Act.

Third, section I2 of the Act—the removal statute—when viewed in light of sections 9 and 13, confirms the conclusion of “alien”-“Ambassador, public Ministers, and Consuls” exclusivity in another way. Section 13 of the Act provides: “That the Supreme Court . . . shall have exclusively all such jurisdiction of suits or proceedings against ambassadors, or other public ministers . . . as a court of law can have or exercise consistently with the law of nations.”<sup>118</sup> The Supreme Court has always construed this statute and its descendants to require exclusivity of jurisdiction in the Court alone.<sup>119</sup> Section 9, in a clause subsequent to the ATS, provides that the district courts “shall also have jurisdiction exclusively of the courts of the several States, of all suits against consuls or vice-consuls, except for” certain crimes.<sup>120</sup> Thus, under the incontrovertible literal reading of these two sections, no civil suit can be brought against an ambassador, a public minister, a consul, or a vice consul, in any state court.

115. U.S. Const. art. III, § 2, cl. 1.

116. *Id.* (emphasis added). The ensuing clause further provides that “[i]n all Cases affecting Ambassadors, other public Ministers and Consuls . . . the supreme Court shall have original Jurisdiction.” *Id.* cl. 2.

117. *Id.* cl. 1.

118. Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 80.

119. The Supreme Court’s exclusive original jurisdiction in cases against ambassadors or public ministers was made concurrent with the district courts in 1978. See Diplomatic Relations Act, Pub. L. No. 95-393, § 8(b), 92 Stat. 808, 810 (1978) (codified as amended at 28 U.S.C. § 1251(b)(1) (2000)); see also 28 U.S.C. § 1251(b)(1) (“The Supreme Court shall have original but not exclusive jurisdiction of . . . [a]ll actions or proceedings to which ambassadors, other public ministers, consuls, or vice consuls of foreign states are parties.”).

120. Judiciary Act of 1789 § 9, 1 Stat. at 77.

But section 12, the removal statute, provides “[t]hat if a suit be commenced *in any state court against an alien*, . . . and the matter in dispute exceeds the . . . sum or value of five hundred dollars, exclusive of costs,” the defendant has a right of removal to federal circuit court—or district court in Maine or Kentucky.<sup>121</sup> Because suits against ambassadors and public ministers could only be brought in the Supreme Court under section 13, even if one assumes that the removal statute was in part intended to effectuate exclusive federal jurisdiction—and very incompletely at that since suits involving the then considerable sum of five hundred dollars or less would not be removable—the circuit courts would not have been the proper federal forum. Likewise, under section 9, it was the district courts—not the circuit courts—that had exclusive jurisdiction over suits against consuls or vice consuls.<sup>122</sup> But it is not necessary even to go that far, because removal jurisdiction has never been understood as a means to effectuate exclusive federal original jurisdiction; rather, removal “is always deemed in both [civil and criminal] cases an exercise of appellate, and not of original jurisdiction.”<sup>123</sup> And if “alien” does not include ambassadors, ministers, or consuls in section 12 pertaining to the circuit courts’ removal jurisdiction, the term surely does not include them in the sections of the Act pertaining to the same courts’ original jurisdiction in section 11,<sup>124</sup> the original jurisdiction of the Supreme Court in section 13,<sup>125</sup> or most importantly, the original jurisdiction of the district courts in section 9, including the ATS.<sup>126</sup> This conclusion is bolstered by the fact that the three provisions were drafted by the same person,<sup>127</sup> and deal with closely related subject matter.<sup>128</sup>

Fourth, contemporaneous principles of international law strongly support the conclusion of alien-ambassador nonoverlap. It was universally held that a posted ambassador or public minister was entitled to the

121. *Id.* § 12, 1 Stat. at 79 (emphasis added).

122. *Id.* § 9, 1 Stat. at 77.

123. *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 349 (1816).

124. Judiciary Act of 1789 § 11, 1 Stat. at 78 (granting circuit courts original jurisdiction in suits to which alien is party involving more than five hundred dollars in controversy).

125. *Id.* § 13, 1 Stat. at 80 (vesting nonexclusive original jurisdiction in Supreme Court for civil controversies between states and aliens).

126. *Id.* § 9, 1 Stat. at 77 (vesting concurrent original jurisdiction in district courts in suits where alien sues for tort in violation of law of nations or treaty of United States).

127. See *supra* note 74 and accompanying text.

128. It seems doubtful to construe the singular word “alien” not to include “ambassadors, ministers, consuls, or vice consuls” when it is used in section 12, but to include them when the word is used in section 9 in the ATS and presumably also in sections 11 and 13. The fact that the plural words “consuls” and “vice-consuls” are also used in section 9, Judiciary Act of 1789 § 9, 1 Stat. at 77, without clarification that they are intended to refer to a subset of “any alien,” i.e., “any alien who is a consul or vice consul” further suggests this reading is inaccurate. The same incongruity is presented in section 13, where one clause refers to “ambassadors, . . . public ministers, . . . a consul, or vice consul,” and another clause to “aliens.” *Id.* § 13, 1 Stat. at 80–81.

dignity of his sovereign and therefore was of a fundamentally different legal status from a private citizen or subject of the sovereign traveling in the same foreign land on private business.<sup>129</sup> As will be detailed below, the law of nations recognized significant differences in the obligations of a foreign sovereign toward private aliens as opposed to public ministers or ambassadors.<sup>130</sup> Moreover, because the United States was the newest and weakest member of the Eurocentric world, and the Republic's own diplomats would benefit from reciprocal treatment in the capitals of the more powerful and established European sovereigns, the First Congress must have perceived it to be particularly important to clarify the exalted status of ambassadors in its domestic laws. It seems, therefore, particularly unlikely that the First Congress would have equated an ambassador with a plain alien in a statute affording foreign parties access to newly created national courts for the aim of international peace.

The fifth reason for concluding that the word "alien" as used in the 1789 Act does not include ambassadors, public ministers, and consuls is best framed by beginning with a question the reader is likely to have formed. Assuming that "alien" in the Act does not include these foreign sovereign agents, why did the First Congress provide for jurisdiction in federal district court concurrent with state courts (and federal circuit courts) for tort claims in violation of international law by private aliens, but not for tort causes of action in violation of international law by foreign public officials?

The answer is that foreign ambassadors, ministers, and consuls were afforded original jurisdiction in the Supreme Court concurrent with state courts for *all* causes of action brought by ambassadors, ministers, and consuls. Section 13 of the Act provided the Supreme Court with "original, but not exclusive jurisdiction of all suits brought by ambassadors, or other public ministers, or in which a consul, or vice consul, shall be a party."<sup>131</sup> Statutory assignment of suits brought by these foreign parties to the Supreme Court is consistent with the Article III specification of the Court's original jurisdiction over all cases affecting ambassadors, public

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129. See, e.g., Vattel, *supra* note 81, bk. 4, ch. VI, § 70, at 520–21 (noting that ministers represent sovereigns "not only in their rights . . . but likewise in their dignity, their grandeur, and pre-eminence"); *id.* § 80, at 525–26 ("A respect due to sovereigns should reflect on their representatives, and chiefly on their ambassadors . . ."); cf. *Ex parte Gruber*, 269 U.S. 302, 303 (1925) (noting that right to invoke Court's original jurisdiction under Ambassadors provision "is a privilege, not of the official, but of the sovereign or government which he represents"); *Davis v. Packard*, 32 U.S. (7 Pet.) 276, 284 (1833) ("If the privilege or exemption was merely personal, . . . it would [not] have been thought a matter sufficiently important to require a special provision in the constitution and laws of the United States.").

130. Consuls were a problematic hybrid. See *infra* notes 273–277 and accompanying text.

131. Judiciary Act of 1789 § 13, 1 Stat. at 80–81. The Court was also afforded original and exclusive jurisdiction for all suits against ambassadors or public ministers but not consuls. *Id.*

ministers, and consuls.<sup>132</sup> The Court and most commentators agree that the reason for the constitutional and statutory assignment of these cases to the Supreme Court was forum dignity—to accord due respect to foreign sovereigns and sovereign agents by assuring them a hearing in the nation's highest tribunal.<sup>133</sup>

In theory, a possibility left open by section 13's qualification of "original but *not exclusive*" jurisdiction in the Supreme Court is that the ATS was intended to extend *concurrent* jurisdiction in federal district courts over ambassadorial cases—thus undermining the distinction between private aliens and public officials argued for here.<sup>134</sup> The better interpretation, however, is that the reference in section 13 was to concurrent jurisdiction in state courts only.<sup>135</sup> The strongest reason supporting this conclusion is a commonsense understanding of how diplomatic relationships worked in the late eighteenth century twinned with the geography of the new national courts. Because ambassadors and ministers were expected to be resident in the national capital<sup>136</sup>—and would have required the Presi-

132. U.S. Const. art. III, § 2, cl. 2. Section 9 of the 1789 Act, discussed in greater detail below, conferred "jurisdiction, exclusively of the courts of the several States, of all suits against consuls or vice-consuls" except for criminal offenses in the federal district courts. Judiciary Act of 1789 § 9, 1 Stat. at 77. At least one of the first Supreme Court justices thought that this sharing of the Court's original jurisdiction with a lower *federal* court was unconstitutional, which would mean that any concurrent vesting of jurisdiction over ambassadorial cases in federal district courts as presumed by the ambassadorial-infringement theory of the ATS would similarly be unconstitutional. See *United States v. Ravara*, 2 U.S. (2 Dall.) 297, 298–99 (C.C.D. Pa. 1793) (Iredell, J., dissenting) ("[I]t appears to me, that for obvious reasons of public policy, the Constitution intended to vest an exclusive jurisdiction in the Supreme Court, upon all questions relating to the Public Agents of Foreign Nations."). Chief Justice Marshall expressed a similar sentiment in *Marbury v. Madison*:

If it had been intended to leave it in the discretion of the legislature to apportion the judicial power between the supreme and inferior courts according to the will of that body, it would certainly have been useless to have proceeded further than to have defined the judicial power, and the tribunals in which it should be vested.

5 U.S. (1 Cranch) 137, 174 (1803).

133. See *California v. Arizona*, 440 U.S. 59, 65–66 (1979); *Ames v. Kansas*, 111 U.S. 449, 464 (1884).

134. See *Casto*, *Protective Jurisdiction*, *supra* note 3, at 496–97.

135. On Justice Iredell's view expressed in *Ravara* that concurrent vesting of consular cases in lower federal courts was unconstitutional, such concurrent jurisdiction in state courts may also have been unconstitutional. See *supra* note 132.

136. See, e.g., Act of Apr. 30, 1790, ch. 9, § 27, 1 Stat. 112, 118 (providing that persons may only be prosecuted for crime under act for "having arrested or sued" domestic servant of ambassador or public minister if name of servant had been registered with Secretary of State to be "transmitted to the marshal of the district in which Congress shall reside" and therein publicly posted). Note the implicit presumption that ambassadors and public ministers would be located at the national capital where Congress—and the Supreme Court—would "reside." It does, however, appear that a number of public ministers remained in Philadelphia after the capital was moved to the District of Columbia in 1800. Cf. *United States v. Hand*, 26 F. Cas. 103, 103–04 (C.C.D. Pa. 1810) (No. 15,297) (involving defendant indicted for shooting into windows of Russian chargé d'affaires's residence in Philadelphia). This was most likely because the ambassadors and public ministers

dent's permission to leave—and thus were likely to be injured there, the Court would certainly have been the natural and convenient forum, on the reasonable presumption that the Court would sit in the capital. And since the capital was New York in 1789, pending a permanent seat of national government,<sup>137</sup> concurrent jurisdiction in New York—and, after 1790, Pennsylvania—state court may have been envisioned as a temporary, practical measure, given that the Act contemplated significant circuit riding duties for the Justices of the Court that would prevent the timely riding of a sensitive ambassadorial case.<sup>138</sup> Accordingly, it would not have occurred to the First Congress to assign jurisdiction of civil suits by ambassadors or ministers to the district courts, except perhaps to the district of New York or Pennsylvania, because an ambassador or minister would have neither reason nor authorization to go to any other state in which a district or circuit court was located.<sup>139</sup>

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preferred the established and relatively cosmopolitan and commercial city of Philadelphia to the unfinished District, which was situated in sparsely populated swampland. The diplomats who stayed in Philadelphia—presumably with the permission of the President—may also have harbored the hope that the capital would eventually return to Philadelphia. Cf. Whit Cobb, *Democracy in Search of Utopia: The History, Law, and Politics of Relocating the National Capital*, 99 *Dick. L. Rev.* 527, 538–51 (1995) (discussing inconveniences suffered by early residents of District and resultant proposals for relocation). Nativist sentiments such as those expressed by Representative Key of Maryland in opposition to a proposal to abandon the District illustrate why Philadelphia may have been more attractive: “Shall we gain by removal to a large commercial town, whose capital and interests are much in the hands of foreigners domiciliated among them, a motley crew, a heterogeneous mixture, coming from every portion of the globe?” 18 *Annals of Cong.* 1547 (1808). Nonetheless, whatever the preferences of ambassadors and public ministers turned out to be, it is clear that the First Congress contemplated that ambassadors and public ministers would be primarily located in the capital district in 1789 when the ATS was enacted and even in 1790 when plans were in the offing for a permanent move of the capital.

137. U.S. Const. art. I, § 9, cl. 17 (providing for separate national capital district).

138. See Judiciary Act of 1789, ch. 20, §§ 4–5, 1 Stat. 73, 74–75 (describing geographical scope of circuit courts, their makeup, and their sitting schedules). Moreover, Congress may have viewed the courts of New York or Pennsylvania—relatively cosmopolitan states with major seaports and significant commercial interests—as acceptably neutral toward foreign ambassadors. For instance, a Pennsylvania court was swift to recognize and punish a famous preconstitutional law of nations violation. See *Respublica v. De Longchamps*, 1 U.S. (1 Dall.) 111, 111–12 (Pa. 1784); *infra* text accompanying notes 149–152. Indeed, Pennsylvania courts were apparently perceived as hospitable enough to foreign official litigants that a Spanish minister who was libeled by a Pennsylvania newspaper arranged to have the case tried in a Pennsylvania state court rather than a federal court. See Casto, *Protective Jurisdiction*, *supra* note 3, at 496 n.163 (citing *Trial of William Cobbett, for Libel* (Sup. Ct. Pa. 1797), reprinted in Francis Wharton, *State Trials of the United States During the Administrations of Washington and Adams* 322 (New York, Burt Franklin 1849)); see also 1 *Op. Att’y Gen.* 71, 73 (1797) (arguing that Cobbett should be prosecuted in federal court).

139. As shall be shown, the district courts did have concurrent jurisdiction over some cases involving consuls—quasidiplomatic commercial agents who were stationed at ports and therefore not necessarily at the capital—which explains why the Constitution provides that the President “shall appoint Ambassadors, other public Ministers and Consuls,” but “shall receive” only “Ambassadors and other public Ministers.” U.S. Const. art. II, §§ 2–3.

Geography is also the likely reason why alien tort suits were entrusted to the federal district courts and not the circuit courts, which were the principal trial courts under the 1789 Act. There would likely have been a delay before an alien could bring a tort suit in a circuit court because it sat twice a year when at least one justice of the Supreme Court riding circuit was present to convene a panel—which was normally constituted by two justices and a district judge.<sup>140</sup> Since district judges were always *in situ* and had four, as opposed to two, sittings,<sup>141</sup> an alien tort suit—like an admiralty suit which similarly implicated sensitive foreign relations—could be heard, and any restitution awarded promptly, before the matter was likely to become an issue with the offended sovereign.<sup>142</sup>

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In 1790, Congress passed a statute ordaining that the national capital would be located in a district not more than ten miles square along the Potomac River, on land ceded by Maryland and Virginia. Act of July 16, 1790, ch. 28, § 1, 1 Stat. 130, 130. The statute also specified that the move was not to take place before December 1800, and that Philadelphia would serve as the temporary seat of national government until that time. *Id.* § 5.

140. See Judiciary Act of 1789 § 4, 1 Stat. at 74–75.

141. See *id.* § 3, 1 Stat. at 73–74; Weisburd, *supra* note 3, at 1225–26.

142. There is one piece of counterevidence that merits attention. Professor Casto, the leading scholar on the ATS's historical origins, argues that an 1804 opinion by U.S. Attorney General Levi Lincoln supports concurrent jurisdiction in federal district court over civil suits brought by ambassadors or ministers. See Casto, *Protective Jurisdiction*, *supra* note 3, at 504 n.208. In 1804, the British minister to the United States complained that one of his domestic servants had been snatched from his garden by a private American citizen claiming that the servant was a runaway slave. 1 Op. Att'y Gen. 141 (1804). Lincoln replied that if "there has been an offence against the rights of nations . . . the offenders may be prosecuted by the minister, either in the district or the Supreme Court of the United States, or by an indictment in the district court." *Id.* at 147. Casto concludes that the phrase "in the district" in Lincoln's opinion was a reference to concurrent jurisdiction in the federal district courts over the British minister's civil suit under the ATS. See Casto, *Protective Jurisdiction*, *supra* note 3, at 504 n.208.

Even putting aside the important point that this opinion was given fifteen years after the 1789 Act was passed, the better interpretation is that Lincoln's reference was to the circuit court "in the district" created by the 1801 "Act concerning the District of Columbia" passed by the lame-duck Federalist Congress. Act of Feb. 27, 1801, ch. 15, § 5, 2 Stat. 103, 103. This circuit court had jurisdiction "of all cases in law and equity between parties, both or either of which shall be resident or be found within said district," *id.* § 5, 2 Stat. at 106, and was accordingly the functional equivalent of the state court for the District of Columbia. The British minister was surely either a "resident" or a party "found within said district." As discussed above, section 13 of the 1789 Act implicitly conferred concurrent state-court jurisdiction over suits brought by ambassadors and public ministers, which would presumably include the newly created D.C. federal circuit court.

A separate 1802 statute—passed by the Republican-controlled Congress—created a federal district court for the District of Columbia with "the same powers and jurisdiction which are by law [i.e., section 9 of the 1789 Act] vested" in the federal district courts, see Act of Apr. 29, 1802, ch. 31, § 24, 2 Stat. 156, 166, but Lincoln was likely not referring to that court when he referred to "in the district" in his opinion. The precise language Lincoln used was "either in the district or the Supreme Court of the United States, or by an indictment in the district court." 1 Op. Att'y Gen. at 147. Construing "in the district or the Supreme Court of the United States" in the first phrase to mean "in the district court for the District of Columbia or the Supreme Court of the United States" rather than "in the District [of Columbia] or the Supreme Court of the United States" seems syntactically odd

So far, this Part has articulated an affirmative case based on a straightforward reading of sections 9, 11, 12, and 13 of the 1789 Act and commonsense inferences from the operational characteristics of the different federal courts they created and each court's separate jurisdiction over foreign sovereign agents. The commonly articulated case made for an ambassadorial-immunity infringement theory of the ATS, however, has not focused on text or context of this sort. Rather, it has been based on an inference of congressional response triggered by the uproar caused by two incidents involving foreign ministers in the United States.<sup>143</sup> It is likely that the First Congress was aware of these incidents, that it considered it important to redress them, and that it believed state courts inadequate for the task. The ATS, so it goes, was the statute drafted to do the job. Every major account of the historical origins of the ATS—save a re-

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and contrasts with the explicit reference to “district court” in the second phrase pertaining to a criminal indictment. Accordingly, Lincoln’s opinion should not be read as construing section 13 of the 1789 Act to authorize concurrent jurisdiction in federal district courts for suits by foreign ministers—presumably under the ATS clause of section 9 of the 1789 Act—but rather as an implicit acknowledgement of the unique role of the federal circuit court “in the district” as a state-court analogue.

In addition, the ATS itself refers only to jurisdiction “concurrent with the courts of the several States, or the circuit courts, as the case may be,” and not to any concurrent jurisdiction with the Supreme Court. Judiciary Act of 1789 § 9, 1 Stat. at 77. While Casto suggests that the First Congress would have believed that concurrent jurisdiction would lie in the Supreme Court without explicit statutory reference given the unexceptionable view that the Court’s original jurisdiction was self-executing, see Casto, *Protective Jurisdiction*, supra note 3, at 498 n.169 (discussing Judiciary Act drafter’s understanding that Congress had “no power over the Supreme Court’s original jurisdiction”), his argument is unpersuasive. In general terms, Casto’s theory—that Supreme Court original jurisdiction over ambassadorial cases is implicit whenever the 1789 Act grants lower federal court jurisdiction in alien cases—introduces too many inconsistencies to be true. Specifically, if the word “alien” includes ambassadors, public ministers, and consuls each time it is used in the Act, then a civil suit against an ambassador for a sum greater than five hundred dollars might be brought in circuit court under section 11, Judiciary Act of 1789 § 11, 1 Stat. at 78, regardless of whether such a suit could be brought “consistently with the law of nations” as would be required if the suit were brought in the Supreme Court under section 13. *Id.* § 13, 1 Stat. at 80. Second, Casto’s theory cannot be squared with the 1789 Act’s grant of concurrent jurisdiction between the Supreme Court and the federal district courts in consular cases where consuls or vice consuls are defendants in the sixth clause of section 9, *id.* § 9, 1 Stat. at 77, and between the Supreme Court and the state courts where consuls or vice consuls are plaintiffs, *id.* § 13, 1 Stat. at 80–81. On Casto’s view, the federal district courts would also have concurrent jurisdiction with the Court over tort suits brought by consuls and vice consuls by the separate operation of the ATS, the fourth clause of section 9, referring to such consular officials by an omnibus singular noun—“alien.” The conclusion that the First Congress, in a single section of the 1789 Act, used the plural words “consuls or vice-consuls” when it explicitly intended to vest concurrent jurisdiction in district courts over consular suits where consuls or vice consuls were *defendants* but the singular word “alien” when it implicitly intended to vest concurrent jurisdiction in district courts over tort suits where consuls or vice consuls were *plaintiffs* is difficult to defend as a matter of statutory interpretation.

143. See *infra* notes 148–158 and accompanying text.

cent effort by Professor Curtis Bradley<sup>144</sup>—has assumed that redressing ambassadorial infringements was at least part of the statute's purpose.<sup>145</sup>

The basic response to this argument is to concur in its general premise—that the First Congress would have thought it imperative to provide for specific redress of ambassadorial infringements—but to show that Congress deemed the issue so critical as to draft two tailored provisions—one civil and one criminal—to deal specifically with the problem rather than to redress it as one of a package of violations under a multipurpose ATS. On the civil side, section 13 of the 1789 Act vested jurisdiction over infringements of ambassadorial rights in the Supreme Court, the logical tribunal in terms of forum dignity and geography as has already been argued.<sup>146</sup> On the criminal side, the 1790 Crimes Act (1790 Act) addressed the problem in a way that strongly suggests enactment with the past incidents involving torts against foreign ambassadors and ministers specifically in mind.<sup>147</sup>

Existing studies have documented in detail the two famous founding-era incidents involving infringements of the rights of foreign diplomats;<sup>148</sup> the discussion here will accordingly be brief. In May 1784, Francois de Barbee Marbois, the French Consul General and Secretary of Legation in Philadelphia, was insulted at his residence and then forced to defend himself after his cane was struck on a street by Charles Julian de Longchamps, a French subject.<sup>149</sup> Longchamps was captured, tried before the Pennsylvania Supreme Court for violating the law of nations,

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144. See Bradley, *Alien Tort Statute*, *supra* note 3, at 637–45. Professor Bradley makes the argument that the ATS was not intended for ambassadorial infringements to support his thesis that the ATS was strictly an implementation of Article III foreign-parties jurisdiction. It is not necessary to his argument that the ATS might have been intended to redress torts against ambassadors, ministers, or consuls by other aliens, since the “Ambassadors” Subclause of Article III supplies a separate constitutional basis for such cases. U.S. Const. art. III, § 2, cl. 1. Professor Slaughter also expressed doubt about whether the ATS was intended to redress ambassadorial infringements, see Burley (Slaughter), *supra* note 3, at 469–74, although she ultimately conceded a nexus, see *id.* at 476–77.

145. See, e.g., Casto, *Protective Jurisdiction*, *supra* note 3, at 491–94; Dodge, *Historical Origins*, *supra* note 3, at 229–30; Rogers, *supra* note 3, at 54–55 (describing theory of ATS as providing for instances when foreign ambassadors are attacked and wish to sue in tort under state law).

146. See *supra* text accompanying notes 136–142.

147. Act of Apr. 30, 1790, ch. 9, 1 Stat. 112. See *infra* notes 181–184 and accompanying text.

148. See, e.g., Bradley, *Alien Tort Statute*, *supra* note 3, at 637–42; Casto, *Protective Jurisdiction*, *supra* note 3, at 491–94; Dodge, *Historical Origins*, *supra* note 3, at 229–30; Randall, *supra* note 3, at 24–26; Alfred Rosenthal, *The Marbois-Longchamps Affair*, 63 *Pa. Mag. Hist. & Biography* 294, 295–301 (1939).

149. See *Republica v. De Longchamps*, 1 U.S. (1 Dall.) 111, 111–12 (Pa. 1784). The dispute apparently arose from Marbois's refusal to authenticate documents attesting to Longchamps's rank, station, and military record, which Longchamps had hoped to use “to refute several publications, which had been made in the newspapers, injurious to his character and pretensions.” *Id.* at 112.



sentenced to two years' imprisonment, and fined. The court, however, denied Marbois's demands for Longchamps's extradition.<sup>150</sup> The Continental Congress, hampered by the Articles of Confederation, could only recommend action by the states and applaud Pennsylvania's resolution.<sup>151</sup> Marbois eventually dropped his request for extradition but "expressed a Wish that Congress would pass Resolutions asserting the Rights of Ministers &c."<sup>152</sup>

The second incident, though not as famous as the Marbois affair, is more important for the purposes of this Article because it occurred in New York in December 1787—just as the Constitution was debated at state ratification conventions and only fifteen months before the Senate Committee was formed to draft the 1789 Act when the First Congress convened in New York.<sup>153</sup> A city constable named John Wessel had entered the residence of Pieter Johan van Berckel, the Dutch minister plenipotentiary to the United States, with a warrant to arrest one of van Berckel's "domestics."<sup>154</sup> Van Berckel appealed to John Jay, the American minister of foreign affairs, who asked the Mayor of New York to act on the "Aggression," which was "not the first of the kind which that Minister has experienced during his Residence here."<sup>155</sup> Jay also wrote a conciliatory note to van Berckel on January 10, 1788: "The present Instance doubtless originated in Ignorance, not in Design; but still as your official Rights were infringed, it is highly proper not only that you should assert them but that proper Satisfaction be given you on that Head."<sup>156</sup> At the same time, Jay reported to Congress that "the federal Government [did] not appear to him to be vested with any judicial Powers competent to the Cognizance and Judgment of such Cases," and advised that the best that could be done would be to commend the matter to the Governor of New York.<sup>157</sup> Wessel was convicted by a New York state court of violating the law of nations and sentenced to three months in jail.<sup>158</sup>

150. See *id.* at 116–18.

151. See 28 *Journals of the Continental Congress*, *supra* note 23, at 314 (John C. Fitzpatrick ed., 1933) (providing Continental Congress's resolution that Secretary for Foreign Affairs should explain to Marbois that "difficulties . . . may arise . . . from the nature of a federal union in which each State retains a distinct and absolute sovereignty in all matters not expressly delegated to Congress leaving to them only that of advising in many of those cases in which other governments decree"); Dodge, *Historical Origins*, *supra* note 3, at 229–30.

152. 29 *Journals of the Continental Congress*, *supra* note 23, at 598 (John C. Fitzpatrick ed., 1933).

153. See 4 *Documentary History of the Supreme Court*, *supra* note 74, at 22.

154. 34 *Journals of the Continental Congress*, *supra* note 23, at 109 (Roscoe R. Hill ed., 1937).

155. *Id.*

156. *Id.* at 110.

157. *Id.* at 111.

158. Letter from James Duane to John Jay (Aug. 8, 1788), microfilmed on *Papers of the Continental Congress, 1774–1789*, roll 106, Item No. 80, vol. III, at 410–13 (Nat'l Archives Microfilm Publ'ns).

The facts of the van Berckel incident bear a suggestive resemblance to some puzzling features of section 13 of the 1789 Act and, more strikingly, Ellsworth's original Senate bill version. Article III, Section 2, Clause 1 does not mention an ambassador's or minister's "domestics," but section 13 provides for exclusive jurisdiction in the Supreme Court for "proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, as a court of law can have or exercise consistently with the law of nations."<sup>159</sup> By operation of this clause, a city constable could no longer execute a warrant in "proceedings" against an ambassador's "domestics," such proceedings now falling within the exclusive jurisdiction of the Supreme Court and being only permissible to the extent permitted by the law of nations. In this sense, section 13 preemptively struck at precisely the ambassadorial right infringement—legal proceedings against an ambassador's domestics—at issue in van Berckel.

Another clause of section 13, as discussed above, authorized original jurisdiction in the Supreme Court "of all suits brought by ambassadors, or other public ministers."<sup>160</sup> Had this provision been in force at the time that Wessel entered van Berckel's home, the minister could have sued for trespass on property in the Supreme Court. The original Senate bill version of this provision suggests even more forcefully that Ellsworth wrote it with the van Berckel incident—suffered fifteen months earlier in the very city in which Congress was convening—specifically in mind. The bill provided for "original, but not exclusive jurisdiction [in the Supreme Court] of *all Suits for trespasses* brought by ambassadors, other publick ministers or consuls, or their domesticks or domestick servants."<sup>161</sup> Although that language was not adopted, the enacted version was broader than the Senate bill—inasmuch as it allowed "all suits" and not just "all suits for trespasses," which presumably protected one's person as well as property—but narrower as to the prospective litigants—omitting "domestics or domestic servants." Regardless of the reason for the revision,<sup>162</sup> it is beyond doubt that section 13 at least covered Supreme Court jurisdiction over "all suits for trespass brought by ambassadors [and] other publick ministers" as provided for in the original Senate bill, thereby throwing into question the belief that Congress enacted the more generally worded ATS out of a sense of urgency to make a federal court available for such suits.

In order to see how a criminal provision—section 28 of the 1790 Crimes Act—relating to ambassadorial infringements, like section 13 of

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159. Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 80.

160. *Id.*

161. Judiciary Act of 1789, Original Senate Bill § 13, reprinted in 4 Documentary History of the Supreme Court, *supra* note 74, at 38, 70 (emphasis added).

162. Professor Casto speculates, with good reason, that the revision was made to ensure that the Act would not diminish the Supreme Court's self-executing original jurisdiction. See Casto, Protective Jurisdiction, *supra* note 3, at 498 ("This expansion of the Supreme Court's original jurisdiction may have been accomplished to conform the Act to the Constitution.").

the 1789 Judiciary Act on the civil side, is best understood as the founding group's tailored response to the Marbois and van Berckel incidents, one must turn again to Blackstone's *Commentaries*. Blackstone's most detailed discussion of a specific ambassadorial right at international law concerned a right of relatively recent vintage, recognized in England only in the early eighteenth century: diplomatic immunity in civil actions in the courts of the receiving state. Blackstone explained the origin of the right in Book I of *Commentaries*, which he cross-referenced in footnotes to his discussion of law-of-nations offenses in Book IV.<sup>163</sup>

Blackstone related an incident in 1708 involving the Russian ambassador to England, a man whose lifestyle apparently exceeded his means. The Russian diplomat was "actually arrested and taken out of his coach in London . . . for debts which he had there contracted."<sup>164</sup> Peter the Great, Czar of Russia, was outraged and demanded that Queen Anne put the arresting officers to death. However, as Blackstone noted with evident national pride, Peter the Great was told that no punishment could be inflicted because no English law protected ambassadors from payment of their lawful debts.<sup>165</sup>

But as a prospective matter, the English Sovereign was forced to concede the point. In response to "the clamours of the foreign ministers (who made it a common cause) as well as to appease the wrath of Peter," Parliament enacted a statute declaring all future process on an ambassador or his household to be "utterly null and void" and criminalizing such conduct.<sup>166</sup> The law provided that "the persons prosecuting, soliciting, or executing such process shall be deemed violators of the law of nations, and disturbers of the public repose."<sup>167</sup> The statute provided, however, that it did not apply to any "trader" who was generally subject to the "bankrupt laws," and also foreclosed criminal punishment for arresting an ambassador's servant whose name was not registered with "the secretary of state, and by him transmitted to the sheriffs of London and Middlesex."<sup>168</sup> The City of London and the county of Middlesex<sup>169</sup> were the jurisdictions in which ambassadors were authorized to reside and conduct their official business while posted to the Court of St. James—St. James Palace itself being located in Middlesex County.<sup>170</sup>

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163. See 1 Blackstone, *supra* note 66, at 247–48; 4 *id.* at 70–71.

164. 1 *id.* at 247–48.

165. *Id.*

166. *Id.* at 248.

167. *Id.*

168. *Id.*

169. See James Barclay, *A Complete and Universal English Dictionary on a New Plan* 709 (London, Richardson & Urquhart et al. 1774) (stating in entry for "Middlesex" that Middlesex County contains "126 parishes, besides London, and 4 market-towns, [and] it sends 8 members to parliament, 4 for London, 2 for Westminster, and 2 for the county").

170. St. James remains the official seat of the British Sovereign, notwithstanding Queen Victoria's move to Buckingham Palace in 1837. Christopher Hibbert, *The Court of St. James's* 3 (1979).

There is no mistaking the causal influence of Blackstone's account of the 1708 incident and its statutory consequences on a series of provisions the First Congress enacted as part of the 1790 Crimes Act.<sup>171</sup> Section 25 of the Act prohibited process against ambassadors, other public ministers,<sup>172</sup> or their domestics or domestic servants.<sup>173</sup> Section 26 criminalized violations with imprisonment of up to three years and a fine at the court's discretion. It also specified, like the English statute reported by Blackstone, that "all attorneys or solicitors prosecuting or soliciting in such case, and all officers executing any such writ or process, being thereof convicted, shall be deemed violaters of the laws of nations, and disturbers of the public repose."<sup>174</sup> Section 27 likewise copied the English statutory exception for servants who had not registered with the Secretary of State. Of course, under the American statute, the Secretary was to pass on registered names not to "the sheriffs of London and Middlesex," but rather "to the marshal of the district in which Congress shall reside."<sup>175</sup> Section 28 of the 1790 Crimes Act similarly warrants special attention. It provided:

That if any person shall violate any safe-conduct or passport duly obtained and issued under the authority of the United States, or shall assault, strike, wound, imprison, or in any other manner infract the law of nations, by offering violence to the person of an ambassador or other public minister, such person so offending, on conviction, shall be imprisoned not exceeding three years, and fined at the discretion of the court.<sup>176</sup>

This is an interesting provision for two reasons. First, it is unclear if the first clause's mention of "safe-conduct or passport" violations refers to such violations in general or breaches of the special safe conducts or passports held by diplomatic officials.<sup>177</sup> Second, and more important here, there is no apparent parallel English statutory provision in Blackstone, who was so meticulously copied in the previous three sections of the Act. Blackstone merely states "that the common law of England recognizes [ambassadorial rights] in their full extent, by immediately stopping all legal process . . . which may intrench upon the immunities of a foreign minister or any of his train."<sup>178</sup> He then mentions the antiprocess stat-

171. Act of Apr. 30, 1790, ch. 9, 1 Stat. 112. The committee to draft the 1790 Crimes Act was likely chaired by Oliver Ellsworth, 1 Senate Journal, *supra* note 80, at 108 (Jan. 26, 1790) (recording composition of committee and that Ellsworth reported to Senate "on behalf of the committee"); but there is no indication that he played the prominent role in its drafting that he did with respect to the 1789 Act.

172. "[O]ther public minister," Act of Apr. 30, 1790, § 25, 1 Stat. at 118, was a specification absent in Queen Anne's statute, and the inclusion in the 1790 Crimes Act could be a result of Marbois's and van Berckel's ministerial, not ambassadorial, rank.

173. *Id.*, 1 Stat. at 117-18.

174. *Id.* § 26, 1 Stat. at 118.

175. *Id.* § 27.

176. *Id.* § 28.

177. See *infra* text accompanying notes 290-293.

178. 4 Blackstone, *supra* note 66, at 70.

ute.<sup>179</sup> The best conclusion to be drawn from this passage is that Blackstone is referring exclusively to the ambassadorial right against legal process, not to any additional criminal law directed to the violation of ambassadorial rights against assault or violence. Nor is there any specific mention of the crime of assaulting or striking an ambassador in Blackstone's volume on English criminal law. It therefore seems reasonable to presume that assault against the person of an ambassador was not separately punishable, but only in the ordinary course under the English common law of crimes.<sup>180</sup>

Then where did section 28 come from, given the obvious debt of its three sisters to Blackstone? One possibility is Vattel's famous admonition that violence done to a public minister is a "crime of state" in violation of the law of nations rather than a common trespass.<sup>181</sup> The fact that violence against an ambassador, notwithstanding the lack of reference by Blackstone, was listed in the 1781 resolution by the Continental Congress urging states to enact laws punishing law-of-nations violations<sup>182</sup>—which predates the Marbois and van Berckel incidents—certainly suggests the influence of Vattel, whose treatise had been available to the members of the Continental Congress since at least 1775.<sup>183</sup> However, section 28's odd language of "assault, strike, wound . . . by offering violence to the person of an ambassador or other public minister" may best be explained as being indicative of an emphatic concern for redressing any recurrence of the affair concerning Marbois, whose cane had been struck.<sup>184</sup> The specific phrasing of the statute, at the very least, contrasts with the general terms of the ATS. To the extent that the ambassadorial-infringement theory of the ATS is based on the surmise that the First Congress would surely have provided a national forum to afford redress in the event of any recurrence of a Marbois-type incident, it seems that the theory is even better suited as an explanation of the origins of section 28 of the 1790 Crimes Act.

In sum, although there is no direct legislative history that confirms that the First Congress did not draft the Alien Tort Statute as a provision to authorize federal district court jurisdiction over ambassadorial-rights cases, the textual and circumstantial evidence in favor of the conclusion is

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179. *Id.* at 70–71.

180. Or at least that would be the inference that the First Congress would have drawn from Blackstone's omission, because there is no evidence suggesting that the First Congress directly consulted the pertinent English statutes that Blackstone summarized.

181. See *supra* text accompanying note 107.

182. See 21 *Journals of the Continental Congress*, *supra* note 23, at 1136–37.

183. See *supra* text accompanying note 87.

184. Professor Bradley has also concluded that this "provision . . . would have covered the circumstances of the Marbois incident" and that the ATS was enacted to serve a different function. Bradley, *Alien Tort Statute*, *supra* note 3, at 644–45. In Bradley's account, the ATS only applied to "suits involving at least one U.S. citizen." *Id.* at 645. The sequence of "assault, strike, wound" presumably reflects increasing severity in the violence offered.

persuasive. This evidence does not come from private sources or any other form of hidden history, but rather from a careful reading of the relevant statutes and an elementary understanding of how the federal courts were set up and the basic rules of contemporaneous international law. However strange it might seem to us today, the founding group—the leaders of a revolutionary political entity of newfound and dubious status among the Eurocentric club of civilized sovereigns—was likely profoundly sensitive about the conceptual and legal distinction between foreign private citizens or subjects and foreign public ambassadors or ministers. It is hard to believe that they would not have drafted the first national judiciary act to honor that distinction, assigning public ambassadorial cases to the Supreme Court at the national capital and private alien cases to the federal district courts located in each of the states. By contrast, the case the other way is based neither on textual nor specific contextual evidence, but rather on the concern for ambassadorial-rights infringements the founding group likely perceived in light of the Marbois and van Berckel incidents. The concern, as has been argued above, was in fact deemed so urgent that the First Congress did not entrust any resulting ambassadorial suits to the district courts by means of the ATS construed as an omnibus provision; rather, Congress specially entrusted ambassadorial suits to the Supreme Court by section 13 of the 1789 Judiciary Act and additionally criminalized any assaults or violence against ambassadors and ministers by enacting section 28 of the 1790 Crimes Act.

### C. *Piracy and Prize-Based Accounts of the ATS*

The second late eighteenth-century paradigm law-of-nations violation *Sosa* identified was piracy.<sup>185</sup> However, just as with the tort claims of ambassadors, public ministers, and consuls, the First Congress likely did not intend to redress piracy claims through the ATS. It is probable that any tort causes of action arising from piracy would be heard in federal district court, not under the fourth clause of section 9 of the 1789 Act, but rather under its second clause, which implemented jurisdiction as to admiralty and maritime matters. That statute afforded district courts

exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation or trade of the United States, where the seizures are made, on waters which are navigable from the sea by vessels of ten or more tons burthen, within their respective districts as well as upon the high seas; saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it.<sup>186</sup>

This grant has been construed very broadly for a very long time. Justice Joseph Story observed in 1815 that the jurisdiction “must include all

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185. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 715 (2004).

186. Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77.

maritime contracts, *torts* and injuries.”<sup>187</sup> The word “maritime,” in turn, was “defined with regard to the character of the waters where or with reference to which the given transaction or occurrence takes place.”<sup>188</sup> The reasonable implication from the geographical scope of “seizures” set forth in the admiralty statute indicates that at the very least, it extended jurisdiction over “waters which are navigable from the sea by vessels of ten or more tons burthen.”<sup>189</sup>

Because of the sweeping breadth of the admiralty statute, most scholars have emphasized the ATS’s putative role in addressing infringements of ambassadorial rights more than any role *vis-à-vis* piracy.<sup>190</sup> For instance, it is universally accepted that the admiralty statute covered prize jurisdiction,<sup>191</sup> which probably included almost all “piracy” cases after 1789 because, by that time, piracy had evolved into an enterprise in which most aspirants seem to have carried at least one letter of marque or commission from some diploma-mill sovereign and, accordingly, had a plausible basis to plead a legal prize capture.<sup>192</sup> Indeed, only one scholar before *Sosa*—Professor Joseph Modeste Sweeney—seriously argued that the ATS covered any sort of tort arising in a maritime context.<sup>193</sup> The challenge for any theory of ATS applicability to this context is to imagine a scenario in which a tort might occur on the seas but would not fall within the traditional admiralty or maritime jurisdiction as those terms were used in the admiralty statute.

One logical way to approach this task with an eye to piracy would be to compare the First Congress’s definition of this law-of-nations offense in the 1790 Crimes Act with the breadth of the admiralty statute to see if there is any type of piracy that the latter might not encompass. Section 8 of the 1790 Act defined the offense:

[I]f any person or persons shall commit upon the high seas, or in any river, haven, basin or bay, out of the jurisdiction of any particular state, murder or robbery, or any other offence which if committed within the body of a county, would by the laws of

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187. *De Lovio v. Boit*, 7 F. Cas. 418, 442 (C.C.D. Mass. 1815) (No. 3776) (emphasis added).

188. Grant Gilmore & Charles L. Black, Jr., *The Law of Admiralty* 31 (2d ed. 1975).

189. Judiciary Act of 1789 § 9, 1 Stat. at 77.

190. See, e.g., Dodge, *Historical Origins*, *supra* note 3, at 246–56 (rejecting view that ATS only referred to prize jurisdiction because of federal district court’s broad admiralty jurisdiction); cf. Bradley, *Alien Tort Statute*, *supra* note 3, at 617–18 (concluding that ATS was not enacted to address any wrongs committed within admiralty or maritime jurisdictions).

191. See, e.g., Gustavus H. Robinson, *Handbook of Admiralty Law in the United States* 254 (1939).

192. See Lauren Benton, *Oceans of Law: The Legal Geography of the Seventeenth-Century Seas* (paper given at *Seascapes, Littoral Cultures, and Trans-Oceanic Exchanges*, Feb. 12–15, 2003), at <http://www.historycooperative.org/proceedings/seascapes/benton.html> (on file with the *Columbia Law Review*) (describing “maritime forum shopping” available to privateers once prize courts became “ubiquitous”).

193. See Sweeney, *supra* note 3, at 447.

the United States be punishable with death; . . . every such offender shall be deemed, taken and adjudged to be a pirate and felon, and being thereof convicted, shall suffer death . . . .<sup>194</sup>

Section 9 stated that "any commission from any foreign prince, or state" would not be an affirmative defense to piracy committed "against the United States, or any citizen thereof, upon the high sea."<sup>195</sup> Section 10 made punishable by death the giving of aid to pirates;<sup>196</sup> section 11 provided punishments for those who concealed pirates or took goods from them;<sup>197</sup> and section 12 punished those who conspired to be pirates.<sup>198</sup>

If one interlineates the geographical element of piracy's definition in the 1790 Act with the geographical scope of the 1789 admiralty statute, it is hard to see what is left. That is, "any river, haven, basin or bay, out of the jurisdiction of any particular state" would appear to be largely coextensive with "waters which are navigable from the sea by vessels of ten or more tons burthen." Perhaps one could imagine a smallish (thirty-foot) pirate dinghy of less than ten tons burthen and shallow draft that wreaks death-penalty eligible havoc in a little river or rivulet that is inaccessible to ships of ten tons draft. As to such putative pirates, the admiralty clause would not provide a basis for jurisdiction in district court. But this is hardly a realistic scenario. The better view is to acknowledge that the admiralty statute is a far more plausible and natural peg for district court jurisdiction over torts arising from piracy.

It is, in theory, possible that the First Congress intended the adjacent admiralty and alien tort clauses of section 9 of the 1789 Act to provide redundant coverage for piracy.<sup>199</sup> But the exclusive jurisdiction provided by the former and the concurrent jurisdiction with state and circuit courts recognized by the latter would appear to foreclose such an interpretation. The admiralty grant, however, does have a proviso "saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it,"<sup>200</sup> which has been construed to authorize suit in state court for actions other than in rem actions involving condemnation of the ship or cargo itself.<sup>201</sup> Thus, the tension might be reconciled on the ground that both statutes afford concurrent jurisdiction in state courts (and circuit courts) for in personam tort actions for damages arising from piracy, although the admiralty clause would be the exclusive jurisdictional grant for an in rem action related to piracy. This seems, however, a strange way to divide jurisdiction, given that the clauses relate to the jurisdiction of the same court. Moreover, the last provision

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194. Act of Apr. 30, 1790, ch. 9, § 8, 1 Stat. 112, 113-14.

195. *Id.* § 9, 1 Stat. at 114.

196. *Id.* § 10.

197. *Id.* § 11.

198. *Id.* § 12, 1 Stat. at 115.

199. It appears that the two grants were viewed as overlapping by 1795, six years after enactment, for reasons to be discussed below. See *infra* text accompanying notes 314-325.

200. Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77.

201. Robinson, *supra* note 191, at 23.



in section 9 creates another inconsistency: It specifies that “trial of issues in fact, in the district courts, in all causes except civil causes of admiralty and maritime jurisdiction, shall be by jury.”<sup>202</sup> On the theory that a piracy-related civil cause of action might be brought under the ATS or the preceding admiralty and maritime jurisdiction clause, the same suit might then be tried by jury if pled under the ATS but not if pled in admiralty.<sup>203</sup>

In response to the several obstacles to a piracy construction of the ATS, Professor Sweeney takes a different, creative tack. He argues that the exclusive admiralty grant would not cover a certain subset of prize cases, which would accordingly have to be brought under the ATS.<sup>204</sup> Under the late eighteenth-century law of prize, a combatant vessel had the right to capture enemy vessels and to stop and search the merchant ships of a neutral sovereign for war contraband.<sup>205</sup> If during the course of such a search, the neutral ship’s crew were injured, or the cargo or ship damaged, the injured party had a right to sue the commander of the interdicting ship in prize court.<sup>206</sup> The United States had additionally signed treaties to such effect in the period prior to 1789.<sup>207</sup> Sweeney concedes that the admiralty statute afforded federal district courts exclusive jurisdiction over cases contesting the legality of capture and most incidental issues.<sup>208</sup> But, Sweeney argues, the admiralty clause did not extend the federal district courts’ exclusive jurisdiction to cases in which capture and possession were not at issue,<sup>209</sup> specifically, when a neutral alien was injured in the course of an interdicting search by a belligerent.<sup>210</sup> Sweeney concludes that the ATS was enacted to allow for some jurisdiction in state courts in addition to federal district court jurisdiction for this very scenario.<sup>211</sup> As other commentators have noted, however,

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202. Judiciary Act of 1789 § 9, 1 Stat. at 77.

203. Ellsworth wrote a private letter while the bill was in committee that also supports the conclusion that the First Congress viewed the admiralty clause and the ATS as non-overlapping enactments. See Letter from Oliver Ellsworth to Richard Law (Apr. 30, 1789), in 4 Documentary History of the Supreme Court, supra note 74, at 382, 382 (describing Senate committee’s consideration of judiciary system including “district court with one Judge resident in each State, with jurisdiction in admiralty cases, smaller offences, & some other special cases” (emphasis added)).

204. See Sweeney, supra note 3, at 482 (recognizing concurrent jurisdiction of state courts under ATS as exception to exclusive federal district court jurisdiction under admiralty clause, “so long as the legality of a capture was not in issue, and the suit was ‘only’ for the reparation in damages of a wrong related to a capture”).

205. *Id.* at 447.

206. See *id.*

207. See *id.* at 469–70 (referencing treaties with France, the Netherlands, Sweden, and Prussia).

208. See *id.* at 447.

209. See *id.*

210. See *id.* at 454.

211. See *id.* at 482–83.

the theory runs decisively against the weight of the evidence,<sup>212</sup> even allowing Sweeney the key threshold point—a doubtful concession—that traditional admiralty and maritime jurisdiction did not encompass this scenario.

To start off, a major textual problem with Sweeney's reading of the ATS is that "tort," while a technical term of art at common law on land signifying a noncontract injury,<sup>213</sup> was not used in the contemporaneous law of prize, specifically with respect to the injuries or wrongs suffered by a neutral merchantman during an aggressive search.<sup>214</sup> Sweeney concedes this and, in rebuttal, suggests that Ellsworth used the word as a synonym for the word "wrong," which *was* used in the law of prize at the time.<sup>215</sup> He then points to Justice Story's first reported use of the word "tort" in the prize context twenty-eight years later in 1817.<sup>216</sup> The speculation that "tort" in the ATS was intended in a seaborne sense may be correct, but it would require more evidence than this to be validated.

The theory, however, introduces too many other wrinkles to smooth over this textual inconsistency. First, if, as Professor Sweeney speculates, affording jurisdiction in such instances to state courts was precisely what the ATS was intended to do, why did Ellsworth write an open-ended, free-standing provision stating that district courts "shall have" such jurisdiction rather than drafting it as a carve-out from the admiralty clause? Second, the ATS also afforded concurrent jurisdiction to federal circuit courts, and there is no indication that those courts were intended to serve as prize courts under any circumstances.<sup>217</sup>

Third, it seems wrong to presume that the First Congress in 1789 was thinking prospectively about prize jurisdiction with sufficient focus to have contemplated jurisdictional sharing of this subset of prize jurisdiction with state courts. Sweeney's theory seems to require that the United States or an ally be at war—specifically a war with a naval dimension—in order for there to be a sufficiently strong impetus for drafting such a provision. Although 1789 was a difficult year owing to problems with

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212. See, e.g., Bradley, *Alien Tort Statute*, supra note 3, at 617 (arguing no evidence exists in legislative history that ATS was subset of admiralty jurisdiction); Dodge, *Historical Origins*, supra note 3, at 250.

213. 3 Blackstone, supra note 66, at 117 (1768).

214. See Sweeney, supra note 3, at 475 (noting review of neutral merchantmen cases fails to turn up word "tort").

215. See *id.*

216. See *id.* at 475–76.

217. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78; see also supra notes 190–192 (noting that prize jurisdiction fell under exclusive admiralty jurisdiction of district courts).

Great Britain with respect to the 1783 Treaty of Paris,<sup>218</sup> neither the United States nor its ally France was then at war.<sup>219</sup>

Finally, sharing this sort of prize jurisdiction with the states made sense during the revolutionary period when some of the states had their own navies, but it is harder to see a need for it after the ratification of the Constitution. Congress was given exclusive power “[t]o provide and maintain a Navy”<sup>220</sup> in peacetime and “grant Letters of Marque”<sup>221</sup> to privateers, which powers were explicitly taken from the states: “No State shall . . . grant Letters of Marque;”<sup>222</sup> “No State shall, without the Consent of Congress . . . keep . . . Ships of War in time of Peace . . . .”<sup>223</sup> There would have been no reason for assigning any aspect of prize jurisdiction to state courts with respect to searches conducted on the seas by federal warships or congressionally authorized privateers. And it seems a stretch to think that the First Congress, in passing the ATS in 1789, was drafting it with the expectation that a future Congress would consent to state navies in peacetime or that a war with a naval dimension was perceived as imminent, in which case the Constitution authorized Congress to permit the states to build “Ships of War.”<sup>224</sup>

### III. THE SAFE-CONDUCT EXPLANATION OF THE ALIEN TORT STATUTE

If *Sosa* was correct in concluding that the Alien Tort Statute was drafted with Blackstone’s discussion of law-of-nations offenses in mind,<sup>225</sup> and it was not enacted to redress ambassadorial infringements or piracy, then the only possibility left is that it was intended to address violations of alien safe conducts. But what was a safe conduct?

#### A. *The Concept of the Safe Conduct in International Law at the Time of Enactment*

The infringement of safe conducts is the first of the law-of-nations offenses Blackstone discusses in Chapter 5 of Book IV of *Commentaries*. He writes:

[V]iolation of safe-conducts or passports, expressly granted by the king or his ambassadors to the subjects of a foreign power in

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218. See *infra* note 266 and accompanying text; see also Thomas H. Lee, *The Supreme Court of the United States as Quasi-International Tribunal: Reclaiming the Court’s Original and Exclusive Jurisdiction over Treaty-Based Suits by Foreign States Against States*, 104 *Colum. L. Rev.* 1765, 1829–30 & n.291 (2004) [hereinafter Lee, *Quasi-International Tribunal*] (discussing states’ reluctance to adhere to obligations under 1789 Treaty of Peace).

219. See Elkins & McKittrick, *supra* note 79, at 337 (“France declared war on Great Britain and Holland on February 1, 1793 . . .”).

220. U.S. Const. art. 1, § 8, cl. 13.

221. *Id.* cl. 11.

222. *Id.* § 10, cl. 1.

223. *Id.* cl. 3.

224. *Id.*

225. See *supra* text accompanying notes 66–71.

time of mutual war; or, committing acts of hostility against such as are in amity, league, or truce with us, who are here under a general implied safe-conduct; these are breaches of the public faith, without the preservation of which there can be no intercourse or commerce between one nation and another: and such offences may, according to the writers upon the law of nations, be a just ground of a national war; since it is not in the power of the foreign prince to cause justice to be done to his subjects by the very individual delinquent, but he must require it of the whole community. And as during the continuance of any safe-conduct, either express or implied, the foreigner is under the protection of the king and the law; and, more especially, as it is one of the articles of magna carta, that foreign merchants shall be intitled to safe-conduct and security throughout the kingdom; there is no question but that any violation of either the person or property of such foreigner may be punished by indictment in the name of the king, whose honour is more particularly engaged in supporting his own safe-conduct.<sup>226</sup>

This rich two-sentence passage reveals a great deal about the concept of the safe conduct the First Congress likely had in mind. First, the safe conduct protected “the person or the property” of aliens. Second, there is a bifurcation between wartime and peacetime safe conducts (for “such as are in amity, league, or truce with us”). Third, overlapping this division, there is a distinction between “express” and “implied” safe conducts. Fourth, safe conducts could apparently be granted to aliens within a sovereign’s territory—as signified by the word “here” with respect to “the general implied safe-conduct”—or abroad, on the presumption that “safe-conducts or passports expressly granted” in war could apply to aliens on the seas or in foreign lands. Fifth, although the injury to an alien’s person or property might be committed by a private actor, it had public ramifications because “during the continuance of any safe-conduct, either express or implied, the foreigner is under the protection of the king and the law.” Sixth, safe conducts served the dual and related functions of facilitating “intercourse or commerce” among nations and mitigating “a just ground of a national war.”

Vattel gives additional insight into the late eighteenth-century conception of the safe conduct. He explained the obligation of the sovereign granting a safe conduct in the following way:

He who promises security by a safe-conduct, promises it where he is master, not only in his territories but likewise where any of his troops may be, and he not only is to forbear violating the security, either by himself or his people, but he is to protect and defend him to whom he has promised it, to punish any of his subjects who have offered any violence to him, and oblige them to make good the damage.<sup>227</sup>

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226. 4 Blackstone, *supra* note 66, at 68–69 (emphasis omitted).

227. Vattel, *supra* note 81, bk. 3, ch. XVII, § 268, at 479–80.

Thus, like Blackstone, Vattel recognized that a safe conduct could apply beyond a sovereign's territory, specifically to include places "where any of his troops may be." Vattel further suggests that the safe conduct implicated four related sovereign obligations at international law: (1) a duty "to forbear violating the security, either by himself or his people"—that is, an obligation to prevent harm to aliens by one's own citizens; (2) a larger obligation of defense that appears to extend to defend the alien against injuries caused by noncitizens—"to defend him to whom he has promised it"; (3) a punitive obligation in the event the person who caused or threatened harm was a citizen—"to punish any of his subjects who have offered any violence to him;" and (4) an obligation to ensure compensation if the one who caused injury was a citizen—that is to "oblige them to make good the damage."

Drawing from Blackstone and Vattel jointly, then, it seems safe to say that a safe conduct signified a sovereign obligation on the part of the United States to prevent injury to the person or property of an alien within its territory and also abroad where it had a military presence. Where a safe conduct was implicated, the United States assumed correlative duties to punish the injurer under its criminal laws if harm occurred and to oblige the injurer to pay damages for the injury. The safe conduct might be expressly or impliedly granted and it could be granted in war or peace. But what created a safe conduct, whether express or implied, in war or at peace, within or outside one's territory?

1. *Express Safe Conducts.* — Express safe conducts, it seems, were documents issued by sovereigns or their authorized representatives such as ambassadors or military commanders in the field, particularly in wartime. Thus the grant was a domestic political decision, but once created, any violation of the safety and security of person and property promised in the express safe-conduct document would constitute a violation of the law of nations. Such documents correspond to the first category of safe conducts Blackstone identified, namely, "safe-conducts or passports, expressly granted by the king or his ambassadors to the subjects of a foreign power in time of mutual war."<sup>228</sup> The Continental Congress, which had foreign-affairs authority, echoed Blackstone's formulation of this first category of safe conducts in its 1781 resolution recommending redress of law-of-nations offenses by the states "[f]or the violation of safe conducts or passports, expressly granted under the authority of Congress to the subjects of a foreign power in time of war."<sup>229</sup> The Connecticut General Assembly enacted a state version of the congressional resolution in May 1782, which criminalized the violation of any safe conduct or passport granted by Congress or "under the Authority of this State."<sup>230</sup>

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228. 4 Blackstone, *supra* note 66, at 68 (emphasis omitted).

229. 21 Journals of the Continental Congress, *supra* note 23, at 1136.

230. See An Act to Prevent Infractions of the Laws of Nations, reprinted in Public Records, *supra* note 110, at 156, 157.

The express safe-conduct document was similar to the modern concept of the passport, which entitles a bearer with a valid visa to safe passage to, within, and out of a foreign land pursuant to a treaty or an agreement negotiated by his or her sovereign and the host sovereign. Blackstone appears to have considered them synonyms.<sup>231</sup> According to Vattel, however, there remained the vestiges of an important distinction between the two terms of art in the law of nations, originating in that body of law's bifurcation between the laws of war and the laws of peace. A passport was a safe conduct held by a subject of a sovereign at peace with the state in which he sought to travel. Thus, "[t]he word passport is used . . . for persons in whom there is no particular exception against their coming or going in safety," and thus no need of "dispensing them from some general prohibition."<sup>232</sup> In Vattel's words, "[a] safe-conduct is given to those who otherwise could not safely go to the places where he who grants it is master; for instance, to a person charged with some misdemeanor, or to an enemy."<sup>233</sup> What is important to note is that the express safe conduct could be granted in peace or at war—a fact that is not self-evident from Blackstone's discussion.

2. *Implied Safe Conducts.* — Safe conducts could also be implied for a class of aliens—by contrast to the individual character of an express safe-conduct document—from specific treaty provisions or generally from the law of nations. An example of the former is Article V of the 1783 Treaty of Paris, which provided "that persons of any . . . description shall have free liberty to go to any part or parts of any of the thirteen United States, and therein to remain twelve months, unmolested in their endeavors to obtain the restitution of such of their estates, rights and properties, as may have been confiscated."<sup>234</sup> The special features of this specific implied safe conduct include the one-year time limitation and the applicability to "persons . . . of any description" rather than British subjects, which may have been a concession to extend coverage to American Loyalists. An example of the latter, general implied safe conduct was the protection extended to alien merchants under the English domestic law of

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231. See 4 Blackstone, *supra* note 66, at 68.

232. Vattel, *supra* note 81, bk. 3, ch. XVII, § 265, at 479.

233. *Id.* It is not altogether clear that early American authorities hewed to Vattel's distinction. For instance, the records of the Continental Congress refer, in wartime, to a "passport granted by the Commander in Chief, for the protection of cloathing and other necessaries sent from New York [then occupied by the British] in the ship *Amazon*, for the use of the British and German prisoners of war." 24 *Journals of the Continental Congress*, *supra* note 23, at 141 (Gaillard Hunt ed., 1922) (Feb. 20, 1783). Similarly, a 1796 peacetime budget entry for the Department of State records \$200.00 "[f]or printing sea-letters, safe-conducts, and other printing for the office of the Department" but does not mention passports. 2 *House Journal*, *supra* note 99, at 418 (Jan. 15, 1796). The sea-letter appears to be a variant of the safe conduct for merchant ships carrying cargo.

234. 1783 Treaty of Paris, *supra* note 2, art. V.

Magna Carta, which was grounded in “ancient and rightful customs,”<sup>235</sup> presumably a medieval reference to the law of nations.

Blackstone seems to collapse the two categories of specific and general implied safe conduct when he defines his second violation as “committing acts of hostility against such as are in amity, league, or truce with us, who are here under a general implied safe-conduct.” The early American sources—the Continental Congress’s 1781 resolution and the 1782 Connecticut statute—also place them together in a single provision, but suggest a difference between the two. Thus, in the 1781 resolution, Congress recommends redress “[f]or the commission of acts of hostility against such as are in amity, league or truce with the United States, or who are within the same, under a general implied safe conduct”;<sup>236</sup> and the 1782 state statute similarly provides for punishment “against all . . . Persons as shall be Guilty of the Commission of any Acts of Hostility against the Subjects of any Prince or Power in Amity League or Truce within the United States of America, or such as are within this State under a General implied safe Conduct.”<sup>237</sup>

The best way to get a sense of the sorts of treaty provisions that—like Article V of the 1783 Treaty of Paris—generated implied safe conducts for a broad class of aliens is to canvass the terms of the treaties of the United States in force at the time the First Congress drafted the ATS. In 1789, the United States had exactly eight bilateral treaties with six countries that generated safe conducts: three treaties with France—an alliance treaty and treaty of amity and commerce from 1778, and a 1788 consular convention;<sup>238</sup> the 1783 peace treaty with Great Britain;<sup>239</sup> and treaties of amity and commerce with the Netherlands (1782),<sup>240</sup> Sweden (1783),<sup>241</sup> Prussia (1785),<sup>242</sup> and Morocco (1787).<sup>243</sup>

The provisions in these treaties possibly pertaining to safe conduct fall roughly within four categories. The first category consists of basic treaty terms committing the United States to “protect,” “defend,” and

235. Magna Carta, *supra* note 1, cl. 41.

236. 21 Journals of the Continental Congress, *supra* note 23, at 1136.

237. An Act to Prevent Infractions of the Laws of Nations, reprinted in Public Records, *supra* note 110, at 156, 157.

238. Treaty of Alliance, U.S.-Fr., Feb. 6, 1778, 8 Stat. 6 [hereinafter 1778 France Alliance Treaty]; Treaty of Amity and Commerce, U.S.-Fr., Feb. 6, 1778, 8 Stat. 12 [hereinafter 1778 France Amity Treaty]; Convention Between His Most Christian Majesty and the United States of America, U.S.-Fr., Nov. 14, 1788, 8 Stat. 106 [hereinafter 1788 France Consular Convention].

239. 1783 Treaty of Paris, *supra* note 2.

240. Treaty of Amity and Commerce, U.S.-Neth., Oct. 8, 1782, 8 Stat. 32 [hereinafter 1782 Netherlands Treaty].

241. Treaty of Amity and Commerce, U.S.-Swed., Apr. 3, 1783, 8 Stat. 60 [hereinafter 1783 Sweden Treaty].

242. Treaty of Amity and Commerce, U.S.-Prussia, July–Sept. 1785, 8 Stat. 84 [hereinafter 1785 Prussia Treaty].

243. Treaty of Peace and Friendship, U.S.-Morocco, Jan. 1787, 8 Stat. 100 [hereinafter 1787 Morocco Treaty].

take best efforts to "cause to be restored" the "vessels and effects" belonging to the subjects of the treaty partner, in line with Vattel's specification of safe-conduct duties. A term in the 1778 Treaty of Amity and Commerce with France is the earliest example of this sort of provision and seems to have been the model for an analogous term in the 1782 Treaty with the Netherlands and the 1785 Treaty of Amity and Commerce with Prussia. It provided that:

[T]he said United States and their ships of war . . . shall protect and defend . . . all the vessels and effects belonging to the subjects of the Most Christian King, and use all their endeavours to recover, and cause to be restored, the said vessels and effects that shall have been taken within the jurisdiction of the said United States, or any of them.<sup>244</sup>

The 1783 Treaty with Sweden did not include such a treaty term, presumably because it was incorporated by reference through the operation of a "most favoured nations" provision, which declared that the "subjects of the King of Sweden . . . shall enjoy all the rights, liberties, [and] privileges" that the "said nations do or shall enjoy."<sup>245</sup> Nor is this basic provision found in the 1787 Treaty with Morocco, likely because the locus of the treaty partners' interaction would be confined to the Mediterranean and therefore not within the jurisdiction of the United States.

The second category of treaty rights typically granted to aliens that might potentially implicate safe-conduct obligations were rights of burial and testament or donation of the alien's property if he should die within the foreign land.<sup>246</sup> It is unclear whether violations of these treaty rights would have been considered safe-conduct violations at international law, for they do not necessarily entail seizure of property or injury to the person of living aliens.<sup>247</sup> Vattel mentions them,<sup>248</sup> but he is not clear whether granting these rights was merely sound policy or a rule of cus-

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244. 1778 France Amity Treaty, *supra* note 238, art. VII. The analogous provision in the 1782 treaty with the Netherlands provided substantially the same protections. See 1782 Netherlands Treaty, *supra* note 240, art. V. Article VII of the Treaty of Amity and Commerce with Prussia, concluded in 1785, appears to have been the state-of-the-art treaty provision of this sort at the time of the First Congress and provided the same protections in generalized terms. See 1785 Prussia Treaty, *supra* note 242, art. VII.

245. 1783 Sweden Treaty, *supra* note 241, art. III.

246. For rights of burial, see 1785 Prussia Treaty, *supra* note 242, art. XI; 1783 Sweden Treaty, *supra* note 241, art. V; 1782 Netherlands Treaty, *supra* note 240, art. IV. For testament or donation of property upon death, see 1787 Morocco Treaty, *supra* note 243, art. XXII; 1785 Prussia Treaty, *supra* note 242, art. X; 1783 Sweden Treaty, *supra* note 241, art. VI; 1782 Netherlands Treaty, *supra* note 240, art. VI.

247. Similarly, it is doubtful that a provision common to treaties the United States ratified in 1782 and 1783, that no subject or citizen of the signatories "shall be molested in regard to his worship," 1783 Sweden Treaty, *supra* note 241, art. V; 1782 Netherlands Treaty, *supra* note 240, art. IV, would have been viewed as a safe-conduct violation, for to "molest" an alien with respect to his or her worship does not necessarily entail injury to person or property.

248. See Vattel, *supra* note 81, bk. 2, ch. VIII, §§ 109–112, at 236–39.



tomary international law, for he notes “with how little justice the treasury, in some states lays claim to the effects left there by a foreigner at his death.”<sup>249</sup> It is also unclear whether a violation of such a treaty term would have constituted a tort actionable under the common law for purposes of the ATS. It may be that the statute’s “tort only” limitation was intended, in part, to clarify that these sorts of international law violations—on top of the debt actions to be discussed below—were not enforceable in federal courts.

The third and most interesting category comprises treaty provisions implying what might be called contingent wartime safe conducts. These provisions provided categorical protection to certain classes of citizens or subjects of the other sovereign, first, in the event the promisor was at war with other third-party sovereigns while the promisee remained neutral and, second, in the event of war between the contracting parties. Article III of the 1787 Treaty with Morocco is a good example of the first of these two types of treaty provisions. It provided for the safe return of any of the treaty partner’s “subjects or effects” found onboard an enemy vessel taken as a prize, and barred seizure of enemy goods carried on the treaty partner’s ships.<sup>250</sup>

An example of the second subset of treaty terms implying contingent wartime safe conducts was common to the United States’s treaties with Sweden and Prussia. Article XXII of the 1783 Treaty with Sweden provided that “[i]n order to favour commerce on both sides as much as possible,” each side would allow the “merchants and subjects” of the other nine months after any declaration of war to sell or depart with their property.<sup>251</sup> A wrinkle with this particular provision is that although it clearly promised protection to the specified class of noncombatant enemy aliens, it appears to have required, for implementation, the forum sovereign to issue

passports which shall be valid for a time necessary for their return . . . for their vessels, and the effects which they shall be willing to carry with them. And if any thing is taken from them, or if any injury is done to them by one of the parties, their people and subjects, during the term above prescribed, full and entire satisfaction shall be made to them on that account. The above-mentioned passports shall also serve as a safe conduct against all insults or prizes which privateers may attempt against their persons and effects.<sup>252</sup>

The requirement of a passport, which is in line with Blackstone and the specifications of the 1781 resolution of the Continental Congress and the

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249. *Id.* at 238.

250. 1787 Morocco Treaty, *supra* note 243, art. III.

251. 1783 Sweden Treaty, *supra* note 241, art. XXII.

252. *Id.*

1782 Connecticut statute, thus appears to have been the baseline norm with respect to safe conducts for enemy aliens in wartime.<sup>253</sup>

This contingent wartime provision of the 1783 Treaty with Sweden was replicated in the 1785 Treaty with Prussia, with the addition of a far-reaching treaty term implying a safe-conduct obligation for the person and property of diverse noncombatant groups, including “all women and children, scholars of every faculty, cultivators of the earth, artisans, manufacturers and fishermen unarmed and inhabiting unfortified towns, villages, or places, and in general all others whose occupations are for the common subsistence and benefit of mankind.”<sup>254</sup>

Article XXIV of the 1785 Treaty with Prussia implied a more extravagant wartime contingent safe conduct for *combatants*; it appears to be one of the earliest international prisoner-of-war conventions.<sup>255</sup> It provided that:

[T]o prevent the destruction of prisoners of war, by sending them into distant and inclement countries, or by crowding them into close and noxious places, the two contracting parties solemnly pledge themselves to each other, and to the world, that they will not adopt any such practice; that neither will send the prisoners whom they may take from the other into the East-Indies, or any other parts of Asia or Africa, but that they shall be placed in some part of their dominions in Europe or America, in wholesome situations; that they shall not be confined in dungeons, prison-ships, nor prisons, nor be put into irons, nor bound, nor otherwise restrained in the use of their limbs . . . . And it is declared, that neither the pretence that war dissolves all treaties, nor any other whatever, shall be considered as annulling or suspending this . . . but, on the contrary, that the state of war is precisely that for which they are provided, and during which they are to be as sacredly observed as the most acknowledged articles in the law of nature or nations.<sup>256</sup>

The final category of treaty-based safe-conduct rights, which was the immediate concern of the ATS at enactment, was the peace treaty terms negotiated with Great Britain that implied safe conducts for British subjects and Loyalists with legal claims against the states and their citizens. The best example, as has already been shown, was Article V of the 1783 Treaty of Paris.<sup>257</sup> This specific implied safe conduct would have expired

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253. See *supra* text accompanying notes 228–230.

254. 1785 Prussia Treaty, *supra* note 242, art. XXIII. See generally *The Treaties of 1785, 1799, and 1828 Between the United States and Prussia* (James Brown Scott ed., 1918).

255. See *Documents on the Laws of War 4* (Adam Roberts & Richard Guelff eds., 3d ed. 2000).

256. 1785 Prussia Treaty, *supra* note 242, art. XXIV.

257. 1783 Treaty of Paris, *supra* note 2, art. V. Similarly, Article VI barred the prosecution of any person for “the part which he or they may have taken in the present war” and “any future loss or damage, either in his person, liberty or property” on “that account.” *Id.* art. VI.

in 1784, but regardless of whether a treaty explicitly furnished safe conducts, the enduring condition of peace between the United States and Great Britain would have put in its place a general implied safe conduct on the model of clause 41 of Magna Carta. Thus, there would have been no need to provide an additional safe conduct by treaty—at least with respect to British subjects as opposed to Loyalists—if the United States and Great Britain remained at peace upon the expiration of the treaty-based implied safe conduct. Moreover, in 1789 the general implied safe conduct for alien merchants would have applied to Spanish subjects given peace between the United States and Spain, notwithstanding that the United States did not negotiate a treaty of amity and commerce with Spain until 1795.<sup>258</sup> Blackstone explained the commerce-based rationale for this implication: “[C]ommitting acts of hostility against such as are in amity, league, or truce with us, who are here under a general implied safe-conduct . . . are breaches of the public faith, without the preservation of which there can be no intercourse or commerce between one nation and another . . . .”<sup>259</sup>

3. *The Safe-Conduct Account of the ATS.* — To summarize, the American concept of the safe conduct at the time of the ATS’s enactment likely encompassed both explicit safe conducts granted under the authority of the United States to individual aliens and implied safe conducts afforded to classes of aliens whether by virtue of a treaty or generally under the law of nations. A better understanding of the safe-conduct concept illuminates the cryptic words of the ATS. The statute authorized jurisdiction for “all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States.”<sup>260</sup> A tort, according to Blackstone, was a personal noncontract action “whereby a man claims a satisfaction in damages for some injury done to his person or property.”<sup>261</sup> A safe-conduct violation was a noncontract injury to an alien’s person or property—an alien tort.

The subsequent words “only in violation of the law of nations or a treaty of the United States” were necessary to establish the legal basis for the safe-conduct violation and not to signify the need to allege an independent substantive violation of international law. Indeed, such an allegation would have been an anachronism given the late eighteenth-century view of international law as creating duties and obligations among sovereign states only. A safe conduct was such an obligation—a formal promise between sovereign states; it was the resultant right of passage that was exercised by individuals. Because the state of war diminished such obligations between belligerent sovereigns, an enemy alien could sue under the ATS only if he held an express safe-conduct document, for

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258. Treaty of Friendship, Limits and Navigation, U.S.-Spain, Oct. 27, 1795, 8 Stat. 138.

259. 4 Blackstone, *supra* note 66, at 68.

260. Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77.

261. 3 Blackstone, *supra* note 66, at 117.

then his tort was “in violation of the law of nations”; or if he was entitled to an implied safe conduct as a member of a class against whom injury was “in violation of the law of nations” such as a civilian, or proscribed by a “treaty of the United States,” such as a prisoner of war under the 1785 Treaty with Prussia. An enemy alien who could not allege either of these—such as a soldier in combat—could not sue under the ATS even if he suffered a noncontract injury to his person or property because he lacked a law-of-nations or treaty basis on which a safe-conduct obligation might be implied. By contrast, although a friendly or neutral alien who suffered an injury on the high seas would typically need to produce an express American safe-conduct document that had been breached or a treaty term to ground a specific implied safe conduct, if the alien were injured within the United States, he could sue without either because he was entitled to a general implied safe conduct, the breach of which constituted a violation of the law of nations.

One can imagine the importance of the safe conduct as a means of facilitating cross-border commerce in an anarchic world system of independent sovereigns who, in Thomas Hobbes’s evocative metaphor, “are in continuall jealousies, and in the state and posture of Gladiators; having their weapons pointing, and their eyes fixed on one another.”<sup>262</sup> Without the mechanism of the reciprocal safe conduct, a sovereign would always fear the worst from the arrival of subjects from another sovereign in its land, and its natural instinct would be to kill any alien. But even though the safe-conduct institution was of great value to mutually beneficial relations among sovereigns, the anarchic nature of a world system consisting of autonomous nation states meant that there was no centralized enforcement authority to police and punish their violation. Thus, under traditional state-based principles of international law—i.e., those from the late eighteenth to the early twentieth centuries—the safe-conduct promise was enforceable through the offended sovereign’s right to make war in the event of a breach.<sup>263</sup>

In light of the benefits for the conduct of commerce and avoiding war, it was prudent for a sovereign promisor to furnish an alternative domestic means for redress by an alien safe-conduct holder against the person who directly caused any injury. But a domestic lawsuit between the private parties involved could not remedy the breach of the safe conduct at late eighteenth-century international law, because the safe-conduct promise was a contract between the sovereigns, and the leading interna-

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262. Thomas Hobbes, *Leviathan* 90 (Richard Tuck ed., rev. student ed., Cambridge Univ. Press 1996) (1651).

263. It is only in the early twentieth century that we see multilateral treaties prohibiting war on behalf of the individual claims of a sovereign’s citizens or subjects. Even then, the only express prohibition concerns war on behalf of a citizen’s or subject’s breach of contract debt claims, not tort actions. See Hague Convention Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts, art. 1, Oct. 18, 1907, 36 Stat. 2241, 1 Bevans 607.

tional lawyers of the time generally sought to deny the existence of individual rights at international law.<sup>264</sup> Accordingly, suit in domestic court for tort remedies by an alien against the one who injured his person or property was mainly a political expedient premised on the host sovereign's hope that if the alien received a speedy and fair remedy, the other sovereign might not be informed of, or act upon, the safe-conduct breach, diminishing the risk that the offended sovereign would exercise its lawful right to make war.<sup>265</sup> The expedient was likely of especial value if the promisor were militarily weaker than the promisee.

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264. See, e.g., Vattel, *supra* note 81, bk. 2, ch. VII, § 81, at 225 ("All those who form a society, a nation being considered by foreign states, as making only one whole, one single person . . ."). I have argued elsewhere that the chief (and counterintuitive) reason for this denial was the ambition of progressive Enlightenment thinkers to create a system of interstate rules founded on the principle of sovereign equality in legal rights and obligations, in order to put young new republics—generally smaller and militarily weaker than established monarchies—on an equal footing with the traditional great-power monarchies. See Thomas H. Lee, *International Law, International Relations Theory, and Preemptive War: The Vitality of Sovereign Equality Today*, *Law & Contemp. Probs.*, Autumn 2004, at 147, 150–53 (2004). In effect, making individual rights the exclusive business of the sovereign state was a key move toward solidifying the right of newly established republics—formed from fragments of established monarchies—to claim independent and equal sovereign status. It bears remembering that the idea of individual rights at international law (e.g., *lex mercatoria*) was historically an imperial invention that was very useful in undermining the autonomy of subimperial, alternative political entities. *Id.*

265. Additionally, if a minimally fair forum were not provided—a distinct possibility given the hostility of state courts to claims by foreigners—the sovereign might also be accused of a related but separate international law violation called a "denial of justice." The most thorough treatment of the subject defines the offense in this way:

If . . . in the attempt to vindicate rights before the local instrumentalities of justice, a foreigner meets with some act or omission on their part violating the State's duty to accord adequate judicial protection to aliens—as a consequence of which he sustains damage—the delinquent State's international responsibility is forthwith engaged. A claim now arises on behalf of the injured individual which may subsequently be prosecuted by his own State through the channels instituted for the purpose by the law of nations. Distinct from the original cause of action or defense involved in the defective municipal proceedings, the new, public reclamation is founded solely on the nonfulfillment of an essential international obligation. It is this obligation whose infraction constitutes a "denial of justice" as the term must be understood in relations between States.

Alwyn V. Freeman, *The International Responsibility of States for Denial of Justice 1* (1938) (footnote omitted).

In *Federalist No. 80*, Alexander Hamilton singled out denial of justice to aliens in state courts as an argument for federal courts with foreign-parties jurisdiction:

The Union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for an injury ought ever to be accompanied with the faculty of preventing it. As the denial or perversion of justice by the sentences of courts, as well as in any other manner, is with reason classed among the just causes of war, it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned.

The *Federalist No. 80*, at 476 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Seizing on Hamilton's clue, three professors, in separate articles published in 1985 and 1988, articulated denial-of-justice theories of the Alien Tort Statute. See D'Amato, *supra* note 3,

The Alien Tort Statute was just such an expedient: It was enacted by the First Congress likely with an eye on a particular group of aliens, namely British subjects, and the potential that injuries suffered by them in violation of international law might disrupt renewed trade and even lead to renewed war with Great Britain. Vexed by the inability or unwillingness of the states and their courts to police sensitive alien safe conducts held by British subjects during the first six years of peace, the First Congress in 1789 chose individual alien tort suits as the primary lever of national enforcement,<sup>266</sup> and entrusted this vital peace-preserving and trade-promoting function to the new federal district courts.

It bears repeating that on the safe-conduct explanation of the ATS, international law is secondary—a condition precedent—to the domestic common law of tort and not its primary emphasis. It was common law that supplied the right to sue and defined the elements of the cause of action; the international law reference was necessary only to identify when aliens were entitled to sue. To put this essential point another way, the ATS was a statute designed to provide federal courts as an alternative to state courts for the litigation of ordinary tort causes brought by aliens—mostly friendly or neutral aliens, but also enemy aliens in some contexts—injured in the United States or extraterritorially in places under the control of American military forces. It was a special right not given to citizens of the United States.

#### B. *The Duties of Private Aliens and Public Ministers in a Foreign Jurisdiction*

Whether express or implied, a safe conduct granted to an alien on private business was limited to ensuring the safety of his person and non-

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at 64–65; Randall, *supra* note 3, at 20–22; Rogers, *supra* note 3, at 47. Professor Rogers (now a judge on the Sixth Circuit), for instance, asserted that in enacting the ATS, “Congress meant to grant federal jurisdiction over cases in which an individual has committed a tortious act in the United States which, if unredressed, would result in international legal responsibility on the part of the United States.” Rogers, *supra* note 3, at 47. Dean Randall concluded that “it appears that the Alien Tort Statute and other provisions of the Judiciary Act concerning aliens were largely intended to avoid denying justice to aliens.” Randall, *supra* note 3, at 22. Of the existing scholarship, the denial-of-justice theory comes closest to the argument made in this Article. And surely, as will be discussed below, the foreign parties jurisdiction of the federal courts was generally intended to balance out any denial of justice in state courts, mostly with respect to debt claims. However, the ATS had the unique and additional function of affording entry to federal district court for aliens with tort claims in violation of sovereign safe-conduct promises. The failure to provide such access or a miscarriage of justice in federal court might constitute denial of justice, but the denial of justice was, in Professor Freeman’s words, “[d]istinct from the original cause of action or defense involved in the defective municipal proceedings,” Freeman, *supra*, at 1, namely, the alleged tort.

266. See Wythe Holt, “To Establish Justice”: Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts, 1989 *Duke L.J.* 1421, 1440–50. Congress intended secondary enforcement through reparations negotiations by the State Department and foreign-state versus state suits in the Supreme Court, in reference to the related issue of treaty-backed payment on debts owed to English subjects. See Lee, *Quasi-International Tribunal*, *supra* note 218, at 1849–66.

contraband property and did not exempt the alien from the general laws of the forum jurisdiction. Thus, a private alien who broke the domestic criminal laws could be imprisoned and punished consistently with contemporaneous international law, notwithstanding any injury or infringement of his person or property. As Chief Justice John Marshall explained in 1812:

When private individuals of one nation spread themselves through another as business or caprice may direct, mingling indiscriminately with the inhabitants of that other . . . it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the [host] government to degradation, if such individuals or merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country. Nor can the foreign sovereign have any motive for wishing such exemption. His subjects thus passing into foreign countries, are not employed by him, nor are they engaged in national pursuits.<sup>267</sup>

By virtue of this “temporary and local allegiance,” the invited alien was a subject of the forum sovereign during his stay. If he were to attack and thereby violate the safe conduct of another invited alien in the same territory, responsibility at international law would accrue to the forum sovereign, which, as Marshall described, had the power under the law of nations to regulate the alien tortfeasor’s conduct within its borders. In other words, because the bounds and obligations of a safe conduct were determined by territory or troop presence, not by the nationality of the tortfeasor, a sovereign would still be liable under the law of nations if an alien were injured by another alien. To give a concrete example, if a British subject were assaulted by a French citizen in 1790 aboard a U.S. warship or in Philadelphia, the United States government would bear sovereign responsibility for the tort at international law.

The private alien’s duty of allegiance to the forum sovereign was an important point of distinction at international law vis-à-vis ambassadors or public ministers. Owing to the sovereign status of his principal, a foreign ambassador or public minister was entitled to certain rights in a receiving state under the law of nations on top of the basic safe-conduct guarantee of physical safety. These rights were the antecedents of diplomatic immunity at present international law.<sup>268</sup> Blackstone grounded the rights of ambassadors in “the law of nature and nations” and believed these rights indefeasible by municipal laws, since ambassadors represented “the persons of their masters, who owe no subjection to any laws but those of their own country.”<sup>269</sup> Pufendorf drew a similar but subtler distinction: Because of the unique importance of ambassadors in securing public peace

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267. *The Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 144 (1812).

268. For the contours of modern diplomatic immunity, see Ian Brownlie, *Principles of Public International Law* 341–58 (6th ed. 2003).

269. 1 Blackstone, *supra* note 66, at 246.

between sovereigns, and in contrast to the commercial basis of private safe conducts, Pufendorf grounded ambassadorial rights in a foreign country in the indefeasible law of nature and private alien safe-conduct rights abroad in the more mutable law of nations.<sup>270</sup> Marshall, writing in 1812, came to the same conclusion about the uniqueness of ambassadorial rights but on a more positivist view.<sup>271</sup>

Although the general concept of the inviolability of ambassadorial rights was universally recognized in the eighteenth century, there was some difference of opinion as to whom the rights extended and the scope of protection. Ambassadors and ministers were clearly covered, as were members of their household, including domestic servants.<sup>272</sup> Consuls, who were viewed at the time as principally commercial—not diplomatic—representatives of a foreign state posted at trading ports abroad,<sup>273</sup> simultaneously exhibited aspects of a foreign official and a foreign private party. Hence, late eighteenth-century international law experts were conflicted about the rights beyond basic safe-conduct protection of person and property to which consuls were entitled.<sup>274</sup> The

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270. See Pufendorf, *supra* note 108, at 151.

271. As Marshall noted:

The assent of the sovereign to the very important and extensive exemptions from territorial jurisdiction which are admitted to attach to foreign ministers, is implied from the considerations that, without such exemption, every sovereign would hazard his own dignity by employing a public minister abroad. His minister would owe temporary and local allegiance to a foreign prince, and would be less competent to the objects of his mission. A sovereign committing the interests of his nation with a foreign power, to the care of a person whom he has selected for that purpose, cannot intend to subject his minister in any degree to that power; and, therefore, a consent to receive him, implies a consent that he shall possess those privileges which his principal intended he should retain—privileges which are essential to the dignity of his sovereign, and to the duties he is bound to perform.

*The Schooner Exch.*, 11 U.S. (7 Cranch) at 138–39.

272. See Vattel, *supra* note 81, bk. 4, ch. IX, §§ 117–118, at 554–55.

273. See *id.* bk. 2, § 34, at 207 (“Among the modern institutions for the utility of commerce, one of the most useful is that of consuls or persons residing in the large trading cities, and especially in foreign seaports, with a commission empowering them to attend to the rights and privileges of their nation . . .”). It is apparent from Article II of the Constitution that the Framers understood and accepted this conception of consuls. The President is given the power to “appoint Ambassadors, other public Ministers and Consuls” subject to the Senate’s advice and consent, U.S. Const. art. II, § 2, cl. 2, but “shall receive Ambassadors and other public Ministers” only, *id.* § 3. The President would logically not “receive” consuls since their duty stations were ports, not the national capital. More importantly, as commercial, not diplomatic, representatives of a foreign sovereign, consuls would not have presented their credentials to the President in his capacity as head of state.

274. See Vattel, *supra* note 81, bk. 2, ch. II, § 34, at 208 (“Wicquefort, in his treatise of *The Ambassador*, . . . says [‘]that consuls do not enjoy the protection of the law of nations, and that both in civil and criminal cases they are subject to the justice of the place where they reside.[’] But the very instances he cites contradict his proposition.” (emphasis omitted)). Even under current international law, “[c]onsuls are in principle distinct in function and legal status from diplomatic agents. Though agents of the sending state for particular purposes, they are not accorded the type of immunity from the laws and



language of Article III suggests that the Framers inclined to view them in the same category as ambassadors and public ministers<sup>275</sup>—a view facially at odds with section 13 of the 1789 Act, which provided for exclusive original jurisdiction in the Supreme Court for civil suits against ambassadors and public ministers, but only nonexclusive original jurisdiction for suits against consuls and vice consuls, which was concurrently vested in federal district courts and exclusive of the state courts.<sup>276</sup> It is illuminating and unsurprising that the Framers would have exhibited a preference for the more robust position in the debate about the rights the law of nations afforded to consuls.<sup>277</sup>

The freedom of an ambassador or minister from the criminal laws of a receiving state was also the subject of some controversy. Marshall observed in 1812 that certain criminal acts might result in the forfeiture of a minister's immunity because they constituted breaches of the agreed-upon conditions under which the minister was received.<sup>278</sup> Blackstone had also reported controversy on the subject of the ambassadorial right against municipal criminal liability in 1768. "[F]ormerly," the English rule was that ambassadors were exempt from prosecution for statutory crimes—*mala prohibita*—such as coining, but not offenses against the law of nature—*mala in se*—such as murder.<sup>279</sup> But, according to Blackstone, the general practice of Europe had by then "adopted the sentiments of the learned Grotius" in granting ambassadors broad immunity from prosecution for "any offence, however atrocious."<sup>280</sup>

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enforcement jurisdiction of the receiving state enjoyed by diplomatic agents." Brownlie, *supra* note 268, at 355.

275. See U.S. Const. art. III, § 2, cl. 2 (grouping together ambassadors, public ministers, and consuls for purposes of Supreme Court's original jurisdiction).

276. See Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 80–81; see also *id.* § 9, 1 Stat. at 77. As noted, this jurisdiction may have been a function of geography, since consuls and vice consuls were located not at the national capital, where the Supreme Court was likely contemplated to sit, but at port cities. Thus, section 9 of the Act provided for exclusive jurisdiction in federal district courts of civil suits against consuls and vice consuls. *Id.* Ellsworth's original Senate bill followed Article III's cue in treating the three sorts of foreign representative the same way by providing that the Court "shall have exclusively all such jurisdiction of Suits or proceedings against ambassadors, other publick ministers or consuls, or their domesticks or domestick servants, as a court of law can have or exercise consistently with the law of nations." Judiciary Act of 1789, Original Senate Bill § 13, reprinted in 4 *Documentary History of the Supreme Court*, *supra* note 74, at 38, 70.

277. See, e.g., 1788 France Consular Convention, *supra* note 238, art. II (granting consuls, vice consuls, and their chancellors and secretaries "full and entire immunity for their chancery, and the papers which shall be therein contained," and other limited immunities from personal service and taxation, but otherwise subjecting them to "the laws of the land as the natives are").

278. *The Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 139 (1812).

279. See 1 Blackstone, *supra* note 66, at 246.

280. *Id.* at 247.

C. *Criminalizing Private Alien Safe-Conduct Violations*

As with violation of the ambassadorial right against process described earlier,<sup>281</sup> there were historical English statutes criminalizing violations of safe conducts granted to private foreign subjects,<sup>282</sup> but by Blackstone's time only one such statute remained on the books. Presumably, any violations that met the elements of common law crimes might be prosecuted in the ordinary course. This was not to Blackstone's liking. Certainly, a specific criminal prohibition was consistent with the law of nature and the constitution of England as set forth in clause 41 of Magna Carta, since foreigners with express or implied safe conducts were "under the protection of the king and the law," and so the king's "honour . . . particularly engaged in supporting his own safe-conduct."<sup>283</sup> Based on this rationale, when criminal statutes were in force in response to the systemic breach of safe conducts during the reigns of Henry V (1413–1422) and Henry VI (1422–1461), the relevant crime was treason against the crown.<sup>284</sup> Blackstone accordingly attributed the repeal of those laws to the general statutes enacted during the reigns of Edward VI (1547–1553) and Mary (1553–1558) "abolishing new-created treasons."<sup>285</sup>

But on top of the treason statutes, special restitution statutes were also enacted during the reign of Henry VI. The most notable such statute authorized the lord chancellor to provide equitable relief in the form of "restitution . . . prior to any claim of the crown" if a safe conduct were violated on land.<sup>286</sup> Although that statute expired, a similar restitution statute from the reign of Henry VI pertaining to territorial waters and ports remained in force in the eighteenth century by Blackstone's reckoning, even as the original treason statutes were repealed. The statute provided that

if any of the king's subjects attempt or offend, upon the sea [i.e., English territorial waters, not the high seas], or in any port within the king's obeysance, against any stranger in amity, league, or truce, or under safe-conduct; and especially by attaching his person, or spoiling him, or robbing him of his goods; the lord chancellor, with any of the justices of either the king's bench or common pleas, may cause full restitution and amends to be made to the party injured.<sup>287</sup>

Blackstone was a lawyer, not an economic or social historian, and his implicit belief in the necessity of having statutes criminalizing any violations of private alien safe conducts must be viewed in this light. What he

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281. See *supra* text accompanying notes 171–184.

282. See 4 Blackstone, *supra* note 66, at 68–70.

283. See *id.* at 69.

284. See *id.* at 69–70 (recounting statutory enactments by Henry V and Henry VI to criminalize violations of alien safe conducts as "high treason against the crown and dignity of the king").

285. *Id.* at 70.

286. *Id.* at 69.

287. *Id.* at 69–70.

failed to grasp was that just as the ambassadorial privilege against civil suit was a newly minted law-of-nations norm responsive to growing debtor litigation in England—and to profligate diplomats—the medieval norm of the general implied safe conduct—a true innovation at the time of Magna Carta—was becoming anachronistic in an era of increasing international commerce and transborder travel. There were simply too many alien merchants traveling to, from, and within England to justify a statute criminalizing any ordinary tort when it was committed against an alien and the background belief that the commission of any such alien tort was so sensitive a foreign relations matter to constitute treason against the sovereign. One feature of the anachronism that surrendered to these circumstances in England was the treason statute. Another was the restitution statute on land.

For the First Congress, which had so studiously followed Blackstone's prescriptions as to ambassadorial immunities in drafting the 1790 Crimes Act,<sup>288</sup> there was no similar guidance from his more complicated history of English statutes pertaining to private safe conducts. On the one hand, Blackstone classed violations of private safe conducts as an offense against the law of nations in its natural law sense. On the other hand, as a positivist matter, England did not have laws on the books specifically addressed to the violations which the First Congress could emulate. Moreover, the English historical statutes treated the crime as one of treason based on the aforementioned rationale that a safe conduct was a promise made by the English sovereign to another sovereign, and thus a breach by an English subject was an act against his sovereign by making him break his promise. But the American founders, like the English, had come to view treason as a problematic political crime conducive to governmental overreaching. This view was memorialized in Article III of the Constitution: "Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort."<sup>289</sup>

In light of this, it seems at least doubtful that the first part of section 28 of the 1790 Crimes Act criminalized the violation of private alien, as opposed to public ambassadorial or ministerial, safe conducts when it provided for punishment "if any person shall violate any safe-conduct or passport . . . , or in any other manner infract the law of nations, by offering violence to the person of an ambassador or other public minister."<sup>290</sup> Concededly, the better view may be that the provision envisioned the same sentence and fine for the violation of a private or a public safe conduct, and that it was drafted to address both violations in one breath. Indeed, that appears to have been the view of the compiler of the statute

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288. See *supra* text accompanying notes 171–175.

289. U.S. Const. art. III, § 3, cl. 1.

290. Act of Apr. 30, 1790, ch. 9, § 28, 1 Stat. 112, 118.

in the statutes at large,<sup>291</sup> and it was the conclusion drawn by James Kent in his *Commentaries*.<sup>292</sup> It does, at the same time, seem odd to draft it in such an ambiguous and confusing way.<sup>293</sup>

But even if the First Congress did intend section 28 as a criminal provision addressed to private safe-conduct violations—that is, any ordinary tort committed against an alien—it would have been difficult to enforce it as a policy matter. Ambassadors and ministers were few in number and expected to be geographically limited to the national capital,<sup>294</sup> which was soon to be in a district of exclusive federal authority. Private aliens were more numerous and dispersed throughout the interiors of the several states. Any attempt by the national government to punish violation of private alien safe conducts would have interfered with the internal sovereignty of the states, which, under the dual sovereignty construct prevalent at the time, had exclusive police powers within their territories, including the power to punish and redress torts.<sup>295</sup>

Put another way, the First Congress would have found it difficult, in light of the bedrock principle of federalism which left police matters within the states to the states, to enforce a criminal statute defining a simple assault or robbery in a state as a federal offense against the law of nations by virtue of the fact that the victim was an alien—even though the offense might violate a safe conduct—in the same way Congress could enforce such a criminal statute if the victim were a foreign ambassador or public minister in the capital. Hence, the best the First Congress could do was to grasp the slender reed proffered by Blackstone's mention of the one surviving English restitution statute—which was at best a rough analogue, as it was limited to ports and territorial seas, not land, and operated at equity, not law<sup>296</sup>—and provide, by means of the ATS, for a federal judicial power to afford damages to aliens whose persons or goods were tortiously injured while conducting business within the territories of the states. Indeed, an alien merchant, in light of his transient stay in the jurisdiction, quite possibly might have preferred damages in a civil action over criminal prosecution of the tortfeasor. The alien could invoke this

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291. *Id.* (describing section 28 as “Violation of a safe conduct, or to the person of public minister, how punished” in margin note).

292. James Kent, 1 *Commentaries on American Law* 182–83 (New York, O. Halsted 2d ed. 1832) (“The statute law of the United States has provided . . . that if any person shall violate any safe conduct or passport, granted under the authority of the United States, he shall, on conviction, be imprisoned not exceeding three years, and fined at the discretion of the Court.”).

293. By contrast to the Judiciary Act of 1789, deliberation in the Senate which also originated the 1790 Crimes Act was notably brief—it appears that the bill was drafted in a day, read two times over three days, and unanimously passed with one amendment. See 1 *Senate Journal*, *supra* note 80, at 108–09 (Jan. 26–28, 1790).

294. See *supra* text accompanying notes 135–142.

295. See *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 601 (1819); *Pennhallow v. Doane's Adm'rs*, 3 U.S. (3 Dall.) 54, 93 (1795) (Iredell, J., dissenting); *The Federalist* No. 39, *supra* note 265, at 245 (James Madison).

296. See *supra* note 287 and accompanying text.

federal judicial power by filing in federal district court a writ for a common law cause of action for tort, such as trespass, with the additional allegation of a right of safe conduct under a treaty or the law of nations.

#### D. *Extraterritorial Safe-Conduct Obligations*

An important aspect of the late eighteenth-century safe conduct was a promisor sovereign's responsibility even for certain extraterritorial harm to a protected alien. As Vattel indicated, a sovereign could be held responsible under the late eighteenth-century law of nations for injury to aliens committed by its military outside of its own territory if in violation of an express or implied safe conduct.<sup>297</sup> Grotius agreed, offering as justification the extraterritorial nature of the right to make war itself: "[S]afe-conduct is due to the person to whom it has been granted even outside of the territory of the grantor. For it is granted in derogation of the right of war, which in itself is not confined to a territory."<sup>298</sup> For example, the torture in a foreign country of enemy-alien prisoners to whom a military commander had promised protection might constitute a safe-conduct violation under the laws of war. Or an express safe conduct could be written with terms that extend beyond the borders of the granting sovereign. Yet another example would be an implied safe-conduct violation between countries at peace under the law of nations, such as when the subjects of a neutral power are injured during a search of their vessel by a belligerent or by the armies of an occupying power while they are lawfully conducting business in the occupied state as neutrals.

A sovereign's responsibility for extraterritorial injuries to friendly or neutral aliens committed by its *private* citizens or subjects—rather than by its military forces—was a harder question. Fortunately, a 1795 opinion letter of a U.S. Attorney General sheds some light on the American view of the answer at the time. The letter arose in response to a grievance filed by Lord Grenville with the American Secretary of State. Although the United States and Great Britain were then at peace under the terms of the 1783 Treaty of Paris and the 1794 Jay Treaty, certain American citizens, acting on their own, "voluntarily joined, conducted, aided, and abetted a French fleet in attacking the settlement, and plundering or destroying the property of British subjects on that coast."<sup>299</sup>

Great Britain was at war with France in 1795.<sup>300</sup> The United States was still an ally of France under the 1778 Treaty of Alliance, but the Federalists endeavored to maintain the country's neutrality vis-à-vis Britain based on a narrow reading of the alliance treaty.<sup>301</sup> The question, then,

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297. See *supra* note 227 and accompanying text.

298. Hugo Grotius, *De Jure Belli ac Pacis Libri Tres*, bk. III, ch. XXI, § XXII, at 841 (Francis W. Kelsey trans., Clarendon Press 1925) (1646).

299. 1 *Op. Att'y Gen.* 57, 58 (1795).

300. See Jeremy Black, *European Warfare, 1660–1815*, at 176–77 (1994).

301. Cf. Elkins & McKittrick, *supra* note 79, at 339–41 (detailing controversy within President Washington's cabinet whether public minister from new French Republic should

which was posed by the Governor of the Sierra Leone colony whose memorial Lord Grenville of the British Foreign Office forwarded to the American national government, was whether anything might be done in the U.S. federal courts against the complicit American citizens.<sup>302</sup>

Attorney General William Bradford's 1795 opinion letter, which has received much attention from the academy—albeit without appreciation of the safe-conduct angle<sup>303</sup>—begins by readily admitting that criminal jurisdiction was at least in theory available.<sup>304</sup> Bradford also readily acknowledged that the federal courts did not have power to exert either civil or criminal jurisdiction (“cognizance”) over such acts by private American citizens committed in a foreign country, here the British Sierra Leone colony.<sup>305</sup> This is fully consistent with the scope of safe conducts—the United States could not and did not promise freedom from harm to aliens if they were injured in other countries, even by its own citizens. The United States had no sovereign power over the territory of other sovereigns and so accordingly did not have the power to promise safety there. By the same token, the forum sovereign—the British crown—presumably did have authority to redress any acts of hostility within its colony, even if committed by aliens—here, American citizens.

To the extent that the private Americans' depredations occurred in the North Atlantic Ocean, over which no sovereign exercised jurisdiction, Bradford concluded that such “crimes committed on the high seas *are* within the jurisdiction of the district and circuit courts of the United States; and, so far as the offence was committed thereon, . . . may be legally prosecuted in either of those courts, in any district wherein the offenders may be found.”<sup>306</sup> He expressed some doubt, however, as to

be received “without qualifications” signifying that United States believed itself bound by 1778 Treaty of Alliance despite end of war that occasioned it).

302. See 1 Op. Att’y Gen. at 58.

303. See, e.g., Bradley, Alien Tort Statute, *supra* note 3, at 635 (discussing Bradford opinion without mentioning safe-conduct issue); Casto, Protective Jurisdiction, *supra* note 3, at 502–04 (same); Dodge, Historical Origins, *supra* note 3, at 233–34, 253 (same), Randall, *supra* note 3, at 41 (same).

304. See 1 Op. Att’y Gen. at 58 (“[A]cts of hostility committed by American citizens against such as are in amity with us, being in violation of a treaty, and against the public peace, . . . are punishable by indictment in the district or circuit courts.”). Note the references to “in amity with us” and “against the public peace,” which echo Blackstone’s discussion of safe conducts in *Commentaries*. See *supra* note 226 and accompanying text.

305. *Id.* (“So far . . . as the transactions complained of originated or took place in a foreign country, they are not within the cognizance of our courts; nor can the actors be legally prosecuted or punished for them by the United States.”). The word “cognizance” is used exclusively with reference to the criminal jurisdiction of the federal district and circuit courts in sections 9 and 11 of the Act respectively, and used interchangeably with “jurisdiction” to refer to the civil jurisdiction of those courts in those sections. See Judiciary Act of 1789, ch. 20, § 9, § 11, 1 Stat. 73, 76–78. Bradford was thus likely referring to the civil and criminal jurisdiction of any American court—federal or state—in the first clause of this sentence. The second clause forecloses the possibility of a federal criminal prosecution.

306. 1 Op. Att’y Gen. at 58–59.

whether the 1790 Crimes Act extended to such acts.<sup>307</sup> “But,” he continued,

there can be no doubt that the company [operating the British colony of Sierra Leone] or individuals who have been injured by these acts of hostility have a remedy by a civil suit in the courts of the United States; jurisdiction being expressly given to these courts in all cases where an alien sues for a tort only, in violation of the laws of nations, or a treaty of the United States . . . .<sup>308</sup>

And, as suggested by Bradford in reference to the criminal jurisdiction of the federal courts—“acts of hostility committed by American citizens against such as are in amity with us, being in violation of a treaty . . . are punishable by indictment”<sup>309</sup>—there was an on-point treaty provision between the United States and Great Britain committing the United States to prevent “acts of hostility or violence against” British subjects by American citizens upon “commission or instructions so to act from any foreign prince or state, enemies to” Great Britain, namely, the French Republic in 1795.<sup>310</sup> Article XXI of the 1794 Jay Treaty provided:

It is likewise agreed, that the subjects and citizens of the two nations, shall not do any acts of hostility or violence against each other, nor accept commissions or instructions so to act from any foreign prince or state, enemies to the other party; nor shall the enemies of one of the parties be permitted to invite, or endeavour to enlist in their military service, any of the subjects or citizens of the other party; and the laws against all such offences and aggressions shall be punctually executed.<sup>311</sup>

Bradford would surely have been aware of this provision, for the Senate had given advice and consent to the Jay Treaty two weeks before he delivered his opinion.<sup>312</sup> Article XXI is a classic example of a treaty provi-

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307. See *id.*

308. *Id.* at 59.

309. *Id.* at 58.

310. The *Sosa* Court and commentators generally have assumed that Bradford’s reference was to the law-of-nations prong of the ATS, overlooking the 1794 Jay Treaty. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 721 (2004) (“Although it is conceivable that Bradford . . . assumed that there had been a violation of a treaty . . . that is certainly not obvious, and it appears likely that Bradford understood the ATS to provide jurisdiction over what must have amounted to common law causes of action.”); Casto, *Protective Jurisdiction*, *supra* note 3, at 504 (“[Bradford’s] opinion establishes a direct relationship between the then-settled concept of common-law crimes committed in violation of the law of nations and the notion of civil torts committed in violation of the law of nations.”).

311. 1794 Jay Treaty, *supra* note 33, art. XXI.

312. Bradford’s opinion was tendered on July 6, 1795, see 1 *Op. Att’y Gen.* at 58; the Senate gave advice and consent on June 24, 1795, see 1 *Journal of the Executive Proceedings of the Senate of the United States of America* 186–87 (Wash., Duff Green 1828). The President ratified the treaty with an unrelated condition proposed by the Senate on August 14, 1795; Great Britain ratified the treaty on October 28, 1795; the treaty entered into force on October 28, 1795. 2 *Treaties and Other International Acts of the United States of America* 245 (Hunter Miller ed., 1931). Although not technically in force when Bradford submitted his opinion, it seems reasonably clear from this close chronology

sion granting an implied safe conduct to British subjects that would be violated if American citizens committed acts of hostility against them—even upon the “instructions” of France, then an enemy of Britain. And since France was already at war with Great Britain, the British could not plead a safe-conduct violation against France unless the laws of war were separately violated, for instance, by the killing of noncombatants or soldiers *hors de combat*.

The Bradford opinion, however, raises another interesting wrinkle. Bradford clearly believed that the ATS was the jurisdictional peg for any civil suit arising from the incident, but since it was a tort arising on the high seas, why did he not view the case as one arising under the admiralty statute? And does the fact that he did not consider the admiralty statute necessarily cast doubt on the conclusion above that the First Congress did not intend the ATS to cover piracy and prize?

Bradford’s plausible conclusion of ATS treaty jurisdiction over the Sierra Leone case shows an illuminating evolution in the nature of the particular safe-conduct violation at issue for the American Republic. In 1789 when the ATS was enacted, the safe-conduct violation of concern was violence against British creditors and merchants within the several states.<sup>313</sup> By 1795, that problem had been largely solved by payment of reparations under the terms of the 1794 Jay Treaty and the resumption of trade.<sup>314</sup> The pressing safe-conduct problem of the day was violence against British and allied Spanish subjects on the seas and abroad by American citizens affiliated with the French republican cause, which was the scenario addressed by Bradford’s opinion. Because the concept of the safe conduct was robust enough to encompass both foreign policy problems, it was natural for Bradford to look to the statute enacted to police safe conducts as the proper jurisdictional peg.

Indeed, three-and-a-half months later, a federal district judge, the able Judge Thomas Bee, who had been a member of the Continental Congress that drafted the 1781 resolution, similarly suggested that jurisdiction over a safe-conduct case might be grounded in the ATS or the 1789 Act’s admiralty grant. In *Bolchos v. Darrel*, a French privateer, Bolchos, sailed a Spanish prize into Charleston harbor.<sup>315</sup> France was then at war with both Spain and Great Britain, but the United States con-

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and the subject-matter fit between article XXI and Bradford’s opinion that he had this treaty provision in mind. And, even if he did not, the 1783 Treaty of Paris was still in force and enforceable in the United States under the Supremacy Clause. Article VII of the 1783 Treaty of Paris provided: “There shall be a firm and perpetual peace between His Britannic Majesty and the said States, and between the subjects of the one and the citizens of the other, wherefore all *hostilities, both by sea and land*, shall from henceforth cease . . .” 1783 Treaty of Paris, *supra* note 2, art. VII (emphasis added). Thus, Article VII of the 1783 Treaty of Paris provided an alternative basis for Bradford’s opinion that there was a treaty provision which had generated a specific implied safe conduct.

313. See *supra* note 266 and accompanying text.

314. See Elkins & McKittrick, *supra* note 79, at 375.

315. 3 F. Cas. 810, 810 (D.S.C. 1795) (No. 1607).



sidered both Spain and Great Britain neutrals notwithstanding its alliance with France. The prize had a cargo of slaves, which was the property of a Spanish subject who had mortgaged the chattel to a British subject, Savage. Darrel, Savage's agent (presumably an American citizen), seized the slaves on behalf of Savage, apparently after they had made landfall in Charleston,<sup>316</sup> and sold them. Bolchos filed a libel in admiralty in federal district court demanding the return of the chattel (or the proceeds of the sale) as lawful prize, invoking, as his legal justification, Article XIV of a treaty of the United States with France. If jurisdiction had been based on the ATS, Bolchos's argument would have been that the qualifying tort was Darrel's seizure of the slaves on American soil.

However, Article XIV of the 1778 Treaty of Amity and Commerce between the United States and France which was then in force appears inapposite; it seems that the parties and the federal district judge were referring instead to Article XIX of the treaty, which is precisely on point. Article XIX provided that "[i]t shall be lawful for the Ships of War of either Party & Privateers freely to carry whithersoever they please the Ships and Goods taken from their Enemies . . . ; nor shall such Prizes be arrested or seized, when they come to and enter the Ports of either Party."<sup>317</sup> Article XIX thus created a very specific implied safe-conduct obligation on the part of the United States to prevent trespass on the property of a French privateer, like Bolchos, which had been taken as prize from an enemy of France and brought into an American port. The crucial fact necessary to trigger the safe-conduct obligation under the treaty provision was that the "Goods" had to have been taken from an enemy of France.

With this understanding of the specific implied safe conduct at issue, Judge Bee's cryptic opinion in *Bolchos*, which has been an enduring source of confusion in the commentary,<sup>318</sup> becomes very clear. Darrel argued on behalf of Savage that "the negroes are not within that [treaty] clause, as they were not laden on board the prize by the real owner, the mortgagee" Savage, but rather by the Spanish-subject mortgagor.<sup>319</sup> Darrel reasoned that "no unauthorized act of the mortgagor"—the Spanish

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316. The fact that Darrel's seizure of the slaves occurred on land—the port of Charleston—caused the judge "at first [to be] doubtful whether this court had jurisdiction." *Id.* Bee reasoned, however, that admiralty jurisdiction covered "every thing dependent" on the original cause (presumably, the seizure of the prize ship and its cargo at sea), that there would be a remedial gap ("a failure of justice") if he did not assert jurisdiction given that the South Carolina state court had dismissed on the ground that the matter was for the exclusive admiralty jurisdiction of the federal district court, and, importantly for the purposes of this Article, that the ATS afforded an alternative basis for jurisdiction. *Id.*

317. 1778 France Amity Treaty, *supra* note 238, art XIX.

318. For instance, the Second Circuit in *Filartiga* simplified the case thusly: "In *Bolchos v. Darrel*, the Alien Tort Statute provided an alternative basis of jurisdiction over a suit to determine title to slaves on board an enemy vessel taken on the high seas." 630 F.2d 876, 887 n.21 (2d Cir. 1980) (citation omitted).

319. *Bolchos*, 3 F. Cas. at 810.

subject's loading of the slaves as cargo on the ship that was subsequently captured by Bolchos as prize—"ought to affect an innocent third person," namely Savage, who had a contingent ownership interest in the slaves by right of his mortgage.<sup>320</sup> Bee agreed that "a mortgage vests a right in the mortgagee under certain conditions, and for certain purposes," but qualified that the mortgagor might yet "exercise the rights of an owner."<sup>321</sup> He continued: "But the question of property here is of little consequence; for the mortgagor is a Spanish subject, and the mortgagee a subject of Great Britain."<sup>322</sup> This fact is of course relevant because given the condition of war between France and Spain in September of 1795 when the case was decided, both subjects were enemies for purposes of Article XIX of the treaty of the United States with France.

It is at this point that the case illustrates how the safe conduct was the touchstone of the late eighteenth-century conception of international law, at least from the perspective of American lawyers and judges. Bee wrote: "It is certain that the law of nations would adjudge neutral property, thus circumstanced, to be restored to its neutral owner."<sup>323</sup> In other words, absent the treaty, friendly and neutral aliens—here the British and Spanish subjects—enjoyed general implied safe conducts protecting their persons and property while within the United States. And if the slaves were indeed their property, a federal district judge's ratification of Bolchos's capture would have impaired their property interest in slaves physically present in United States territory in violation of the safe conduct. "[B]ut", Bee continued, "the [19th] article of the treaty of France alters that law, by stipulating that the property of friends found on board the vessels of an enemy shall be forfeited."<sup>324</sup> That is, the specific implied safe conduct granted to prizes and prize cargo seized by French warships and privateers preempted the default general implied safe conduct enjoyed by friendly and neutral aliens within the United States and its territorial seas. Thus, Bee decreed, "[l]et these negroes, or the money arising from the sale, be delivered to the libellant" Bolchos.<sup>325</sup>

Bradford's attorney-general opinion and Bee's opinion in *Bolchos* show how the founding generation understood much of international law to operate as a hierarchy of safe-conduct obligations. The safe conduct was, in a functional sense, the late eighteenth-century conceptual prism by which public sovereign-to-sovereign obligations at international law were transformed into private individual claims. To be sure, piracy and ambassadorial violations were also law-of-nations offenses, but they were special cases; it was the safe-conduct violation that was the international law violation most likely to occur in the late eighteenth century.

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320. *Id.*

321. *Id.*

322. *Id.*

323. *Id.* at 811.

324. *Id.*

325. *Id.*

That both Bradford and Bee, in June and September of 1795, believed federal jurisdiction might be argued under the ATS or the admiralty statute does not necessarily mean that this would have been the understanding of the First Congress when it enacted the Judiciary Act in September 1789. The relevant circumstances had changed dramatically in the intervening six years between 1789 and 1795, owing to the negotiation of the Jay Treaty and the war between Great Britain and France. Whereas the high-profile safe-conduct violation in 1789 was the possibility of injuries to British merchants within the United States,<sup>326</sup> the violations of concern in 1795 were acts of hostility by Americans allied to the French republican cause.<sup>327</sup> Bradford's and Bee's interpretations of the ATS therefore show how robust and expansive the safe-conduct violation was understood to be by the late eighteenth century, and accordingly, how the lawyers of the early Republic understood the ATS's capacity for coverage beyond the specific safe-conduct problem the statute was enacted to address in 1789. Put another way, the ATS's adaptability to present circumstances within the safe-conduct construct of torts implicating a U.S. sovereign obligation was a notable feature of the statute from its earliest years.

E. *Integrating the ATS as a Safe-Conduct Provision with the Rest of the 1789 Act*

As discussed above, the general underlying purpose of the safe conduct in the late eighteenth century was to facilitate commerce and to avoid war. The aim of this subpart is to draw out the specific instantiation of the safe-conduct problem that the First Congress had in mind when it enacted the ATS. But to understand how the ATS was custom tailored to the most immediate foreign policy problem facing the national government in 1789, it is necessary to see how the statute worked in tandem with the other alienage provisions of the first Judiciary Act, rather than as a freestanding oddity. The ATS provides for jurisdiction in a suit by an alien for a tort only in violation of the law of nations or a U.S. treaty "concurrent" with federal circuit or state courts "as the case may be."<sup>328</sup>

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326. See *supra* note 266 and accompanying text.

327. See *supra* notes 299–302, 309–312 and accompanying text.

328. The reference to concurrent jurisdiction was removed when Congress first revised the 1789 Act in 1873 to read: "The district courts shall have jurisdiction as follows: . . . Of all suits brought by any alien for a tort only in violation of the law of nations, or of a treaty of the United States." Rev. Stat. § 563 (1874). Also in 1873, "jurisdiction" replaced "cognizance." It seems, as the Court concluded in *Sosa v. Alvarez-Machain*, that "cognizance" had a meaning indistinguishable from that of jurisdiction in 1789. 542 U.S. 692, 713 (2004). The terms are used interchangeably in the 1789 Act. For example, Section 9 of the 1789 Act provides, *inter alia*, that the district courts have "cognizance" exclusively of state courts for federal crimes, "cognizance" concurrent with state courts for ATS claims, and "jurisdiction exclusively" of state courts for suits against consuls or vice consuls. Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76–77. Section 10, dealing with the district courts in Kentucky and Maine, refers to the prior section's enumerations of district

Inspection of the provisions of the 1789 Act dealing with circuit court jurisdiction in cases involving aliens should therefore illuminate the meaning of the ATS, which addresses only district courts.<sup>329</sup>

Two provisions of the 1789 Act discuss federal circuit court cognizance over suits involving aliens as parties. Section 11 provides that “the circuit courts shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds . . . the sum or value of five hundred dollars, and . . . an alien is a party.”<sup>330</sup> Section 12 of the Act authorizes an alien sued in state court to remove to federal circuit court in a suit exceeding the same amount in controversy.<sup>331</sup> Although neither section 11 nor 12 states that the other party to an alien suit must be a state citizen, it has long been presumed that the provisions implemented Article III foreign-parties jurisdiction,<sup>332</sup> for they lack the ATS’s potential federal-question hook of “in violation of the law of nations or a treaty of the United States.”<sup>333</sup> Further, section 11 authorizes jurisdiction when “an alien is a party”<sup>334</sup>—a phrase suggesting invocation of Article III’s foreign-parties heading, and not its arising-under grant.

These provisions regarding the circuit courts are more stringent than the ATS with respect to district courts to the extent they include an amount-in-controversy requirement and were construed to be limited to state citizen defendants, but less restrictive inasmuch as they authorized federal circuit court cognizance of all suits of a civil nature at common law or in equity. By contrast, the ATS authorized suit in federal district

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court coverage as “the jurisdiction aforesaid,” without distinguishing between the cognizance and jurisdiction headings. *Id.* § 10, 1 Stat. at 77–78; see also *The Federalist* No. 81, *supra* note 265, at 485–86 (Alexander Hamilton) (using jurisdiction and cognizance interchangeably).

329. See 28 U.S.C. § 1350 (2000). It is questionable whether similar illumination might be afforded by inspection of parallel provisions (if they exist) in state statutes, since some states would not have shared the same interest as the national government in enforcing the terms of the Treaty of Peace.

330. Judiciary Act of 1789 § 12, 1 Stat. at 78.

331. See *id.* § 12, 1 Stat. at 79. Section 13 provides for original, nonexclusive jurisdiction in the Supreme Court for suits between states and aliens, *id.* § 13, 1 Stat. at 80, which was limited (or clarified) to not permit suits filed by aliens against states only by the ratification of the Eleventh Amendment, U.S. Const. amend XI.

332. U.S. Const. art. III, § 2, cl. 1 (“The judicial power shall extend . . . to Controversies . . . between a State, or the citizens thereof, and foreign States, citizens or subjects.”); see also *Hodgson v. Bowerbank*, 9 U.S. (5 Cranch) 303, 303 (1809) (interpreting section 11 to vest no federal jurisdiction over suits between two aliens); *Mossman v. Higginson*, 4 U.S. (4 Dall.) 12, 13–14 (1800) (same). A letter from Ellsworth during the Senate debates supports the conclusion. See Letter from Oliver Ellsworth to Richard Law, *supra* note 203, at 382 (detailing the circuit court’s jurisdiction “in controversies between fo[r]eigners & citizens”).

333. Judiciary Act of 1789 § 9, 1 Stat. at 77.

334. *Id.* § 11, 1 Stat. at 78.

court only of “all causes where an alien sues for a tort only,” and “in violation of the law of nations or a treaty of the United States.”<sup>335</sup>

The area of overlap between circuit and district court cognizance therefore comprised those causes where (1) an alien sued for a tort in violation of international law; (2) the amount in controversy exceeded five hundred dollars; and (3) the defendant was a state citizen. In such a case, the suit might have been brought either in the district court under the ATS or in the circuit court under section 11. Conversely, only the circuit courts would have had cognizance of nontort causes of action brought by aliens exceeding the amount in controversy, including contract claims like the writ in debt—even those alleging a colorable violation of international law.<sup>336</sup> On the other hand, only the district courts would have had cognizance of tort suits in violation of international law, and where the amount in controversy was five hundred dollars or less, exclusive of costs. These mutually reinforcing and exclusive functions of the federal district and circuit courts under the ATS and section 11’s alien-party clause are consistent with the concerns regarding the provisions expressed by Edmund Pendleton in a letter to James Madison (then in the House of Representatives) while the 1789 Act was being debated:

[W]hat is meant by a Tort? Is it intended to include suits for the Recovery of debts, or on breach of Contracts, as a reference to the laws of Nations & Fœderal treaties seems to indicate; or does it only embrace Personal wrongs, according to it’s [sic] usual legal meaning, or violations of Personal or Official privilege of foreigners? [I]n the last case it will probably be unexceptionable, in the former, very inconvenient.

[Section 11’s alienage provision] seems to take in the debts & may serve to explain the former.<sup>337</sup>

Consider a hypothetical example to see how the provisions might have been intended to operate. A New York creditor attempts to collect from a Virginia debtor in Virginia on a bona fide five-hundred-dollar note that has come due in 1789. The debtor refuses to pay, citing a Virginia statute nullifying the debt, and calls the county sheriff who roughs up the New Yorker and throws him in jail, causing one hundred dollars in damages. The creditor could plead a debt cause against the debtor for five hundred dollars, and a trespass cause—for the modern torts of assault, battery, and false imprisonment—against the sheriff, for one hun-

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335. *Id.* § 9, 1 Stat. at 77.

336. For instance, an alien frustrated in the collection of a debt might plead a violation of Article IV of the 1783 Treaty of Paris: “It is agreed that creditors on either side, shall meet with no lawful impediment to the recovery of the full value in sterling money, of all bona fide debts heretofore contracted.” 1783 Treaty of Paris, *supra* note 2, art. IV.

337. Letter from Edmund Pendleton to James Madison (July 3, 1789), in 4 *Documentary History of the Supreme Court*, *supra* note 74, at 444, 446. It should be noted that the reference by Pendleton—who was not in Congress at the time but rather a judge of the Virginia Court of Appeals—to “violations of Personal or Official privilege of foreigners” conflates the distinction argued for in Part I of this Article.

dred dollars. The creditor likely could not sue in federal circuit court—whether in New York, if he might obtain territorial jurisdiction over the debtor and the sheriff, or in Virginia—because determination of the matter in dispute for amount-in-controversy purposes would not have permitted aggregation of damages under both the contract and tort causes of action to cross the then daunting exceeding-five-hundred-dollars threshold.<sup>338</sup> In any event, all of the claims would be common law causes: They would not state violations of international law because the New Yorker and Virginian are both citizens of the United States, and the traditional view of international law recognized rights and duties only as among sovereign states.<sup>339</sup>

If, however, the facts were the same but the creditor in 1789 was a British subject, the creditor would have not only common law causes of action, but also, as to the debt claim, a possible violation of Article IV of the 1783 Treaty of Paris.<sup>340</sup> Additionally, the alleged trespass on the alien's person by the Virginia sheriff would violate the subject's general implied safe conduct affording protection to his person or property within the lands and seas of the United States. Under the explicit terms of the ATS, the British creditor might sue the county sheriff in federal district court for the tort cause in trespass only but not for the underlying debt cause. Nor could he plead a debt cause in federal circuit court, falling a dollar short of the amount-in-controversy threshold.

As Professor Wythe Holt has pointed out, creditor-debtor tensions were much on the mind of Ellsworth and his colleagues in the First Congress as they took up deliberations on the 1789 Act.<sup>341</sup> State courts, especially those in the biggest debtor state, Virginia, had proved spectacularly unhelpful in redressing the debt claims of English creditors. This refusal came despite the state courts' obligation under the Supremacy Clause to enforce the debt provisions of the 1783 Treaty of Paris.<sup>342</sup> As one can imagine, emotions often ran high in such disputes and in disputes involving claims by British subjects to properties that the states had confiscated and transferred to other private parties, usually state citizens. Unsurprisingly, English newspapers of the late 1780s are replete with reports of the

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338. In his experience as a Connecticut state judge, Oliver Ellsworth did not witness any tort damages award in excess of \$350. See Casto, *Protective Jurisdiction*, *supra* note 3, at 497 n.168.

339. See Coleman Phillipson, *Wheaton's Elements of International Law* 34 (5th English ed. 1916) (“[T]he subjects of international law are, properly speaking, only States,—for they alone are vested with international personality.”).

340. See 1783 Treaty of Paris, *supra* note 2, art. IV.

341. See Holt, *supra* note 266, at 1452; *id.* at 1478–517 (discussing enactment of 1789 Act).

342. See, e.g., *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 237 (1796) (“[I]t is the declared duty of the State Judges to determine any Constitution, or laws of any State, contrary to [the 1783 Treaty of Paris] . . . null and void.”).

violent, dishonest, and unreliable behavior of the colonials.<sup>343</sup> In the back of the minds of the American leaders was likely the additional, very significant risk that the English sovereign might choose to act on behalf of his subjects, whether by war, limitations on trade, or retaliatory breaches of critical peace-treaty commitments to evacuate western outposts of vital concern to American national security.

The 1789 Act was, at bottom, a breathtakingly complicated and ingenious scheme to mitigate this foreign policy risk by parsimonious deployment of the federal courts in the manner of what military planners today might call a surgical strike.<sup>344</sup> Although debt claims were the central underlying issue, the Act provided for circuit court jurisdiction only for very large claims against state citizens—those exceeding five hundred dollars. British creditors with debt claims on this level might have influence with Parliament or be favored subjects of the king; it was prudent to give them the option of litigating in the national courts rather than taking their chances with a possibly biased state court. They did not even have to allege a violation of international law, though it would have been easy enough under the terms of Article IV of the 1783 Treaty of Paris.<sup>345</sup>

As for British creditors with smaller claims—those not so likely to move their Sovereign to action on their behalf—the national courts were closed, despite the fact that creditors owed five hundred dollars or less had the same international law claims as their countrymen seeking to collect on debts in higher amounts, for neither the 1783 Treaty of Paris nor the incipient denial-of-justice norm had an amount-in-controversy requirement. But if it should so happen that a smaller creditor suffered physical injuries related to his efforts to vindicate his claim, particularly spectacular injuries of the sort that might be taken up by press, pamphleteers, or politicians with interest or inclination to involve the British Sovereign in renewal of war with its former colonies, a more delicate foreign relations situation presented itself. As a formal legal matter, the injured creditor now could add to his portfolio of international law claims a new one for violation of his implied general safe conduct. The ATS unlocked the doors of the federal district court for his safe-conduct claim for the “tort only,” not for the breach of contract claim that had been the ultimate cause of his injury. Along with this limitation came an expansion: Because safe conducts were guarantees by a sovereign of safety without regard to the citizenship of the tortfeasor, an alien holder harmed by another alien in the United States or on the high seas could also sue under the ATS.

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343. See Holt, *supra* note 266, at 1440–41, 1449 (recounting several violent incidents).

344. The apex of the scheme was original and exclusive jurisdiction of state-foreign suits in the Supreme Court. See Lee, *Quasi-International Tribunal*, *supra* note 218, at 1861–62.

345. See 1783 Treaty of Paris, *supra* note 2, art. IV.

The Alien Tort Statute, then, was a statute that allowed aliens to sue for torts—but not debts—in federal district court. This was a right unique to aliens. After the enactment of the 1789 Act, a citizen of a state could only bring a tort action against another citizen of the same state in state court. A citizen of a state could bring a tort action against a citizen of another state in federal circuit court, or remove a suit there, but only if the amount in controversy was greater than five hundred dollars—a daunting threshold that foreclosed any such suits in practice. The underlying, prospective reasons for giving this unique right to aliens were to encourage trade and to prevent war, which the victim's sovereign was entitled to wage against the United States if it had made an explicit or implicit promise at international law to protect the alien—the safe-conduct promise. The specific, retrospective, and immediate reason for furnishing the right was the British creditor problem. It was unnecessary to give this right to citizens of other states because the Constitution prohibited the states from waging war<sup>346</sup>—an important difference between the purposes of the foreign-parties diversity jurisdiction and the state-citizens diversity jurisdiction.

#### IV. THE IMPLICATIONS OF THE SAFE-CONDUCT THEORY FOR MODERN ATS LITIGATION

The preceding portion of this Article has made the case for a clarification of the reasons for the enactment of the ATS and how the statute might be interpreted in light of a better understanding of the history. This Part endeavors merely to suggest—a fuller discussion is better left to another article—how the revised history might be applied to construe the ATS's role in the present day. In a nutshell, the statute was enacted to police sovereign obligations on the part of the United States prospectively to prevent, and retrospectively to provide damages for, injuries to the persons or property of aliens. It was not enacted for the redress of international law violations *per se*, or for such injuries to aliens absent a U.S. sovereign obligation to protect and redress. The ultimate aims of the enactment were national security and commerce; the specific foreign policy of concern was injury to British creditors and merchants within the United States.

The obvious translation to the present context would be to apply the statute to extend jurisdiction over suits seeking redress of injuries to the person or property of aliens where the injuries have a U.S. sovereign nexus, similar to the state-action requirement of modern § 1983 litigation<sup>347</sup> and tort liability against federal governmental employees under

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346. U.S. Const. art. I, § 10, cl. 3 (“No State shall, without the Consent of Congress . . . keep Troops, or Ships of War in time of Peace . . . or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.”); cf. *id.* cl. 1 (“No State shall . . . grant Letters of Marque and Reprisal . . .”).

347. 42 U.S.C. § 1983 (2000). Combining the purpose of the ATS on the safe-conduct view with the language of § 1983 would result in something like the following: “Every



the Federal Tort Claims Act (FTCA).<sup>348</sup> And the fact of the underlying U.S. sovereign obligation would shore up the case for an Article III basis for ATS suits, even of the alien-versus-alien, law-of-nations variant. To be sure, one might argue a similar limitation of the present scope of the statute on pragmatic grounds, but the safe-conduct theory provides an originalist foundation for such an interpretation and also expands the scope of cognizable claims to include torts that do not rise to the level of violations of substantive international law. Although this view of the doctrine departs from *Sosa's* prescription insofar as *Sosa* extended actionable claims to what one could call "global" on top of "heartland" claims, but restricted such claims to violations of international law only, it is possible to work the revised history into *Sosa's* reasonable framework by shaping the doctrine to privilege heartland claims—a prioritization that seems more justifiable than the present global orientation from a policy perspective, in light of perceptions at home and abroad that the United States does not respect the rights of aliens, particularly enemy aliens.

In a recent case, Vietnamese nationals alleged injuries arising from the use of Agent Orange defoliant during the Vietnam War.<sup>349</sup> They brought suit under the ATS against the manufacturers in the Federal District Court for the Eastern District of New York. The alien plaintiffs' theory of injury under international law was that the use of Agent Orange was the functional equivalent of the use of proscribed poison.<sup>350</sup> The district judge dismissed the claim on the ground that the plaintiffs had not stated a violation of customary international law.<sup>351</sup> In another case, Iraqi nationals brought suit against American contractors for alleged torture and mistreatment in Iraq.<sup>352</sup> In a third case, aliens in an immigration holding facility in the United States brought suit under the ATS against the contractors who operated the facility alleging maltreatment.<sup>353</sup> On the safe-conduct view of the ATS—that the statute is intended for the redress of domestic common law torts with a U.S. sovereign nexus—all of these suits would be actionable heartland claims,

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person who, under color of any statute, ordinance, regulation, custom or usage of" the United States commits a common law tort against an alien "shall be liable to the injured party in an action at law."

348. 28 U.S.C. §§ 1346(b)(1), 2671–2680 (2000). The FTCA grants federal jurisdiction and waives sovereign immunity in suits against the United States

for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

*Id.* § 1346(b).

349. *In re Agent Orange Prod. Liab. Litig.*, 373 F. Supp. 2d 7, 16 (E.D.N.Y. 2005).

350. *Id.* at 36.

351. See *id.* at 130.

352. *Ibrahim v. Titan Corp.*, 391 F. Supp. 2d 10, 12 (D.D.C. 2005).

353. *Jama v. U.S. Immigration and Naturalization Serv.*, 343 F. Supp. 2d 338, 345 (D.N.J. 2004).

regardless of whether an independent violation of international law was pled.

The safe-conduct theory of the ATS helps to resolve the three larger issues with respect to modern applications left unsettled by *Sosa*. The first major question concerns the constitutional basis of the federal judicial power to hear alien-versus-alien suits alleging torts in violation of the law of nations under the ATS. Those who believe the statute constitutional in this instance assert that an alien-versus-alien ATS suit arising under the law of nations invokes arising-under jurisdiction, just like a case arising under a U.S. treaty.<sup>354</sup> Consider a significant implication of such a position: If a case brought by an alien arising under the law of nations also arises under federal law for purposes of Article III, does it not follow that a case arising under the law of nations brought by a U.S. citizen also falls within Article III, regardless of whether it is authorized by the current understanding of the general federal-question jurisdiction statute?<sup>355</sup> Those, on the other hand, who believe that a constitutional anchor is lacking point to the absence of an explicit textual reference to the “law of nations” in Article III, by contrast to “treaties,” and conclude that the ATS is unconstitutional as applied to alien-versus-alien law-of-nations suits.<sup>356</sup> They assert, rather, that the law of nations was pre-*Erie* general common law which is now state law and thus incapable of grounding Article III arising-under jurisdiction.<sup>357</sup>

The safe-conduct explanation of the ATS yields a more convincing answer. A threshold question for the safe-conduct theory of the statute is whether under late eighteenth-century principles of international law a sovereign’s safe-conduct promise included a duty to prevent harm to aliens by other aliens, on top of any harm caused by its own citizens. If it did not, then the constitutional question might be avoided because an ATS defendant would necessarily be an American citizen, and so any suit would be covered by Article III foreign-parties jurisdiction. The balance of the evidence suggests, however, that the safe conduct covered any harm within the sovereign’s territory or extraterritorially in places under its military control, regardless of the nationality of the tortfeasor.<sup>358</sup> The

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354. See, e.g., Dodge, *Constitutionality*, supra note 3, at 703–07 (arguing textual differences between Article III and Supremacy Clause support inclusion of law of nations in arising-under jurisdiction); Louis Henkin, *International Law as Law in the United States*, 82 Mich. L. Rev. 1555, 1560 (1984) (“[C]ases arising under international law are ‘cases arising under . . . the Laws of the United States’ and therefore are within the judicial power of the United States under article III of the Constitution . . . .” (quoting U.S. Const. art. III, § 2, cl. 1)).

355. 28 U.S.C. § 1331 (2000). The Court in *Sosa* intimated that Congress did not intend to grant the Court general power to develop common law through § 1331. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 731 n.19 (2004).

356. See, e.g., Bradley, *Alien Tort Statute*, supra note 3, at 597–616 (challenging view that First Congress believed that law of nations was matter of general federal common law).

357. See *id.* at 646–47 (disputing Supreme Court’s holding that “post-*Erie* federal common law is part of the ‘Law of Nations’ referred to in Article III”).

358. See supra notes 297–308 and accompanying text.

question then becomes how, if at all, the safe-conduct theory changes the Article III analysis in the present day.

The constitutional basis for extending judicial power over alien-versus-alien law-of-nations ATS suits under the safe-conduct theory is the arising-under jurisdiction, but not in the ways implied by previous theories. If the threshold inquiry in an ATS suit is whether the United States has undertaken a sovereign obligation to prevent harm to the alien plaintiff—analytically similar to the basic question in an FTCA suit—the suit raises federal concerns relating to the foreign relations of the United States, and so arises under federal law for purposes of Article III jurisdiction. There is a plausible case that whether the United States has made a safe-conduct promise is the sort of question of federal common law that falls within constitutional arising-under jurisdiction even after *Erie*,<sup>359</sup> possibly, to follow Professor Casto's cue even without the safe-conduct U.S. sovereign nexus angle, as an exercise of so-called protective jurisdiction<sup>360</sup>—a concept dear to federal courts scholars but short on precedent.<sup>361</sup> But if pressed for a specific textual hook, a forceful argument could be made, on the lead of the Court's decisions in *Verlinden B.V. v. Central Bank of Nigeria*<sup>362</sup> and *Gutierrez de Martinez v. Lamagno*,<sup>363</sup> that this case arises under the “laws of the United States” in the form of a federal statute—the ATS—in the same way that those prior cases involving common law causes could be seen as arising under jurisdictional statutes—the Foreign Sovereign Immunities Act<sup>364</sup> and the Westfall Act,<sup>365</sup> respectively—for Article III purposes.<sup>366</sup>

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359. See *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 460 (1957) (Burton, J., concurring) (rejecting view that section 301 of Taft-Hartley Act, 29 U.S.C. § 185 (2000), authorized judges to make federal common law but justifying Article III jurisdiction over suit under theory of protective jurisdiction). See generally Henry J. Friendly, In Praise of *Erie*—and of the New Federal Common Law, 39 N.Y.U. L. Rev. 383 (1964) (discussing post-*Erie* federal common law and attacks on decision).

360. See Casto, Protective Jurisdiction, *supra* note 3, at 512–25 (arguing that ATS jurisdiction grant includes alien-versus-alien suits under protective jurisdiction theory).

361. See Richard H. Fallon, Jr. et al., *Hart & Wechsler's The Federal Courts and the Federal System* 846–55 (5th ed. 2003).

362. 461 U.S. 480 (1983).

363. 515 U.S. 417 (1995).

364. Pub. L. No. 94-583, 90 Stat. 2891 (1976) (codified as amended in scattered sections of 28 U.S.C. (2000)).

365. Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563 (codified as amended in scattered sections of 28 U.S.C.).

366. Justice Frankfurter best described this category of argument, although he did not agree with it in the context of a provision of the Taft-Hartley Act, 29 U.S.C. § 185(a) (2000), a statute governing labor-management relations. See *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 473 (1957) (Frankfurter, J., dissenting) (“Analysis of the ‘protective jurisdiction’ theory might also be attempted in terms of the language of Article III—construing ‘laws’ to include jurisdictional statutes where Congress could have legislated substantively in a field.”). According to Frankfurter, “[t]he theory must have as its sole justification a belief in the inadequacy of state tribunals in determining state law,” *id.* at 475, which he did not believe to extend to the Taft-Hartley context. Of course, it

The safe-conduct intuition that the ATS is about the redress of torts implicating United States sovereign responsibility could be pitched under other Article III jurisdictional grants. For instance, the case might be that the United States, as safe-conduct promisor, is necessarily a party in an ATS suit, thereby putting the case under the United States-as-Party head of Article III. Alternatively, one might even claim that an implied safe conduct is simply a "Treaty which shall be made" in the sense of being a sovereign obligation that might be memorialized by a treaty for evidentiary purposes, but which would exist even without a treaty in the circumstances of peaceful relations prescribed by the law of nations.

More generally speaking, the basic insight that what is at stake in a safe-conduct case is a sovereign obligation of the United States implicates a line of precedents considered by the courts and scholars as comfortably within the pale of constitutional arising-under jurisdiction. First, the ATS could be viewed as analogous to the FTCA, inasmuch as it affords federal jurisdiction for suits against tortfeasors whose acts or omissions—like those of federal governmental employees—implicate U.S. sovereign responsibility. Second, it is entirely uncontroversial that federal jurisdiction lies whenever the United States's financial obligations are implicated.<sup>367</sup> That line of cases is not only useful as an analogy but also directly relevant when one considers that the historical safe-conduct obligation carried with it, in Vattel's words, a duty on the part of the United States to "oblige [tortfeasors] to make good the damage."<sup>368</sup> Indeed, the 1781 congressional resolution implies that the tortfeasor is liable "for compensation to the United States for damage sustained by them from an injury done to a foreign power by a citizen,"<sup>369</sup> apparently in light of the fact that the safe-conduct violation has forced the United States to breach its sovereign obligation. That sovereign obligation at the very least supplies the federal "ingredient" sufficient to satisfy Article III arising-under jurisdiction.<sup>370</sup>

The second question *Sosa* left unsettled concerns the Court's resort to originalism in statutory construction. Any justification begins with the intrinsic value of getting the history right regardless of its value as an instrument in aid of doctrinal exegesis. On top of that, there is the conventional judicial restraint justification for originalism typically articu-

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seems easy to distinguish the ATS on Frankfurter's rationale which, on this Article's account, was premised precisely on the perceived "inadequacy of state tribunals" to redress common law torts committed against aliens which the United States had a duty to prevent under international law. *Id.*

367. See *United States v. Kimbell Foods, Inc.* 440 U.S. 715, 726 (1979); *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366–67 (1943); *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 456–59 (1942).

368. Vattel, *supra* note 81, bk. 3, ch. XVII, § 268, at 480.

369. 21 Journals of the Continental Congress, *supra* note 23, at 1137.

370. *Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738, 823 (1824) ("[W]hen a question to which the judicial power of the Union is extended by the constitution, forms an ingredient of the original cause, it is in the power of Congress to give the Circuit Courts jurisdiction of that cause . . .").

lated in the constitutional context. Moreover, an originalist approach seems particularly appropriate for the interpretation of a provision that is organic to a founding-era framework statute of quasi-constitutional stature, which is the bedrock of the federal court system and the Rosetta Stone for the interpretation of Article III of the Constitution.

But assuming that the *Sosa* Court was justified to look to original intent gives rise to a third question: Why is it necessary to read the statute to authorize subject matter jurisdiction over analogous modern violations, rather than simply the trio of violations the Court believed to pertain at enactment? Those violations are clearly still relevant today. Diplomats are regularly kidnapped and even assassinated—not that Blackstone would have required anything so eventful for an infringement of ambassadorial rights: He noted that the mere act of filing a suit against a member of an ambassador's household was an infringement.<sup>371</sup> Pirates abound today—for example, off the coast of Somalia.<sup>372</sup> Above all, there are countless thousands of infringements of safe conducts every day—any Japanese tourist with a valid passport and visa mugged in Detroit has a safe-conduct claim she might bring in U.S. federal court. Put another way, what in the text and context of the ATS licenses flexible originalism—that is, abstraction to an evolving standard beyond the three still pervasive law-of-nations violations the Court identified? And if some abstraction is justified, what is the rule of translation most faithful to the essential shared traits of the three historical violations? Should it be, as the Court intimated, that any modern norm must be “specific, obligatory, and universal?”<sup>373</sup>

If one understands that the ATS was originally about safe conducts, it is easy to see that it is neither possible nor imperative to redress every safe-conduct violation today. A strict application of the ATS limited to the specific violation it was intended to redress is simply unworkable. To redress every safe-conduct violation was critical for England in 1215 at a time of difficult and rare cross-border travel and still important for the young, trade-hungry United States in 1789 during the age of sail. But it is an anachronism for the United States in 2006 given the exponential proliferation of today's safe-conduct equivalent—the passport—in light of transportation technologies, the extent of globalization, and the dramatic increase of world population. The counterintuitive realization that a strictly originalist interpretation would be overinclusive today justifies

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371. 4 Blackstone, *supra* note 66, at 70–71.

372. See Marc Lacey, *Pirate Militias from Somalia Spill into the Gulf of Aden*, N.Y. Times, Sept. 12, 2001, at B2.

373. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004) (internal quotation marks omitted) (quoting *In re Estate of Ferdinand Marcos*, 25 F.3d 1467, 1475 (9th Cir. 1994)); see also *id.* at 732 n.20 (stating ATS's modern scope was “defined by ‘a handful of beinous actions—each of which violates definable, universal, and obligatory norms’” (quoting *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 (D.C. Cir. 1984) (Edwards, J., concurring))).

flexible originalism, or moderate abstraction to a principle of greater vitality in the present day.

The right rule of translation on a safe-conduct view of the ATS is redress of torts against aliens committed under circumstances implicating U.S. sovereign responsibility, that is, where tortfeasors are acting under the color of U.S. law or sovereign action. Such responsibility might be implicated by virtue of occurrence in U.S. territory with governmental—federal, state, or local—involvement or acquiescence; or extraterritorially in places where the significant presence of U.S. troops implies a promise of safety or the tortfeasor is a U.S. or foreign national plausibly acting at the behest of the U.S. government. These violations are heartland ATS claims, by contrast to the *Sosa*-defined set of global ATS claims. They are still subject to residual damages immunities in the FTCA—an after-enacted statute—insofar as the defendants are federal governmental employees. But, beyond the FTCA conclave, it seems important, in a world in which the United States now wields supreme power but in which supreme power has forever proved ephemeral, to keep the promise the ATS signified at a time of national infirmity. The promise made then was to prevent harm to foreigners who had come under the control of the United States.<sup>374</sup> Few would doubt that this is a promise worth keeping today.

The safe-conduct theory of the ATS does not require overruling *Sosa*. It is possible to work within the boundaries set by the Court, which frankly implied that its account of the history was not conclusive.<sup>375</sup> This could be done by applying the doctrine to privilege heartland ATS claims over global ones. For example, a burning issue in ATS litigation is the deference owed to the executive branch in determining which ATS claims to recognize.<sup>376</sup> Based on the safe-conduct account, one could accord executive deference to second-order global claims of customary international law violations, while declining to do so for heartland tort claims. Or one could prospectively relax the bar as to substantive international law violations where U.S. responsibility is alleged, clarifying that a

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374. The promise might plausibly be extended to the unique mass tort of genocide committed by anyone anywhere, on the theory that all sovereigns bear collective responsibility at international law to prevent such systemic intentional harm to humankind, even by unilateral resort to force, and so they should afford relief in their domestic courts should they fail to prevent it. Cf. Restatement (Third) of the Foreign Relations Law of the United States § 702 cmts. d, n (1987) (asserting that according to human rights norms genocide is *jus cogens* violation).

375. See *Sosa*, 542 U.S. at 718–19 (“[D]espite considerable scholarly attention, it is fair to say that a consensus understanding of what Congress intended has proven elusive.”).

376. Compare *id.* at 733 n.21 (“[T]here is a strong argument that federal courts should give serious weight to the Executive Branch’s view of the case’s impact on foreign policy.”), with Beth Stephens, *Upsetting Checks and Balances: The Bush Administration’s Effort to Limit Human Rights Litigation*, 17 *Harv. Hum. Rts. J.* 169, 170 (2004) (arguing that executive branch deserves no deference in determining which customary international law claims federal courts should recognize).

treaty need not be self-executing to sustain an ATS claim because the private cause of action would be provided by the underlying tort claim.

The greatest virtue of reformulating the ATS's role today in light of the safe-conduct explanation of its historical origins is the benefit that it will produce for the national security of this country. By holding subject to suit aliens or U.S. private citizens acting on behalf of the national government, but not in a manner close enough to trigger FTCA protection, the ATS could be used as a means to ensure that the government does not contract out potentially tortious activity that injures foreigners—for instance, by using alien or private U.S. contractors less amenable to national governmental supervision to harvest human intelligence from Iraqi prisoners using aggressively coercive means. And by focusing on heartland tort claims as opposed to global international law claims, the risks of offending other nations and of setting back American competitiveness abroad by opening up U.S. corporations to ATS suits could also be diminished. The larger point is that it is entirely consistent with the original purpose of the ATS to see it as a means to deploy the federal courts in the service of a national security policy in the best interests of the American people.

#### CONCLUSION

The title character of Richard Wagner's *Lohengrin* is a mysterious knight who appears on a swan-pulled boat to champion the noble Elsa's honor. He will marry her, he says, on the condition that she never ask his name or origin. But doubt sown by enemies overcomes Elsa—she breaks her vow on their wedding night. He tells her he is a knight of the valorous order of the Holy Grail, but the revelation is sad and fatal. For breaching his order's vow of secrecy, Lohengrin must leave Elsa, even as he saves her and her brother Gottfried, who is revealed to be the swan, now transformed. Elsa, loveless, dies.

In 1975, Judge Henry Friendly famously called the Alien Tort Statute "a kind of legal Lohengrin; although it has been with us since the first Judiciary Act, no one seems to know whence it came."<sup>377</sup> Judge Friendly invoked the right operatic metaphor, but he may have confused the cast. Elsa is a better stand-in for the ATS, the missing but now returned Gottfried stands for the long obscured, safe-conduct explanation of the statute, and Lohengrin is a metaphor for the prevailing interpretation of the ATS as an international human rights crusader. But the ATS was not premised on an idealistic commitment to the redress of violations of international law by anyone anywhere, but rather to redress of torts against aliens that the United States had a commitment under international law to protect. This account of the ATS's origins, however, still has relevance today, as the United States is criticized among nations for callous disregard of the rights and views of other peoples. Claims for torture and maltreat-

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377. *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975) (citation omitted).

ment by increasing numbers of private U.S. and alien contractors—at Abu Ghraib, at Guantanamo Bay, and at immigration facilities in the United States—are heartland ATS claims, regardless of whether the tortfeasors are U.S. citizens, alien contractors, or corporations. Lohengrin may in the end prove to be a transient dream, but Elsa need not herself expire, for she may yet recover a more familiar, if less worldly, champion in her own brother Gottfried.