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## The Alien Tort Statute and the Law of Nations

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## ARTICLES

### **The Alien Tort Statute and the Law of Nations**

*Anthony J. Bellia Jr<sup>†</sup> & Bradford R. Clark<sup>††</sup>*

*Courts and scholars have struggled to identify the original meaning of the Alien Tort Statute (ATS). As enacted in 1789, the ATS provided “[t]hat the district courts . . . shall . . . have cognizance . . . 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.” The statute was rarely invoked for almost two centuries. In the 1980s, lower federal courts began reading the statute expansively to allow foreign citizens to sue other foreign citizens for all violations of modern customary international law that occurred outside the United States. In 2004, the Supreme Court took a more restrictive approach. Seeking to implement the views of the First Congress, the Court determined that Congress wished to grant federal courts jurisdiction only over a narrow category of alien claims “corresponding to Blackstone’s three primary [criminal] offenses [against the law of nations]: violation of safe conducts, infringement of the rights of ambassadors, and piracy.” In this Article, we argue that neither the broader approach initially endorsed by*

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*lower federal courts nor the more restrictive approach subsequently adopted by the Supreme Court fully captures the original meaning and purpose of the ATS. In 1789, the United States was a weak nation seeking to avoid conflict with other nations. Every nation had a duty to redress certain violations of the law of nations committed by its citizens or subjects against other nations or their citizens—from the most serious offenses (such as those against ambassadors) to more commonplace offenses (such as violence against private foreign citizens). If a nation failed to redress such violations, then it became responsible and gave the other nation just cause for war. In the aftermath of the Revolutionary War, Congress could not rely upon states to redress injuries suffered by aliens (especially British subjects) at the hands of Americans. Accordingly, the First Congress enacted the ATS as one of several civil and criminal provisions designed to redress law of nations violations committed by United States citizens. The ATS authorized federal court jurisdiction over claims by foreign citizens against United States citizens for intentional torts to person or personal property. At the time, both the commission of—and the failure to redress—such “torts” violated “the law of nations.” The statute thus employed these terms to create a self-executing means for the United States to avoid military reprisals for the misconduct of its citizens. Neither the ATS nor Article III, however, authorized federal court jurisdiction over tort claims between aliens. Indeed, federal court adjudication of at least one subset of such claims—alien–alien claims for acts occurring in another nation’s territory—would have contradicted the statute’s purpose by putting the United States at risk of foreign conflict. Despite suggestions that the true import of the ATS may never be recovered, the original meaning of the statute appears relatively clear in historical context: the ATS limited federal court jurisdiction to suits by aliens against United States citizens but broadly encompassed any intentional tort to an alien’s person or personal property.*

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## INTRODUCTION

Although courts and commentators have offered a wide range of theories regarding the Alien Tort Statute<sup>1</sup> (ATS), the original meaning of the statute has remained elusive. As enacted in 1789, the ATS provided that “the district courts . . . shall [ ] 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>2</sup> The statute was rarely invoked for almost two centuries. Courts and commentators have struggled to recover the original meaning of the ATS and to apply the statute in light of changed circumstances, particularly changes in the scope and content of customary international law. The statute identifies the plaintiff as an alien, but does not specify the nationality of the defendant. Nor does the statute expound the meaning of “a tort only in violation of the law of nations.”<sup>3</sup> In 1980, lower federal courts began the modern practice of reading the ATS expansively to allow foreign citizens to sue other foreign citizens for violations of modern customary international law that occurred outside the United States.<sup>4</sup> In *Sosa v Alvarez-Machain*,<sup>5</sup> the Supreme Court took a more restrictive approach. Without expressly addressing the propriety of the party alignment, the Court rejected a claim by a Mexican citizen suing another Mexican citizen as outside the scope of the ATS.<sup>6</sup> Specifically, the Court concluded that Jose Francisco Sosa’s claim for arbitrary detention did not constitute a

<sup>1</sup> Judiciary Act of 1789 § 9, 1 Stat 73, 76–77, codified as amended at 28 USC § 1350.

<sup>2</sup> Judiciary Act of 1789 § 9, 1 Stat at 76–77.

<sup>3</sup> Judiciary Act of 1789 § 9, 1 Stat at 77.

<sup>4</sup> See, for example, *Filartiga v Pena-Irala*, 630 F2d 876, 878 (2d Cir 1980).

<sup>5</sup> 542 US 692 (2004).

<sup>6</sup> *Id* at 697.

tort in violation of the law of nations within the meaning of the statute. Although the Court interpreted the statute to leave the door “open to a narrow class of international norms [existing] today,”<sup>7</sup> it stressed the need for “judicial caution when considering the kinds of individual claims that might implement the jurisdiction conferred by the early statute.”<sup>8</sup> According to the Court, the ATS should be interpreted in accordance with the views of the First Congress. Under this approach, “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 [the ATS] was enacted.”<sup>9</sup>

Neither the broader approach initially endorsed by lower federal courts nor the more restrictive approach subsequently adopted by *Sosa* fully captures the original meaning and purpose of the ATS. The ATS, understood in historical context, was meant to cover a narrower set of party alignments than those allowed by lower federal courts but a broader range of torts than those identified in *Sosa*. Read in light of Article III, the common law forms of action applicable to intentional torts against aliens, and the background law of nations principles that informed the statute, the ATS restricted suits to those against US citizens but allowed aliens to sue for any intentional tort involving force against their person or personal property. At the time, only such “torts” committed by US citizens against aliens would have been understood to violate “the law of nations.” Despite suggestions that the true import of the ATS may never be recovered, the legal and historical background of the statute suggests that its original meaning has been hiding in plain sight.

In 1789, every nation had a duty to redress certain violations of the law of nations committed by its citizens or subjects against other nations or their citizens.<sup>10</sup> Such violations included interfering with the rights of ambassadors, violating safe conducts, impairing neutral use of the high seas, and committing intentional torts against the citizens of another nation. If a nation failed to redress such violations, then it became responsible to the other nation under the law of nations and

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<sup>7</sup> Id at 729.

<sup>8</sup> Id at 725–28.

<sup>9</sup> *Sosa*, 542 US at 732. According to the Court, these paradigms consisted of “torts corresponding to Blackstone’s three primary offenses [against the law of nations]: violation of safe conducts, infringement of the rights of ambassadors, and piracy.” Id at 724. See William Blackstone, 4 *Commentaries on the Laws of England* 68 (Chicago 1979).

<sup>10</sup> We use the term “citizens” in this Article to refer to citizens of the United States or a US state and to citizens or subjects of another nation.

gave the other nation just cause for war. The First Congress was undoubtedly aware of these principles and enacted several statutory provisions—including the ATS—in order to comply with the United States’ obligations under the law of nations to redress violations by its citizens. This context helps to illuminate the original meaning and purpose of the ATS.

In 1789, the United States was a weak nation seeking to avoid conflict with foreign nations. The Constitution was designed to enhance the United States’ ability to comply with its various obligations under the law of nations—and thus prevent conflict with other nations. For example, Article I gave Congress power to define and punish offenses against the law of nations.<sup>11</sup> The First Congress exercised this power to enact important federal criminal prohibitions designed to deter and punish certain violations of the law of nations, including violations of the rights of ambassadors and violations of safe conducts.<sup>12</sup> In addition, Article III authorized federal court jurisdiction over a variety of civil cases implicating the law of nations and US foreign relations, including admiralty disputes, cases affecting ambassadors, and controversies between foreign citizens and citizens of the United States.<sup>13</sup> The Judiciary Act of 1789 implemented this jurisdiction by authorizing federal courts to hear suits by ambassadors, admiralty and maritime disputes, and controversies between aliens and US citizens.<sup>14</sup> Within the last category, the Act gave federal circuit courts general foreign diversity jurisdiction (with a \$500 amount in controversy requirement)<sup>15</sup> and—by virtue of the ATS—federal district courts jurisdiction over alien claims “for a tort only in violation of the law of nations or a treaty of the United States” (with no amount in controversy requirement).<sup>16</sup> Without the ATS, the amount in controversy requirement would have prevented federal courts from hearing most claims for intentional torts committed by US citizens against aliens. Such torts, however, constituted violations of the law of nations that the United States had an obligation to redress. Thus, by enacting the ATS, the First Congress enabled the United States to remedy an important category of law of nations violations committed by US citizens against aliens.

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<sup>11</sup> US Const Art I, § 8, cl 10.

<sup>12</sup> See notes 333–36 and accompanying text.

<sup>13</sup> Article III refers to controversies between “Citizens” of “a State” and “foreign . . . Citizens or Subjects.” US Const Art III, § 2. Accordingly, we use the phrases “citizens of the United States” or “US citizens” in this Article to refer to citizens of US states.

<sup>14</sup> Judiciary Act of 1789 §§ 9, 11, 1 Stat at 76–79.

<sup>15</sup> Judiciary Act of 1789 § 11, 1 Stat at 78–79.

<sup>16</sup> Judiciary Act of 1789 § 9, 1 Stat at 77.

Although the practice has been largely forgotten today, a nation became responsible under the law of nations for injuries that its citizens inflicted on aliens if it failed to provide an adequate means of redress—by punishing the wrongdoer criminally, extraditing the offender to the aggrieved nation, or imposing civil liability. Failure to redress such injuries in one of these ways gave the alien’s home nation just cause for war.<sup>17</sup> In the aftermath of the Revolutionary War, members of Congress did not believe that they could rely upon states to redress injuries suffered by British subjects at the hands of Americans. To ensure that the United States would not violate the law of nations, the First Congress enacted both criminal and civil statutes to redress harms inflicted by US citizens against aliens.<sup>18</sup> Because early federal criminal jurisdiction did not clearly encompass all such harms, the ATS operated as a fail-safe provision. The ATS gave British subjects (and all other aliens) a right to sue Americans in federal court for torts that, if not redressed through a civil or criminal action, would render the United States responsible for its citizens’ violations of the law of nations.<sup>19</sup> By authorizing civil redress under the ATS, the United States simultaneously signaled to other nations its intent to comply fully with its obligations under the law of nations and established a self-executing means of avoiding military reprisals for the misconduct of its citizens.

The First Congress did not have the same incentives to authorize the adjudication of tort suits between aliens in federal court. In this regard, it is useful to analyze suits between aliens based on where the tort occurred. First, consider violence between aliens that took place in the United States. It is not clear that the United States had the same *obligation* under the law of nations to redress such violence as it did to redress violence by US citizens. Nor is it clear that such alien–alien violence occurred with any frequency in the 1780s. If suits of this kind arose, moreover, state courts were available to hear them. There does not appear to be any evidence that states failed to adjudicate such suits fairly (unlike suits by aliens against US citizens). Accordingly, even assuming that the United States had an obligation to redress

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<sup>17</sup> At the time, the violation of certain rights—known as “perfect rights”—gave the aggrieved nation just cause for war. For a discussion of the origin and importance of perfect rights under the law of nations and the US Constitution, see Anthony J. Bellia Jr and Bradford R. Clark, *The Federal Common Law of Nations*, 109 *Colum L Rev* 1, 16–19 (2009).

<sup>18</sup> See notes 315–68 and accompanying text.

<sup>19</sup> See Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 *Va J Intl L* 587, 630–31 (2002) (describing how the ATS was “consistent with the law of international responsibility in the late 1700s”); Michael G. Collins, *The Diversity Theory of the Alien Tort Statute*, 42 *Va J Intl L* 649, 652 (2002) (describing a sovereign’s obligation to remedy citizens’ law of nations violations).

violence in its territory by one alien against another, redress in state court would have satisfied that obligation. Absent evidence that such claims arose frequently or that state courts failed to adjudicate them fairly, Congress had no obvious reason to assign them to federal courts. Had it wished to do so, moreover, it could not have relied on foreign diversity jurisdiction. Rather, it would have had to employ “arising under” jurisdiction by creating a federal cause of action.

Second, consider violence between aliens that occurred in foreign nations (a routine scenario in modern ATS cases). The law of nations imposed no obligation on the United States to provide aliens with a forum for adjudicating such claims against one another. Thus, failure to adjudicate such claims would not have subjected the United States to reprisals by foreign nations. Indeed, at the time the ATS was adopted, adjudication of such claims arguably would have infringed upon the territorial sovereignty of foreign nations under the law of nations.<sup>20</sup> Under these circumstances, the First Congress had no reason to authorize—and good reason to exclude—suits between aliens in federal court for acts occurring in other nations.<sup>21</sup>

The limited nature of federal judicial power under the Constitution also suggests that the ATS was meant to encompass only claims by aliens against US citizens. Article III extends the judicial power to only nine categories of cases and controversies. The first three categories are defined by reference to the subject matter of the case. The last six categories are defined by reference to the identities of the parties. Suits by aliens against US citizens fall within diversity jurisdiction over controversies “between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.”<sup>22</sup> By contrast, suits by aliens against other aliens do not fall within Article III’s diversity jurisdiction. Thus, to uphold jurisdiction over such suits (other than perhaps cases affecting ambassadors and cases of admiralty and

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<sup>20</sup> Historically, the law of nations recognized that “every nation possesses an exclusive sovereignty and jurisdiction within its own territory.” Joseph Story, *Commentaries on the Conflict of Laws, Foreign and Domestic, in Regard to Contracts, Rights, and Remedies, and Especially in Regard to Marriages, Divorces, Wills, Successions, and Judgments* 19 (Hilliard, Gray 1834). See also *id.* at 21.

<sup>21</sup> Perhaps for this reason, courts have been reluctant to apply federal statutes extraterritorially absent a clear congressional intent to do so. See, for example, *Morrison v National Australia Bank Ltd*, 130 S Ct 2869, 2878 (2010) (“When a statute gives no clear indication of an extraterritorial application, it has none.”); *EEOC v Arabian American Oil Co*, 499 US 244, 248 (1991) (“It is a longstanding principle of American law ‘that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.’”), quoting *Foley Bros, Inc v Filardo*, 336 US 281, 285 (1949).

<sup>22</sup> US Const Art III, § 2, cl 1.



maritime jurisdiction<sup>23</sup>), one would have to conclude that they constitute cases “arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.”<sup>24</sup> At the time the ATS was enacted, however, the law of nations was understood to be general law. After the Constitution was ratified and the ATS enacted, judges and other public officials sharply debated whether federal courts had power in the exercise of their Article III jurisdiction to adopt and apply a municipal common law of the United States (including those parts of the law of nations incorporated by the common law). Ultimately, this question was resolved in 1812 when the Supreme Court decided that the constitutional structure precludes federal courts from unilaterally recognizing and applying common law crimes on behalf of the United States.<sup>25</sup>

For these reasons, the First Congress would not have understood an alien claim “for a tort only in violation of the law of nations” to arise under the Constitution, Laws, and Treaties of the United States.<sup>26</sup> Moreover, although scholars continue to debate aspects of *Sosa*’s precise holding, the Supreme Court affirmed, as a matter of historical understanding, that “the ATS is a jurisdictional statute creating no new causes of action.”<sup>27</sup> On this understanding, the statute merely gave aliens a federal forum to adjudicate common law claims for law of nations violations that happened to fall within Article III jurisdiction, such as controversies between a citizen or subject of a foreign state and a citizen of an American state. The ATS did not create an independent cause of action arising under federal law.<sup>28</sup>

These considerations suggest that the ATS was originally enacted to enable the United States to remedy a specific, but important, law of nations violation—the intentional infliction of harm by a US citizen upon the person or personal property of an alien. In the parlance of the time, such harms constituted “torts” “in violation of the law of nations.” The statute’s inclusion of the term “only” following “tort”

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<sup>23</sup> Article III extends the federal judicial power “to all Cases affecting Ambassadors, other public ministers and Consuls,” and “to all Cases of admiralty and maritime Jurisdiction.” US Const Art III, § 2, cl 1.

<sup>24</sup> US Const Art III, § 2, cl 1. Of course, claims by aliens arising under a treaty would fall within federal question jurisdiction. Our focus is on claims by aliens arising under the law of nations.

<sup>25</sup> See notes 330–31 and accompanying text.

<sup>26</sup> See Bradley, 42 Va J Intl L at 597–616 (cited in note 19) (arguing that the First Congress did not understand the law of nations to be part of the “Laws of the United States” under Article III).

<sup>27</sup> 542 US at 724.

<sup>28</sup> Although ATS suits for torts in violation of “a treaty of the United States” may, in theory, have arisen under such treaty, it is difficult to conceive of an alien–alien tort claim that would have violated a US treaty.

was probably meant to emphasize a subcategory of all potential torts—that is, only those common law torts that violated the law of nations, in context a class limited to intentional torts committed with force by US citizens against aliens or their personal property.

Understanding the ATS as one of the means employed by the First Congress to fulfill the United States' duties under the law of nations is consistent with the Constitution's allocation of powers to conduct war and foreign relations. Historically, this allocation of powers has led the Supreme Court to read federal statutes to avoid conflict with foreign nations absent a clear indication from the political branches that they intended to initiate such conflict. The Supreme Court famously endorsed this approach in *Murray v Schooner Charming Betsy*,<sup>29</sup> and the same constitutional concerns animate the Court's adherence to traditional sovereignty-respecting rules like the act of state doctrine.<sup>30</sup> By understanding the ATS as a means of satisfying the United States' obligations under the law of nations, courts would avoid usurping the constitutional prerogatives of the political branches.<sup>31</sup>

Courts and scholars have advanced various claims about the ATS, but none has fully recovered the original meaning of the statute in its historical context. Some scholars have suggested that the ATS was originally understood to authorize federal court jurisdiction over all alien tort claims for law of nations violations, regardless of the citizenship of the parties.<sup>32</sup> These theories are too broad because they not only fail to account for the jurisdictional limitations of Article III but also contradict important principles of the law of nations, which the ATS was meant to uphold. Others have argued that the ATS was intended to give federal courts jurisdiction over only particular kinds of paradigmatic law of nations violations—for example, violations of safe conducts<sup>33</sup> or certain kinds

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<sup>29</sup> 6 US (2 Cranch) 64, 118 (1804).

<sup>30</sup> See Bellia and Clark, 109 Colum L Rev at 84–90 (cited in note 17). The act of state doctrine dictates that “the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory.” *Banco Nacional de Cuba v Sabbatino*, 376 US 398, 416 (1964), quoting *Underhill v Hernandez*, 168 US 250, 252 (1897).

<sup>31</sup> See David H. Moore, *Medellín, the Alien Tort Statute, and the Domestic Status of International Law*, 50 Va J Intl L 485, 498 (2010) (arguing that *Medellín v Texas*, 552 US 491 (2008), reinforces *Sosa*'s separation of powers approach to reading the ATS).

<sup>32</sup> See, for example, William S. Dodge, *The Constitutionality of the Alien Tort Statute: Some Observations on Text and Context*, 42 Va J Intl L 687, 691–96 (2002); William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the “Originalists,”* 19 Hastings Intl & Comp L Rev 221, 252–53 (1996); Anthony D'Amato, *The Alien Tort Statute and the Founding of the Constitution*, 82 Am J Intl L 62, 65 (1988).

<sup>33</sup> Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 Colum L Rev 830, 871 (2006).

of admiralty torts.<sup>34</sup> Similarly, the Supreme Court itself has concluded that the ATS encompasses only a narrow class of international torts closely analogous to the three international crimes recognized by Blackstone.<sup>35</sup> These theories are too narrow because they do not include certain basic tort claims by aliens that members of the Founding generation would have understood the ATS to encompass in order to satisfy the United States' basic obligations under the law of nations.<sup>36</sup> Still other scholars have contended that history reveals interpretive presumptions that courts should apply to the ATS, including a presumption that courts should interpret the ATS expansively in favor of alien claims because the Founders aspired to give the law of nations broad effect in the United States.<sup>37</sup> These theories, however, are anachronistic. Had courts interpreted the ATS too broadly in 1789, they could have violated distinct principles of the law of nations recognizing the territorial sovereignty of independent states.

This Article offers an interpretation of the ATS informed by well-known principles of the law of nations at the time of its adoption, by available common law forms of action, and by the limits of Article III. In 1789, the most natural way to read the ATS, given its full legal and historical context, was as a grant of jurisdiction to federal district courts to hear common law tort claims by aliens against United States citizens for intentional injuries to person or property. Such harms violated the law of nations and, if not redressed by the perpetrator's nation, gave the victim's nation just cause for war. In light of these background principles, the ATS is best understood as a self-executing, fail-safe measure that enabled the United States to avoid responsibility for law of nations violations by permitting aliens to sue US citizens for intentional torts in federal court.

This Article proceeds as follows. Part I explains present-day confusion surrounding the scope and meaning of the ATS. First, it

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<sup>34</sup> Joseph Modeste Sweeney, *A Tort Only in Violation of the Law of Nations*, 18 *Hastings Intl & Comp L Rev* 445, 451 (1995).

<sup>35</sup> *Sosa*, 542 US at 724–25 (suggesting that Congress had in mind Blackstone's three primary offenses when drafting the ATS).

<sup>36</sup> For instance, John Rogers has argued that the ATS gave jurisdiction for a tort that a US citizen committed against an alien in the United States for which, if unredressed, the United States would bear responsibility to another nation. John M. Rogers, *The Alien Tort Statute and How Individuals "Violate" International Law*, 21 *Vand J Transnatl L* 47, 51 (1988). Like others, however, Professor Rogers does not account for the fact that in 1789 the United States would have borne responsibility for any unredressed tort committed by a United States citizen against a foreign citizen, whether committed in the United States or abroad.

<sup>37</sup> See William R. Casto, *The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 *Conn L Rev* 467, 489–501 (1986); Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 *Am J Intl L* 461, 477–80 (1989).

describes modern judicial applications of the ATS, culminating in *Sosa*. Further, it observes how, after *Sosa*, courts and scholars have continued to struggle to understand the proper scope of the ATS. Finally, Part I explains the methodology by which this Article analyzes the ATS. The *Sosa* Court attempted to discern the meaning of the ATS as it would have been understood by the First Congress in 1789. Most scholars who have analyzed the meaning of the ATS have considered historical understandings determinative of, or at least relevant to, how courts should interpret it today. Following this line of inquiry, this Article examines what, in 1789, was the most reasonable understanding of the text of the ATS in light of the full legal and political context surrounding its adoption.

Part II explains the background principles of the common law and the law of nations against which Congress enacted the ATS and related statutory provisions. The ATS gave federal district courts jurisdiction of “all causes where an alien sues for a tort only in violation of the law of nations or a treaty.”<sup>38</sup> Well-known principles of the law of nations established when a tort by a citizen against an alien would be imputed to the citizen’s sovereign. If a citizen of one nation intentionally inflicted an injury upon the person or personal property of a citizen of a nation at peace with the first, then the offender violated the law of nations and the offender’s nation became responsible for the violation if it failed to redress the injury. The offender’s nation could redress the injury by imposing a criminal punishment on the offender, requiring the offender to make civil redress, or, if appropriate, extraditing the offender to the offended nation. Writers on the law of nations—well known to members of the First Congress—recognized that any of these mechanisms was an acceptable way for the perpetrator’s nation to redress the injury and to avoid responsibility under the law of nations. In certain instances, a civil remedy was the only available means of redress. The law of nations did not require extradition, and a nation might be unable or unwilling to extradite an offender for a variety of reasons. Moreover, when a nation’s citizen inflicted an injury within another nation’s territorial jurisdiction, the law of nations itself forbade criminal prosecution, leaving civil remedies as the only means of redress.

In light of this legal framework, Part III describes the political context that gave rise to the ATS. Members of the Founding generation were genuinely concerned that violence by US citizens against aliens would violate the law of nations and lead the United States into a war that it might not survive. During the Confederation

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<sup>38</sup> Judiciary Act of 1789 § 9, 1 Stat at 77.

era, British officials linked the treatment of loyalists in the United States to Britain's refusal to vacate Northwest forts after the Revolution. The United States could not rely on states to redress violence against British subjects, as the states had proven themselves unwilling to do so. Accordingly, the First Congress enacted the ATS as part of a broader framework to redress offenses against other nations by US citizens. Although criminal prosecution, extradition, or civil redress in state court would have satisfied the United States' obligations under the law of nations, these remedies were often unavailable or unreliable. A tort suit under the ATS provided a fail-safe mechanism that allowed aliens to obtain relief from US citizens in federal court.

Part IV explains the meaning of the ATS within the larger context of the first Judiciary Act and Article III. Members of the Founding generation were aware of the mechanisms by which nations avoided responsibility under the law of nations for the acts of their citizens. The First Congress enacted the ATS as part of a larger effort to redress law of nations violations, modeled on the role of English courts in upholding the law of nations. The Judiciary Act of 1789 enabled federal courts to redress offenses that US citizens might commit against ambassadors or against other nations on the high seas—serious offenses against other nations. It also gave federal circuit courts criminal jurisdiction over offenses against the United States. Nonetheless, without more, the Act had gaps and uncertain application. The Act did not specifically define criminal offenses against the United States. (That would come later in the Crimes Act of 1790<sup>39</sup> and subsequent statutes.) In addition, in the absence of the ATS, federal courts would have been limited to hearing suits between aliens and US citizens when the amount in controversy exceeded \$500. Finally, it was unclear in 1789 how the political branches would proceed when other nations requested extradition of US citizens. Accordingly, with states unwilling or unable to redress offenses against other nations, the United States had no reliable mechanism in 1789 to redress injuries that US citizens inflicted against aliens—a serious and well-known problem under the Articles of Confederation. The ATS provided just such a mechanism.

Having yet to define statutory crimes or establish extradition proceedings, the First Congress ensured through the ATS that at least one means would always be available for the United States to avoid responsibility under the law of nations for acts of violence committed

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<sup>39</sup> Act of Apr 30, 1790 ("Crimes Act of 1790"), 1 Stat 112, codified as amended in various sections of Title 18.

by its citizens against aliens. The First Congress gave federal courts jurisdiction over such alien claims in the ATS (§ 9 of the Judiciary Act) and authorized federal courts to provide appropriate legal remedies both in § 14 of the Judiciary Act and in the Process Acts of 1789<sup>40</sup> and 1792.<sup>41</sup> The mere availability of these remedies prevented torts against aliens from being attributed to the United States under the law of nations because it placed the burden upon the injured alien to seek redress in federal court. In other words, the mechanism was self-executing—it did not require the United States affirmatively to marshal resources for prosecuting or extraditing an offender. In hindsight, it may not be surprising that aliens rarely, if ever, invoked ATS jurisdiction throughout most of US history. There is evidence that, over time, state court discrimination against aliens dissipated, many loyalists assimilated into the US population, and state courts became convenient venues for tort litigation. In practice, the ATS remained a little-used—but symbolically important—backstop, authorizing redress of law of nations violations whenever state courts, federal criminal prosecutions, or extradition proceedings failed to provide it.

The primary goal of this Article is to identify what the ATS meant at the time of its enactment. The implications of that meaning for present-day applications of the ATS present problems of translation and interpretation that are beyond the scope of this Article. Yet because the Supreme Court in *Sosa* attempted to apply the original meaning of the ATS to modern circumstances, Part V revisits the Court’s historical analysis in light of the meaning we have uncovered. In particular, the *Sosa* Court made several discrete determinations about the historical meaning of the ATS, ultimately instructing courts to allow only claims “defined with a specificity comparable to the features of the 18th-century paradigms.”<sup>42</sup> We examine each of these determinations, explaining which ones fairly reflect the original meaning of the ATS and which ones run counter to such meaning. Additionally, we identify other questions regarding the original meaning of the ATS that *Sosa* did not resolve but that remain important for present-day ATS litigation. Although this Part does not purport to resolve all outstanding questions under the ATS, it highlights the importance of the ATS’s original legal and political context to any attempt to understand the statute today.<sup>43</sup>

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<sup>40</sup> Act of Sept 29, 1789 (“Process Act of 1789”), 1 Stat 93.

<sup>41</sup> Act of May 8, 1792 (“Process Act of 1792”), 1 Stat 275.

<sup>42</sup> *Sosa*, 542 US at 725.

<sup>43</sup> This Article does not address Congress’s power to create federal causes of action for alien plaintiffs in US courts. We assume that Congress has significant power to create federal causes of action in favor of aliens in the exercise of its enumerated powers. This Article

## I. MODERN CONFUSION REGARDING THE ALIEN TORT STATUTE

Courts had few occasions to interpret and apply the ATS for most of US history. In the early years of the Republic, aliens rarely brought cases in federal district court seeking a remedy for torts suffered at the hands of Americans. Had such suits been brought, they would have fallen within the Constitution's grant of jurisdiction over controversies between US citizens and foreign citizens or subjects.<sup>44</sup> Beginning in 1980, however, lower federal courts began interpreting the ATS to permit aliens to sue other aliens for actions taken outside the United States in violation of modern norms of customary international law. They justified this use of the statute by relying on the assumption that the law of nations "has always been part of the federal common law,"<sup>45</sup> and that suits between aliens under the ATS therefore arise under federal law for purposes of Article III.<sup>46</sup>

In 2004, the Supreme Court interpreted the ATS for the first time in *Sosa*. The Court held that the ATS was solely a jurisdictional statute and did not create a federal cause of action. At the same time, the Court assumed that the statute permitted aliens to bring claims like those that the First Congress had in mind when it enacted the ATS. Although the opinion is not a model of clarity,<sup>47</sup> the Court repeatedly emphasized the importance of historical context to a proper understanding of the ATS. We agree with the Court's emphasis on historical context, but believe that the Court did not fully recover the relevant context.

### A. Early Invocation of the ATS

Prior to the recent resurgence of the ATS, the only significant invocation of the statute in federal court occurred in 1795. In *Bolchos v Darrel*,<sup>48</sup> a French privateer brought an enemy Spanish vessel that it had captured on the high seas into port in South Carolina.<sup>49</sup> The ship had on board slaves that a Spanish subject had mortgaged to Savage, a

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addresses only the question of what jurisdiction Congress in fact conferred on federal courts in 1789 through the ATS.

<sup>44</sup> US Const Art III, § 2, cl 1 ("The judicial Power shall extend to all Cases . . . between a State, or the Citizens thereof, and foreign States, Citizens, or Subjects.").

<sup>45</sup> *Filartiga v Pena-Irala*, 630 F2d 876, 885 (2d Cir 1980).

<sup>46</sup> US Const Art III, § 2, cl 1 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.").

<sup>47</sup> See Ernest A. Young, *Sosa and the Retail Incorporation of International Law*, 120 Harv L Rev F 28, 28 (2007) (observing that the *Sosa* opinion "has become something of a Rorschach blot").

<sup>48</sup> 3 F Cases 810 (D SC 1795).

<sup>49</sup> *Id* at 810.

British subject.<sup>50</sup> Darrel, apparently a US citizen, seized the slaves on behalf of Savage. *Bolchos* was a suit in admiralty brought against Darrel by a French privateer who claimed that the ship, including its cargo of slaves, was a lawful prize. District Judge Thomas Bee “was at first doubtful whether [the district court] had jurisdiction, Darrel’s seizure, under the mortgage, having been made on land.”<sup>51</sup> He concluded, however, that “as the original cause arose at sea, every thing dependent on it is triable in the admiralty.”<sup>52</sup> “Besides,” he remarked, “as the 9th section of the judiciary act of congress gives this court concurrent jurisdiction with the state courts and circuit court of the United States where an alien sues for a tort, in violation of the law of nations, or a treaty of the United States, I dismiss all doubt upon this point.”<sup>53</sup> In other words, the court concluded that it had two alternative bases for jurisdiction: admiralty or the ATS. The predicate tort under the ATS, as Professor Thomas Lee has noted, was “Darrel’s seizure of the slaves on American soil.”<sup>54</sup> To the extent the ATS conferred jurisdiction, federal courts had authority to provide a French citizen with a remedy for a US citizen’s wrongful conduct aimed at the plaintiff’s claimed property. Such jurisdiction would have prevented France from imputing Darrel’s tort to the United States under the law of nations. Although at least one early attorney general had occasion to interpret the ATS,<sup>55</sup> *Bolchos* contains the only significant judicial discussion of the statute in the early Republic.<sup>56</sup>

#### B. *Filartiga* and the Modern Expansion of the ATS

Starting in 1980, some lower courts began interpreting the ATS to permit aliens to sue other aliens for violations of international law that occurred outside the United States. In the first such case, *Filartiga v Pena-Irala*,<sup>57</sup> the Second Circuit allowed citizens of Paraguay to sue another citizen of Paraguay for wrongfully causing their son’s death

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<sup>50</sup> Id.

<sup>51</sup> Id.

<sup>52</sup> *Bolchos*, 3 F Cases at 810.

<sup>53</sup> Id.

<sup>54</sup> Lee, 106 Colum L Rev at 893 (cited in note 33).

<sup>55</sup> See text accompanying notes 369–72.

<sup>56</sup> The only other reference to the ATS came in *Moxon v The Fanny*, 17 F Cases 942 (D Pa 1793). There, the British owners of a ship captured by a French vessel in US waters libeled the ship and sought restoration thereof in US district court. Although the court acknowledged that the capture was an offense against the US as a neutral power, it declined to adjudicate the dispute on the ground that the offense must be left to the executive branch. Id at 947. In dicta, the court also noted that the case did not fall within the ATS because “[i]t cannot be called a suit for a tort only, when the property, as well as damages for the supposed trespass, are sought for.” Id at 948.

<sup>57</sup> 630 F2d 876 (2d Cir 1980).



by the use of torture. The court concluded that “deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties.”<sup>58</sup> The court reasoned that if the alleged torturer is found and served with process by an alien in the United States, then the ATS provides federal jurisdiction because the alien is suing for a tort in violation of the law of nations.<sup>59</sup> Without further explanation, the court held that its exercise of jurisdiction was consistent with the limits of Article III because the case arose under “the law of nations, which has always been part of the federal common law.”<sup>60</sup> The court recognized that its “reasoning might also sustain jurisdiction under the general federal question provision, 28 U.S.C. § 1331,” but indicated that it preferred to rest its decision on the ATS given the close coincidence between the subject matter of the statute and “the jurisdictional facts presented in this case.”<sup>61</sup>

Although several circuits have followed *Filartiga*’s lead,<sup>62</sup> the DC Circuit rejected the Second Circuit’s approach in *Tel-Oren v Libyan Arab Republic*.<sup>63</sup> Israeli citizens sued several Palestinian organizations, alleging that they were responsible for an armed attack on a civilian bus in Israel that killed and injured numerous civilians and thus amounted to tortious acts in violation of the law of nations.<sup>64</sup> The DC Circuit affirmed the district court’s dismissal of the complaint in a brief per curiam opinion, and all three judges wrote separate concurrences. Judge Harry Edwards indicated that the ATS allowed federal courts to hear some cases alleging violations of established international law—such as genocide, slavery, and systematic racial discrimination—but concluded that terrorism against civilians was not sufficient to support a claim under the statute.<sup>65</sup> The other judges on the panel took an even more restrictive approach. Judge Robert Bork concluded that the ATS is solely a jurisdictional statute that does not itself create a private cause of action.<sup>66</sup> In his view, separation of powers precludes federal courts from inferring a cause of action from

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<sup>58</sup> Id at 878.

<sup>59</sup> See id at 878–79.

<sup>60</sup> Id at 885–86.

<sup>61</sup> *Filartiga*, 630 F2d at 887 n 22 (attributing the “paucity of suits successfully maintained under [the Alien Tort Statute]” to the difficulty of establishing a violation of the law of nations, rather than a controversy over proper jurisdiction).

<sup>62</sup> See, for example, *Abebe-Jira v Negewo*, 72 F3d 844, 848 (11th Cir 1996); *In re Estate of Ferdinand Marcos*, 25 F3d 1467, 1475 (9th Cir 1994).

<sup>63</sup> 726 F2d 774 (DC Cir 1984) (per curiam).

<sup>64</sup> Id at 775.

<sup>65</sup> Id at 781, 796 (Edwards concurring).

<sup>66</sup> Id at 811 (Bork concurring).

the ATS or creating a federal common law cause of action for violations of customary international law. He reasoned that recognition of a cause of action in this context should be left to the political branches because the decision “would necessarily affect the foreign policy interests of the nation.”<sup>67</sup> Judge Roger Robb concurred on the ground that the dispute presented a nonjusticiable political question. He thought that courts lacked judicially manageable standards for determining the international legal status of terrorism and that they should leave such politically sensitive issues to the executive branch for diplomatic resolution.<sup>68</sup>

Courts and commentators continued to debate the meaning of the ATS prior to the Supreme Court’s decision in *Sosa*. The Second Circuit took an expansive approach to the statute and allowed aliens to sue other aliens for a variety of claims.<sup>69</sup> The DC Circuit, by contrast, took a more restrictive approach.<sup>70</sup> Scholars were similarly divided. Some maintained that the ATS created a federal cause of action—and hence triggered federal question jurisdiction—because the law of nations was a form of federal common law.<sup>71</sup> Others argued that the ATS was a purely jurisdictional statute that created no federal cause of action.<sup>72</sup> This uncertainty led Congress to enact the Torture Victim Protection Act of 1991<sup>73</sup> (TVPA). The Act gives individuals (including aliens) an express federal statutory cause of action against other individuals (including aliens) for acts of torture and extrajudicial killing taken under color of law of any foreign nation.<sup>74</sup> But the Act did not amend—or resolve the uncertainty surrounding—the ATS. Accordingly, the lower courts continued to struggle to interpret and apply the ATS.<sup>75</sup>

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<sup>67</sup> *Tel-Oren*, 726 F2d at 801 (Bork concurring).

<sup>68</sup> *Id.* at 826–27 (Robb concurring).

<sup>69</sup> See *Kadic v Karadzic*, 70 F3d 232, 236 (2d Cir 1995) (holding that an individual can be sued in his private capacity for “genocide, war crimes, and crimes against humanity”).

<sup>70</sup> See *Al Odah v United States*, 321 F3d 1134, 1144–45 (DC Cir 2003) (denying jurisdiction to foreign detainees).

<sup>71</sup> See Dodge, 42 Va J Intl L at 710–11 (cited in note 32); Ryan Goodman and Derek P. Jinks, *Filartiga’s Firm Footing: International Human Rights and Federal Common Law*, 66 Fordham L Rev 463, 480 (1997).

<sup>72</sup> See Curtis A. Bradley, Jack L. Goldsmith, and David H. Moore, *Sosa, Customary International Law, and the Continuing Relevance of Erie*, 120 Harv L Rev 869, 887–88 (2007); Bradley, 42 Va J Intl L at 597–98, 616 (cited in note 19).

<sup>73</sup> Pub L No 102-256, 106 Stat 73 (1992).

<sup>74</sup> TVPA § 2, 106 Stat at 73.

<sup>75</sup> Even after *Sosa*, lower courts continue to struggle with the ATS. In particular, lower courts have struggled to decide whether the ATS applies to corporate defendants or imposes aiding and abetting liability. See, for example, *Kiobel v Royal Dutch Petroleum Co*, 621 F3d 111, 145 (2d Cir 2010) (holding that the ATS does not create jurisdiction over suits against corporate defendants because corporate liability is not a universal norm of international law); *Lizarbe v*

### C. *Sosa* and the ATS

The Supreme Court addressed the ATS for the first time in 2004. *Sosa* arose out of the kidnapping of Humberto Alvarez-Machain in Mexico in order to force him to stand trial in the United States for the murder of a Drug Enforcement Agency (DEA) agent. The agent was captured in Mexico by members of a drug cartel, tortured for several days, and then murdered. The United States alleged that Alvarez, a Mexican doctor, treated him in order to prolong his torture and interrogation.<sup>76</sup> A federal grand jury indicted Alvarez for murder, but Mexican authorities refused to extradite the defendant to the United States. The DEA approved a plan to hire Mexican nationals to capture Alvarez in Mexico and bring him to the United States for trial. Jose Francisco Sosa and several others abducted Alvarez from his home in Mexico and transported him to Texas, where he was taken into US custody to stand trial.<sup>77</sup> At the close of the government's case, the district court granted the defendant's motion for acquittal, thereby taking the case from the jury and preventing any appeals.<sup>78</sup> The defendant returned to Mexico and filed suit in federal court under the ATS and the Federal Tort Claims Act<sup>79</sup> (FTCA) against Sosa, several other Mexican nationals, the United States, and four US DEA agents for their participation in bringing him to the United States. Before the case reached the Supreme Court, the district court awarded Alvarez \$25,000 in damages against Sosa but disposed of the ATS claims against the DEA agents and the United States by substituting the United States for the individual defendants and then dismissing the FTCA claim against the United States.<sup>80</sup> The Ninth Circuit affirmed the award under the ATS but reversed the dismissal of the FTCA claim against the United States.<sup>81</sup>

The Supreme Court reversed the Ninth Circuit on both points, leaving Alvarez without a remedy in federal court. First, it concluded that the FTCA claim against the United States fell within the statutory exception for claims arising in a foreign country.<sup>82</sup> Second, it

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*Rondon*, 642 F Supp 2d 473, 491 (D Md 2009) (“[C]ase law recognizes causes of action for aiding and abetting, conspiracy, and joint criminal enterprise under the ATS.”). See also *Presbyterian Church of Sudan v Talisman Energy, Inc.*, 244 F Supp 2d 289, 320–21 (SDNY 2003) (holding that the ATS creates a cause of action against a corporation for aiding and abetting crimes against humanity, such as genocide and ethnic cleansing).

<sup>76</sup> *Sosa*, 542 US at 697.

<sup>77</sup> *Id.* at 697–98.

<sup>78</sup> *Alvarez-Machain v United States*, 107 F3d 696, 699 (9th Cir 1996).

<sup>79</sup> 28 USC §§ 1346(b), 2671–80.

<sup>80</sup> *Alvarez-Machain v United States*, 266 F3d 1045, 1049 (9th Cir 2001).

<sup>81</sup> See *Alvarez-Machain v United States*, 331 F3d 604, 610, 620, 641 (9th Cir 2003) (en banc).

<sup>82</sup> *Sosa*, 542 US at 699.

held that the ATS did not authorize Alvarez to sue Sosa for his abduction and detention in Mexico.<sup>83</sup> In the course of deciding the case, the Court undertook an extensive analysis of the ATS. The Court began by concluding that “the ATS is a jurisdictional statute creating no new causes of action.”<sup>84</sup> The Court rejected the idea, however, that the First Congress passed the ATS “as a jurisdictional convenience to be placed on the shelf for use by a future Congress.”<sup>85</sup> Accordingly, the Court concluded that the ATS was designed to permit adjudication of a narrow class of torts in violation of the law of nations that would have been recognized within the common law of the time.<sup>86</sup> In the Court’s view, Congress enacted the jurisdictional grant “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>87</sup>

Applying this understanding to the case, the Court concluded that Alvarez’s claim for arbitrary detention fell outside the narrow range of violations contemplated by the ATS. According to the Court, the historical record suggests that the First Congress enacted the ATS simply to redress those torts corresponding to three primary criminal offenses against the law of nations under English law identified by Blackstone: “violation of safe conducts, infringement of the rights of ambassadors, and piracy.”<sup>88</sup> In the Court’s view, this meant that “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 [three] 18th-century paradigms.”<sup>89</sup> Applying this standard, the Court concluded that Alvarez’s claim based on “a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy.”<sup>90</sup>

The *Sosa* Court identified several reasons “for great caution in adapting the law of nations to private rights.”<sup>91</sup> At the same time, the Court rejected Justice Antonin Scalia’s position that the ATS permits

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<sup>83</sup> Id at 738.

<sup>84</sup> Id at 724.

<sup>85</sup> Id at 719.

<sup>86</sup> See *Sosa*, 542 US at 714, 720.

<sup>87</sup> Id at 724.

<sup>88</sup> Id.

<sup>89</sup> Id at 725.

<sup>90</sup> *Sosa*, 542 US at 738.

<sup>91</sup> Id at 725–28. See notes 454–59 and accompanying text.

no new claims for violations of modern customary international law.<sup>92</sup> As the Court put it, whereas Justice Scalia would “close the door to further independent judicial recognition of actionable international norms, other considerations persuade us that the 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.”<sup>93</sup> According to the Court, this approach prevents courts from overstepping their role vis-à-vis the political branches but fulfills the First Congress’s assumption “that federal courts could properly identify some international norms as enforceable in the exercise of § 1350 jurisdiction.”<sup>94</sup>

The Court’s opinion in *Sosa* leaves a number of important questions unanswered. The Court did not directly address the Article III basis for subject matter jurisdiction over ATS claims. The Court simply stated several times that the ATS is solely a jurisdictional statute that creates no federal cause of action.<sup>95</sup> It also denied the assertion in Justice Scalia’s concurrence that ATS claims (as contemplated by the Court) necessarily arise under federal law and are thus supported by 28 USC § 1331.<sup>96</sup> Technically, the Court did not have to address the Article III issues in *Sosa* because it held that Alvarez’s claim was outside the scope of the ATS.<sup>97</sup> As a related matter, the Court did not expressly resolve whether the ATS encompasses claims between aliens that arise in foreign nations, which Article III allows only if such claims arise under the Constitution, laws, or treaties of the United States.

Since *Sosa*, courts and scholars have continued to debate the scope and meaning of the ATS.<sup>98</sup> Lower federal courts have focused

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<sup>92</sup> See *Sosa*, 542 US at 746–47 (Scalia concurring in part and concurring in the judgment).

<sup>93</sup> *Id.* at 729 (majority).

<sup>94</sup> *Id.* at 730.

<sup>95</sup> *Id.* at 724.

<sup>96</sup> *Sosa*, 542 US at 731 & n 19.

<sup>97</sup> In addition, *Sosa* itself began as a diversity action by an alien against a US citizen (with supplemental jurisdiction over the plaintiff’s claim against a fellow alien).

<sup>98</sup> See Bradley, Goldsmith, and Moore, 120 Harv L Rev at 893–901 (cited in note 72) (stating that *Sosa* authorized courts to create some federal causes of action under the ATS but suggesting that the scope of these causes of action remains ambiguous); Beth Stephens, *Sosa v. Alvarez-Machain: “The Door Is Still Ajar” for Human Rights Litigation in U.S. Courts*, 70 Brooklyn L Rev 533, 535 (2005) (describing *Sosa* as a “clear victory” for human rights activists); 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, 2255 (2004) (arguing that *Sosa* reaffirmed the continued applicability of international law norms to federal law after *Erie*); Eugene Kontorovich, *Implementing Sosa v. Alvarez-Machain: What Piracy Reveals about the Limits of the Alien Tort Statute*, 80 Notre Dame L Rev 111, 155–56 (2004) (arguing that modern international norms are inconsistent with historical antecedents and thus do not meet *Sosa*’s requirements for a cause of action under the ATS).

primarily on the kinds of international torts that qualify under the ATS and have permitted or dismissed suits on this basis. These decisions reveal continued confusion regarding the kinds of international law violations that trigger the statute.

#### D. The ATS in Historical Context

In keeping with *Sosa*'s methodology, we examine how a person knowledgeable of the Judiciary Act of 1789, the Constitution, and the general legal and political context of the day would have understood the text of the ATS in 1789. We agree with the *Sosa* Court's general conclusion that the ATS should be interpreted to fulfill its historic function of allowing aliens to bring suits for violations of the law of nations. The historical context surrounding its adoption, however, reveals that the *Sosa* Court defined the statute's scope too narrowly. The relevant legal and political context suggests that the statute authorized suits by aliens against US citizens for law of nations violations that, if left unredressed, would be attributed to the United States. *Sosa* is too restrictive in suggesting that the ATS originally encompassed only torts corresponding to a narrow class of law of nations violations that English law criminalized—violation of safe conducts, infringement of the rights of ambassadors, and piracy. In 1789, Congress would have reasonably understood the ATS to encompass all tort claims for intentional injuries that a US citizen inflicted upon the person or property of an alien. The United States would have been responsible to the victim's nation for all such violations of the law of nations if it failed to redress them, and the text of the ATS reflects that concern.<sup>99</sup> On the other hand, *Sosa* is too broad if the opinion is read—as some lower courts have done—to assume that the ATS originally permitted one alien to sue another in US courts for conduct occurring outside the territory of the United States. Although *Sosa* did not expressly address this question, some lower courts have understood the opinion to permit such suits. The law of nations did not obligate the United States to provide a remedy in such cases and, to the contrary, arguably prohibited adjudication of such disputes.<sup>100</sup>

Our account of the ATS is consistent with the original purpose of the statute: to prevent US violations of the law of nations and reduce friction with other nations. By providing aliens with a means of redressing intentional harms inflicted by Americans, the United States avoided responsibility under the law of nations. This understanding of

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<sup>99</sup> See notes 341–51 and accompanying text.

<sup>100</sup> See Part II.C.

the ATS also accords with the jurisdictional limits of Article III because every suit by an alien against a US citizen—regardless of the nature of the claim or the amount in controversy—falls squarely within the federal courts’ jurisdiction over controversies “between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.”<sup>101</sup> After examining the original meaning of the ATS in Parts II through IV, we evaluate *Sosa* in light of this understanding in Part V.

## II. ALIEN CLAIMS AND THE SOVEREIGNTY OF NATIONS

Recovering the meaning of the ATS requires an appreciation of the larger legal and historical context in which it was adopted. In the 1780s, following the War of Independence, states and their citizens took a range of actions that violated the law of nations. A foundational principle of the law of nations at the Founding required that each nation reciprocally respect certain rights of every other nation to exercise territorial sovereignty, conduct diplomatic relations, exercise neutral rights, and peaceably enjoy liberty.<sup>102</sup> In addition, the law of nations obliged each nation to respect every other nation’s sovereign duty to protect its members.<sup>103</sup> Various important law of nations rules followed from these foundational principles, including rules protecting treaty rights, rights of ambassadors, neutral use of the high seas, and the personal security of aliens from acts of violence.

Various actions by US states violated such law of nations rules. In particular, states failed to uphold the rights of British creditors under the Paris Peace Treaty of 1783,<sup>104</sup> interfered with the rights of ambassadors, mishandled admiralty cases, and failed to redress acts of violence by their citizens against British subjects.<sup>105</sup> Even where states acted to redress law of nations violations, the inability of the Confederation Congress to do so was manifest.<sup>106</sup> In the 1780s, two

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<sup>101</sup> US Const Art III, § 2, cl 1.

<sup>102</sup> See Emmerich de Vattel, 2 *The Law of Nations; or, Principles of the Law of Nature: Applied to the Conduct and Affairs of Nations and Sovereigns* bk III, § 26 at 10–11 (Coote 1759) (concluding that violations of a nation’s perfect rights provide just cause for war).

<sup>103</sup> See Emmerich de Vattel, 1 *The Law of Nations; or Principles of the Law of Nature: Applied to the Conduct and Affairs of Nations and Sovereigns* bk I, § 17 at 13 (Newberry 1759) (explaining that a nation is “obliged carefully to preserve all its members . . . since the loss even of one of its members weakens it, and is injurious to its preservation”); id at bk II, §§ 71–72 at 144 (describing the responsibilities of a state “not to suffer” its citizens-subjects injuring citizens-subjects of another state, for to do so would offend the foreign state, “which ought to protect [its] citizen[s]”).

<sup>104</sup> Definitive Treaty of Peace between the United States of America and His Britannic Majesty, 8 Stat 80, Treaty Ser No 104 (1783) (“Paris Peace Treaty”). See notes 259–77 and accompanying text.

<sup>105</sup> See notes 278–91 and accompanying text.

<sup>106</sup> See notes 292–304 and accompanying text.

famous incidents occurred involving the rights of foreign diplomats, a special concern under the law of nations. Although not directly relevant to the ATS, these incidents illustrate a broader public concern with the Confederation Congress's inability to uphold the law of nations after independence. First, in 1784, a French subject, Charles Julian de Longchamps, insulted and physically assaulted the French General Counsel and Secretary of Legation in Philadelphia, Francois de Barbee Marbois. A Pennsylvania state court convicted and sentenced Longchamps for the offense, but denied Marbois's request for Longchamps's extradition.<sup>107</sup> The Confederation Congress lacked power to do anything to address this incident other than pass resolutions and make recommendations to the states.<sup>108</sup> Second, in 1787, during the Federal Convention, a New York city constable created a similar incident by entering the residence of the Dutch minister plenipotentiary to the United States, Pieter Johan van Berckel, with a warrant to arrest a member of his household.<sup>109</sup> Van Berckel protested to John Jay, the American foreign affairs secretary, who reported to Congress that "the foederal Government does not appear . . . to be vested with any judicial Powers competent to the Cognizance and Judgment of such Cases."<sup>110</sup> These incidents highlight public awareness of the Confederation Congress's general inability to redress law of nations violations in the states.<sup>111</sup>

The Confederation's inability to remedy or curtail violations like these was a significant factor precipitating the Federal Convention of 1787. Under the Articles of Confederation, Congress lacked effective power to countervail state violations of the law of nations. As Professors David Golove and Daniel Hulsebosch have observed, "a core purpose of American constitution-making was to facilitate the

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<sup>107</sup> *Respublica v De Longchamps*, 1 US (1 Dall) 111, 116 (Pa Ct Oyer & Terminer 1784) (acknowledging that extradition might nonetheless be appropriate in extreme cases).

<sup>108</sup> See John C. Fitzpatrick, ed, 28 *Journals of the Continental Congress, 1774–1789* 314–15 (GPO 1933).

<sup>109</sup> See Roscoe R. Hill, ed, 34 *Journals of the Continental Congress, 1774–1789* 109 (GPO 1937).

<sup>110</sup> *Id.* at 111. For detailed discussion of these incidents, see, for example, Lee, 106 *Colum L Rev* at 860–62 (cited in note 33); Bradley, 42 *Va J Intl L* at 637–42 (cited in note 19); Dodge, 19 *Hastings Intl & Comp L Rev* at 229–30 (cited in note 32); Casto, 18 *Conn L Rev* at 491–94 (cited in note 37).

<sup>111</sup> The Continental Congress did create a federal court of appeals to review prize cases initially adjudicated in state court. See Henry J. Bourguignon, *The First Federal Court: The Federal Appellate Prize Court of the American Revolution, 1775–1787* 115 (American Philosophical Society 1977). Some states, however, refused to recognize the federal court's authority to revise state court judgments. See, for example, *Ross v Rittenhouse*, 2 US (2 Dall) 160, 163 (Pa 1792). Although the Supreme Court ultimately upheld the early federal court's appellate authority, see *United States v Peters*, 9 US (5 Cranch) 115, 140 (1809), exclusive federal jurisdiction over prize cases was not established until the adoption of the Constitution and the Judiciary Act of 1789. See notes 317–23 and accompanying text.



admission of the United States into the European-based system of sovereign states governed by the law of nations.”<sup>112</sup> Accordingly, “[t]he Constitution employed a number of devices” to advance this purpose<sup>113</sup>—including assigning foreign relations powers to the political branches and excluding states from the exercise of such powers.<sup>114</sup> Moreover, the Constitution “incorporated a series of mechanisms designed both to ensure, and to manifest to foreign governments, that the new federal government would observe treaties and the law of nations.”<sup>115</sup> The Constitution allocated “a portion of that duty to the courts” by giving them jurisdiction over cases likely to involve the law of nations.<sup>116</sup> Federal court jurisdiction as a mechanism for upholding the law of nations “could be less explicit” than other mechanisms “because the framers borrowed it from British practice.”<sup>117</sup>

By the 1780s, England had adopted much of the law of nations as English municipal law. In the late eighteenth century, English judges thus routinely applied the law of nations to the extent it was incorporated as “part of the law of England.”<sup>118</sup> (After independence, American states adopted the common law—and, by extension, principles of the law of nations that it incorporated—as part of state law.<sup>119</sup>) English courts upheld their nation’s obligations under the law of nations in various ways. “It was well understood,” Professors Golove and Hulsebosch explain, “that the greatest number of cases raising questions under the law of nations would fall under admiralty jurisdiction.”<sup>120</sup> English admiralty courts applied the law of nations in

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<sup>112</sup> David M. Golove and Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 NYU L Rev 932, 935 (2010).

<sup>113</sup> *Id.* at 991.

<sup>114</sup> *Id.* at 991–94.

<sup>115</sup> *Id.* at 994–95.

<sup>116</sup> Golove and Hulsebosch, 85 NYU L Rev at 1000 (cited in note 112).

<sup>117</sup> *Id.* at 1000–01.

<sup>118</sup> See *Triquet v Bath*, 97 Eng Rep 936, 938 (KB 1764) (Mansfield) (explaining that “Lord Talbot declared a clear opinion [in 1736]—‘That the law of nations, in its full extent, was part of the law of England’”), quoting *Buvot v Barbut*, 25 Eng Rep 777, 778 (Ch 1736). See also Blackstone, 4 *Commentaries* at 67 (cited in note 9) (“The law of nations (wherever any question arises which is properly the object of [its] jurisdiction) is here adopted in [its] full extent by the common law, and is held to be a part of the law of the land.”); Philip Hamburger, *Beyond Protection*, 109 Colum L Rev 1823, 1942 (2009) (“Even higher laws were understood to be legally binding in England only to the extent they were recognized by the common law.”); Philip Hamburger, *Law and Judicial Duty* 62, 349–50 & n 43 (Harvard 2008) (explaining how the law of nations applied in English courts in the eighteenth century insofar as English law incorporated it).

<sup>119</sup> See Bellia and Clark, 109 Colum L Rev at 29 (cited in note 17).

<sup>120</sup> Golove and Hulsebosch, 85 NYU L Rev at 1002 (cited in note 112).

various kinds of cases arising on the high seas, including prize.<sup>121</sup> The Founders regarded prize cases, in particular, as the “most important part” of admiralty jurisdiction,<sup>122</sup> because jurisdiction over such cases was “a necessary appendage to the power of war[] and negotiations with foreign nations.”<sup>123</sup> Moreover, English law recognized the rights and immunities of foreign ambassadors and other diplomatic officials in common law cases.<sup>124</sup> Finally, and of most relevance to the ATS, English courts provided various forms of redress for harms that English subjects inflicted upon foreign citizens. The laws of England provided not only criminal punishments but also civil remedies against British subjects who used force to injure the person or personal property of aliens. Both citizens and lawfully visiting aliens in amity generally could claim the protection of a nation’s laws.<sup>125</sup> Aliens within protection could pursue both actions arising locally and transitory actions against citizens of the host nation.<sup>126</sup> (Alien enemies, in contrast, were generally not entitled to the protection of a nation’s laws and thus could not seek redress in its courts.<sup>127</sup>) By exercising

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<sup>121</sup> See notes 217–24 and accompanying text.

<sup>122</sup> Federalist 80 (Hamilton), in *The Federalist* 534, 538 (Wesleyan 1961) (Jacob E. Cooke, ed).

<sup>123</sup> Joseph Story, *Commentaries on the Constitution of the United States* 615 (Hilliard, Gray 1833). Prize courts had the responsibility of applying the law of nations to resolve disputes involving captures on the high seas. “If justice be there denied, the nation itself becomes responsible to the parties aggrieved,” and the nation to which the aggrieved parties belong “may vindicate their rights, either by a peaceful appeal to negotiation, or by a resort to arms.” *Id.* See also Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U Pa L Rev 1245, 1334–40 (1996) (explaining the importance of prize jurisdiction in the early Republic).

<sup>124</sup> See notes 171–74 and accompanying text.

<sup>125</sup> Hamburger, 109 Colum L Rev at 1847 (cited in note 118). Protection and allegiance were reciprocal obligations: foreign citizen-subjects present in another nation at peace with their own were presumed to have submitted to the government and laws of that nation and thus entitled to its protection. *Id.*

<sup>126</sup> See Blackstone, 1 *Commentaries* at 372 (cited in note 9) (describing the right of aliens to bring personal actions, including transitory ones). For a description of the difference between local and transitory actions, see Anthony J. Bellia Jr, *Congressional Power and State Court Jurisdiction*, 94 Georgetown L J 949, 955–66 (2006).

<sup>127</sup> See Blackstone, 1 *Commentaries* at 372 (cited in note 9) (explaining that “alien enemies have no rights, no privileges, unless by the king’s special favour, during the time of war”). The same rule obtained in American states. See *Cruden v Neale*, 2 NC (1 Haywood) 338, 344 (NC Super Ct L & Eq 1796) (“All persons in general, as well foreigners as citizens, may come into this court to recover rights withheld, and to obtain satisfaction for injuries done, unless where they are subject to some disability the law imposes. Foreigners are in general entitled to sue, unless a war exists between our country and theirs.”); *Bayard v Singleton*, 1 NC (1 Mart) 5, 9 (NC Super Ct L & Eq 1787) (“The law of England, which we have adopted, . . . does not allow an alien ENEMY any political rights at all.”); *Arnold v Sergeant*, 1 Root 86, 86 (Conn Super Ct 1783) (“The defendant plead in abatement—That Amos Arnold one of the plaintiffs was an alien enemy, etc. which plea was judged sufficient.”); *Wilcox v Henry*, 1 US (1 Dall) 69, 71 (Pa 1782) (“An alien enemy has no right of action whatever during the war; but by the law of nations, confirmed by universal usage, at the end of the war, all the rights and credits, which the

jurisdiction over claims for injuries inflicted by its citizens on the persons or property of aliens in amity, a nation avoided responsibility under the law of nations for its citizens' misconduct. Such responsibility left a nation open to retaliation—including military retaliation—by the victim's nation.

The First Congress enacted a number of jurisdictional provisions that mimicked the jurisdiction of English courts in order to enable the United States to comply with its various obligations under the law of nations. Most importantly, the First Congress gave federal district courts admiralty jurisdiction, enabling them to uphold the law of nations in prize, piracy, and other cases involving the neutral rights of other nations to use the open seas. The Congress also gave the Supreme Court original jurisdiction over cases involving ambassadors and appellate jurisdiction in cases involving treaty rights. Finally, in the ATS, the First Congress gave federal courts jurisdiction to provide civil redress for harms that United States citizens inflicted upon foreign citizens. Although such harms were not as momentous for foreign relations as cases involving ambassadors or prize, the United States had to provide some form of redress if it wished to comply fully with the law of nations and avoid responsibility (and even war).

Seen in this light, the ATS, enacted as part of the Judiciary Act of 1789, authorized district courts to hear alien tort claims for which the United States would become responsible under the law of nations if not adequately redressed. The ATS was enacted against a well-known background understanding of when the law of nations held nations responsible for the torts of their citizens. Private citizens were said to violate the law of nations if they engaged in certain acts that breached the peace of nations by triggering an obligation on the part of their nation to provide redress or face reprisals. One act constituting such a law of nations violation was the intentional infliction of injury upon the person or personal property of an alien friend—that is, a citizen of another nation at peace with the first. Under the law of nations, the transgressor's nation was responsible for the violation if it failed to redress the injury. A nation could redress the injury by providing criminal punishment, a civil remedy, or extradition of the offender. Common law courts gave aliens tort remedies against citizens of the forum, thereby enabling the forum nation to avoid responsibility for law of nations violations and potential military reprisals. The First Congress regarded state courts as unable or unwilling to provide such

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subjects of either power had against the other, are revived; for, during the war, they are not extinguished, but merely suspended.”).

remedies, and thus enacted the ATS in order to assign this function to newly minted federal courts.

This Part describes the circumstances under which an injury that a nation's citizen inflicted upon the citizen of another nation could be imputed to the offender's nation. It further explains how the law of England avoided responsibility for such offenses by providing criminal punishment and civil remedies. Those knowledgeable of the Constitution, the Judiciary Act of 1789, and the general legal and political context of the time would have reasonably understood the ATS to serve the similar function of preventing the United States from being held responsible by other nations for torts committed by US citizens against aliens. The historical context recounted in this Part provides essential background for understanding the original meaning of the ATS.

#### A. State Responsibility for Individual Offenses under the Law of Nations

In accordance with the law of nations, English law avoided friction with other nations by redressing British subjects' offenses against other nations and their citizens. To appreciate how members of the Founding generation understood these aspects of the law of nations, it is important to examine the writings of Emmerich de Vattel. As many have observed, Vattel's treatise, *The Law of Nations*, was well known in England and the American states at the time of the Founding.<sup>128</sup> Vattel specifically addressed "the Concern a Nation may have in the Actions of its Citizens."<sup>129</sup> "Private persons," he observed, "who are the members of one nation, may offend and ill-treat the citizens of another, and may injure a foreign sovereign."<sup>130</sup> He thus

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<sup>128</sup> See Bellia and Clark, 109 Colum L Rev at 15–16 (cited in note 17); Mark Weston Janis, *The American Tradition of International Law: Great Expectations, 1789–1914* 57 (Clarendon 2004) ("Those meeting at Philadelphia to draft the document were not deficient in formal training in the law of nations."); Douglas J. Sylvester, *International Law as Sword or Shield? Early American Foreign Policy and the Law of Nations*, 32 NYU J Intl L & Polit 1, 67 (1999) (explaining that, in early American judicial decisions, "in all, in the 1780s and 1790s, there were nine citations to Pufendorf, sixteen to Grotius, twenty-five to Bynkershoek, and a staggering ninety-two to Vattel"); David Gray Adler, *The President's Recognition Power*, in David Gray Adler and Larry N. George, eds, *The Constitution and the Conduct of American Foreign Policy* 133, 137 (Kansas 1996) ("During the Founding period and well beyond, Vattel was, in the United States, the unsurpassed publicist on international law."); Edwin D. Dickinson, *The Law of Nations as Part of the National Law of the United States*, 101 U Pa L Rev 26, 35 (1952) (explaining that this treatise and the writings of Hugo Grotius, Samuel von Pufendorf, and Jean-Jacques Burlamaqui "were an essential and significant part of the minimal equipment of any lawyer of erudition in the eighteenth century").

<sup>129</sup> Vattel, 1 *The Law of Nations* at bk II, ch 6 at 144 (cited in note 103).

<sup>130</sup> *Id* at bk II, § 71 at 144.

examined the question of “what share a state may have in the actions of its citizens,” and, correspondingly, “what are the rights and obligations of sovereigns in this respect.”<sup>131</sup> Vattel explained, first, that any person who harms a citizen of another nation harms that citizen’s nation: “Whoever uses a citizen ill, indirectly offends the state, which ought to protect this citizen.”<sup>132</sup> A nation owed its members a duty of protection.<sup>133</sup> A person who harmed a citizen of another nation thereby offended that nation, which was duty-bound to protect its members from harm. According to Vattel, a nation so offended “should revenge the injuries, punish the aggressor, and, if possible, oblige him to make intire satisfaction; since otherwise the citizen would not obtain the great end of the civil association, which is safety.”<sup>134</sup>

An infringement of the rights of ambassadors and other public ministers was a particularly egregious offense against a nation. Ambassadors and other public ministers represented “the person and dignity of a sovereign.”<sup>135</sup> Public ministers were “necessary instruments in affairs which sovereigns have among themselves, and to that correspondence which they have a right of carrying on.”<sup>136</sup> The right to send public ministers—and thus the rights, privileges, and immunities of public ministers—were inviolable because “[a] respect due to sovereigns should reflect on their representatives, and chiefly on their ambassadors, as representing his master’s person in the first degree.”<sup>137</sup> Thus, an offense to an ambassador or other public minister was an offense against the state itself. Violence or insult to, or an arrest of, an ambassador or public minister, or his household members, violated the law of nations.<sup>138</sup>

Of particular relevance to the ATS, a nation had a duty to prevent its citizens from harming not only ambassadors and public

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<sup>131</sup> *Id.*

<sup>132</sup> *Id.* Pufendorf similarly explained that “a result of the union into a civil body is that an injury done to one of its members by foreigners is regarded as affecting the entire state.” Samuel von Pufendorf, 2 *De Jure Naturae et Gentium Libri Octo* bk VIII, ch 6, § 13 at 1305 (Clarendon 1934) (C.H. Oldfather and W.A. Oldfather, trans) (originally published 1688).

<sup>133</sup> According to Pufendorf, “the chief end of states is that men should by mutual understanding and assistance be insured against losses and injuries which can be and commonly are brought upon them by other men, and that by these means they may enjoy peace or have sufficient protection against enemies.” Pufendorf, 2 *De Jure Naturae* at bk VII, ch 4, § 3 at 1011 (cited in note 132).

<sup>134</sup> Vattel, 1 *The Law of Nations* at bk II, § 71 at 144 (cited in note 103).

<sup>135</sup> Vattel, 2 *The Law of Nations* at bk IV, § 78 at 140 (cited in note 102).

<sup>136</sup> *Id.* at bk IV, § 57 at 133.

<sup>137</sup> *Id.* at bk IV, § 80 at 142.

<sup>138</sup> *Id.* at bk IV, § 81 at 142; *id.* at bk IV, § 110 at 160–61.

ministers whom it received,<sup>139</sup> but all foreign citizens whom it admitted within its borders:

[T]he nation or the sovereign, ought not to suffer the citizens to do an injury to the subjects of another state, much less to offend the state itself. And that not only because no sovereign ought to permit those who are under his command to violate the precepts of the law of nature, which forbids all injuries; but also because nations ought mutually to respect each other, to abstain from all offence, from all abuse, from all injury, and, in a word, from every thing that may be of prejudice to others.<sup>140</sup>

Vattel elaborated that as soon as the sovereign admits foreigners, “he engages to protect them as his own subjects, and to make them enjoy, as much as depends on him, an intire security.”<sup>141</sup> A nation also had a duty not to harm foreigners in their own country<sup>142</sup> and a duty not to interfere with their use of the open seas.<sup>143</sup> A key inquiry for Vattel was under what circumstances a nation became responsible for an offense that its citizen committed against another nation. Vattel recognized that not all actions of citizens could be imputed to their nation: “[I]t is impossible for the best regulated state, or for the most vigilant and absolute sovereign, to model at his pleasure all the actions of his subjects, and to confine them on every occasion, to the most exact obedience.”<sup>144</sup> A nation would be responsible, however, if it sanctioned the harm that its citizen inflicted. As Vattel explained, a nation “ought not to suffer his subjects to molest the subjects of

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<sup>139</sup> Vattel, 2 *The Law of Nations* at bk IV, § 82 at 142 (cited in note 102) (“To admit a minister, to acknowledge him in such quality, is engaging to grant him the most particular protection, and that he shall enjoy all possible safety.”).

<sup>140</sup> Vattel, 1 *The Law of Nations* at bk II, § 72 at 144 (cited in note 103).

<sup>141</sup> *Id.* at bk II, § 104 at 154.

<sup>142</sup> *Id.* at bk II, § 72 at 144.

<sup>143</sup> See *id.* at bk I, § 282 at 114 (describing “[t]he right of navigating and fishing in the open sea” as “a right common to all men,” the violation of which furnishes a nation with “a sufficient cause for war”).

<sup>144</sup> Vattel, 1 *The Law of Nations* at bk II, § 73 at 144 (cited in note 103). Pufendorf similarly observed that

a community, whether civil or of any other kind, is not responsible for the actions of individual members, except by some culpable act of commission or omission on its own part, for no matter how much a state may threaten, there is always left to the will of citizens the natural liberty to do otherwise, so that in no way can a state stand good for the actions of its individual subjects.

Pufendorf, 2 *De Jure Naturae* at bk VIII, ch 6, § 12 at 1304 (cited in note 132) (emphasizing that a state will not be deemed responsible or accountable for every action by a citizen-subject). See also Hugo Grotius, *The Rights of War and Peace* 454 (Innys, et al, 1738) (Jean Barbeyrac, ed) (“No civil Society, or other publick Body, is accountable for the Faults of its particular Members, unless it has concurred with them, or has been negligent in attending to its Charge.”).

others, or to do them an injury, much less should he permit them audaciously to offend foreign powers.”<sup>145</sup> If a nation “approves and ratifies the [act] committed by a citizen, it makes the act its own: the offence ought then to be attributed to the nation, as the author of the true injury, of which the citizen is, perhaps, only the instrument.”<sup>146</sup>

Vattel identified two ways in which a nation could approve or ratify the act of its citizen, and thus be responsible for an offense against another nation. First, a nation would be responsible for the transgression of its citizen against another nation if it authorized the transgression *ex ante*. “[T]he nation in general, is guilty of the base attempt of its members,” Vattel explained, “when by its manners or the maxims of its government it accustoms, and authorizes its citizens to plunder, and use ill foreigners indifferently, or to make inroads into the neighbouring countries, &c.”<sup>147</sup>

Second, a nation would be responsible if it failed to attempt to redress its members’ transgressions *ex post*. Vattel identified various means by which a nation could redress a private offense against a foreign nation. They included criminal punishment, a civil remedy, or extradition of the offender to the offended nation. A nation, Vattel explained, “ought to oblige the guilty to repair the damage, if that be possible, to inflict on him an exemplary punishment, or, in short, according to the nature of the case, and the circumstances attending it,

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<sup>145</sup> Vattel, 1 *The Law of Nations* at bk II, § 76 at 145 (cited in note 103).

<sup>146</sup> *Id.* at bk II, § 74 at 144–45. See also Pufendorf, 2 *De Jure Naturae* at bk VIII, ch 6, § 12 at 1304 (cited in note 132) (“Now of those ways by which the heads of states become exposed to war because of injuries done by their citizens, two come in for special consideration, namely, sufferance and reception.”); Jean Jacques Burlamaqui, 1 *The Principles of Natural and Politic Law* 353 (Bumstead 4th ed 1792) (Thomas Nugent, trans) (originally published 1748) (explaining that for an injury by a nation’s member upon another nation’s member to be imputed to the first nation, “we must necessarily suppose one of these two things, sufferance, or reception; viz. either that the sovereign has suffered this harm to be done to the stranger, or that he afforded a retreat to the criminal”); Grotius, *Rights of War and Peace* at 454 (cited in note 144) (“Now among those Methods that render Governours the Accomplices in a Crime, there are two of very frequent Use, and which require to be particularly considered, viz. Toleration and Protection.”).

<sup>147</sup> Vattel, 1 *The Law of Nations* at bk II, § 78 at 146 (cited in note 103) (explaining that, if a sovereign encourages its citizens to commit crimes against foreigners, those crimes can be ascribed to the sovereign). Pufendorf and Burlamaqui both believed that a nation, knowing its members were committing such harms, would be responsible for failure to prevent them. See Pufendorf, 2 *De Jure Naturae* at bk VIII, ch 6, § 12 at 1304 (cited in note 132) (“As for sufferance it must be held that he who knows a wrong is being done, and is able and obligated to prevent it, when that does not involve the probable danger of a greater evil, is held to have been guilty himself of the wrong.”); Burlamaqui, 1 *Principles of Natural and Politic Law* at 353 (cited in note 146) (“Now it is presumed, that a sovereign knows what his subjects openly and frequently commit; and as to his power of hindering the evil, this likewise is always presumed, unless the want of it be clearly proved.”). See also Grotius, *Rights of War and Peace* at 454 (cited in note 144) (explaining that one “who is privy to a Fault and does not hinder it, when in a Capacity and Under an Obligation of so doing, may properly be said to be the Author of it”).

to deliver him up to the offended state, there to receive justice.”<sup>148</sup> If a nation refused to take one of these measures, it would become responsible to the other nation for an injury inflicted upon the other’s citizen—and, by extension, upon the foreign nation. “If a sovereign, who might keep his subjects within the rules of justice and peace, suffers them to injure a foreign nation, either in its body or its members, he does no less injury to that nation, than if he injured them himself.”<sup>149</sup> Thus, “[t]he sovereign who refuses to cause a reparation to be made of the damage caused by his subject, or to punish the guilty, or, in short, to deliver him up, renders himself in some measure an accomplice in the injury, and becomes responsible for it.”<sup>150</sup> But if the sovereign of the transgressor provides appropriate redress, then “the offended has nothing farther to demand from him.”<sup>151</sup> In these passages, Vattel clearly explained that a nation was responsible for redressing injuries that its citizens inflicted upon the person or property of foreign citizens.<sup>152</sup>

Significantly, Vattel limited his discussion of when a nation would become responsible for an injury to an alien to instances in which one of *its* citizens inflicted the injury. Vattel did, of course, acknowledge the distinct proposition that nations had an obligation to treat all aliens within their protection fairly (a predecessor to the modern principle that nations not deny justice to such aliens). On this point,

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<sup>148</sup> Vattel, 1 *The Law of Nations* at bk II, § 76 at 145 (cited in note 103). According to Burlamaqui, “[t]he other way, in which a sovereign renders himself guilty of the crime of another”—in addition to consenting to infliction of the injury—“is by allowing a retreat and admittance to the criminal, and skreening him from punishment.” Burlamaqui, 1 *Principles of Natural and Politic Law* at 353 (cited in note 146). See also Grotius, *Rights of War and Peace* at 458 (cited in note 144) (“[A] Prince or People is not absolutely and strictly obliged to deliver up an Offender, but only, as we said before, must either punish him or deliver him up.”).

<sup>149</sup> Vattel, 1 *The Law of Nations* at bk II, § 72 at 144 (cited in note 103).

<sup>150</sup> *Id.* at bk II, § 77 at 145.

<sup>151</sup> *Id.* In the case of an offense against an ambassador, Vattel explained:

Whoever affronts or injures a public minister commits a crime the more deserving a severe punishment, as thereby the sovereign and his country might be brought into great difficulties and trouble. It is just that he should be punished for his fault, and that the state should, at the expence of the delinquent, give a full satisfaction to the sovereign affronted in the person of his minister.

Vattel, 2 *The Law of Nations* at bk IV, § 80 at 142 (cited in note 102). Vattel observed, by way of example, that when King Demetrius “delivered to the Romans those who had killed their ambassador,” it was “unjust” for the Romans, having received such redress, “to reserve to themselves the liberty of punishing that crime by revenging it on the King himself, or on his dominions.” Vattel, 1 *The Law of Nations* at bk II, § 77 at 145–46 (cited in note 103).

<sup>152</sup> Vattel did not expressly address whether an injury that an alien within the nation’s territorial jurisdiction (and within its protection and subject to its laws) inflicted upon another alien within that jurisdiction would be attributed to that nation if it failed to redress the injury. This may not have been a matter of sufficient frequency and importance to warrant treatment in his treatise.



we understand Vattel to say that a nation had to provide an alien injured within its territory (even if injured by another alien) with a fair opportunity for redress, without prejudice or a manifestly unjust result.<sup>153</sup> A nation's denial of justice in this regard gave rise to a distinct injury to the alien (and to his nation). It did not, however, render the forum nation responsible for the underlying injury. This duty of fairness, therefore, was distinct from the duty that a nation owed to aliens injured by *its own citizens*, under which the nation became "an accomplice in the injury" if it failed to provide appropriate redress.<sup>154</sup>

If a nation failed to redress injuries by its citizens upon the citizens of another nation, the perpetrators' nation violated the "perfect rights" of the other nation. The law of nations recognized a limited number of perfect rights, including the right to exercise territorial sovereignty, the right to conduct diplomatic relations, the right to exercise neutral rights, and the right to peaceably enjoy liberty.<sup>155</sup> These rights were so important that interference with them provided the offended nation with just cause for reprisals or war.<sup>156</sup> A nation, Vattel explained, has the "right . . . not to suffer any of its privileges to be taken away, or any thing which lawfully belongs to it."<sup>157</sup> Indeed, "[t]his right is perfect, that is, accompanied with the right of using force to make it observed."<sup>158</sup> In other words, if one

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<sup>153</sup> This approach attempted to balance a nation's right to exercise jurisdiction within its own territory and its obligation to treat foreigners fairly. Accordingly, each nation was required to respect other nations' adjudication of disputes arising in their territories "except[] in the cases of a refusal of justice, palpable and evident injustice, a manifest violation of rules and forms; or, in short, an odious distinction made to the prejudice of his subjects, or of foreigners in general." Vattel, 1 *The Law of Nations* at bk II, § 84 at 148 (cited in note 103).

<sup>154</sup> Id at bk II, § 77 at 145.

<sup>155</sup> Id at bk I, §§ 281–83 at 113–14; id at bk II, §§ 49, 54–55, 84 at 137–39, 147–48. See also Bellia and Clark, 109 *Colum L Rev* at 15–19 (cited in note 17) (discussing perfect rights under the law of nations).

<sup>156</sup> Vattel, 2 *The Law of Nations* at bk III, §§ 24–26 at 10–11 (cited in note 102).

<sup>157</sup> Vattel, 1 *The Law of Nations* at bk II, § 65 at 142–43 (cited in note 103).

<sup>158</sup> Id at bk II, § 66 at 143. See also Emmerich de Vattel, 1 *The Law of Nations; or, Principles of the Law of Nature; Applied to the Conduct and Affairs of Nations and Sovereigns*, preliminaries, § 17 at 54 (Pomroy 1805) ("The *perfect obligation* is that which produces the right of constraint; the *imperfect* gives another only a right to demand."). A perfect right, under the law of nations, was a right that the holder-nation could carry into execution—including by force—without legal restrictions. If one nation violated the perfect rights of another, then the aggrieved nation had just cause to compel the corresponding duty by waging war. Id at preliminaries, § 22 at 55–56 (suggesting that all nations have a perfect right to those things necessary to their preservation).

This idea of perfect rights was deeply rooted in writings on the law of nations and well known to members of the Founding generation. See, for example, Burlamaqui, 1 *Principles of Natural and Politic Law* at 348 (cited in note 146) ("Offensive wars are those which are made to constrain others to give us our due, in virtue of a perfect right we have to exact it of them."); Pufendorf, 2 *De Jure Naturae* at bk I, ch 7, § 15 at 127 (cited in note 132) ("Now an unjust act, which is done from choice, and infringes upon the perfect right of another is commonly

nation failed to redress an injury that its citizen inflicted on an alien, the aggrieved nation could retaliate with force. The most prominent writers on the law of nations all recognized that a nation's failure to respond appropriately to injuries its members inflicted on foreigners or ambassadors gave the other nation just cause for war.<sup>159</sup> For this reason, Vattel observed that “the safety of the state, and that of human society, requires this attention from every sovereign”—that it not “suffer the citizens to do an injury to the subjects of another state.”<sup>160</sup> As we shall see, the ATS was one of the primary means by which the First Congress attempted to meet this obligation.

### B. Redress for Offenses against the Law of Nations in England

England, which had incorporated the foregoing principles of the law of nations into the common law, redressed injuries that its subjects inflicted upon foreign citizens through both criminal and civil

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designated by the one word, *injury*.”); id at bk VIII, ch 6, § 3 at 1294 (listing, as “causes of just wars,” “to assert our claim to whatever others may owe us by a perfect right” and “to obtain reparation for losses which we have suffered by injuries”). See also G.F. von Martens, *Summary of the Law of Nations, Founded on the Treaties and Customs of the Modern Nations of Europe* bk VIII, ch 2, § 3 at 273 (Bradford 1795) (William Cobbett, trans) (“Nothing short of the violation of a perfect right . . . can justify the undertaking of war. . . . [But] every such violation . . . justifies the injured party in resorting to arms.”); Christian Wolff, 2 *Jus Gentium Methodo Scientifica Pertractatum* §§ 73–75 at 43–44 (Clarendon 1934) (Joseph H. Drake, trans) (originally published 1764) (explaining that nations have “imperfect rights” to external commerce and describing how by agreement nations can obtain “perfect rights” to commerce); Alberico Gentili, 2 *De Iure Belli Libri Tres* bk I, ch 22, § 170 at 106 (Clarendon 1933) (John C. Rolfe, trans) (originally published 1612) (“[B]ecause [the Sanguntines] had aided and received the enemies of Hannibal, he had a perfect right to make war upon them.”). For a discussion of the historical importance of “perfect rights,” see Bellia and Clark, 109 Colum L Rev at 16–19 (cited in note 17).

<sup>159</sup> See Burlamaqui, 1 *Principles of Natural and Politic Law* at 353 (cited in note 146) (“[I]n civil societies, when a particular member has done an injury to a stranger, the governor of the commonwealth is sometimes responsible for it, so that war may be declared against him on that account.”); id (“[A] sovereign, who knowing the crimes of his subjects, as for example, that they practise piracy on strangers; and being also able and obliged to hinder it, does not hinder it, renders himself criminal, because he has consented to the bad action, the commission of which he has permitted, and consequently furnished a just reason of war.”); Pufendorf, 2 *De Jure Naturae* at bk VIII, ch 6, § 12 at 1304 (cited in note 132) (examining “those ways by which the heads of states become exposed to war because of injuries done by their citizens”); Grotius, *Rights of War and Peace* at 458 (cited in note 144) (“Thus we read, that the Eleans made War on the Lacedemonians, because they would take no Notice of those who had injured them, that is, would neither inflict condign Punishment nor deliver them up. For the Obligation is either to one or the other.”).

<sup>160</sup> Vattel, 1 *The Law of Nations* at bk II, § 72 at 144 (cited in note 103). He warned that “[i]f you let loose the reins of your subjects against foreign nations, these will behave in the same manner to you; and instead of that friendly intercourse, which nature has established between all men, we should see nothing but one nation robbing another.” Id. As an ancient matter, he observed that when nations treated strangers ill, “[a]ll other nations had a right to unite their forces in order to chastize them.” Id at bk II, § 104 at 154.

means. In so doing, it avoided responsibility for its subjects' violations of the law of nations.

1. Criminal punishment to prevent violations of the law of nations.

Blackstone, like Vattel, described certain private acts of violence against foreigners as offenses against the law of nations. He explained, moreover, that the offender's nation would be responsible for the offense—and thus subject to military retaliation—if it failed to redress the offense. It is worth quoting Blackstone at length on this point:

But where the individuals of any state violate this general law, it is then the interest as well as duty of the government under which they live, to animadvert upon them with a becoming severity, that the peace of the world may be maintained. For in vain would nations in their collective capacity observe these universal rules, if private subjects were at liberty to break them at their own discretion, and involve the two states in a war. It is therefore incumbent upon the nation injured, first to demand satisfaction and justice to be done on the offender, by the state to which he belongs; and, if that be refused or neglected, the sovereign then avows himself an accomplice or abettor of his subject's crime, and draws upon his community the calamities of foreign war.<sup>161</sup>

Thus, an individual's unauthorized offense against another nation did not itself give that nation just cause for war; rather, it was the home sovereign's failure to redress the offense that subjected the home nation to "the calamities of [a] foreign war."

Criminal punishment was one important way for a nation to redress injuries to foreigners and avoid responsibility for its citizens' offenses to other nations. The English common law applied generally to punish British subjects who committed wrongs against foreign citizens or their personal property. Such crimes included homicide, mayhem, assault, battery, wounding, false imprisonment, kidnapping, larceny, and malicious mischief.<sup>162</sup> In addition, Blackstone specifically identified three "principal offences against the law of nations" that the English common law criminalized generally and that the English Parliament criminalized by statute in particular circumstances: "1. Violation of safe-conducts; 2. Infringement of the rights of ambassadors; and

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<sup>161</sup> Blackstone, 4 *Commentaries* at 68 (cited in note 9).

<sup>162</sup> See *id.* at 176–219, 229–50.

3. Piracy.”<sup>163</sup> Criminal punishment in such cases ensured that England would not be held responsible for its subjects’ violations of the law of nations.<sup>164</sup> Because the Supreme Court placed emphasis on these three offenses in *Sosa*, we examine them in greater detail below.

a) *Violation of safe conducts*. The first offense that Blackstone identified was “[v]iolation of safe-conducts.” He explained:

As to the first, *violation of safe-conducts* or *passports*, expressly granted by the king or his ambassadors to the subjects of a foreign power in 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 offenses may, according to the writers upon the law of nations, be a just ground of a national war.<sup>165</sup>

A safe conduct or a passport was a privilege that a nation granted a foreigner to pass safely within its borders or within territory that it controlled abroad.<sup>166</sup> A safe conduct privileged a person who otherwise could not travel safely within a nation’s territory. A foreign subject could not enter the realm if that subject’s nation was at war with England or if that subject suffered some other disability to entry, unless that person held a safe conduct or a passport. As Vattel explained, “[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>167</sup> A passport, in contrast, generally privileged persons who had no particular disabilities from traveling in a foreign land; it simply rendered doubtless their security in traveling through that country.<sup>168</sup>

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<sup>163</sup> Id at 68.

<sup>164</sup> Id.

<sup>165</sup> Blackstone, 4 *Commentaries* at 68–69 (cited in note 9).

<sup>166</sup> See Lee, 106 *Colum L Rev* at 871–73 (cited in note 33).

<sup>167</sup> Vattel, 2 *The Law of Nations* at bk III, § 265 at 102 (cited in note 102). See also Blackstone, 1 *Commentaries* at 252 (cited in note 9):

But no subject of a nation at war with us can, by the law of nations, come into the realm, nor can travel himself upon the high seas, or send his goods and merchandize from one place to another, without danger of being seized by our subjects, unless he has letters of safe-conduct.

<sup>168</sup> Vattel, 2 *The Law of Nations* at bk III, § 265 at 102 (cited in note 102) (“The word passport is used, in some occurrences, for persons in whom there is no particular exception against their coming or going in safety, and whom it the better secures for avoiding all debate.”). Consider William Blackstone, 1 *Commentaries on the Laws of England* 260 (Clarendon 4th ed 1770) (“But passports under the king’s sign-manual, or licences from his ambassadors abroad, are now more usually obtained [than safe conducts], and are allowed to be of equal validity.”).

Blackstone recognized that safe conducts could be “express” or “implied.” An express safe conduct was protection “expressly granted by the king or his ambassadors” through papers issued to a particular subject of a foreign country.<sup>169</sup> An implied safe conduct was protection granted not by documentation given to individuals, but by a positive municipal act in favor of a class of persons.<sup>170</sup> By criminalizing violence against aliens lawfully protected in English territories through safe conducts or passports, England avoided responsibility under the law of nations to the offended nation for such acts.

b) *Infringements of the rights of ambassadors.* The second offense identified by Blackstone involved infringements of the rights of ambassadors under the law of nations. Vattel had described the rights to send and receive public ministers as inviolable because such rights were necessary to effectuate all other rights of nations.<sup>171</sup> Blackstone explained that the common law of England recognized the full rights of ambassadors under the law of nations “by immediately stopping all legal process, sued out through the ignorance or rashness of individuals, which may intrench upon the immunities of a foreign minister or any of his train.”<sup>172</sup> In addition, individuals pursuing process against ambassadors or their servants “though wantonness or insolence” were “violaters of the laws of nations, and disturbers of the public repose; and shall suffer such penalties and corporal punishment as [the lord chancellor and the chief justices], or any two of them, shall think fit.”<sup>173</sup> Insulting or arresting ambassadors, other public ministers, or their domestics also qualified as offenses against the law of nations.<sup>174</sup>

c) *Piracy.* Finally, English law punished piracy. Blackstone explained that “the crime of *piracy*, or robbery and depredation upon the high seas, is an offense against the universal law of society.”<sup>175</sup> As the pirate “has renounced all the benefits of society and government, and has reduced himself afresh to the savage state of nature, by declaring war against all mankind, all mankind must declare war

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In certain instances, it appears, a passport could exempt a foreigner from a general prohibition on passage through a nation. See Vattel, 2 *The Law of Nations* at bk III, § 265 at 102 (cited in note 102) (explaining that a “passport” could operate to exempt a person “from some general prohibition”).

<sup>169</sup> Blackstone, 4 *Commentaries* at 68 (cited in note 9).

<sup>170</sup> *Id.*

<sup>171</sup> See text accompanying notes 135–38.

<sup>172</sup> Blackstone, 4 *Commentaries* at 70 (cited in note 9).

<sup>173</sup> *Id.* at 70–71.

<sup>174</sup> See *In the Matter of Count Haslang*, 21 Eng Rep 274, 274 (Ch 1755) (explaining that insulting or arresting ambassadors was a violation of the law of nations and a disturbance of the public repose).

<sup>175</sup> Blackstone, 4 *Commentaries* at 71 (cited in note 9).

against him.”<sup>176</sup> Piracy constituted a grave offense against countries in a state of peace with the transgressor. Each nation had an equal right to use the open sea, the violation of which justified the use of force.<sup>177</sup> If a nation failed to redress an act of piracy committed by one of its citizens, the injured nation had just cause to retaliate through war. In England, piracy was a serious criminal offense, tried by special procedure in the court of admiralty.<sup>178</sup> Because piracy threatened the entire world, the law of nations also gave a nation the right to punish pirates with no allegiance to, or affiliation with, the nation in question. Such universal jurisdiction served to punish and deter piracy, but the law of nations imposed no obligation on bystander nations to punish piracy committed by aliens.

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After describing violations of safe conducts, infringements of the rights of ambassadors, and piracy, Blackstone concluded that “[t]hese are the principal cases, in which the statute law of England interposes, to aid and enforce the law of nations, as a part of the common law; by inflicting an adequate punishment upon offences against that universal law, committed by private persons.”<sup>179</sup> The common law itself, of course, punished subjects who committed other, more mundane crimes against aliens, such as assault and battery. By punishing subjects who committed both statutory and common law crimes against foreigners, England prevented itself from becoming an accomplice or abettor of such crimes, thereby denying the offended nation just cause to pursue satisfaction and justice through war.

## 2. Civil remedies as redress.

The Supreme Court in *Sosa* regarded the foregoing criminal offenses as highly relevant to understanding the civil liability provided

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<sup>176</sup> *Id.*

<sup>177</sup> See Vattel, 1 *The Law of Nations* at bk I, § 283 at 114 (cited in note 103).

<sup>178</sup> The Offences at Sea Act, 28 Hen VIII, ch 15 (1536), in 3 Statutes of the Realm 671, provided that piracy be tried before special commissioners—the admiral (or his deputy) and three or four others, typically including two common law judges—and that “the course of proceedings should be according to the law of the land,” in other words the common law. Blackstone, 4 *Commentaries* at 265–66 (cited in note 9) (noting that piracy was considered so grave an offense that the English Parliament provided for special jurisdiction, process, and remedy in the court of admiralty). See also *id.* at 71 (describing this procedure). The reason for this special procedure was that, in this context, “the rules of the civil law” were “inconsistent with the liberties of the nation, that any man’s life should be taken away, unless by the judgment of his peers, or the common law of the land.” *Id.*

<sup>179</sup> Blackstone, 4 *Commentaries* at 73 (cited in note 9).

by the ATS. English law, however, complied with the law of nations not only by punishing those specific criminal offenses, but *also* by giving aliens independent common law civil remedies for all injuries to person or personal property suffered at the hands of British subjects. These civil remedies were much broader than Blackstone's three crimes; indeed, they covered a broad range of intentional torts to person or personal property recognized at common law.

English writers recognized that an alien from a nation not at war with England could bring a common law action in an English court against a British subject for any intentional harm to person or personal property.<sup>180</sup> For example, a common law action was available to aliens for assault, battery, wounding, mayhem, false imprisonment, wrongful taking of goods, and deprivation of possession.<sup>181</sup> In many instances, a civil remedy supplemented criminal penalties. In some instances, however, a civil remedy was the only available redress, short of extraditing the offender, because the criminal law did not extend to injuries that British subjects inflicted upon foreign citizens outside the territorial jurisdiction of England. Under the law of nations, as adopted in England, one nation's criminal jurisdiction did not extend to acts committed within the territorial jurisdiction of another sovereign. Vattel explained that it is the province of the sovereign "to take cognizance of the crimes committed" within its jurisdiction, and that "[o]ther nations ought to respect this right."<sup>182</sup> English law considered crimes and other penal actions to be local, meaning that the nation in which such actions arose had exclusive jurisdiction to adjudicate them.<sup>183</sup> One reason for this principle was that the offended nation had exclusive jurisdiction to determine what

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<sup>180</sup> See John Comyns, 4 *A Digest of the Laws of England* 429 (Strahan and Woodfall 1780) ("If a Subject attaches the Person or Goods of any one, who comes by Way of Amity, Truce, or Safe-conduct, the Chancellor, calling to him any Justice of the one Bench or the other, on a Bill of Complaint, may make Process against the Offender; and may award Delivery and Restitution of the Person, Ship, or Goods."); Comyns, 1 *Digest of the Laws of England* at 301 (explaining that "if an Alien be within the Kingdom with a Safe-Conduct, or under the King's Protection, he may have an Action, tho' his King be in Enmity," and that "[a]n Alien Friend may have all Personal Actions, for his Goods, or Property"); Matthew Bacon, 1 *A New Abridgment of the Law* 5-6 (Strahan 5th ed 1798) (explaining that an alien enemy cannot bring any action in English courts unless "he comes here under letters of safe conduct, or resides here by the king's license," while an alien friend "may maintain personal actions").

<sup>181</sup> Blackstone, 3 *Commentaries* at 118-21, 127-28, 144-54 (cited in note 9).

<sup>182</sup> Vattel, 1 *The Law of Nations* at bk II, § 84 at 147-48 (cited in note 103).

<sup>183</sup> See *Wolff v Oxholm*, 105 Eng Rep 1177, 1180 (KB 1817) ("[N]o country regards the penal laws of another."); *Ogden v Follitt*, 100 Eng Rep 825, 829 (KB 1790) (Buller) ("It is a general principle, that the penal laws of one country cannot be taken notice of in another."); *Rafaël v Verelst*, 96 Eng Rep 621, 622 (KB 1776) (De Grey) ("Crimes are in their nature local, and the jurisdiction of crimes is local.").

penalty fit the crime and to collect the penalty owing for the crime.<sup>184</sup> For another country to exercise such jurisdiction would in itself give offense to the nation with territorial jurisdiction over the act.<sup>185</sup> Accordingly, criminal punishment was not always an available means of redressing acts of violence committed by British subjects against foreigners.

For such acts committed outside of Great Britain, the only appropriate forms of redress under the law of nations were extradition or a civil remedy. In *East India Co v Campbell*,<sup>186</sup> the Court of Exchequer, recognizing that England would not exercise criminal jurisdiction over an offense committed in another nation, observed that “the government may send persons to answer for a crime wherever committed, that he may not involve his country; and to prevent reprisals.”<sup>187</sup> But if the government chose not to extradite, then its only remaining option was to provide redress through a civil remedy. Foreign citizens in amity injured abroad by a British subject could come to England, receive the protection of its laws, and pursue a transitory action in an English court against a British subject.<sup>188</sup> *Rafael v Verelst*<sup>189</sup> provides an example. Rafael, an Armenian, brought an action against Verelst, a British subject, for a false imprisonment inflicted in foreign parts.<sup>190</sup> Chief Justice William De Grey explained that “[t]he place where the imprisonment happened; viz. the dominions of a foreign prince,” did not bar the action, as it was transitory: “Crimes are in their nature local, and the jurisdiction of crimes is local. And so as to the rights of real property, the subject being fixed and immovable. But personal injuries are of a transitory nature.”<sup>191</sup>

Thus, where the criminal law was unavailable to remedy a law of nations violation, a civil tort remedy remained an available means of redress. Moreover, even when criminal prosecution was an option—for acts of violence committed within British territory by British subjects against foreigners—a civil tort action was available and provided aliens with an additional means of redress.

As Part IV explains, courts and scholars have erred by attempting to interpret the ATS—a provision for *civil* jurisdiction—

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<sup>184</sup> See Bellia, 94 Georgetown L J at 961–64 (cited in note 126) (describing these and other reasons why penal actions were understood to be local).

<sup>185</sup> See note 192 and accompanying text.

<sup>186</sup> 27 Eng Rep 1010 (Ex 1749).

<sup>187</sup> Id at 1011.

<sup>188</sup> See text accompanying notes 240–41.

<sup>189</sup> 96 Eng Rep 621 (KB 1776).

<sup>190</sup> Id at 621–22.

<sup>191</sup> Id at 622–23 (De Grey) (emphasis added).



solely by reference to the three English *crimes* against the law of nations that Blackstone described. These three offenses were but an important subset of a much broader range of civil and criminal remedies that English law provided to foreigners injured by British subjects. This entire range of remedies was essential if England wished to avoid responsibility to foreign nations for all such offenses.

### C. Refraining from Interfering with Other Nations' Sovereignty

While England provided both criminal punishments and civil remedies to redress law of nations violations by British subjects, it is significant to a proper understanding of the ATS that England refused to exercise criminal and civil jurisdiction that would have infringed upon other nations' territorial sovereignty. Under the law of nations, each nation was bound to respect the territorial sovereignty of other nations. Vattel explained:

The empire united to the domain, establishes the jurisdiction of the nation in its territories, or the country that belongs to it. It is that, or its sovereign, who is to exercise justice in all the places under his obedience, to take cognizance of the crimes committed, and the differences that arise in the country. Other nations ought to respect this right.<sup>192</sup>

Within its territorial domain, each nation had sovereign governing authority, free from interference by other nations:

It is a manifest consequence of the liberty and independence of nations, that all have a right to be governed as they think proper, and that none have the least authority to interfere in the government of another state. Of all the rights that can belong to a nation, sovereignty is, doubtless, the most precious, and that which others ought the most scrupulously to respect, if they would not do it an injury.<sup>193</sup>

As explained in Part I, present-day courts have invoked the ATS to exercise jurisdiction over disputes between foreign citizens for acts occurring in foreign countries. In 1789, adjudication of such disputes not only was *not* required by the law of nations, but in fact would have stood in tension with the principles of territorial sovereignty described by Vattel. In particular, under the law of nations, nations declined to exercise jurisdiction over actions that were local to another nation—in other words, within that other

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<sup>192</sup> Vattel, 1 *The Law of Nations* at bk II, § 84 at 147–48 (cited in note 103).

<sup>193</sup> *Id.* at bk II, § 54 at 138.

nation's exclusive territorial sovereignty.<sup>194</sup> As discussed, it was well established that common law courts would not entertain penal actions arising within the territory of another nation. In addition, aliens could not bring actions in English courts asserting rights to real property in other nations. Reflecting the law of nations, English law understood actions asserting rights in real property to be local.<sup>195</sup> (Moreover, under the common law, an alien could not bring an action in an English court asserting a permanent interest in real property in England.<sup>196</sup>)

Most relevant for present purposes, judges and other writers were reluctant to have local courts embrace claims between aliens for

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<sup>194</sup> See Bellia, 94 Georgetown L J at 957 (cited in note 126).

<sup>195</sup> See *Rafael*, 96 Eng Rep at 622–23 (De Grey) (explaining that jurisdiction over real property is local, “the subject being fixed and immoveable”); Blackstone, 3 *Commentaries* at 294 (cited in note 9) (describing actions for recovery of possession of land and damages for trespass as local); Comyns, 1 *Digest of the Laws of England* at 117 (cited in note 180) (explaining that “[e]very Action for Recovery of the Seisen, or Possession of Land, shall be brought in the County where the Land lies”).

As Blackstone explained, “territorial suits must be discussed in the territorial tribunal. I may sue a Frenchman here for a debt contracted abroad; but lands lying in France must be sued for there; and English lands must be sued for in the kingdom of England.” Blackstone, 3 *Commentaries* at 384 (cited in note 9). Real property, Vattel explained, “ought to be enjoyed according to the laws of the country where [it is] situated, and as the right of granting the possessions is vested in the superior of the country, the disputes relating to them can only be decided in the state on which they depend.” Vattel, 1 *The Law of Nations* at bk II, § 103 at 154 (cited in note 103).

<sup>196</sup> As Blackstone explained, “[i]f an alien could acquire a permanent property in lands, he must owe an allegiance, equally permanent with that property, to the king of England; which would probably be inconsistent with that, which he owes to his own natural liege lord.” Blackstone, 1 *Commentaries* at 360 (cited in note 9). Blackstone also thought that alien ownership of real property in England might subject the nation “to foreign influence.” *Id.* Thus, to protect England's territorial sovereignty, an alien could acquire only “a property in goods, money, and other personal estate,” not real property. *Id.* Because aliens could not acquire real property, they could not bring claims to establish real property rights. These rules accorded well with the law of nations. Writers on the law of nations, including Vattel, explained that a nation should decide for itself whether aliens can own real property there. See Vattel, 1 *The Law of Nations* at bk II, § 114 at 158 (cited in note 103). An alien could, however, bring an action in English courts asserting personal property interests. Blackstone, 1 *Commentaries* at 360–61 (cited in note 9). After independence, states initially adopted the common law rule that aliens could not hold a permanent interest in real property in the state. For example, in 1788, in an opinion joined by Judge Oliver Ellsworth, the Connecticut Superior Court explained that “[a] state may exclude aliens from acquiring property within it of any kind, as its safety or policy may direct; as England has done, with regard to real property, saving that in favor of commerce, alien merchants may hold leases of houses and stores . . . .” *Apthorp v Backus*, 1 Kirby 407, 413 (Conn Super Ct 1788). See also *Bayard*, 1 NC (1 Mart) at 9 (explaining “[t]hat it is the policy of all Nations and States, that the lands within their government should not be held by foreigners,” and thus, “by the civil, as well as by the common law of England, *aliens* are incapacitated to hold lands”). As in England, aliens could not assert actions in state court to establish a freehold in real property. See, for example, *Barges v Hogg*, 2 NC (1 Haywood) 485, 485 (NC Super Ct L & Eq 1797) (holding that “[a]n alien cannot maintain ejectment, or any action for the recovery of a freehold,” as “aliens are not allowed to acquire real property”).

acts occurring abroad because they could implicate foreign sovereignty and therefore foreign relations. In discussing the territorial sovereignty of nations, Vattel presumed that it would be improper for a nation to exercise jurisdiction over an alien–alien claim arising abroad unless the defendant alien had established domicile in the forum territory. He explained that “disputes that may arise between the strangers, or between a stranger and a citizen,” ought to be decided by a judge of the place, and by the laws of the place, “where this defendant has his domicil, or that of the place where the defendant is, when any sudden difficulty arises, provided it does not relate to an estate in land, or to a right annexed to such an estate.”<sup>197</sup> In other words, the dispute should be resolved only by the judge of the place in which the defendant was domiciled or where the cause of action arose (if the defendant was present there). By implication, Vattel suggested that a judge should not hear the case if he were in a place where the defendant was not domiciled or where the cause of action did not arise. Unless a defendant had settled in the forum nation, the forum nation should not exercise jurisdiction of an alien–alien claim arising abroad. Vattel justified these jurisdictional principles, in part, by observing that “the jurisdiction of a nation ought to be respected by the other sovereigns.”<sup>198</sup>

Nations paid particular attention to these principles because they implicated peace among nations.<sup>199</sup> Historically, if one nation interfered with the sovereignty of another to govern within its own territory, then the interfering nation violated the offended nation’s perfect rights and gave it just cause for war. According to Vattel, a nation had “a right of refusing to suffer”<sup>200</sup> such interference because “[t]o govern itself according to its pleasure[] is a necessary part of its independence.”<sup>201</sup> Unless a nation had granted a right of interference by treaty, “a sovereign has a right to treat as enemies those who endeavor to interfere, otherwise than by their good offices, in his domestic affairs.”<sup>202</sup>

Not surprisingly, English judges and other writers were sensitive to the territorial sovereignty implications of exercising jurisdiction over claims between aliens for acts occurring in other nations. In 1774,

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<sup>197</sup> Vattel, 1 *The Law of Nations* at bk II, § 103 at 154 (cited in note 103).

<sup>198</sup> *Id.*

<sup>199</sup> A nation had a perfect right in its own territorial sovereignty. Modern treatises contain little or no discussion of perfect rights because they are no longer recognized under international law. Perfect rights, however, played an important role in shaping the common law. See Bellia and Clark, 109 *Colum L Rev* at 9 (cited in note 17).

<sup>200</sup> Vattel, 1 *The Law of Nations* at bk II, § 57 at 140 (cited in note 103).

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

in *Mostyn v Fabrigas*,<sup>203</sup> Lord Mansfield suggested that English courts may have no jurisdiction over personal trespass actions arising abroad between nonresident foreigners because such actions were local to the foreign state, just as crimes were local. Anthony Fabrigas brought an action of trespass for an assault and imprisonment that occurred on the island of Minorca against John Mostyn, the English governor of Minorca.<sup>204</sup> Mostyn argued, among other things, that the cause of action could not be tried in England because it arose abroad.<sup>205</sup> Mansfield rejected this argument, holding that a transitory action arising abroad against a British subject may be brought in an English court.<sup>206</sup> In the process, however, Mansfield distinguished a case arising abroad between nonresident foreigners:

[T]here are some cases that arise out of the realm, which ought not to be tried anywhere but in the country where they arise; as . . . if two persons fight in France, and both happening casually to be here, one should bring an action of assault against the other, it might be a doubt whether such an action could be maintained here . . . because, though it is not a criminal prosecution, it must be laid to be against the peace of the King; but the breach of the peace is merely local, though the trespass against the person is transitory.<sup>207</sup>

Because a tort action arising abroad between foreigners breached only the local peace, Mansfield questioned whether English courts could hear such an action.<sup>208</sup>

Mansfield never had occasion squarely to consider a tort action arising abroad between foreigners because apparently no such actions were brought in English courts.<sup>209</sup> Given eighteenth-century

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<sup>203</sup> 98 Eng Rep 1021 (KB 1774).

<sup>204</sup> *Id.* at 1026–27 (Mansfield).

<sup>205</sup> *Id.* at 1029.

<sup>206</sup> *See id.* at 1030.

<sup>207</sup> *Mostyn*, 98 Eng Rep at 1030 (Mansfield).

<sup>208</sup> *See id.* In his *Commentaries*, Blackstone stated that a dilatory plea could be made “[t]o the *jurisdiction* of the court: alleging, that it ought not to hold plea of this injury, it arising in Wales or beyond sea.” Blackstone, 3 *Commentaries* at 301 (cited in note 9). He did not provide any further explanation of the grounds for this plea.

<sup>209</sup> In 1859, a New York court observed that “no case will be found in the whole course of English jurisprudence in which an action for an injury to the person, inflicted by one foreigner upon another in a foreign country, was ever held to be maintainable in an English court.” *Molony v Dows*, 8 Abb Prac 316, 329–30 (NY Ct Com Pleas 1859). Regarding *Mostyn*, the New York court explained:

The only thing bearing upon the subject is the remark of Lord Mansfield in *Mostyn v. Fabrigas* (1 *Cowp.*, 161), in which he questions the existence of the right. The absence of all authority in England upon such a point is almost as conclusive as an express adjudication denying the existence of such a right.

*Id.* at 330.

transportation and communication, it would have been unusual for two Frenchmen with a dispute arising exclusively in French territory to both be in England at the same time and for one to pursue legal redress there rather than in France. Ordinarily, a lack of such cases might suggest that the question whether courts had jurisdiction over such claims simply never arose. In this context, however, the absence of such cases reflects a deeper point about territorial sovereignty under the law of nations.

Like Mansfield, other judges and writers suggested that exercising jurisdiction over claims between foreigners for acts occurring abroad would offend the territorial sovereignty of the nation in which the action arose. Over a century before *Mostyn*, the Scottish Court of Session explained that it would not hear a contract action between two Englishmen that arose entirely outside of Scotland. In *Vernor v Elvies*,<sup>210</sup> the court stated that “[t]he Lords will not find themselves Judges betwixt two Englishmen, being in this country not *animo remanendi sed negociandi tantum* [with the intention of remaining, but just on business], specially in matters of debt contracted forth of this country.”<sup>211</sup> Only if a debt had been contracted to be paid in Scotland would the court “be judges in that case.”<sup>212</sup>

English and continental treatises illuminate the territorial sovereignty concerns implicated by cases like *Vernor* and Mansfield’s hypothetical in *Mostyn*. In his seventeenth-century treatise *De Jure Maritimo et Navali*, Charles Molloy described the French equivalent of Mansfield’s hypothetical—that of an Englishman pursuing an action in France, arising within the English realm, against another Englishman.<sup>213</sup> Hieron, a London merchant and British subject, brought an action against other British subjects in a French court “for certain Injuries supposed by them to be made within the Jurisdiction of the King of *England* at *Calice*.”<sup>214</sup> France ultimately dismissed the action on the ground that it rested within the exclusive jurisdiction of England. Specifically, the parliament at Paris dismissed the defendants “by a Judicial Sentence, for that they had no Cognizance or Ground to inquire or examine matters committed within the Jurisdiction of the King of *England*.”<sup>215</sup> Molloy’s discussion highlights England’s longstanding interest in protecting its own territorial

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<sup>210</sup> 6 Dict Dec 4788 (Sess 1610).

<sup>211</sup> Id at 4788.

<sup>212</sup> Id.

<sup>213</sup> See Charles Molloy, *De Jure Maritimo et Navali: or, a Treatise of Affairs Maritime and of Commerce* 475–76 (Walthoe 1722) (originally published 1676).

<sup>214</sup> Id at 475.

<sup>215</sup> Id.

jurisdiction—and its appreciation, as Mansfield evinces in *Mostyn*, of other nations’ reciprocal interest.<sup>216</sup>

Respect for the territorial sovereignty of other nations applied even in admiralty cases. For example, in 1817 the British Court of Admiralty was careful not to extend its admiralty jurisdiction into the penal jurisdiction of France.<sup>217</sup> Admiralty courts were also cognizant of other nations’ interests in adjudicating local disputes between their own citizens. Admiralty courts generally had jurisdiction to resolve disputes between aliens arising on the high seas. Nonetheless, such cases could implicate the territorial sovereignty of the aliens’ nations. In 1799, the Court of Admiralty was mindful that it could intrude upon the territorial jurisdiction of another nation by resolving local disputes between its citizens. In *The “Two Friends,”*<sup>218</sup> the court, in an opinion delivered by Sir William Scott, addressed whether it had jurisdiction over a case of salvage when the crew of an American ship recaptured the vessel from the French.<sup>219</sup> One objection to the court’s jurisdiction was that the salvage claim should “be enforced in

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<sup>216</sup> Molloy further explained that the king’s “Subjects there inhabiting in a Foreign Court . . . was an act so derogating from the Law, and of so high a Contempt,” that a statute forbade it. *Id.* at 475–76. Molloy referred to the Statute of Praemunire, 27 Edw III, ch 1 (1353), which provided that any subject who pursued an action within the king’s cognizance in a foreign court would suffer forfeiture and imprisonment, or outlawry. The statute was originally aimed to check papal patronage. See William Holdsworth, 1 *A History of English Law* 585–86 (Little, Brown 3d ed 1922).

<sup>217</sup> In “*Le Louis*,” 165 Eng Rep 1464 (Adm 1817), the Court of Admiralty reversed the sentence of a vice-admiralty court that had condemned a French ship for being employed in the slave trade. *Id.* at 1482. “[W]hat is to be done,” Sir William Scott asked, “if a French ship laden with slaves for a French port is brought in?” *Id.* at 1479. In answering this question, the court was aware that imposing a penalty upon the slave trade would interfere with France’s ability to enforce its own penal laws and right to receive penalties owed to it:

I answer without hesitation, restore the possession which has been unlawfully divested:—rescind the illegal act done by your own subject; and leave the foreigner to the justice of his own country. What evil follows? If the laws of France do not prohibit, you admit that condemnation cannot take place in a British Court. But if the law of France be what you contend, what would have followed upon its arrival at Martinique, the port whither it was bound? That all the penalties of the French law would have been immediately thundered upon it. If your case be true, there will be no failure of justice. Why is the British judge to intrude himself *in subsidium juris*, when everything requisite will be performed in the French Court in a legal and effectual manner? Why is the British judge, professing, as he does, to apply the French law, to assume cognisance for the mere purpose of directing that the penalties shall go to the British Crown and its subjects, which that law has appropriated to the French Crown and its subjects, thereby combining, in one act of this usurped authority, an aggression upon French property as well as upon French jurisdiction?

*Id.* As this passage reveals, British courts, including admiralty courts, were aware of limitations that the law of nations imposed upon their jurisdiction, including that nations should not exercise the penal jurisdiction of other nations.

<sup>218</sup> 165 Eng Rep 174 (Adm 1799).

<sup>219</sup> *Id.* at 174.

America, because the ship is an American ship, and the parties are American sailors.”<sup>220</sup> The court rejected this objection on two grounds—first, that crew members were in fact British subjects and, second, that “salvage is a question of the *jus gentium*,” which courts of admiralty jurisdiction are competent to resolve.<sup>221</sup> The court observed, however, that this question was “materially different from the question of a mariner’s contract, which is a creature of the particular institutions of each country, to be applied and construed, and explained by its own particular rules.”<sup>222</sup> Thus, the court explained, “[t]here might be good reason . . . why this Court should decline to interfere in such cases, and should remit the foreign parties to their own domestic forum.”<sup>223</sup> “Between parties who were all Americans,” Scott continued,

if there was the slightest disinclination to submit to the jurisdiction of this Court, I should certainly not incline to interfere; for this Court is not hungry after jurisdiction, where the exercise of it is not felt to be beneficial to the parties between whom it is to operate. At the same time, I desire to be understood to deliver no decided opinion, whether American seamen rescuing an American ship and cargo, brought into this country, might not maintain an action *in rem* in this Court of the law of nations.<sup>224</sup>

This case further illustrates that English judges were aware that adjudication of claims between aliens could implicate the territorial sovereignty of the aliens’ nation.

US courts were also cognizant that the law of nations recognized jurisdictional limitations respecting the territorial sovereignty of other nations. For example, federal courts sitting in admiralty followed a “general rule not to take cognizance of disputes between the masters and crews of foreign ships,” and instead to refer “them to their own courts.”<sup>225</sup> As one district court explained in 1801, “[r]eciprocal policy, and the justice due from one friendly nation to another, calls for such conduct in the courts of either country.”<sup>226</sup> Similarly, the Supreme

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<sup>220</sup> *Id.* at 176.

<sup>221</sup> *Id.* at 176–77.

<sup>222</sup> *The “Two Friends,”* 165 Eng Rep at 177.

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Willendson v Forsoket*, 29 F Cases 1283, 1284 (D Pa 1801).

<sup>226</sup> *Id.* See also *Thompson v The Catharina*, 23 F Cases 1028, 1028 (D Pa 1795) (stating that the court has “avoided taking cognizance, as much as possible, of disputes in which foreign ships and seamen, are concerned,” and has, “in general, left them to settle their differences before their own tribunals”).

Court and state courts routinely recited the law of nations' prohibition on adjudicating penal actions arising within another nation's territorial jurisdiction.<sup>227</sup>

Although alien–alien claims for acts occurring in foreign territory were unusual in the late eighteenth century, there is some evidence that judges and lawyers in the states appreciated that adjudication of such suits might also offend the law of nations. For example, in *Brinley v Avery*,<sup>228</sup> the Connecticut Superior Court held in 1786 that Connecticut courts lacked jurisdiction over a contract action arising in British territory between two British subjects.<sup>229</sup> George Brinley, commissary general of Nova Scotia, brought an action on the case against Avery, a British subject resident in Connecticut, to enforce a written agreement. Avery pleaded in abatement that, at the time the contract was made and allegedly breached, “both the plaintiff and defendant were inhabitants of [ ] Halifax, subjects of [the] king of Great Britain; both under the allegiance of [the] king, and owing no allegiance to this state, or to said United States.”<sup>230</sup> Because Halifax was “governed by the laws and statutes of the kingdom of Great Britain,” the plaintiff’s claim “ought to be tried and determined in and by the courts of said king of Great Britain, according to the laws, statutes and usages of said kingdom.”<sup>231</sup> Avery claimed that no such actions can be maintained “by the law of nations” or “by the laws of England.”<sup>232</sup> Finally, Avery argued that a British court would not respect a Connecticut judgment in his case, allowing the plaintiff to pursue a second judgment there.<sup>233</sup>

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<sup>227</sup> In 1825, Chief Justice John Marshall wrote that “[t]he Courts of no country execute the penal laws of another.” *The Antelope*, 23 US (10 Wheat) 66, 123 (1825). See also *Rose v Himely*, 8 US (4 Cranch) 241, 280 (1808) (Marshall) (stating that “this court, having no right to enforce the penal laws of a foreign country, cannot inquire into any infraction of those laws”). For state cases, see, for example, *Simmons v Commonwealth*, 5 Binn 617, 620 (Pa 1813) (Yeates) (“Offences are *local* in their nature, and must by common law be tried in the county where they were committed.”); *Sturgenegger v Taylor*, 5 SCL (3 Brev) 7, 7 (SC 1811) (“[C]rimes, and the rights of real property, are local.”).

<sup>228</sup> 1 Kirby 25 (Conn Super Ct 1786).

<sup>229</sup> *Id.* at 25.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> *Brinley*, 1 Kirby at 26.

<sup>233</sup> *Id.* Vattel stated that one nation generally should respect foreign judgments, even against its subject, unless (1) the decision was not “within the extent of [the judge’s] power,” or (2) “in the cases of a refusal of justice, palpable and evident injustice, a manifest violation of rules and forms; or, in short, an odious distinction made to the prejudice of his subjects, or of foreigners in general.” Vattel, 1 *The Law of Nations* at bk II, §§ 84–85 at 148 (cited in note 103). Thus, if a foreign nation perceived a Connecticut court to exceed the bounds of its permissible jurisdiction over foreigners under the law of nations, it could refuse to respect its judgment.



Brinley's argument in replication was that he, being an alien friend—a subject of Britain, which was “at amity, and in league with this state”—had a right under the Paris Peace Treaty and law of nations to bring personal, transitory actions against citizens of Connecticut or resident British aliens.<sup>234</sup>

The court ruled for Avery and refused to adjudicate the dispute. The reported decision was simply: “The plea in abatement ruled sufficient.”<sup>235</sup> The court likely accepted Avery's argument that British courts had exclusive jurisdiction of a claim arising between British subjects in British territory. In his reports of Connecticut Superior Court cases, Ephraim Kirby listed “authorities important” to this case.<sup>236</sup> The first authority that he cited was Lord Kames's *Historical Law-Tracts*, noting: “Court of Sessions refused to judge between the two foreigners concerning a covenant made abroad—but judged where the debt by agreement was to be paid in Scotland for that gave jurisdiction.”<sup>237</sup> As Kames described, the nation in which a contract was made and to be performed had territorial sovereignty over the debt it created. Only if British subjects were involved or the debt was to be paid in England would English courts employ the fiction that the debt arose in England.<sup>238</sup>

In contrast to alien–alien claims arising abroad, a nation's courts did not implicate other nations' territorial sovereignty under the law of nations when they heard actions by aliens against their own citizens. Indeed, adjudication of such claims was often necessary to avoid violating the rights of foreign nations. Under the law of nations, a nation had a right to regulate its own citizens or subjects wherever they might be. In exchange for the sovereign's protection, citizens owed allegiance to their sovereign at home and abroad.<sup>239</sup> A sovereign

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<sup>234</sup> *Brinley*, 1 Kirby at 26–27.

<sup>235</sup> *Id.* at 27.

<sup>236</sup> See *Brinley v Avery*, 2 Kirby 22, 22 (Conn Super Ct 1786).

<sup>237</sup> *Id.*, citing Henry Home (Lord Kames), 1 *Historical Law-Tracts* 234 (Kincaid 2d ed 1761).

<sup>238</sup> See Home, 1 *Historical Law-Tracts* at 237 (cited in note 237).

<sup>239</sup> As Blackstone explained, being “under the king's protection . . . [a]n Englishman who removes to France, or to China, owes the same allegiance to the king of England there as at home, and twenty years hence as well as now.” See Blackstone, 1 *Commentaries* at 357–58 (cited in note 9). Joseph Story explained that a nation's sovereignty over its citizens extended to their actions both within and beyond its territorial jurisdiction. “In regard to [citizens], while within the territory of their birth, or adopted allegiance, the jurisdiction of the sovereignty over them is complete and irresistible. It cannot be controlled; and it ought to be respected everywhere.” Story, *Commentaries on the Conflict of Laws* at 451 (cited in note 20). Regarding citizens absent from their nations' territorial jurisdiction:

It is true, that nations generally assert a claim to regulate the rights, duties, obligations, and acts of their own citizens, wherever they may be domiciled. And, so far as these rights, duties, obligations, and acts afterwards come under the cognizance of the tribunals of the

had an interest in protecting its citizens' rights and enforcing their duties, arising at home or abroad, when they properly came within the jurisdiction of its tribunals. Thus, an English court would hear an alien tort claim arising abroad against a British subject both to enforce the duties that the nation imposed on its subjects and to avoid national responsibility to the plaintiff's nation for the defendant's misconduct. This was the actual case of *Mostyn v Fabrigas*—an action brought by an alien against a British subject in an English court for an injury inflicted abroad.<sup>240</sup> *Rafael v Verelst*, mentioned earlier, provides another example. The King's Bench exercised jurisdiction over a transitory personal action for an injury inflicted by a British subject upon an alien abroad. Chief Justice William De Grey held that the plaintiff's alienage did not bar the action, "for this is no objection in personal actions."<sup>241</sup> In addition to adjudicating tort claims, English courts heard actions on debts and contracts arising abroad between an alien and a British subject, employing the fiction that the debt arose in England.<sup>242</sup> Moreover, if a debt or contract—even between aliens—was to be performed in England, English courts would have territorial jurisdiction over the cause of action, as it would arise in English territory.<sup>243</sup>

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sovereign power of their own country, either for enforcement, or for protection, or for remedy, there may be no just ground to exclude this claim.

Id.

<sup>240</sup> 98 Eng Rep at 1026–27 (Mansfield).

<sup>241</sup> *Rafael*, 96 Eng Rep at 622–23 (De Grey).

<sup>242</sup> See *Holman v Johnson*, 98 Eng Rep 1120, 1121 (KB 1775) (Mansfield) (enforcing a contract for goods sold and delivered at Dunkirk that was not illegal under the laws of England and remarking that "[d]ebt follows the person, and may be recovered in England, let the contract of debt be made where it will; and the law allows a fiction for the sake of expediting the remedy"); *Odwyer v Salvador*, 21 Eng Rep 313, 313 (Ch 1763) (requiring an alien merchant plaintiff to give security to answer costs before the alien's claims would proceed in English court); *Freeman v King*, 84 Eng Rep 196, 196 (KB 1666) ("[A] bond dated at Paris in France, may be laid at Paris in France in Islington [County of Middlesex]; but where it's dated at Paris within the kingdom of France, it's not triable at all."); Bacon, 1 *New Abridgment of the Law* at 58 (cited in note 180) (explaining that "[a]n action may be brought on a contract or matter which arose beyond sea" by alleging it was made in England, and that if the contract alleges it was made in a particular place abroad, the plaintiff should allege that that place is in the County of Middlesex in London); Home, 1 *Historical Law-Tracts* at 248–49 (cited in note 237) (explaining how fictions came to be used for trying actions between British subjects upon contracts or debts arising in foreign parts).

<sup>243</sup> As Lord Kames described *Vernor v Elvies* in his *Historical Law-Tracts*, "[t]he court of session, [ ] though they refused to sustain themselves judges betwixt two foreigners, with relation to a covenant made abroad, thought themselves competent, where it was agreed the debt should be paid in this country." Home, 1 *Historical Law-Tracts* at 234 (cited in note 237). Kames additionally explained:

A covenant bestows a jurisdiction upon the judge of the territory where it is made, provided only the party be caught within the territory, and be cited there. The reason is, that if no other place for performance be specified, it is implied in the covenant, that it shall be

All in all, English law was finely attuned to avoiding law of nations violations in the adjudication of a broad array of alien claims. As discussed below, this set of understandings supplied the basis for the way the Founders shaped the Judiciary Act of 1789.<sup>244</sup> Before turning to that history, however, it is necessary to explain the ways in which the Articles of Confederation fell short of fulfilling the new nation's obligations under the law of nations.

### III. LAW OF NATIONS VIOLATIONS UNDER THE ARTICLES OF CONFEDERATION

During the Articles of Confederation period, states violated the law of nations in various ways, including by their failure to redress private offenses to other nations. Certain states failed to comply with the 1783 Treaty of Paris by impeding British creditors from recovering debts. They also violated the law of nations by failing to punish or otherwise redress acts of violence committed by their citizens against British subjects. These violations of the law of nations were well known to the British, straining relations between the two nations and raising the possibility of British military retaliation. To avoid these consequences, certain states strengthened alien rights in the late 1780s to encourage commerce and avoid offense to Britain. These measures were insufficient, however, to prevent violations by other states and eliminate the threat of armed conflict. The states' ongoing violations of the law of nations were instrumental in bringing about the Federal Convention of 1787. The inability of the United States, under the Articles of Confederation, to comply with the law of nations provides important context for understanding the Constitution and the work of the First Congress.

#### A. Redressing Law of Nations Violations

After the United States won its independence, its viability as a nation required increasing trade and maintaining peace with other nations. Members of the Founding generation were well versed in the law of nations and the English methods of preventing the actions of individuals from triggering hostilities with foreign nations. In short, they understood that maintaining peace required the United States to redress private offenses to other nations. Because state remedies were inadequate, the Second Continental Congress resolved in 1781 that

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performed in the place where it is made; and it is natural to apply for redress to the judge of that territory where the failure happens, provided the party who fails be found there.  
Id.

<sup>244</sup> See Part IV.

state legislatures should take measures to redress violations of the law of nations by private citizens.<sup>245</sup> A committee of Edmund Randolph, James Duane, and John Witherspoon considered a motion “for a recommendation to the several legislatures to enact punishments against violators of the law of nations.” The committee reported:

That the scheme of criminal justice in the several states does not sufficiently comprehend offenses against the law of nations:

That a prince, to whom it may be hereafter necessary to disavow any transgression of that law by a citizen of the United States, will receive such disavowal with reluctance and suspicion, if regular and adequate punishment shall not have been provided against the transgressor:

That as instances may occur, in which, for the avoidance of war, it may be expedient to repair out of the public treasury injuries committed by individuals, and the property of the innocent be exposed to reprisal, the author of those injuries should compensate the damage out of his private fortune.<sup>246</sup>

In other words, the committee found that (1) state courts were not adequately punishing law of nations violations by individuals, (2) the states’ failure to provide adequate redress could lead the United States into war, and (3) public and private redress of such law of nations violations was necessary to avoid war or reprisals. The committee plainly appreciated that a state’s failure to redress private transgressions of the law of nations provided just cause for war by the offended nation.<sup>247</sup>

A resolution of the Continental Congress followed upon this report:

*Resolved*, That it be recommended to the legislatures of the several states to provide expeditious, exemplary and adequate punishment:

First. For 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:

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<sup>245</sup> See Gaillard Hunt, ed, 21 *Journals of the Continental Congress, 1774–1789* 1136–37 (GPO 1912) (resolving to provide a forum and a remedy for “those offences against the law of nations which are most obvious . . . [and] requiring that punishment should be co-extensive with such crimes”).

<sup>246</sup> *Id.* at 1136.

<sup>247</sup> See notes 128–34 and accompanying text.

Secondly. For 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:

Thirdly. For the infractions of the immunities of ambassadors and other public ministers, authorized and received as such by the United States in Congress assembled, by animadverting on violence offered to their persons, houses, carriages and property, under the limitations allowed by the usages of nations; and on disturbance given to the free exercise of their religion: by annulling all writs and processes, at any time sued forth against an ambassador, or other public minister, or against their goods and chattels, or against their domestic servants, whereby his person may be arrested: and,

Fourthly. For infractions of treaties and conventions to which the United States are a party.

The preceding being only those offences against the law of nations which are most obvious, and public faith and safety requiring that punishment should be co-extensive with such crimes:

*Resolved*, That it be farther recommended to the several states to erect a tribunal in each State, or to vest one already existing with power to decide on offences against the law of nations, not contained in the foregoing enumeration, under convenient restrictions.

*Resolved*, That it be farther recommended to authorise suits to be instituted for damages by the party injured, and for compensation to the United States for damage sustained by them from an injury done to a foreign power by a citizen.<sup>248</sup>

All of the offenses that this resolution identified gave the offended nation just cause for war, and the Continental Congress urged states to adopt overlapping criminal and civil remedies to redress these offenses. The first recommendation called upon states to punish violations of express safe conducts.<sup>249</sup> Typically, express safe conducts were granted to certain alien enemies during wartime to permit them to travel safely within the territory of the granting nation. Violation of an express safe conduct, if not redressed, justified an armed response, threatening the escalation of hostilities.<sup>250</sup>

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<sup>248</sup> Hunt, ed, 21 *Journals of the Continental Congress* at 1136–37 (cited in note 245).

<sup>249</sup> *Id.* at 1136.

<sup>250</sup> See notes 165–70 and accompanying text.

The second recommendation called upon states to punish acts of hostility against foreign citizens “in amity, league or truce with the United States, or who are within the same, under a general implied safe conduct.”<sup>251</sup> Criminal punishment in such cases would have satisfied the United States’ obligation under the law of nations to redress acts of hostility by its citizens against these groups of aliens. Criminal punishment, however, generally would have been limited to acts of hostility within a state’s territorial jurisdiction (the limit of its common law criminal jurisdiction) or within its admiralty jurisdiction over piracy.<sup>252</sup>

The third recommendation urged states to punish “infractions of the immunities of ambassadors and other public ministers, authorised and received as such by the United States in Congress assembled.”<sup>253</sup> Such offenses constituted serious violations of the perfect rights of foreign nations, justifying war if not appropriately redressed.

The fourth recommendation urged states to punish “infractions of treaties and conventions to which the United States are a party.”<sup>254</sup> The obligations that nations assumed in treaties were understood to give treaty partners corresponding perfect rights.<sup>255</sup> Accordingly, violation of a treaty gave a treaty partner just cause for war under the law of nations.

After calling on the states to punish these “most obvious” law of nations violations, the Continental Congress offered two additional, catch-all resolutions. The first of these encouraged states to establish tribunals to hear other offenses against the law of nations “not contained in the foregoing enumeration.”<sup>256</sup> The second resolution—an early precursor of the kind of civil remedy later established by the ATS—called upon states to “authorise suits to be instituted for damages by the party injured, and for compensation to the United States for damage sustained by them from an injury done to a foreign power by a citizen.”<sup>257</sup> This recommendation envisioned civil redress for both the criminal offenses already enumerated and distinct private

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<sup>251</sup> Hunt, ed, 21 *Journals of the Continental Congress* at 1136 (cited in note 245).

<sup>252</sup> The first clause of this second recommendation was likely meant to cover acts of hostility against foreign citizens protected by a treaty of amity, league, or truce. The second clause was likely meant to cover acts of hostility against aliens under the protection of an implied safe conduct.

<sup>253</sup> Hunt, ed, 21 *Journals of the Continental Congress* at 1136–37 (cited in note 245).

<sup>254</sup> *Id.* at 1137.

<sup>255</sup> Vattel, 1 *The Law of Nations* at bk II, § 164 at 174 (cited in note 103) (“As the engagements of a treaty impose on the one hand a perfect obligation, they produce on the other a perfect right. To violate a treaty, is then to violate the perfect right of him with whom we have contracted.”).

<sup>256</sup> Hunt, ed, 21 *Journals of the Continental Congress* at 1137 (cited in note 245).

<sup>257</sup> *Id.*

law of nations violations that the criminal law did not reach. In this way, the recommendation sought to supplement the proposed criminal penalties, thereby providing additional assurance that the United States would not be held responsible for the misconduct of its citizens directed against other nations or their citizens.<sup>258</sup>

## B. Ongoing Law of Nations Violations

Notwithstanding these resolutions, states did little to redress violations of the law of nations throughout the 1780s. Two sets of violations are noteworthy. First, states failed to comply with the Paris Peace Treaty of 1783 by obstructing claims of British creditors. Second, states failed to provide redress for acts of violence against British subjects. These law of nations violations threatened reprisals by Great Britain. As the 1780s progressed, states took some measures to redress these violations, but additional measures were necessary, as delegates to the Federal Convention of 1787 recognized. The law of nations violations known to the Founders during this period provide essential context for understanding how various provisions of the Judiciary Act of 1789—including the ATS—operated to avoid US responsibility for its citizens’ law of nations violations.

### 1. Obstructing claims of British creditors.

Article IV of the Paris Peace Treaty of 1783 provided “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.”<sup>259</sup> Britain demanded this provision, and American negotiators knew that ongoing trade with Britain required enforcement of creditors’ rights across the Atlantic.<sup>260</sup> Nonetheless, this provision provoked controversy.<sup>261</sup> Debtor planters and farmers resisted debt payment to British creditors, and states continued various impediments to the recovery of such debts.<sup>262</sup> Pennsylvania, for example, continued a 1781 law refusing judicial process to British creditors seeking to recover debts.<sup>263</sup> Maryland and Virginia allowed debtors to make discounted payments into the state treasury in

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<sup>258</sup> The committee that drafted these resolutions left no doubt that their purpose was “the avoidance of war.” *Id.* at 1136.

<sup>259</sup> See Paris Peace Treaty Art IV, 8 Stat at 82.

<sup>260</sup> See Merrill Jensen, *The New Nation: A History of the United States during the Confederation, 1781–1789* 15–17 (Knopf 1965).

<sup>261</sup> *Id.* at 68–69.

<sup>262</sup> *Id.* at 277–79.

<sup>263</sup> See Wythe Holt, “*To Establish Justice*”: *Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 *Duke L J* 1421, 1438–39.

exchange for certificates discharging their debts to British creditors.<sup>264</sup> Private violence also impeded debt recovery by British creditors. In 1786, for example, a mob forced an attorney during a Maryland court session to “strike off several Actions which he had brought for the recovery of British Debts.”<sup>265</sup>

American resistance to debt recovery by British creditors stifled American commerce with Britain and threatened to renew hostilities between the two nations. Unable to rely on American credit or recover existing debts, British merchants withdrew from trade. In August 1784, for example, five London merchant houses that traded with the United States shut down.<sup>266</sup> Even more ominously, American resistance to British debt recovery threatened reprisals—or war. Under the law of nations, a treaty obligation was understood to give treaty partners a corresponding perfect right enforceable by arms.<sup>267</sup> American writers well appreciated that state resistance to British debt recovery threatened to impede commerce and provoke reprisals, if not war.<sup>268</sup>

The complaints of British merchants were well publicized in England. In December 1785, for instance, the *London Times* published a letter from a British merchant in Charleston who complained bitterly about South Carolina’s failure to afford British

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<sup>264</sup> See *id.* at 1438.

<sup>265</sup> William Smallwood, *A Proclamation* (July 14, 1786), reprinted in Aubrey C. Land, ed., 9 *Journal and Correspondence of the State Council of Maryland, 1784–1789* 123 (Maryland Historical Society 1970) (ordering the cessation of such violent and disorderly conduct and warning that subsequent violations would be met with penalties).

<sup>266</sup> See Jensen, *The New Nation* at 188 (cited in note 260).

<sup>267</sup> According to Vattel, “[a]s the engagements of a treaty impose on the one hand a perfect obligation, they produce on the other a perfect right. To violate a treaty, is then to violate the perfect right of him with whom we have contracted”—and thus provides just cause for war. See Vattel, 1 *The Law of Nations* at bk II, § 164 at 174 (cited in note 103).

<sup>268</sup> In 1784, a political writer, “Lycurgus,” criticized Pennsylvania’s refusal to afford process to British creditors in a letter to *The Freeman’s Journal*:

The restraint layed in 1781 [in Pennsylvania], and continued last year upon the ultimate process for debts, contradicting as it doth, the late definitive treaty between the United States of America and Great Britain, which secures to the subjects of both, the fullest remedy for their legal demands on each other, is very destructive to the credit of this country in foreign parts, and may provoke reprisals.

Lycurgus, *Letter to Mr. Printer*, *Freeman’s J* (Phila) 1 (May 5, 1784). In 1787, members of the South Carolina assembly debated whether to continue obstructing debt recovery by British creditors. David Ramsay argued that “to postpone still further the payment of debts” would be “not only contrary to our honor, but to our natural interest.” *Debate in the Assembly of South Carolina, Respecting a Bill for the Discharge of Private Debts by Installments*, *Mass Gazette* 1 (Mar 23, 1787). Not only would British merchants hesitate to do business with the United States, but, according to “the best informed citizens of the United States, . . . letters of marque and reprisal would be speedily issued against us; and [ ] our property on the high seas would be captured, and thrown into a common fund for the relief of our foreign creditors.” *Id.*



merchants appropriate legal process.<sup>269</sup> In February 1786, Lord Carmarthen refused to engage John Adams on Britain's failure to withdraw from its military posts in the United States—in violation of the Paris Peace Treaty<sup>270</sup>—because the United States had failed to remove impediments to debt collection by British creditors.<sup>271</sup> Carmarthen attached a list of grievances of British debtors, which the *London Times* published in September 1786.<sup>272</sup> The grievances listed, state by state, the acts, ordinances, and edicts that obstructed British creditors from recovering debts in state courts. In Georgia, the grievances specifically noted that “the Judges from the bench have declared that no suit shall be proceeded on if brought by a British subject, while, on the contrary, they allow British subjects to be sued by their creditors.”<sup>273</sup> In other states, “although the courts appear to be open, the lawyers are afraid to prosecute for British debts.”<sup>274</sup> In 1790, the editor of *A Review of the Laws of the United States of North America*, published in London, noted that, even where state courts afforded process to British creditors, it is “too frequently evaded to the injury of the British creditor.”<sup>275</sup> Regarding Georgia in particular, the editor observed:

Every privilege and protection which belongs to American citizens, as alien friends in Britain, equally appertains to British subjects, as alien friends within the United States, with respect to the security both of person and property, because the laws of both countries are substantially the same. But nevertheless the

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<sup>269</sup> *Copy of a Letter from Charlestown*, *Lond Times* 2 (Dec 28, 1785).

<sup>270</sup> Paris Peace Treaty Art VII, 8 Stat at 83.

<sup>271</sup> Lord Carmarthen wrote:

The little Attention paid to the fulfilling this Engagement on the Part of the Subjects of the United States in general and the direct Breach of it, in many particular Instances, have already reduced many of the Kings Subjects to the utmost degree of Difficulty and Distress: nor have their Applications for Redress, to those whose Situations in America naturally pointed them out as the Guardians of public Faith, been as yet successfull in obtaining them that Justice to which, on every Principle of Law, as well as of Humanity, they were clearly and indisputably entitled.

Letter from Lord Carmarthen to John Adams (Feb 28, 1786), reprinted in Mary A. Guinta, ed, *Documents of the Emerging Nation: U.S. Foreign Relations, 1775–1789* 166 (Scholarly Resources 1998).

<sup>272</sup> *Substance of Lord Carmarthen's Answer to the Requisition of His Excellency John Adams*, *Lond Times* 4 (Sept 5, 1786).

<sup>273</sup> *Id.*

<sup>274</sup> *Id.*

<sup>275</sup> *A Review of the Laws of the United States of North America, the British Provinces, and West India Islands: With Select Precedents and Observations upon Divers Acts of Parliament and Acts of Assembly, and a Comparison of the Courts of Law and Practice There with That of Westminster Hall* 12 (Otridge and Otridge 1790). The editor hoped this work would prove “of some service to Gentlemen of the Profession, as well as the Merchants of *both Countries*.” *Id.* at vi.

judges in Georgia have, since the peace, determined, in the case of one Perkin's, that a British merchant and alien friend, could not maintain an action against a citizen of that State.<sup>276</sup>

These concerns prompted London merchants to engage in organized political activity to pressure the British government to demand satisfaction of American debts.<sup>277</sup>

## 2. Failing to redress acts of violence against British subjects.

In addition to thwarting the rights of British creditors under the Paris Peace Treaty, states violated the law of nations by not redressing tort injuries inflicted by state citizens upon British subjects.<sup>278</sup> In the 1780s, state citizens increasingly made violent attacks upon the persons and property of British subjects in America. Indeed, the president of the Continental Congress, Elias Boudinot, feared that postwar acts of violence by New York Whigs against the British were so extreme as possibly to “involve us in another War.”<sup>279</sup>

Acts of violence against loyalists and their property after the 1783 Paris Peace Treaty have been well documented.<sup>280</sup> Britain attempted formally to protect loyalists in the Treaty, most notably in Article V. Article V provided that Congress would “earnestly recommend” to state legislatures that they restore property confiscated from British

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<sup>276</sup> Id at 11–12.

<sup>277</sup> See Katharine A. Kellock, *London Merchants and the Pre-1776 American Debts*, 1 *Guildhall Stud Lond Hist* 109, 113 (1974).

<sup>278</sup> By permitting their citizens to injure British subjects, states arguably contradicted the Treaty as well. Article VI of the Treaty provided:

That there shall be no future confiscations made, nor any prosecutions commenced against any person or persons for, or by reason of the part which he or they may have taken in the present war; and that no person shall, on that account, suffer any future loss or damage, either in his person, liberty or property; and that those who may be in confinement on such charges, at the time of the ratification of the treaty in America, shall be immediately set at liberty, and the prosecutions so commenced be discontinued.

Paris Peace Treaty Art VI, 8 Stat at 83. Thus, if a state citizen injured a British subject in person or property because of “the part which he . . . may have taken in the present war,” and the state refused to provide redress, then Britain might have considered this to be a treaty violation.

<sup>279</sup> Oscar Zeichner, *The Loyalist Problem in New York after the Revolution*, 21 *NY Hist* 284, 289 (1940).

<sup>280</sup> See Jensen, *The New Nation* at 290–91 (cited in note 260) (noting that “[i]ncreasingly violent attacks were made on British merchants and their American abettors”); Wallace Brown, *The Good Americans: The Loyalists in the American Revolution 175–76* (Morrow 1969); A.L. Burt, *The United States, Great Britain, and British North America: From the Revolution to the Establishment of Peace after the War of 1812* 94–98 (Yale 1940). Before and during the war, British merchants of course had feared such violence. For an account of one such merchant, see William L. Roberts III, *The Losses of a Loyalist Merchant in Georgia during the Revolution*, 52 *Ga Hist Q* 270, 272–73 (1968) (describing a merchant's fear of “imprisonment or bodily harm” in 1776).

subjects.<sup>281</sup> The Treaty gave loyalists twelve months to return and claim their property without interference.<sup>282</sup> In fact, confiscations continued, and many loyalists were injured or killed upon returning to reclaim their property.

A 1785 letter to the *New York Packet* from the writer “Americanus” describes one such violent incident and its foreign relations implications. The writer conveyed that a “supporter of the British lion,” returning to New Jersey from Nova Scotia, suffered an “ill-treating” and “the cutting off an ear.”<sup>283</sup> The New York writer was “sorry to say, that this is not the first outrage of the kind (though the most serious) that has happened in our sister state of New Jersey.”<sup>284</sup> The writer recognized that such attacks offended the law of nations. He stated that the United States could never “be respected as a nation” if such acts “are suffered to pass unpunished.”<sup>285</sup> If Americans received such treatment in England, Americanus explained, the English government would severely punish the perpetrators:

Should some of us go to England, we might, no doubt meet with people there to whom, as having been “strenuous OPPOSERS of the British lion,” we might be no less obnoxious; than the most violent Tory would be to us; I would ask, in that case, what should we say of their government, if such an outrage was suffered to be committed on one of us with impunity; but I do not hesitate to assert that the reverse would be the case; that the perpetrators of such a deed would meet with a very severe punishment.<sup>286</sup>

Americanus implored New Jersey to “endeavor to suppress rather than appear to boast of actions which must reflect disgrace on our government.”<sup>287</sup> Violence against foreigners, in addition to being “in the highest degree disgraceful to us as a nation,” would deter foreigners from “sett[ing] among us” and “venturing their property.”<sup>288</sup>

Failure to redress such violence gave Britain just cause for war against the United States. In reality, however, Britain, like the United

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<sup>281</sup> Paris Peace Treaty Art V, 8 Stat at 82.

<sup>282</sup> Paris Peace Treaty Art V, 8 Stat at 82.

<sup>283</sup> Americanus, *Letter to Mr. Loudon*, NY Packet 2 (Oct 20, 1785).

<sup>284</sup> Id.

<sup>285</sup> Id.

<sup>286</sup> Id.

<sup>287</sup> Americanus, *Letter to Mr. Loudon*, NY Packet at 2 (cited in note 283).

<sup>288</sup> Id.

States, could ill afford another war at that time.<sup>289</sup> Accordingly, it had to resort to lesser forms of retaliation. In time, Britain would link both the treatment of loyalists at the hands of United States citizens and state-imposed impediments to debt recovery by British merchants to its refusal to give up military posts in North America (as required by the Paris Peace Treaty).<sup>290</sup>

Britain was not the only nation with whom private violence threatened to precipitate hostilities. In the 1780s, the danger of clashes between American settlers and Spaniards on lands adjacent to the Mississippi threatened hostilities between the United States and Spain.<sup>291</sup> Even before the United States and Spain entered into a treaty, violence by Americans against Spaniards violated the law of nations and—if not redressed—gave Spain just cause for war.

### 3. State attempts to provide redress.

Over time, writers and public officials increasingly came to appreciate that the peace and prosperity of the United States depended on protecting the interests of foreign merchants and redressing private violence against foreign subjects. Robust commerce required respect for the commercial rights of foreign merchants. In 1784, Alexander Hamilton published a letter exhorting the states to foster commerce by protecting the commercial rights of British merchants.<sup>292</sup> Certain states attempted to encourage commerce by

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<sup>289</sup> See Burt, *The United States, Great Britain, and British North America* at 97 (cited in note 280).

<sup>290</sup> See *id.* at 94.

<sup>291</sup> At this time, Americans claimed that they had rights to navigate the Mississippi River under the Treaty of Paris of 1763, which granted navigation rights to British subjects. Spain contended that the treaty was inapplicable and refused navigation rights to Americans. In 1787, the French *charge d'affaires*, Louis Guillaume Otto, observed that “[t]he inhabitants of Kentucky and Frankland are insisting not only on the free navigation of the Mississippi, but they threaten to commit hostilities against the inhabitants of Louisiana unless Spain renounces its exclusive system.” Letter from Louis Guillaume Otto to Comte de Montmorin (Mar 5, 1787), reprinted in Guinta, ed, *Documents of the Emerging Nation* 210, 210 (cited in note 271). See also Louis Guillaume Otto, *Question of the Mississippi* (1786), reprinted in Albert Bushnell Hart, ed, *3 American History Told by Contemporaries: National Expansion 1783–1845* 150, 151–54 (Macmillan 1901) (describing the threat of hostilities and the potential subjection to England of American settlers on the Mississippi). “Frankland” was the short-lived state into which the western part of North Carolina had organized itself as early as 1786 after declaring independence from North Carolina. See Z.F. Smith, *The History of Kentucky* 442 (Courier-Journal 1892).

<sup>292</sup> Hamilton argued that

every merchant or trader has an interest in the aggregate mass of capital or stock in trade; that what he himself wants in capital, he must make up in credit; that unless there are others who possess large capitals this credit cannot be had; and that, in the diminution of the general capital of this State, commerce will decline, and his own prospects of profit will diminish.

strengthening aliens' ability to recover debts and granting aliens other commercial rights. Georgia, Maryland, and New Jersey, for example, authorized aliens to hold judicially enforceable security interests in real property as a means of fostering lending.<sup>293</sup> (In the coming years, certain states would allow aliens to own real property.<sup>294</sup>) In 1785, Georgia enacted a statute providing that aliens could use its courts to sue for debts and damages arising after 1782.<sup>295</sup> These formal measures were insufficient to resolve the debt controversy, however, as they were sporadic and sometimes disregarded. In addition, these measures did little to redress violence against foreigners.

From the available evidence, it appears that Connecticut was the only state to have acted in response to the Continental Congress's 1781 resolution calling on states to redress private acts of violence against foreign citizens. Oliver Ellsworth, who would later become the principal drafter of the Judiciary Act of 1789, was a delegate to the Continental Congress when these resolutions were passed, though he was not present at that time.<sup>296</sup> From 1780 to 1784, Ellsworth was also

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Alexander Hamilton, *A Letter from Phocion to the Considerate Citizens of New York* (1784), reprinted in Harold C. Syrett, ed, 3 *The Papers of Alexander Hamilton: 1782–1786* 483, 493 (Columbia 1962).

<sup>293</sup> Georgia authorized alien lenders to secure debts by mortgage on real property because the borrowing of Money on Interest from Foreigners, May benefit this State; and it is but reasonable, that any Foreigner lending Money should be secured, on real Estates by Way of Mortgage, and at liberty to institute, suits for the recovery of all sums as well principle as Interest so loaned.

Safeguarding Investment of Foreign Capital (Feb 21, 1785), reprinted in Allen D. Candler, ed, 19 *The Colonial Records of the State of Georgia*, pt 2, 417, 417 (Byrd 1911). Maryland justified its law similarly: “[I]t may prove advantageous to the citizens of this state, were foreigners enabled to lend them money on mortgages, and such loans may conduce much to the improvement of the country.” An Act to Secure the Payment, and to Give a Recovery, of Money Lent by Foreigners to Citizens of This State on Mortgage of Lands (1784), reprinted in Virgil Maxcy, ed, 1 *The Laws of Maryland* 519, 519 (Nicklin 1811). New Jersey provided the same: “[P]roviding security for foreigners, the better to enable them to recover their debts at the day assigned for payment, will greatly conduce to promote and encourage trade, and increase the credit of the citizens of this State.” An Act Empowering Certain Creditors to Secure Their Debts by Mortgage, and for Other Purposes Therein Mentioned (1789), reprinted in William Patterson, ed, *Laws of the State of New-Jersey* 93 (Day 1800).

<sup>294</sup> See, for example, An Act to Enable Aliens to Purchase and Hold Real Estates within This Commonwealth (1789), reprinted in Alexander Dallas, ed, 2 *Laws of the Commonwealth of Pennsylvania* 645 (Hall & Sellers 1793) (authorizing aliens to purchase and hold real estate in Pennsylvania, as this would “introduc[e] large sums of money into this state” and “induc[e] such aliens as may have acquired property to follow their interest, and become useful citizens”).

<sup>295</sup> See Rights of Aliens and Admission of Citizens (Feb 7, 1785), reprinted in Candler, ed, 19 *Colonial Records of the State of Georgia*, pt 2, 375, 375–76 (cited in note 293).

<sup>296</sup> Evidence shows that Ellsworth was present in Congress in Philadelphia from June to September 1781, but then absent until December 1782. See William Garrott Brown, *The Life of Oliver Ellsworth* 53 (Macmillan 1905); Henry Flanders, 2 *The Lives and Times of the Chief Justices of the Supreme Court of the United States* 98–99 (Johnson 1881).

a member of the Governor's Council, or Upper House, of the Connecticut legislature.<sup>297</sup>

In 1782, during Ellsworth's tenure, the Connecticut legislature enacted a statute criminalizing all of the offenses against the law of nations that the Continental Congress had encouraged states to punish. Specifically, the Connecticut statute authorized its courts to punish violations of safe conducts and passports; acts of hostility against citizens of nations in amity, league, or truce with the United States; acts of hostility against those in the state under a general implied safe conduct; and violations of the rights of ambassadors and other public ministers.<sup>298</sup> In addition, the Connecticut act contained a catch-all provision authorizing Connecticut courts to adjudicate "any other Infractions or Violations of or Offences against the known received and established Laws of Civilized Nations, agreeably to the Laws of this State, or the Laws of Nations."<sup>299</sup>

Perhaps of most relevance to the ATS, the last section of the Connecticut act provided a civil remedy for injury to any foreign nation or its subjects:

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<sup>297</sup> Flanders, *2 Lives and Times of the Chief Justices* at 116 (cited in note 296).

<sup>298</sup> The statute provided in pertinent part:

Whereas any violation or Infraction of the Laws of Nations is not only unjust in itself but if not prevented directly tends to the Dishonour and Ruin of any Nation, and therefore calls for the most speedy and exemplary Punishment.

*Thereupon Be it Enacted by the Governor Council and Representatives in General Court Assembled and by the Authority of the same, That the Superior Court and the several County Courts in this State within their respective Limits, be and they are hereby Impowered and directed to proceed against and Punish all such Persons as shall be Guilty of the violation of any safe conduct or Passport, granted under the Authority of the Congress of the United States of America or under the Authority of this State to the Subjects of any Foreign Power in Time of War, And also against all such 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 with the United States of America, or such as are within this State under a General implied safe Conduct; and also against all such as shall be Guilty of any violation or infraction of the Immunities of Ambassadors or other Public Ministers, authorized and received as such by the United States in Congress Assembled, or of any violence offered to the Persons of such Ambassadors or Ministers their Houses Carriages or Property under the Limitations allowed by the Laws and Usages of Nations, or that shall any ways molest or disturb them in the free Exercise of their Religion.*

An Act to Prevent Infractions of the Laws of Nations ("Act to Prevent Infractions") (1782), reprinted in Leonard Woods Labaree, ed, 4 *The Public Records of the State of Connecticut for the Year 1782* 156, 156–57 (Connecticut 1942). See also 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 ("Act for Securing Foreigners' Rights"), in *Acts and Laws of the State of Connecticut, in America* 82, 82–83 (Green 1784). Ellsworth was a member of the Upper House when these acts were passed. See Labaree, ed, 4 *Public Records* at 130.

<sup>299</sup> Act to Prevent Infractions at 157 (cited in note 298). See also Act for Securing Foreigners' Rights at 83 (cited in note 298).

[I]f any Injury shall be offered and done by any Person or Persons whatsoever to any foreign Power or to the Subjects thereof, either in Thier [sic] Persons or Property, by means whereof any Damage shall or may any ways arise happen or accrue either to any such foreign Power, to the said United States, to this State or to any particular Person, the Person or Persons offering or Doing any such Injury shall be liable to pay and answer all such Damages as shall be occasioned thereby.<sup>300</sup>

This provision did not depend on the foreign nation being in amity, league, or truce with the United States under a treaty or on the alien being under a general implied safe conduct. Rather, the statute gave a broad remedy to those injured (including foreign subjects) by an American and thus implemented the Continental Congress's recommendation that states "authorise suits to be instituted for damages by the party injured, and for compensation to the United States for damage sustained by them from an injury done to a foreign power by a citizen."<sup>301</sup>

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State efforts during the Confederation era to bolster commerce and sustain peace by avoiding law of nations and treaty violations turned out to be too little, too late to protect the interests of the United States. In April 1787, in his influential pamphlet, *Vices of the Political System of the United States*, James Madison warned of the dangers that such violations continued to pose:

From the number of Legislatures, the sphere of life from which most of their members are taken, and the circumstances under which their legislative business is carried on, irregularities of this kind must frequently happen. Accordingly not a year has passed without instances of them in some one or other of the States. The Treaty of peace—the treaty with France—the treaty with Holland have each been violated. . . . The causes of these

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<sup>300</sup> Act to Prevent Infractions at 157 (cited in note 298). See also Act for Securing Foreigners' Rights at 83 (cited in note 298).

<sup>301</sup> Hunt, ed, 21 *Journals of the Continental Congress* at 1137 (cited in note 245). Taken literally, the language of the Connecticut statute was broad enough to encompass claims arising domestically between foreign subjects. In this regard, the Connecticut statute differs from the ATS, which limited jurisdiction to claims by an alien for a tort "in violation of the law of nations." In context, as we explain, the inclusion of this phrase in the ATS was a shorthand way of describing violence against aliens by citizens of the forum. See notes 342–51 and accompanying text.

irregularities must necessarily produce frequent violations of the law of nations in other respects.

As yet foreign powers have not been rigorous in animadverting on us. This moderation however cannot be mistaken for a permanent partiality to our faults, or a permanent security agst. those disputes with other nations, which being among the greatest of public calamities, it ought to be least in the power of any part of the Community to bring on the whole.<sup>302</sup>

When Edmund Randolph opened the Federal Convention of 1787, one of the first defects he identified with the Confederation was its inability to prevent or redress “acts against a foreign power contrary to the laws of nations.”<sup>303</sup> He concluded that the Confederation “therefore [could not] prevent a war,”<sup>304</sup> and was fundamentally flawed. One of the Convention’s top priorities, therefore, was to design a new constitution that would enable the United States to act like an established European power and meet its obligations under the law of nations.

A primary goal of the Constitution was to control state violations of the law of nations by strengthening national political authority over determinations of war and peace. The Constitution centralized such authority in various ways. Most importantly, it transferred almost all significant authority relating to foreign relations to the federal government. In addition to granting Congress and the President important foreign relations and war powers, the new Constitution established an independent federal judiciary with jurisdiction to adjudicate a variety of cases and controversies likely to implicate the law of nations. Congress made quick use of this jurisdiction in the Judiciary Act of 1789 by establishing lower federal courts and granting them original jurisdiction over controversies important to the peace of the United States.

#### IV. THE ORIGINAL MEANING OF THE ALIEN TORT STATUTE

In light of the legal and political context surrounding its adoption, the ATS is best understood as one of several means by which the First Congress sought to ensure that the United States would comply with its obligations under the law of nations and avoid giving foreign nations just cause for war. Article III of the

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<sup>302</sup> James Madison, *Vices of the Political System of the United States* (Apr 1787), reprinted in Robert A. Rutland, et al, eds, 9 *The Papers of James Madison* 345, 349 (Chicago 1975).

<sup>303</sup> Max Farrand, ed, 1 *The Records of the Federal Convention of 1787* 24–25 (Yale rev ed 1966).

<sup>304</sup> *Id* at 25.



Constitution authorizes federal court jurisdiction over several categories of cases likely to implicate the law of nations. Prominent members of the Founding generation advocated federal jurisdiction over such cases in order to prevent state courts from generating foreign conflicts by disregarding such law.<sup>305</sup> The Founders sought to mimic the jurisdiction of English courts by granting federal courts jurisdiction over cases likely to implicate key aspects of the law of nations. Such jurisdiction was necessary to foster commerce, redress law of nations violations, and avoid war.<sup>306</sup> As finalized and ratified, Article III extends the federal judicial power

to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.<sup>307</sup>

The categories most likely to implicate questions of war and peace were “Cases . . . arising under . . . Treaties”; “Cases affecting Ambassadors, other public Ministers and Consuls”; “Cases of admiralty and maritime Jurisdiction”; and “Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.” As explained, a nation’s violation of treaties, infringement of rights of ambassadors, interference with open use of the high seas, or failure to redress injuries that its citizens inflicted on foreign citizens gave the offended nation just cause for retaliation.<sup>308</sup>

This Part explains the role that the ATS played—along with other acts of the First Congress—in preventing and punishing law of nations violations in order to keep the United States out of war. As explained in the previous Part, state courts had been unable or unwilling to redress private offenses against the law of nations. In structuring a judiciary for the United States, it was imperative that the

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<sup>305</sup> See Bellia and Clark, 109 *Colum L Rev* at 37–38 (cited in note 17).

<sup>306</sup> See *id.* at 37–46; Kevin R. Johnson, *Why Alienage Jurisdiction? Historical Foundations and Modern Justifications for Federal Jurisdiction over Disputes Involving Noncitizens*, 21 *Yale J Intl L* 1, 6–17 (1996).

<sup>307</sup> US Const Art III, § 2, cl 1.

<sup>308</sup> See notes 135–38, 155–56, 177, 255, and accompanying text.

First Congress enable federal courts to remedy the full range of violations of the law of nations for which the United States otherwise would be responsible. Accordingly, in 1789, the First Congress gave federal courts jurisdiction over important civil cases implicating the law of nations. (Congress also gave federal courts important criminal jurisdiction but did not enact federal crimes until 1790.) First, it gave the Supreme Court original jurisdiction over cases by or against ambassadors and other public ministers.<sup>309</sup> Second, it gave district courts original jurisdiction over admiralty and maritime cases.<sup>310</sup> Third, it gave circuit courts original jurisdiction over suits in which an alien was a party and the amount in controversy exceeded \$500.<sup>311</sup> Claims for less than \$500 had to be brought in state court, but the Act provided for Supreme Court review if the state court judgment denied enforcement of the Constitution, laws, or treaties of the United States.<sup>312</sup> Thus, Congress gave federal courts jurisdiction over cases likely to involve law of nations violations that, if not redressed, could lead the United States into war: (1) violation of the rights of ambassadors, (2) piracy, (3) violations of treaties, and (4) claims by aliens for more than \$500.

Had Congress stopped there, it would have omitted an important category of law of nations violations that threatened the peace of the United States: personal injuries that US citizens inflicted upon aliens resulting in less than \$500 in damages. As explained, the law of nations required countries to redress such injuries through criminal punishment, extradition, or a civil remedy. The first Judiciary Act gave federal circuit courts exclusive jurisdiction of crimes and offenses “cognizable under the authority of the United States,”<sup>313</sup> but the ability of federal courts to recognize and enforce federal common law crimes was not yet established. Moreover, although Congress codified several offenses against the law of nations in 1790, it did not include all private offenses to foreign nations for which the United States could be responsible under the law of nations. (Significantly, the law of nations itself prevented nations from criminalizing private offenses against foreign citizens committed abroad.) In addition, the United

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<sup>309</sup> Judiciary Act of 1789 § 13, 1 Stat at 80.

<sup>310</sup> Judiciary Act of 1789 § 9, 1 Stat at 77.

<sup>311</sup> Judiciary Act of 1789 § 11, 1 Stat at 78.

<sup>312</sup> Judiciary Act of 1789 § 25, 1 Stat at 92.

<sup>313</sup> Judiciary Act of 1789 § 9, 1 Stat at 76–77.

States had no treaties providing for extradition of fugitive criminals until the Jay Treaty of 1794 with Great Britain.<sup>314</sup>

In the absence of other reliable means of redressing acts of violence by US citizens against aliens, the ATS functioned to provide a civil remedy for such misconduct and ensure that the United States would not be held responsible for its citizens' violations of the law of nations. An advantage of this mechanism was that it was self-executing—it placed the burden on injured aliens to bring suit and did not require the still-forming US government immediately to marshal the resources necessary to prosecute crimes. Taken in historical context, the ATS was fully consistent with the jurisdictional limitations of Article III, which authorized federal courts to hear controversies between citizens of a (US) state and citizens of a foreign nation without regard to the amount in controversy.

#### A. Enlisting Federal Court Jurisdiction to Avoid War

This section explains how various jurisdictional provisions of the first Judiciary Act worked together to avoid or redress a range of law of nations violations by the United States and its citizens. This section also considers the specific role that the ATS played within that scheme.

##### 1. Ambassadorial, admiralty, and foreign diversity jurisdiction.

The Judiciary Act of 1789 conferred jurisdiction on the federal courts to hear several important categories of civil cases implicating the law of nations. Section 13 of the Act provided that “the Supreme Court . . . shall have exclusively all such jurisdiction of suits or proceedings against ambassadors, or other public ministers, or their domestics, as a court of law can have or exercise consistently with the law of nations.”<sup>315</sup> This provision enabled the Supreme Court to enforce the immunities of ambassadors, public ministers, and their households under the law of nations. Section 13 also provided that the Supreme Court had “original, but not exclusive jurisdiction over all suits brought by ambassadors, or other public ministers, or in which a consul, or vice consul, shall be a party.”<sup>316</sup> This provision authorized ambassadors to pursue redress for infringements of their rights in the Supreme Court, if they so chose. Thus, the first Judiciary Act gave the Supreme Court original jurisdiction to redress violations of the rights

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<sup>314</sup> See Treaty of Amity, Commerce and Navigation, between His Britannic Majesty and the United States of America, by Their President, with the Advice and Consent of Their Senate Art XXVII, 8 Stat 116, 129, Treaty Ser No 105 (1794) (“Jay Treaty”).

<sup>315</sup> Judiciary Act of 1789 § 13, 1 Stat at 80–81.

<sup>316</sup> Judiciary Act of 1789 § 13, 1 Stat at 80–81.

of ambassadors, thereby allowing the United States to disavow any violations of those rights by its citizens. These were among the most serious offenses a private citizen could commit against other nations.

Moreover, § 9 of the Judiciary Act gave lower federal courts “exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction . . . saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it.”<sup>317</sup> This jurisdiction included prize cases—a crucial category of cases that the law of nations governed and that could provoke war if not properly resolved.<sup>318</sup> Prize jurisdiction and jurisdiction under the ATS served similar functions in important respects. Both allowed aliens to obtain redress from US citizens in federal court, thereby preventing the United States from being held responsible under the law of nations for its citizens’ misconduct. The law of nations permitted nations at war to make prizes of each other’s ships, goods, and effects captured at sea.<sup>319</sup> Nations often authorized their citizens to make such captures, and prize courts allowed privateers to obtain title to seized property through judicial condemnation in admiralty.<sup>320</sup> Perhaps prize courts’ most important function, though, was to remedy any abuses committed by privateers, such as the erroneous capture of a neutral ship or neutral cargo. By providing such remedies, prize courts avoided US responsibility for such misconduct. As Justice William Johnson explained in 1808, “[a] seizure on the high seas by an unauthorised individual, is a mere trespass.”<sup>321</sup> To avoid responsibility for such trespasses, civilized nations constituted prize courts “with powers to inquire into the correctness of captures made under colour of their own authority, and to give redress to those who have been unmeritedly attacked or injured.”<sup>322</sup> The effect of such redress was to disavow “the unauthorised act of an individual.”<sup>323</sup>

The Judiciary Act also gave British creditors several ways to vindicate their rights under the 1783 Paris Peace Treaty. The Act gave circuit courts original jurisdiction, concurrent with state courts, of all actions to which an alien was a party and the amount in controversy exceeded \$500.<sup>324</sup> In such cases, federal courts could enforce the

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<sup>317</sup> Judiciary Act of 1789 § 9, 1 Stat at 77.

<sup>318</sup> See Clark, 144 U Pa L Rev at 1334–37 (cited in note 123).

<sup>319</sup> Id at 1334.

<sup>320</sup> Id.

<sup>321</sup> *Rose v Himely*, 8 US (4 Cranch) 241, 282 (1808) (Johnson dissenting).

<sup>322</sup> Id.

<sup>323</sup> Id at 283.

<sup>324</sup> Judiciary Act of 1789 § 11, 1 Stat at 78. In the case of debts owed to aliens, a \$500 amount in controversy requirement was imposed as a compromise to keep most alien creditors in state court. See Bellia and Clark, 109 Colum L Rev at 44 (cited in note 17).

Treaty against state laws obstructing debt recovery.<sup>325</sup> The Judiciary Act also provided that such actions were removable by an alien to a federal circuit court from state court.<sup>326</sup> In addition, even when the amount in controversy requirement forced debt actions to be brought in state court, an alien could seek appellate review in the Supreme Court of the United States under § 25 of the Judiciary Act if the state court obstructed debt recovery in violation of the 1783 Peace Treaty.<sup>327</sup> In sum, all of these provisions of the Judiciary Act provided a federal forum, original or appellate, in which aliens could seek civil redress for offenses against the law of nations that, if not redressed, could give rise to war.

Standing alone, however, none of these provisions would have authorized federal courts to hear run-of-the-mill tort claims implicating the law of nations—claims by aliens against US citizens for acts of violence against their persons or personal property. Although such acts may not have been as momentous for foreign relations as violence against ambassadors or unauthorized captures on the high seas, they occurred with enough frequency after the Revolutionary War to risk friction with other nations and require redress under the law of nations. Jurisdiction over cases affecting ambassadors would not reach cases affecting ordinary aliens. Likewise, admiralty jurisdiction would not permit federal courts to redress private acts of violence against aliens that occurred on land. In addition, the \$500 amount in controversy requirement for foreign diversity jurisdiction would have denied a federal forum for most tort claims at the time.<sup>328</sup> Finally, as explained in the next section, federal criminal law was not sufficiently established to redress acts of violence by US citizens against aliens. The ATS filled this void.

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<sup>325</sup> In fact, federal courts began doing so in the mid-1790s. See *Hopkirk v Bell*, 7 US (3 Cranch) 454, 458 (1806) (holding that the 1783 Paris Peace Treaty prevented prewar operation of a state statute of limitations on British debts); *Ware v Hylton*, 3 US (3 Dall) 199, 285 (1796) (holding that the 1783 peace treaty required American debtors to pay British creditors notwithstanding a Virginia act authorizing discharge); *Georgia v Brailsford*, 3 US (3 Dall) 1, 5 (1794) (holding that the Paris Peace Treaty required American debtors to pay British creditors notwithstanding the sequestration of debts by Georgia).

<sup>326</sup> Judiciary Act of 1789 § 12, 1 Stat at 78.

<sup>327</sup> Under § 25, a party could seek review of a state court judgment invalidating a treaty, upholding a state authority alleged to violate a treaty, or construing a treaty against a right claimed under it. Judiciary Act of 1789 § 25, 1 Stat at 85–86. The Supreme Court later affirmed its power to enforce federal rights on appeal from state courts. See *Cohens v Virginia*, 19 US (6 Wheat) 264, 353–54 (1821); *Martin v Hunter's Lessee*, 14 US (1 Wheat) 304, 380–81 (1816).

<sup>328</sup> See Lee, 106 Colum L Rev at 900 (cited in note 33).

## 2. Criminal offenses against the United States.

A nation's obligation under the law of nations to redress injuries to aliens inflicted by its citizens theoretically could be satisfied through criminal punishment or extradition of the offender. In the early Republic, however, these solutions were imperfect at best. The first Judiciary Act's criminal provisions did not clearly establish a mechanism for redressing private offenses against foreign citizens. The First Congress gave federal courts exclusive jurisdiction of crimes and offenses "cognizable under the authority of the United States."<sup>329</sup> What constituted a crime or offense against the United States was unclear at this time. Congress had yet to codify crimes against the United States, and the status of federal common law crimes was unsettled. Indeed, from the late 1790s until 1812, public officials would debate whether federal courts had jurisdiction to define and punish common law offenses against the United States in the absence of congressional action.<sup>330</sup> The Supreme Court ultimately rejected federal common law crimes in 1812.<sup>331</sup>

In addition, the United States had no clearly established mechanism for extraditing criminal fugitives to other nations as a means of redressing injuries to aliens. "Within the United States . . . it was settled very early indeed that the extradition of fugitives depended entirely on treaty or legislative provision, and that without it there was no obligation whatsoever upon the government, or any of its branches, to surrender fugitive criminals to foreign nations."<sup>332</sup> Without established federal criminal laws or extradition to redress private offenses against foreign citizens, a civil remedy would provide a reliable means of redressing such offenses and avoiding reprisals under the law of nations.

Even after the passage of the Crimes Act of 1790, federal criminal law still did not reach all private offenses that US citizens might commit against aliens. In the Crimes Act of 1790, Congress used its Article I power "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations"<sup>333</sup> to criminalize each of the principal offenses against the law of nations that Blackstone described as a crime in England. First, the

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<sup>329</sup> Judiciary Act of 1789 § 9, 1 Stat at 76–77 (providing district court jurisdiction); Judiciary Act of 1789 § 11, 1 Stat at 78–79 (providing circuit court jurisdiction).

<sup>330</sup> See Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 Tex L Rev 1321, 1404–19 (2001) (describing the debate and its resolution).

<sup>331</sup> See *United States v Hudson & Goodwin*, 11 US (7 Cranch) 32, 34 (1812).

<sup>332</sup> Benjamin Munn Ziegler, *The International Law of John Marshall: A Study of First Principles* 315 (North Carolina 1939).

<sup>333</sup> US Const Art I, § 8, cl 10.

Crimes Act of 1790 made it a crime to violate “any safe-conduct or passport duly obtained and issued under the authority of the United States” or to “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.”<sup>334</sup> Second, Congress established that, upon conviction, those who prosecute, solicit, or execute any writ or process against “any ambassador or other public minister of any foreign prince or state . . . shall be deemed violators of the laws of nations, and disturbers of the public repose, and imprisoned not exceeding three years.”<sup>335</sup> Third, Congress made piracy a crime against the United States, triable in the district where the offender was apprehended.<sup>336</sup>

Blackstone described safe conduct violations, infringements of the rights of ambassadors, and piracy as “the principal cases, in which the statute law of England interposes, to aid and enforce the law of nations, as a part of the common law.”<sup>337</sup> The Crimes Act of 1790 made these same transgressions offenses against the United States. But just as Blackstone’s three categories of offenses did not exhaust all private offenses that could be imputed to nations, neither did the offenses established by the Crimes Act of 1790. Notably absent from the Crimes Act were private acts of violence by US citizens against aliens who did not enjoy the protection of a safe conduct or diplomatic immunity. Moreover, as explained, criminal laws did not apply extraterritorially and thus were incapable of providing redress for private offenses that US citizens committed against aliens within the territorial jurisdiction of another nation.<sup>338</sup> In 1789, such offenses could occur in close proximity to the United States because the European powers of Great Britain and Spain retained territory adjoining the original United States. In England, mechanisms were available to redress private offenses against aliens—namely, common law crimes and tort actions. In the United States, however, common law remedies were only generally available in the states, which had

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<sup>334</sup> Crimes Act of 1790 § 28, 1 Stat at 118. Thomas Lee has questioned whether this provision encompassed all safe conduct violations or only those against ambassadors. See Lee, 106 Colum L Rev at 864–65 (cited in note 33).

<sup>335</sup> Crimes Act of 1790 §§ 25–26, 1 Stat at 118.

<sup>336</sup> Crimes Act of 1790 § 8, 1 Stat at 113–14.

<sup>337</sup> Blackstone, 4 *Commentaries* at 73 (cited in note 9).

<sup>338</sup> Accordingly, it is not true, as Professor Anne-Marie Slaughter (formerly Burley) has argued, that “[t]he national Government could always appease a foreign sovereign by prosecuting or even extraditing an offender.” Burley, 83 Am J Intl L at 481 (cited in note 37). The criminal laws of the United States did not reach or punish all offenses that might generate law of nations violations, and extradition was not always an available or politically feasible alternative.

received the common law after independence<sup>339</sup> but had been unwilling to use such law to remedy torts committed by their citizens against aliens. The United States as a whole did not adopt the common law, and many prominent Founders (especially Anti-Federalists) believed that the Constitution prevented Congress from doing so.<sup>340</sup> Congress could, however, use Article III foreign diversity jurisdiction to enable federal courts to employ common law forms of action to hear tort claims by aliens against US citizens, regardless of the amount in controversy.

### 3. Alien tort claim jurisdiction.

The ATS filled what would have been a significant gap in the first Judiciary Act. Although the Act's other provisions for civil and criminal jurisdiction went a long way toward satisfying the United States' obligations under the law of nations, they did not provide all of the remedies required by the law of nations for injuries to aliens inflicted by Americans upon aliens. By authorizing federal district court jurisdiction over claims by "an alien . . . for a tort only in violation of the law of nations or a treaty of the United States,"<sup>341</sup> the First Congress ensured that the United States would provide aliens with at least one form of redress for its citizens' violations of the law of nations. For a new nation seeking to join the ranks of the European powers but lacking established structures and resources, the ATS provided the United States with a self-executing civil mechanism that did not require any affirmative federal executive action. To be sure, there was no guarantee that alien plaintiffs would prevail in ATS suits. The First Congress, however, evidently had more confidence that aliens would receive fair adjudication of their tort claims against US citizens in federal court than in state court. If Congress was correct, then adjudication of ATS claims in federal court would provide the better means for redressing injuries that Americans inflicted upon aliens or their personal property. If a foreign nation concluded that its citizen had been denied adequate redress, it could pursue satisfaction through diplomatic channels or reprisals.

a) *The text of the ATS.* Taken in historical context, the language of the ATS most reasonably encompassed intentional tort claims by alien friends against US citizens. More specifically, the phrase "*a tort only in violation of the law of nations*" most reasonably meant an intentional injury to an alien's person or personal property inflicted

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<sup>339</sup> See Bellia and Clark, 109 Colum L Rev at 46 (cited in note 17).

<sup>340</sup> Id at 53–55.

<sup>341</sup> Judiciary Act of 1789 § 9, 1 Stat at 77.



by a US citizen and for which the United States would be responsible to the alien's nation if it failed to provide appropriate redress. The phrase "for a tort" referred to an intentional injury, actionable in a common law tort form of action, to an alien's person or personal property.<sup>342</sup> The phrase "in violation of the law of nations or a treaty of the United States" limited torts actionable in federal district court to those that would be attributed to the tortfeasor's nation if not redressed in accordance with the law of nations. Such torts primarily, if not exclusively, included torts committed with force by US citizens against citizens of nations with which the United States was at peace. Torts in violation of a treaty referred to torts committed by US citizens against citizens of nations with whom the United States had a treaty protecting aliens from such acts. (The United States had a small number of such treaties in 1789.)<sup>343</sup> Torts in violation of the law of nations referred to torts by US citizens against citizens of nations with whom the United States might not have a treaty (or even formal relations) but with whom the United States was at peace. When US citizens committed torts against such aliens, they violated the law of nations by threatening the peace of nations. In such cases, the victim's nation would have expected the United States—in accordance with the law of nations—to redress the injury or become responsible itself for the violation.

Today, it is common to speak of a nation—or an official acting on behalf of a nation—as violating the law of nations.<sup>344</sup> In 1789, however, an ordinary citizen was also said to violate the law of nations by taking hostile actions against a friendly nation or its citizens.<sup>345</sup> To constitute

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<sup>342</sup> Blackstone defined a "tort" as a "personal action," not founded upon a contract, "whereby a man claims a satisfaction in damages for some injury done to his person or property." Blackstone, 3 *Commentaries* at 117 (cited in note 9). As used in the ATS, the term "tort" would not have been reasonably understood to include real property actions because the law of nations prohibited a nation from exercising jurisdiction over claims asserting rights to real property located abroad, and the common law generally disabled aliens from owning real property located in a state. See note 196 and accompanying text. There is a question whether, as state law developed to allow aliens to own rights to real property in US states, it would be appropriate to interpret the ATS dynamically to encompass torts interfering with real property rights.

<sup>343</sup> See notes 416–24 and accompanying text.

<sup>344</sup> See Curtis A. Bradley, *State Action and Corporate Human Rights Liability*, 85 *Notre Dame L Rev* 1823, 1824–25 (2010).

<sup>345</sup> For example, in his famous neutrality proclamation, President George Washington stated that a citizen of the United States could "render himself liable to punishment or forfeiture under the law of nations, by committing, aiding, or abetting hostilities against any of the . . . powers" at war with each other but at peace with the United States. George Washington, *Proclamation* (Apr 22, 1793), reprinted in Jared Sparks, ed, 10 *The Writings of George Washington* 535, 535 (Russell, Shattuck, & Williams 1836). In addition, he instructed officers of the United States "to cause prosecutions to be instituted against all persons, who shall within the cognizance of the courts of the United States violate the law of nations with respect to the

a violation of the law of nations, a private act had to disturb the peace of nations by subjecting the transgressor's nation to justified retaliation if it failed to redress the act. "For in vain," Blackstone explained, "would nations in their collective capacity observe these universal rules, if private subjects were at liberty to break them at their own discretion, and involve the two states in war."<sup>346</sup> Blackstone generally described two kinds of private wrongs—"the one *without force* or violence, as slander or breach of contract; the other coupled *with force* and violence, as batteries, or false imprisonment."<sup>347</sup> The kind of torts committed against an alien that violated the law of nations were those "*with force*"—that is, intentionally inflicted injuries "attended with some violation of the peace."<sup>348</sup> When Vattel described citizens of one nation who "offend and ill-treat the citizens of another,"<sup>349</sup> or "plunder, and use ill foreigners,"<sup>350</sup> he appears to have been referring to actions committed, in Blackstone's words, "*with force*." Thus, "a tort only in violation of the law of nations" most reasonably would have been understood to mean an intentional act of force against an alien's person or property that subjected the transgressor's nation to justified retaliation under the law of nations if it failed to provide appropriate redress.

Rather than attempt to define the underlying misconduct for which an action could be maintained (as the Connecticut statute did), the First Congress simply combined two terms of art in the ATS—one drawn from the common law ("tort") and the other drawn from the law of nations ("violation of the law of nations"). This shorthand approach employed in the ATS necessarily satisfied the United States' obligation under the law of nations to redress intentional injuries inflicted by its citizens against aliens. At common law, "tort" was a broader concept in that it referred to a wider range of misconduct and was indifferent to the citizenship of the parties. The phrase "in violation of the law of nations" necessarily qualified the term "tort" to

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Powers at war, or any of them." Id. Justice James Wilson, sitting as a circuit justice, took up the President's charge by instructing a federal grand jury to consider indicting US citizens who violated President Washington's neutrality proclamation and the law of nations. See *Henfield's Case*, 11 F Cases 1099, 1104 (CC D Pa 1793). Acting on this charge, the grand jury indicted Gideon Henfield for committing acts of hostility and violence against the citizens and ships of nations with which the United States was at peace, all "in violation of the laws of nations and the constitution and laws of the said United States of America, and against the peace and dignity of the said United States of America." Id at 1112. The jury acquitted Henfield, arguably in part because no federal statute made his conduct a crime. Id at 1122.

<sup>346</sup> Blackstone, 4 *Commentaries* at 68 (cited in note 9).

<sup>347</sup> Blackstone, 3 *Commentaries* at 118 (cited in note 9).

<sup>348</sup> Id.

<sup>349</sup> Vattel, 1 *The Law of Nations* at bk II, § 71 at 144 (cited in note 103).

<sup>350</sup> Id at bk II, § 78 at 146.

encompass only intentional acts of force or violence by US citizens against alien friends. Only such “torts” violated the law of nations and required the United States to provide a civil remedy. This understanding of the text is fully consistent with the First Congress’s desire to avoid violations of the law of nations by the United States and its citizens.<sup>351</sup>

Within the phrase “tort only in violation of the law of nations,” it is unclear whether the word “only” modified the preceding term “tort,” the subsequent phrase “in violation of the law of nations or a treaty of the United States,” or both. The word “only” in the ATS is commonly read as modifying “for a tort”—in other words, “only for a tort.” Under this reading, “only” emphasizes the exclusion of nontort alien actions (for example, contract or debt actions)—actions that had to be brought in state court unless the amount in controversy exceeded \$500. It is thus possible that “only” was meant to emphasize that all breach of contract claims, even for violations of the law merchant or a treaty of the United States, had to be brought in state court if the amount in controversy was less than \$500.<sup>352</sup>

Another possible reading, however, is that “only” modified “in violation of the law of nations or a treaty of the United States” to emphasize that *only* those torts in violation of the law of nations fell within the jurisdiction that the ATS conferred. A significant class of tort claims by aliens would not have involved law of nations violations, including claims by enemy aliens, claims for interference with real property rights, claims for private wrongs without force or violence (such as slander), or claims between aliens for injuries arising outside the US. By placing “only” before “violations of the law of

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<sup>351</sup> See Golove and Hulsebosch, 85 NYU L Rev at 936 (cited in note 112).

<sup>352</sup> There is some evidence suggesting that this limitation was significant. In a July 1789 letter, Edmund Pendleton asked James Madison, who was then a member of the House of Representatives:

[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 & Foederal treaties seems to indicate; or does it only embrace Personal wrongs, according to [its] 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.

Letter from Edmund Pendleton to James Madison (July 3, 1789), reprinted in Maeva Marcus, ed, 4 *The Documentary History of the Supreme Court of the United States, 1789–1800* 444, 446 (Columbia 1992). In *Moxon v The Fanny*, 17 F Cases 942 (D Pa 1793), a federal district court noted in dicta that the case before it did not fall within the ATS because “[i]t cannot be called a suit for a tort only, when the property, as well as damages for the supposed trespass, are sought for.” *Id.* at 948. As currently recodified, the word “only” appears to modify “tort,” as “tort only” is set off by a comma from the remainder of the provision: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” 28 USC § 1350.

nations,” Congress may have wished to emphasize that federal courts could not hear this broader range of tort claims under § 9. Moreover, in other instances the drafters of the first Judiciary Act used the word “only” to modify a subsequent prepositional phrase.<sup>353</sup> A final possibility is that “only” modifies the language that appears both before and after it. In any event, the meaning of the statute does not turn on whether “only” was meant to emphasize *only* torts (and not breaches of contract or debts) or *only* those torts in violation of the law of nations (and not other torts). Under either reading, the statute conferred jurisdiction only over torts that also constituted law of nations violations.

Taken in context at the time it was enacted, the language of the ATS did not encompass claims between aliens for acts occurring in other nations’ territories because such claims did not involve violations of the law of nations by the United States or its citizens. The language “in violation of the law of nations or a treaty of the United States” most reasonably referred to law of nations or treaty violations by US citizens—violations that triggered US responsibility to provide redress or risk retaliation by the victim’s nation for the offense. The First Congress had no reason to remedy tort claims arising abroad between two aliens, tort claims against an enemy alien or fugitive, or tort claims implicating permanent rights to real property. The law of nations imposed no obligation on the United States to do so. To the contrary, adjudication of some of these claims by US courts would have violated the law of nations by interfering with the territorial sovereignty of other nations. There is no apparent reason why the ATS would have provided jurisdiction over such torts, and, indeed, its limiting language (“in violation of the law of nations”) is best read to have excluded them.

The language of the ATS also seems to exclude torts committed within the United States by one alien against another. We have found no evidence that the law of nations attributed to a nation a tort committed by one alien against another, even if the tort occurred within its territory. To be sure, the law of nations obligated a nation to treat all aliens within its protection fairly and to provide them with a fair opportunity for redress, without prejudice or a manifestly unjust

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<sup>353</sup> The word “only” is used in the Judiciary Act six times. In four instances, it modifies a prepositional phrase or subordinate clause that immediately follows it. See Judiciary Act of 1789 § 23, 1 Stat at 85 (“in cases only where the writ of error is served”); Judiciary Act of 1789 § 30, 1 Stat at 89 (“shall be done only by the magistrate taking the deposition”); Judiciary Act of 1789 § 32, 1 Stat at 91 (“except those only in cases of demurrer”); Judiciary Act of 1789 § 32, 1 Stat at 91 (“those only which the party demurring shall express as aforesaid”). In one instance, it modifies a verb. See Judiciary Act of 1789 § 27, 1 Stat at 87 (“take only my lawful fees”).

result.<sup>354</sup> A denial of justice of this kind could offend the alien and his nation. Any such offense, however, was distinct from the separate obligation that nations had under the law of nations to redress injuries to aliens inflicted by their own citizens.<sup>355</sup> Thus, a denial of justice in a suit between aliens would not itself constitute, in the language of the ATS, a “tort [ ] in violation of the law of nations.” By contrast, a tort by a US citizen against an alien would have constituted a “tort [ ] in violation of the law of nations.” The ATS, of course, was the very means by which the United States sought to redress such violations and avoid becoming responsible for them in the eyes of the victim’s nation.

One might ask whether the ATS could also be a means by which the United States could avoid denial of justice claims. Apart from the fact that the language of the statute does not fit such claims, there is no evidence that states unfairly adjudicated alien–alien claims arising in the United States or that foreign nations raised any claims of unfairness in diplomatic discussions with the United States. Under these circumstances, members of the First Congress may have been content to leave the adjudication of alien–alien claims arising in the United States to state courts. Moreover, as we explain in Part IV.B, construing the ATS to reach such claims would have exceeded the limits of Article III foreign diversity jurisdiction, which does not encompass claims between aliens.<sup>356</sup> Thus, had this been a real

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<sup>354</sup> See notes 153–54 and accompanying text. This obligation corresponds roughly to states’ modern obligation not to deny justice to aliens within their protection. See Jan Paulsson, *Denial of Justice in International Law* 4 (Cambridge 2005).

<sup>355</sup> See Vattel, 1 *The Law of Nations* at bk II, § 77 at 145–46 (cited in note 103).

<sup>356</sup> Some scholars also have questioned the meaning of the word “alien” in the ATS. The issue is whether “alien” meant something different from “foreigner,” which appeared in an earlier draft of the bill. See A Bill to Establish the Judicial Courts of the United States 4, 6 (Greenleaf 1789), microformed on *Early American Imprints, Series 1: Evans, 1639–1800*, No 45657 (Readex). One possibility is that the House used the word “alien” to denote “Citizens or Subjects” of foreign states, in contrast to foreigners who could claim no country—namely, outlaws. The word foreigner was used in certain contexts to encompass outlaws and stateless persons, who were neither citizens nor subjects of any nation. In light of the language of Article III, it would have been reasonable in 1789 to understand the ATS to provide jurisdiction over claims by citizens or subjects of foreign nations, but not by outlaws under the protection of no country. The purpose of the ATS was to disavow offense to other *nations* whose citizens or subjects were injured at the hands of Americans. Moreover, the common law did not afford outlaws any right to judicial process, so they could not have successfully invoked the ATS in any event. See Hamburger, 109 *Colum L Rev* at 1922 (cited in note 118). It is, of course, possible that the House changed the word “foreigner” to “alien” to ensure that the language of the bill comported with the alienage jurisdiction of Article III, which authorizes federal court jurisdiction over “Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.” US Const Art III, § 2, cl 1.

M. Anderson Berry has recently argued that the term “alien” in the ATS refers only to citizens of foreign nations residing in the United States. See M. Anderson Berry, *Whether*

concern, the First Congress would have had to create a federal cause of action and confer “arising under” jurisdiction on the lower federal courts.

b) *The ATS and common law forms of action.* Our reading of the text of the ATS, as we have explained it, comports with common law rules governing alien claims at the time of the statute’s enactment. The ATS was a jurisdictional provision; it did not create a cause of action. At the time, municipal law, not the law of nations, determined the existence of a cause of action. In common law systems, the “substance” of a cause of action was predetermined by the form of action that a plaintiff used to commence the action. To commence an action, “[t]he plaintiff would have to set forth in strict legal form the combination of facts or events that [by law] enabled a plaintiff to invoke one of the forms of action for a remedy.”<sup>357</sup> In § 14 of the same act that established the ATS, the First Congress authorized federal courts to employ “the traditional mandates which set in motion civil litigation”:<sup>358</sup> “[C]ourts of the United States, shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law.”<sup>359</sup> At the time, common law writs were the means by which individuals pursued legal remedies.<sup>360</sup> Accordingly, § 14 of the Judiciary Act of 1789 conferred a power on federal courts to borrow causes of action “agreeable to the principles and usages of law” in cases within their jurisdiction.

The First Congress was not content, however, with leaving the availability of causes of action in federal courts in such open-ended

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*Foreigner or Alien: A New Look at the Original Language of the Alien Tort Statute*, 27 Berkeley J Intl L 316, 320–21 (2009). Even if this understanding of the term “alien” is correct, it does not follow that the ATS should be read to preclude jurisdiction over claims by aliens against US citizens for injuries inflicted abroad. Courts have long determined party status under federal jurisdictional grants as of the time of filing, not as of the time that the acts underlying the suit took place. A foreign citizen resident in the United States, and thus within protection of its laws, could pursue a transitory cause of action against a US defendant for injuries inflicted abroad. See Hamburger, 109 Colum L Rev at 1903 & n 277 (cited in note 118). Philip Hamburger has argued that only foreign citizens who were present in the United States had protection of its laws and thus could avail themselves of judicial process. See *id.* If “alien” meant a foreigner resident in the United States, the ATS still would provide jurisdiction over actions by aliens injured by US citizens abroad who came to the United States, and thus within the protection of its laws, to pursue redress.

<sup>357</sup> See Anthony J. Bellia Jr, *Article III and the Cause of Action*, 89 Iowa L Rev 777, 789 (2004).

<sup>358</sup> Julius Goebel Jr, 1 *History of the Supreme Court of the United States: Antecedents and Beginnings to 1801* 509 (Macmillan 1971).

<sup>359</sup> Judiciary Act of 1789 § 14, 1 Stat at 82.

<sup>360</sup> See Bellia, 89 Iowa L Rev at 789 (cited in note 357).

terms.<sup>361</sup> Just a few days later, Congress enacted the Process Act of 1789,<sup>362</sup> an interim measure directing federal courts to use the forms of writs operative in the state in which the federal court sat.<sup>363</sup> Specifically, the Act provided that “the forms of writs and executions . . . in the circuit and district courts, in suits at common law, shall be the same in each state respectively as are now used or allowed in the supreme courts of the same.”<sup>364</sup> At the time, states generally fashioned their writs in accordance with common law forms of action. Thus, the first Process Act, likely drafted at least in part by Ellsworth and enacted five days after the ATS, instructed federal courts to employ forms of action derived from state writ systems in ATS cases. In 1792, Congress reaffirmed this interim measure, enacting more permanent legislation that instructed federal courts to apply “the forms of writs, executions and other process” and “the forms and modes of proceeding” in actions at law of the supreme court of the state in which it sat. Additionally, the Process Act of 1792 authorized federal courts to make “such alterations and additions as the said courts respectively shall in their discretion deem expedient, or to such regulations as the supreme court of the United States shall think proper from time to time by rule to prescribe to any circuit or district court concerning the same.”<sup>365</sup>

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<sup>361</sup> Goebel, *History of the Supreme Court* at 510 (cited in note 358).

<sup>362</sup> Process Act of 1789, 1 Stat at 93–94.

<sup>363</sup> Process Act of 1789 § 2, 1 Stat at 93–94. The Judiciary Act was adopted on September 24, 1789. The “Process Act of 1789 reflected Congress’s inability or unwillingness to agree on uniform rules for the operation of the federal courts. It is apparent that the act was intended as no more than an interim measure. . . . [b]ut efforts over the next few years to adopt something more permanent came to naught.” Marcus, ed, 4 *Documentary History of the Supreme Court* at 112 (cited in note 352).

<sup>364</sup> Process Act of 1789 § 2, 1 Stat at 93–94.

<sup>365</sup> Process Act of 1792 § 2, 1 Stat at 276. The static conformity of the Process Acts continued in force until 1872, when Congress enacted a principle of dynamic conformity in the Conformity Act of 1872. See Act of June 1, 1872 (“Conformity Act of 1872”), 1 Stat 196. Rather than applying state law in existence at a fixed time, as the Process Acts required, federal courts were to apply state law currently “existing at the time” in the courts of the state. Conformity Act of 1872 § 5, 17 Stat at 197, repealed by Rules Enabling Act, Pub L No 73-415, 48 Stat 1064 (1934).

The Process Act of 1789 distinguished cases of admiralty, maritime, and equity jurisdiction, providing that “the forms and modes of proceedings in causes of equity, and of admiralty and maritime jurisdiction, [ ] shall be according to the course of the civil law.” Process Act of 1789 § 2, 1 Stat at 93–94. In the Process Act of 1792, Congress provided that the “forms and modes of proceedings” in causes of equity were to be “according to the principles, rules and usages which belong to courts of equity . . . as contradistinguished from courts of common law.” Process Act of 1792 § 2, 1 Stat at 276. After Congress enacted the Process Act, the Supreme Court, per John Jay, its first chief justice, decreed that the “COURT considers the practice of the courts of King’s Bench and Chancery in England, as affording outlines for the practice of this court,” and that it would “from time to time, make such alterations therein, as circumstances may render necessary.” *Rule*, 2 US (2 Dall) 411, 413–14 (1792). The Supreme Court did not formally

The common law forms of action to which the Judiciary and Process Acts referred federal courts were more than adequate to provide aliens with the redress required by the law of nations. As discussed, the common law recognized various actions for intentional injuries to person or property. Although states deviated from English common law in various respects, their forms of action largely preserved the requirements for bringing common law tort actions. The common law recognized alien tort actions for injuries inflicted by citizens of the forum, thereby providing redress sufficient to prevent the misconduct of individual citizens from being attributed to the nation as a whole. The common law, however, did not recognize all alien claims. In accordance with the law of nations, the common law disallowed all claims by enemy aliens.<sup>366</sup> In addition, it did not allow an alien to maintain an action in ejectment or to recover a freehold in real property located in the forum, as aliens could not own real property.<sup>367</sup> As previously discussed, the common law also did not recognize alien claims to real property located abroad, because such claims were considered local to the nation in which the property was located, and adjudication by a foreign tribunal would have been inconsistent with prevailing notions of territorial sovereignty. Moreover, common law judges and treatise writers suggested that common law courts should not hear claims between nonresident aliens for acts occurring abroad. These various limitations were consistent with, if not required by, the law of nations.

As a jurisdictional provision, the ATS gave federal courts jurisdiction over a category of tort claims recognized by the common law. It did not change, but rather presupposed, the forms of proceeding that the common law—incorporated through the Judiciary and Process Acts—allowed aliens to bring. The ATS and these other federal provisions therefore worked together to redress claims by aliens against US citizens for all torts “in violation of the law of nations.”<sup>368</sup>

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prescribe equity rules until 1822, when it adopted thirty-three specific rules against the background of general chancery practice. *Rules of Practice for the Courts of Equity of the United States*, 20 US (7 Wheat) v, v–xiii (1822).

<sup>366</sup> See J. Andrew Kent, *A Textual and Historical Case against a Global Constitution*, 95 Georgetown L J 463, 527–28 (2007).

<sup>367</sup> See *Barges v Hogg*, 2 NC (1 Haywood) 485, 485 (NC Super Ct L & Eq 1797) (“An alien cannot maintain ejectment, or any action for the recovery of a freehold—aliens are not allowed to acquire real property.”).

<sup>368</sup> Even if the common law did recognize claims between aliens for acts occurring abroad, it does not follow that the ATS conferred jurisdiction over such claims, because the US was not responsible for adjudicating these claims under the law of nations. In other words, an alien–alien tort claim arising extraterritorially was not “for a tort only in violation of the law of nations.”



c) *The ATS and other forms of redress.* To be sure, the ATS was partially redundant of other jurisdictional provisions in the Judiciary Act that could sometimes satisfy the United States' obligation under the law of nations to redress its citizens' torts against aliens. Tort claims by aliens against US citizens for more than \$500 could be brought in federal court under either diversity jurisdiction or the ATS. In addition, some alien torts might also have been subject to federal criminal prosecution, especially as Congress enacted more crimes over time. Notably, however, US criminal law could not have reached offenses committed by US citizens on foreign soil (including neighboring British and Spanish territory) because the law of nations assigned exclusive jurisdiction to punish such crimes to the nation in which they occurred. In the end, therefore, the ATS provided the only fully reliable means of complying with the United States' obligation under the law of nations to remedy all intentional harms inflicted by US citizens on aliens. In 1795, Attorney General William Bradford wrote an opinion that recognized this function of the ATS. Bradford received information that, on September 28, 1794, American citizens joined a French fleet in attacking the British Sierra Leone Company's colony on the coast of Africa.<sup>369</sup> Bradford opined that

acts 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 offences against the United States, so far as they were committed within the territory or jurisdiction thereof; and, as such, are punishable by indictment in the district or circuit courts.<sup>370</sup>

The attacks in question, however, were committed in British territory. “[A]s 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.”<sup>371</sup> “But,” Bradford continued,

there can be no doubt that the company 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

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Understood in context, the ATS provided jurisdiction over alien claims for harms that the common law recognized and that the United States had an obligation to redress under the law of nations.

<sup>369</sup> *Breach of Neutrality*, 1 Op Atty Gen 57, 58 (Jul 6, 1795) (William Bradford).

<sup>370</sup> *Id.* At this time, there was strenuous debate over whether federal courts had jurisdiction to entertain common law criminal prosecutions for violations of the law of nations. See Bellia and Clark, 109 Colum L Rev at 46–55 (cited in note 17). The Supreme Court settled the debate in *United States v Hudson & Goodwin*, 11 US (7 Cranch) 32 (1812), when it held that courts cannot recognize and enforce federal common law crimes against the United States. *Id.* at 34.

<sup>371</sup> *Breach of Neutrality*, 1 Op Atty Gen at 58 (cited in note 369).

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>372</sup>

For acts of hostility committed abroad, the ATS provided the only available means of avoiding law of nations and treaty violations that the criminal law did not reach.

In retrospect, it is not surprising that ATS jurisdiction was rarely invoked. Given the difficulties of travel at the time, it would have been unusual for the kind of ATS plaintiff that Bradford described—an alien injured by a US citizen overseas—to pursue an action in the United States. In addition, there is evidence that, in the United States, alien victims of violence often left rather than remain to pursue a remedy in US courts.<sup>373</sup> More fundamentally, violence against loyalists (which ran high after the 1783 Paris Peace Treaty) subsided in the late 1780s and beyond. Many loyalists resettled elsewhere<sup>374</sup> or assimilated into US citizenship,<sup>375</sup> and the United States and its citizens had a strong economic interest in reestablishing trade. Although the ATS remained symbolically important, over time state courts may have become more convenient and attractive fora for tort suits by aliens.

#### B. Abiding by the Limitations of Article III

The natural import of the ATS in historical context—providing jurisdiction over intentional tort claims by foreign citizens against US citizens—not only satisfied US obligations under the law of nations, but also respected the limits of Article III. Article III authorizes federal court jurisdiction over “Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.”<sup>376</sup>

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<sup>372</sup> Id at 59. The acts of hostility he addressed violated not only the law of nations, but the 1794 Jay Treaty as well. Article XXI of the 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 endeavor 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.

Jay Treaty Art XXI, 8 Stat at 127.

<sup>373</sup> See Brown, *The Good Americans* at 175–76 (cited in note 280).

<sup>374</sup> Id at 192 (estimating that between eighty and one hundred thousand loyalists eventually fled the United States after the Revolution).

<sup>375</sup> Id at 177–79. Had US citizens persisted in committing acts of violence against British citizens, and had the ATS proved insufficient to redress such violence, the United States and Britain could have entered into a treaty to provide alternative remedies, such as assigning disputes to binational panels. See Henry Paul Monaghan, *Article III and Supranational Judicial Review*, 107 Colum L Rev 833, 851–52 (2007).

<sup>376</sup> US Const Art III, § 2, cl 1.

Controversies between US citizens and foreign citizens fall squarely within this jurisdictional grant. Controversies between or among foreign citizens do not.<sup>377</sup>

The Supreme Court made clear in the first decades following ratification that the other alienage provision of the Judiciary Act of 1789—found in § 11—was limited to claims by or against US citizens. Section 11, as discussed, conferred original jurisdiction on the circuit courts of suits “where the matter in dispute exceeds . . . five hundred dollars, and . . . an alien is a party.”<sup>378</sup> From the beginning, courts interpreted this provision to extend only to disputes between an alien and a US citizen. In 1794, in *Walton v McNeil*,<sup>379</sup> a Québec inhabitant brought an action in federal circuit court against another Québec inhabitant upon a promissory obligation arising in Québec:

The defendant pleaded to the jurisdiction; that the parties were both inhabitants of Quebec; and that the cause of action, if any, accrued in Canada, and not within the United States; and that cognizance thereof belonged to the courts of Great Britain, and not to any of the courts of the United States.<sup>380</sup>

The court held this plea to be good and refused to exercise jurisdiction over the case.<sup>381</sup> Similarly, a circuit court refused to exercise § 11 jurisdiction over an alien–alien claim in 1799 in *Fields v Taylor*.<sup>382</sup> The report of the decision indicates that the court refused to exercise § 11 jurisdiction over a claim between two British subjects on notes made in England.<sup>383</sup> A reporter’s note suggests that this decision was founded “upon the limited jurisdiction of the federal courts under the constitution and laws of the United States.”<sup>384</sup>

A year later, in 1800, the Supreme Court held that § 11 must be read in light of Article III limitations on federal judicial power. In *Mossman v Higginson*,<sup>385</sup> the Court explained:

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<sup>377</sup> Curtis Bradley has argued that the ATS was meant to implement the alienage jurisdiction of Article III, requiring a US-citizen defendant, see Bradley, 42 Va J Intl L at 626–29 (cited in note 19), and that suits for violations of the law of nations would not have been understood to fall within Article III “arising under” jurisdiction. *Id.* at 597. We agree with those conclusions.

<sup>378</sup> Judiciary Act of 1789 § 11, 1 Stat at 78.

<sup>379</sup> 29 F Cases 141 (CC D Mass 1794).

<sup>380</sup> *Id.* at 141.

<sup>381</sup> *Id.*

<sup>382</sup> 9 F Cases 41 (CC D Mass 1799).

<sup>383</sup> *Id.* at 42.

<sup>384</sup> *Id.*

<sup>385</sup> 4 US (4 Dall) 12 (1800).

[T]he 11th section of the judiciary act can, and must, receive a construction, consistent with the constitution. It says, it is true, in general terms, that the Circuit Court shall have cognizance of suits “where an alien is *a party*,” but as the legislative power of conferring jurisdiction on the federal Courts, is, in this respect, confined to suits *between citizens and foreigners*, we must so expound the terms of the law, as to meet the case, “where, indeed, an alien is one party,” but a citizen is the other.<sup>386</sup>

In 1807, in *Montalet v Murray*,<sup>387</sup> the Court considered whether § 11 authorized jurisdiction over a debt action between two foreign citizens.<sup>388</sup> “The Court was unanimously of opinion that the courts of the United States have no jurisdiction of cases between aliens.”<sup>389</sup> Likewise, in *Hodgson v Bowerbank*,<sup>390</sup> Chief Justice John Marshall rejected the argument that § 11 of “[t]he judiciary act gives jurisdiction to the circuit courts in all suits in which an alien is a party.”<sup>391</sup> “Turn to [Article III] of the constitution of the United States,” he explained, “for the statute cannot extend the jurisdiction beyond the limits of the constitution.”<sup>392</sup>

The reasons for reading § 11 alienage jurisdiction not to reach alien–alien claims apply equally to § 9 ATS jurisdiction. Section 9 jurisdiction over “causes where an alien sues for a tort only in violation of the law of nations” rests on the same Article III jurisdictional authorization as § 11 alienage jurisdiction: controversies “between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.”<sup>393</sup> Article III provides no other general warrant for jurisdiction over tort claims between aliens—even for violations of the law of nations. As we have explained elsewhere, the Article III

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<sup>386</sup> *Id.* at 14.

<sup>387</sup> 8 US (4 Cranch) 46 (1807).

<sup>388</sup> The action was brought by a New York plaintiff upon assignment from a foreign citizen. *Id.* at 46–47. Under § 11, a district or circuit court could not exercise jurisdiction over a “suit to recover the contents of any promissory note or other chose in action in favour of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange.” Judiciary Act of 1789 § 11, 1 Stat at 79. The issue in *Montalet* was whether the New York plaintiff’s action could have been brought in circuit court had no assignment been made. 8 US (4 Cranch) at 47.

<sup>389</sup> *Montalet*, 8 US (4 Cranch) at 47 (emphasis omitted).

<sup>390</sup> 9 US (5 Cranch) 303 (1809).

<sup>391</sup> *Id.* at 304 (emphasis omitted).

<sup>392</sup> *Id.* See also *Jackson v Twentyman*, 27 US (2 Pet) 136, 136 (1829):

The Court were of opinion that the 11th section of the act must be construed in connexion with and in conformity to the constitution of the United States. That by the latter, the judicial power was not extended to private suits, in which an alien is a party, unless a citizen be the adverse party.

<sup>393</sup> US Const Art III, § 2, cl 1.

jurisdictional authorization over cases “arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority”<sup>394</sup> did not encompass claims governed by the law of nations unless positive federal law—such as a statute or a treaty—incorporated it.<sup>395</sup>

Early claims that the law of nations was part of the common law do not contradict this conclusion when understood in the context in which they were made. In the first years of the Union, public officials debated whether US courts could apply a common law “local” to the United States. It is anachronistic, however, to superimpose present-day conceptions of federal common law upon these debates. Even if the law of nations was considered a form of *general* common law, it was not understood to be supreme federal law inherently capable of either preempting state law or supporting “arising under” jurisdiction in federal court.<sup>396</sup> Early federal common law crimes cases (including offenses against the law of nations) do not contradict this conclusion. As the Supreme Court correctly held in *Sosa*, the First Congress did not understand the ATS to be more than a jurisdictional grant; it was not meant to create a federal cause of action or incorporate the law of nations as federal law.<sup>397</sup> Accordingly, jurisdiction under the ATS must rest on—and therefore be consistent with—alienage jurisdiction under Article III.

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<sup>394</sup> US Const Art III, § 2, cl 1.

<sup>395</sup> Bellia and Clark, 109 Colum L Rev at 38–40 (cited in note 17).

<sup>396</sup> In the eighteenth and nineteenth centuries, the law of nations was considered to be a form of general law, not federal common law. See Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 Vand L Rev 819, 832 (1989). For this reason, the Supreme Court traditionally held that it lacked jurisdiction to review cases arising under the law of nations. See *Ker v Illinois*, 119 US 436, 444 (1886) (holding that the Supreme Court has “no right to review” the decision of an Illinois court regarding “a question of common law, or of the law of nations”); *New York Life Insurance Co v Hendren*, 92 US 286, 286–87 (1875) (dismissing a writ of error seeking review of the effect of the Civil War upon a private contract because the question rested on the general law of nations and presented no federal question). See also Curtis A. Bradley, *The Status of Customary International Law in U.S. Courts—Before and After Erie*, 26 Denver J Intl L & Pol 807, 813–15 (1998) (discussing cases).

<sup>397</sup> The ATS also provided jurisdiction over alien tort claims in violation of “a treaty of the United States.” Judiciary Act of 1789 § 9, 1 Stat at 77. An alien tort claim for a US treaty violation presumably would have arisen under a treaty of the United States for purposes of Article III. At the time the ATS was enacted, however, the treaty violations contemplated were acts of violence by US citizens against aliens. See Paris Peace Treaty Art V, 8 Stat at 82 (giving British subjects rights to be in the United States for a given time for specified purposes); Lee, 106 Colum L Rev at 836–37 (cited in note 33) (describing the implied safe conduct that the Paris Peace Treaty created, the violation of which ATS jurisdiction encompassed). Thus, limiting the ATS to personal injury claims by aliens against US citizens not only reflected contemporary concerns, but also ensured that federal court jurisdiction of alien tort claims for violations of the law of nations complied with the limitations of Article III.

### C. Avoiding Judicial Violations of the Law of Nations

In light of the foregoing, the natural import of the ATS was to provide federal court jurisdiction over common law tort claims by aliens for intentional harms inflicted by US citizens. Only such torts committed by US citizens against aliens would have violated the law of nations at the time. Torts by one alien against another did not constitute law of nations violations by the United States or its citizens. On the other hand, adjudicating tort claims between aliens for acts arising abroad would have risked violating the territorial sovereignty of the nation in which the acts occurred. Had the ATS been at all unclear in this regard, separation of powers concerns almost certainly would have led courts to construe it to avoid infringing the territorial sovereignty of other nations.<sup>398</sup> In the first few decades after ratification, the Supreme Court was careful not to take the lead over the political branches in infringing the rights of foreign nations under the law of nations.<sup>399</sup> Violations of such rights could give other nations just cause for war against the United States. When acts of Congress did not clearly violate the sovereign rights of other nations, the Court construed them to respect those rights. In this way, the Court avoided generating conflicts that Congress had not clearly authorized and ensured that the Court did not usurp Congress's exclusive power to determine matters of war and peace.

The most famous case in which the Court construed an act of Congress so as not to violate the law of nations was *Murray v Schooner Charming Betsy*. Congress enacted the Non-Intercourse Act of 1800<sup>400</sup> during the undeclared hostilities with France. The Act prohibited commercial intercourse between residents of the United States and residents of any French territory.<sup>401</sup> In *Charming Betsy*, the Court held that this Act did not authorize the seizure of an American-built vessel that an American captain sold at a Dutch island to an American-born Danish burgher, who proceeded to carry the vessel for trade to a French island.<sup>402</sup> Writing for the Court, Chief Justice Marshall explained that a federal statute “ought never to be construed

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<sup>398</sup> We use the phrase “separation of powers concerns” as a shorthand for the proposition that, because the Founders vested specific foreign relations and war powers in Congress and the President, judicial departures from certain principles of the law of nations could interfere with, or usurp, those powers. See Bellia and Clark, 109 Colum L Rev at 76 (cited in note 17). We do not rest our claim upon the proposition that the Constitution adopted an abstract separation of powers principle. See generally John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 Harv L Rev 1939 (2011).

<sup>399</sup> See Bellia and Clark, 109 Colum L Rev at 59–63 (cited in note 17).

<sup>400</sup> Act of Feb 27, 1800 (“Non-Intercourse Act of 1800”), 2 Stat 7.

<sup>401</sup> Non-Intercourse Act of 1800 § 1, 2 Stat at 8.

<sup>402</sup> 6 US (2 Cranch) at 64–65, 120–21.

to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country.”<sup>403</sup> The Non-Intercourse Act, he concluded, did not clearly authorize such violations: “If it was intended that any American vessel sold to a neutral should, in the possession of that neutral, be liable to the commercial disabilities imposed on her while she belonged to citizens of the United States, such extraordinary intent ought to have been plainly expressed.”<sup>404</sup> By applying this canon of construction, Marshall ensured that Congress, rather than the Court, would determine whether the United States should risk foreign conflict. Neutral rights were perfect rights, and interference with such rights gave the injured sovereign just cause for war.<sup>405</sup>

Under this canon of construction, unless the ATS clearly authorized federal district courts to hear cases that rested within another nation’s exclusive territorial sovereignty, federal courts would have declined to hear them. At the time, separation of powers concerns led the Court to read acts of Congress to avoid law of nations violations. Given that the goal of the ATS was to *avoid* US responsibility for such violations, it is unlikely that courts would have read the statute to authorize jurisdiction that even arguably *violated* the territorial sovereignty of other nations under the law of nations.

#### D. The ATS and Other Questions Surrounding the First Judiciary Act

Scholars have analyzed several other questions surrounding the role of the ATS in the first Judiciary Act, including its role in redressing safe conduct violations and its relationship to ambassadorial and admiralty jurisdiction. This section discusses these questions in light of our reading of the ATS in historical context.

##### 1. The ATS and safe conduct violations.

In an important article, Thomas Lee argues that the ATS was intended solely to give federal courts jurisdiction over safe-conduct violations.<sup>406</sup> We agree that safe-conduct violations constituted one

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<sup>403</sup> Id at 118.

<sup>404</sup> Id at 119 (emphasis omitted).

<sup>405</sup> See Vattel, 2 *The Law of Nations* at bk III, § 112 at 40 (cited in note 102) (recognizing the “entire liberty” of a neutral nation to engage in neutral trade).

<sup>406</sup> See Lee, 106 *Colum L Rev* at 836 (cited in note 33) (“[T]he 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.”).

part of the claims that the ATS was originally meant to encompass. The text and history of the statute strongly suggest, however, that the ATS conferred jurisdiction over a broader class of law of nations violations.

As explained, in the eighteenth century a safe conduct was “given to those who otherwise could not safely pass to the places where he who grants it is master: for instance, to a person charged with some misdemeanor, or to an enemy.”<sup>407</sup> “All safe-conducts,” Vattel explained, “like every other act of supreme cognizance, flow from the sovereign authority.”<sup>408</sup> A safe conduct could be express (specifically issued to a particular person) or implied (legally presumed to exist from a municipal law granting safe passage to a class of persons).<sup>409</sup>

In historical context, the ATS phrase “in violation of the law of nations or a treaty of the United States” (which modifies “tort”) encompassed more than safe conduct violations. To be sure, nations had an obligation to honor the safe conducts they granted by redressing their violations. In 1789, however, the law of nations more broadly protected nations at peace with one another from any violence by citizens of the one directed against citizens of the other—not merely violence against citizens under the protection of a safe conduct. Individuals who performed intentional acts of violence against foreign citizens disturbed the peace by requiring their nation to redress the offense or face justified retaliation. In short, they committed a tort in violation of the law of nations. This basic principle applied regardless of whether the nations had a formal treaty of amity or friendship or whether the transgressor’s nation had granted the victim an express or implied safe conduct.

Vattel described any act of violence by the citizens of one nation against those of another at peace with the first as a law of nations violation. In describing this general principle, Vattel did not mention safe conduct violations; rather, he addressed safe conducts separately in connection with his discussion of war.<sup>410</sup> In 1789, England abided by this principle of the law of nations. As Blackstone explained it, “Great tenderness is shewn by our laws . . . with regard . . . to the admission of strangers who come spontaneously. For so long as their nation continues at peace with ours, and they themselves behave peaceably, they are under the king’s protection.”<sup>411</sup>

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<sup>407</sup> Vattel, 2 *The Law of Nations* at bk III, § 265 at 102 (cited in note 102).

<sup>408</sup> Id at bk III, § 266 at 102.

<sup>409</sup> See note 170 and accompanying text.

<sup>410</sup> See Vattel, 2 *The Law of Nations* at bk III, §§ 265–86 at 102–07 (cited in note 102).

<sup>411</sup> Blackstone, 1 *Commentaries* at 251–52 (cited in note 9). See also Comyns, 1 *Digest of the Laws of England* at 302 (cited in note 180) (“Aliens not enemies, may safely dwell in the



To be sure, the ATS phrase “in violation of the law of nations or a treaty of the United States” was broad enough also to encompass tortious acts by US citizens constituting safe conduct and treaty violations. In 1789, England—unlike the new United States—had granted many aliens of nations at peace with it formal protection through treaties of amity and implied safe conducts. Various English writers described the Magna Carta as granting safe conducts to foreign merchants.<sup>412</sup> Other acts of Parliament granted implied safe conducts as well, such as a fourteenth-century act providing “[t]hat all the Cloth-workers of strange Lands, or whatsoever Country they be, which will come into England, Ireland, Wales, and Scotland, within the King’s Power, shall come safely and surely, and shall be in the King’s Protection and safe Conduct, to dwell in the same lands, [choosing] where they will.”<sup>413</sup> Treaties of amity also generally granted citizens of treaty partners formal protection. English law recognized the rights of aliens in amity to enter English territory with protection,<sup>414</sup> and specific statutes provided them with additional rights. For example, a 1452 statute provided a remedy against any British subjects who “offend upon the Sea, or in any Port within the said Realm, under the King’s Obeisance, against any Person or Persons Strangers, being upon the Sea, or [any other Port] aforesaid

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realm.”). In an earlier passage, Blackstone wrote that “without [a safe conduct] by the law of nations no member of one society has a right to intrude into another.” Blackstone, 1 *Commentaries* at 251 (cited in note 9). Richard Wooddesson, in his *Lectures on the Law of England*, criticized Blackstone for suggesting that “without safe-conducts, by the law of nations, no member of one state has a right to intrude into another.” Richard Wooddesson, 1 *Lectures on the Law of England* 51 n n (Richards 2d ed 1834), quoting Blackstone, 1 *Commentaries* at 251 (cited in note 9). William Carey Jones, in his edition of Blackstone’s *Commentaries*, argued that Wooddesson’s critique was unfounded. See William Blackstone, 1 *Commentaries on the Laws of England* 259 n 13 (Bancroft-Whitney 1916) (William Carey Jones, ed). Blackstone did not mean to refute “the doctrine that subjects of one state may come, without license, into any other in league or amity with it . . . or . . . Vattel’s rule that, in Europe, the access is everywhere free to every person who is not an enemy to the state.” *Id.* Rather, Blackstone plainly meant that if there were an “express prohibition, individual or general,” on admission, “the stranger could not claim admission as a *right* . . . without . . . a safe-conduct from the sovereign.” *Id.*

<sup>412</sup> See Lee, 106 *Colum L Rev* at 874–75 (cited in note 33). In relevant part, the Magna Carta provided that

[a]ll merchants shall have safe conduct to go and come out of and into England, and to stay in and travel through England by land and water for purposes of buying and selling, free of illegal tolls, in accordance with ancient and just customs, except, in time of war, such merchants as are of a country at war with Us. If any such be found in Our dominion at the outbreak of war, they shall be attached, without injury to their persons or goods, until it be known to Us or Our Chief Justiciary how Our merchants are being treated in the country at war with Us, and if Our merchants be safe there, then theirs shall be safe with Us.

Magna Carta Art 41.

<sup>413</sup> Act of 1337, 11 *Edw III*, ch 5, in 1 *Statutes of the Realm* 280, 281.

<sup>414</sup> See *Calvin’s Case*, 77 *Eng Rep* 377, 383 (KB 1608); Comyns, 4 *Digest of the Laws of England* at 429 (cited in note 180).

by way of Amity, League, or Truce, or by force of the King's Safeconduct or Safeguard in any wise."<sup>415</sup> This provision protected both foreigners in amity, league, or truce with England (pursuant to a treaty) and those under the protection of a safe conduct (by virtue of a statute or an individual grant). The common law protected aliens more generally by allowing them to sue British subjects for torts committed either at home or abroad.

Early American initiatives to redress law of nations violations recognized the need to protect not only aliens under a treaty of amity or who held express or implied safe conducts, but all aliens of nations not at war with the United States. In the 1780s, the United States did not have extensive treaties of amity with other nations or statutes granting safe conducts. In 1781, the only nation with which the United States had a treaty of amity was France.<sup>416</sup> The 1781 resolution of the Continental Congress, discussed in Part III, began by calling upon states to punish "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>417</sup> In other words, the resolution recognized that states owed a duty to protect aliens in amity and aliens in the United States under an implied safe conduct. The resolution went further, however, recommending that states "authorise suits to be instituted for damages by the party injured, and for compensation to the United States for damage sustained by them from an injury done to a foreign power by a citizen."<sup>418</sup> The civil remedy that this provision recommended extended to citizens of any foreign power injured by an American, not merely to citizens of treaty partners or those protected by safe conducts. The 1782 Connecticut statute discussed in Part III followed the same pattern. It punished those committing "Acts of Hostility against the Subjects of any Prince or Power in Amity League or Truce with the United States of America, *or* such as are within this State under a General implied safe Conduct."<sup>419</sup> In addition, it provided a civil remedy for injury to any foreign nation or its subjects.<sup>420</sup>

The text of the ATS similarly gave federal courts jurisdiction over claims by an alien "for a tort only in violation of the law of

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<sup>415</sup> Act of 1452, 31 Hen VI, ch 4, in 2 Statutes of the Realm 363, 363–64.

<sup>416</sup> See Treaty of Amity and Commerce between the United States of America and His Most Christian Majesty, 8 Stat 12, Treaty Ser No 83 (1778).

<sup>417</sup> Hunt, ed, 21 *Journals of the Continental Congress* at 1136 (cited in note 245) (emphasis added).

<sup>418</sup> *Id* at 1137.

<sup>419</sup> Act to Prevent Infractions at 157 (cited in note 298) (emphasis added).

<sup>420</sup> *Id*.

nations or treaty of the United States.” This language—by employing terms of art such as “tort,” “the law of nations,” and “treaty”—encompassed any acts of violence by a US citizen against a citizen of a nation at peace with the United States (or otherwise under its protection). Such acts of violence included three kinds of violations: violations of treaties of amity, league, or truce; violations of safe conducts; and violations of background principles of the law of nations that protected aliens at peace.<sup>421</sup> The United States, of course, had a strong interest in preventing and redressing all three kinds of violations.

In 1789, however, the third category of violations arguably posed the most immediate danger to the United States’ peaceful relations

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<sup>421</sup> Professor Lee argues that

a friendly or neutral alien . . . injured within the United States . . . could sue without either [an express American safe conduct document that had been breached or a treaty term to ground a specific implied safe conduct] because he was entitled to a general implied safe conduct, the breach of which constituted a violation of the law of nations.

Lee, 106 Colum L Rev at 880 (cited in note 33). This statement seems to suggest that a friendly or neutral alien could be said to hold an implied safe conduct under the law of nations even without any act of a sovereign conferring one. If by 1789 some conflated the phrase “implied safe conduct” with the protection that a nation owed citizens of friendly or neutral nations within its territory under the law of nations, it does not appear to have been an established and uncontroversial usage. The 1781 Continental Congress resolutions and 1782 Connecticut statute distinguished aliens in amity from those under the protection of a safe conduct, as English statutes had done. See notes 248, 298–301, and accompanying text. Interestingly, Blackstone seems to have broken with previous English sources by equating foreigners in amity, league, or truce with those under a general implied safe conduct. He wrote that it was a crime to commit “acts of hostility against such as are in amity, league, or truce with us, who are here under a general implied safe-conduct.” Blackstone, 4 *Commentaries* at 68 (cited in note 9). Blackstone’s (perhaps inadvertent) equation of those in amity, league, or truce with those under an implied safe conduct did not go unnoticed by subsequent writers. “The only inaccuracy” in this passage, it was argued in 1825, was “calling peace an implied safe-conduct; when it is in fact the removal of the temporary incapacity, superinduced by hostilities, and a restoration to that state, wherein no safe-conduct at all, express or implied, is wanted.” *On the Alien Bill*, 42 *Edinburgh Rev* 99, 120 (Apr 1825). It was argued, furthermore, that “[a]ll the ancient statutes on the subject show, that the necessity of safe-conduct, as a protection, arose, and expired, with the war. 2. H. 5. S. 1. c. 6. distinguishes truce from safe-conduct; so 14 E. 4. c. 4. divides the offence into branches of truce, league, and safe-conduct. So 31. H. 6. c. 4. provides redress for ‘any strangers in amity, league, truce, or by safe conduct.’” *Id.* For present purposes, we need not resolve whether Blackstone actually meant to equate those in amity, league, or truce with those under protection of a safe conduct. Suffice it to say that, under the law of nations, a sovereign had to redress acts of violence against aliens protected by a treaty of amity, league, or truce; aliens under protection of a safe conduct; and aliens of any nation at peace with the nation of the transgressor. The drafters of the 1781 Continental Congress resolution, the 1782 Connecticut statute, and the ATS appear to have well recognized the need to provide protection to both classes of aliens—and all aliens of nations at peace with the United States. Moreover, given even the broadest usage of the phrase “implied safe conduct,” the ATS conferred jurisdiction over more than safe conduct violations. The ATS conferred jurisdiction over claims by aliens that US citizens committed acts of violence in another nation’s territory—territory in which a foreign citizen could not be said to hold an “implied safe conduct” from the United States under any usage of that phrase.

with other nations. As a new nation, the United States had precious few treaties of amity (or treaties otherwise providing safe passage in the United States). In addition to the treaty of amity and commerce with France, the United States had treaties of amity and commerce with Morocco, the Netherlands, Prussia, and Sweden.<sup>422</sup> Notably, however, it did not have a treaty of amity and commerce with Spain—a powerful nation with territory bordering the United States and whose citizens frequently came into contact with Americans. Moreover, Article V of the 1783 Paris Peace Treaty with Great Britain expressly granted British subjects only limited protection in US territory,<sup>423</sup> providing them “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.”<sup>424</sup> This protection was of limited duration and applied only in US territory. Safe conducts had no application to foreigners in foreign territories (such as the British and Spanish territories bordering the United States), and the criminal laws of the United States could not reach violence beyond the territorial limits of the nation. To abide by the law of nations, the United States had to afford a remedy for law of nations violations committed by its citizens in US territory and in (often adjoining) foreign territory. Accordingly, to signal its adherence to the law of nations, the United States provided jurisdiction in the ATS not only for torts “in violation of . . . a treaty of the United States” but also for torts “in violation of the law of nations” by US citizens—which included all acts of hostility (wherever taken) by US citizens against citizens of nations at peace with the United States. Had the ATS been limited to safe conduct violations, it would not have redressed this broader category of violations.

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<sup>422</sup> Treaty of Peace and Friendship between the United States of America, and His Imperial Majesty the Emperor of Morocco, 8 Stat 100, Treaty Ser No 244-1 (1786); Treaty of Amity and Commerce between Their High Mightinesses the States General of the United Netherlands, and the United States of America, 8 Stat 32, Treaty Ser No 249 (1782); A Treaty of Amity and Commerce, between His Majesty the King of Prussia and the United States of America, 8 Stat 84, Treaty Ser No 292 (1785); Treaty of Amity and Commerce, Concluded between His Majesty the King of Sweden and the United States of North-America, 8 Stat 60, Treaty Ser No 346 (1783). For a discussion of the specific protections and rights that these treaties recognized in favor of citizens of the treaty partners, see Lee, 106 Colum L Rev at 875–79 (cited in note 33) (arguing that the provisions of these treaties created implied safe conducts).

<sup>423</sup> It is unclear whether the Paris Peace Treaty with Great Britain constituted a treaty of amity and friendship, such that torts committed by US citizens against British subjects violated the treaty. Either way, however, the ATS ensured that British subjects could sue US citizens in federal court for intentional torts against them.

<sup>424</sup> Paris Peace Treaty Art V, 8 Stat at 82.

## 2. The ATS and ambassadorial and admiralty jurisdiction.

Several scholars have argued that the term “alien” in the ATS should be read to include ambassadors on the assumption that Congress enacted the Judiciary Act partly in response to two incidents involving foreign ministers—Marbois and Van Berckel.<sup>425</sup> In response, Curtis Bradley has contended that neither incident in fact provided the impetus for the ATS.<sup>426</sup> There are strong reasons grounded in the structure of Article III and the Judiciary Act to suggest that the ATS would have been most reasonably understood in 1789 not to include claims by ambassadors. Thomas Lee has identified several of them. Many of these reasons are consistent with the canon of statutory construction that “the specific governs the general.”<sup>427</sup> First, § 13 of the Judiciary Act gave the Supreme Court “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>428</sup> Lee argues that this provision recognized concurrent jurisdiction over ambassadors’ suits in the Supreme Court and state courts.<sup>429</sup> Limiting federal court jurisdiction over ambassadors’ suits to the Supreme Court comported with the elevated protection that the law of nations afforded ambassadors.<sup>430</sup> That said, other scholars have argued that the nonexclusivity of the Supreme Court’s jurisdiction over cases brought by ambassadors suggests that the ATS was meant to give district courts concurrent jurisdiction over tort actions brought by ambassadors.<sup>431</sup> Lee argues in response that it would not have occurred to Congress to give district courts jurisdiction over cases by ambassadors and other public ministers given the dignity owed them and their presumed proximity to the national capital (and thus to the Supreme Court).<sup>432</sup> If Supreme Court justices were riding circuit and

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<sup>425</sup> See Collins, 42 Va J Intl L at 675–77 (cited in note 19); Dodge, 19 Hastings Intl & Comp L Rev at 236 (cited in note 32); Casto, 18 Conn L Rev at 491–94 (cited in note 37). See also *Tel-Oren*, 726 F2d at 815 (Bork concurring).

<sup>426</sup> See Bradley, 42 Va J Intl L at 641–42 (cited in note 19).

<sup>427</sup> For an excellent discussion of the specificity canon, see John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 Yale L J 1663, 1733–39 (2004).

<sup>428</sup> Judiciary Act of 1789 § 13, 1 Stat at 80.

<sup>429</sup> Lee, 106 Colum L Rev at 855–58 (cited in note 33).

<sup>430</sup> *Id* at 856.

<sup>431</sup> See Casto, 18 Conn L Rev at 496–97 (cited in note 37). See also Collins, 42 Va J Intl L at 677 (cited in note 19) (observing that “[i]f foreign officials were excluded from the class of aliens who can sue under the ATS, the only ‘concurrent’ jurisdiction alternative to the Supreme Court in a suit against another alien, as in the Marbois case, would be in state court,” creating a “geographical inconvenience to foreign-citizen consuls”).

<sup>432</sup> Lee, 106 Colum L Rev at 857 (cited in note 33).

thus absent, state courts in proximity to the national capital would have provided a natural alternative forum.<sup>433</sup>

Second, Lee argues that the constitutional counterpart to “alien” in the ATS is “foreign [ ] Citizens or Subjects” in Article III.<sup>434</sup> Article III separately authorizes federal court jurisdiction over “all Cases affecting Ambassadors, other public ministers and Consuls,” and over “Controversies . . . between a State, or Citizens thereof, and foreign States, Citizens or Subjects.”<sup>435</sup> It is unlikely, Lee contends, that the drafters intended these provisions to overlap. Accordingly, they likely understood the term “alien” to refer to its constitutional antecedent—foreign citizens or subjects—not ambassadors.<sup>436</sup>

Finally, Lee argues, the term “alien,” as used elsewhere in the Judiciary Act, does not refer to “ambassadors.”<sup>437</sup> Section 12 authorizes defendants to remove to federal circuit court suits “commenced in any state court against an alien.”<sup>438</sup> Because Article III (and necessarily the Judiciary Act) did not allow plaintiffs ever to file suits against ambassadors in state court, “alien” in § 12 necessarily excludes them. Lee concludes that, in 1789, the most reasonable understanding would have been that “alien” means the same thing in both sections.<sup>439</sup>

With respect to admiralty jurisdiction, at first glance little might appear to hinge on whether the ATS was understood to confer jurisdiction over maritime torts (that might also constitute criminal piracy). Section 9 of the Judiciary Act gave district courts jurisdiction of both “all civil causes of admiralty and maritime jurisdiction” and suits by “an alien [ ] for a tort only in violation of the law of nations or a treaty of the United States.”<sup>440</sup> It might appear to make little difference whether an alien maritime tort claim fell within district court ATS jurisdiction, as a district court would have jurisdiction over such a claim in any event under its admiralty and maritime jurisdiction. In fact, however, there is evidence that Congress intended to keep ATS and admiralty and maritime jurisdiction distinct.

As Thomas Lee has explained, courts long interpreted Congress’s grant of admiralty and maritime jurisdiction to district courts to be

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<sup>433</sup> Id at 857–58.

<sup>434</sup> Id at 853, citing US Const Art III, § 2, cl 1.

<sup>435</sup> US Const Art III, § 2, cl 1.

<sup>436</sup> Lee, 106 Colum L Rev at 853 (cited in note 33).

<sup>437</sup> Id at 854.

<sup>438</sup> Judiciary Act of 1789 § 12, 1 Stat at 79.

<sup>439</sup> Lee, 106 Colum L Rev at 854 (cited in note 33).

<sup>440</sup> Judiciary Act of 1789 § 9, 1 Stat at 76–77.

very broad, encompassing all maritime torts.<sup>441</sup> It is difficult to imagine a case of misconduct on the high seas that a district court would not have authority to redress under its admiralty and maritime jurisdiction.<sup>442</sup> Lee persuasively argues that the First Congress probably did not intend the admiralty and alien tort provisions of § 9 to confer overlapping jurisdiction.<sup>443</sup> That § 9 made admiralty and maritime jurisdiction “exclusive” of state courts and alien tort claim jurisdiction “concurrent” with state courts “would appear to foreclose such an interpretation.”<sup>444</sup> Moreover, he argues, “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>445</sup>

In 1795, in *Bolchos v Darrel*, described in Part I, a federal district court appears to have appreciated that these two grants of jurisdiction in § 9 of the Judiciary Act were mutually exclusive.<sup>446</sup> In this prize suit by a French privateer against a US citizen claiming that a ship and its cargo was lawful prize, District Judge Thomas Bee concluded that “as the original cause arose at sea, everything dependent on it is triable in the admiralty.”<sup>447</sup> “Besides,” he remarked,

as the 9th section of the judiciary act of congress gives this court concurrent jurisdiction with the state courts and circuit court of the United States where an alien sues for a tort, in violation of the law of nations, or a treaty of the United States, I dismiss all doubt upon this point.<sup>448</sup>

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<sup>441</sup> Lee, 106 Colum L Rev at 866–68 (cited in note 33). In 1815, Justice Story observed that admiralty and maritime jurisdiction “must include all maritime contracts, torts and injuries.” *De Lovio v Boit*, 7 F Cases 418, 442 (CC D Mass 1815).

<sup>442</sup> Consider Lee, 106 Colum L Rev at 867–68 (cited in note 33) (attempting to derive such a case but concluding that one would be rare and exceptional).

<sup>443</sup> *Id.* at 868–69.

<sup>444</sup> *Id.* at 868. Lee persuasively argues against competing interpretations. See *id.* at 868–70.

<sup>445</sup> *Id.* at 870. Professor Joseph Sweeney has argued, to the contrary, that § 9 of the Judiciary Act required exclusive federal court jurisdiction over prize but not marine tort cases in which the legality of capture was not in issue; for such cases, the ATS gave federal district courts concurrent jurisdiction with state courts. See Sweeney, 18 Hastings Intl & Comp L Rev at 482 (cited in note 34). Scholars have criticized this reading on several grounds. See, for example, Lee, 106 Colum L Rev at 870 (cited in note 33) (refuting Sweeney’s reading on the ground that “tort” was not a term used in the law of prize when the Judiciary Act was enacted); Bradley, 42 Va J Intl L at 617 (cited in note 19) (arguing that “a generally-worded grant of jurisdiction to the federal courts would have been a strange way” of fulfilling the purpose that Sweeney describes); Dodge, 19 Hastings Intl & Comp L Rev at 244 (cited in note 32) (rejecting Sweeney’s use of term “tort”).

<sup>446</sup> See 3 F Cases at 810.

<sup>447</sup> *Id.*

<sup>448</sup> *Id.* (citation omitted).

The import of this last statement was that even if this action did not lie with the district court's admiralty jurisdiction (because it arose on land), the district court would have had jurisdiction under the ATS for the seizure of personal property, which was made on land. The predicate tort, as Thomas Lee has noted, would have been "Darrel's seizure of the slaves on American soil."<sup>449</sup>

## V. HISTORICAL MEANING AND PRESENT-DAY ATS APPLICATIONS

In keeping with the Supreme Court's approach in *Sosa*, the primary goal of this Article is to explain how members of the First Congress would have understood the ATS at the time of its enactment. Most judges and scholars consider historical understandings of the ATS determinative of—or at least relevant to—how courts should apply it today. Accordingly, it is worth pointing out important historical misunderstandings and tensions in present-day judicial explanations of the statute. Courts, including the Supreme Court, have assumed that the ATS refers only to a narrow range of specialized torts recognized by the law of nations at the time the statute was enacted. On this assumption, the *Sosa* Court instructed that courts should allow only claims under the ATS that are "comparable to the features of the . . . 18th century paradigms."<sup>450</sup> This approach overlooks the full historical context of the ATS. At the time, *any* intentional tort committed by a US citizen against the person or personal property of an alien violated the law of nations. Accordingly, members of the First Congress would not have understood the ATS to single out particular kinds of torts that violated the law of nations. Rather, they would have recognized that all intentional common law torts committed by Americans with force against aliens violated the law of nations and thus triggered jurisdiction under the ATS.

Although the justices in *Sosa* were not unanimous in interpreting the ATS, all sought to limit its application to the kinds of tort claims that it originally encompassed. The Court made four important determinations about the ATS. First, the ATS is a jurisdictional statute and does not create a cause of action. Second, ATS defendants had to have been acting on behalf of a government instead of acting on their own initiative. Third, the statute was originally meant to confer jurisdiction over torts analogous to the three law of nations violations that Blackstone described as crimes in England. Fourth, for such violations, Congress assumed that the common law supplied a cause of action in ATS cases. But the Court did not expressly consider

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<sup>449</sup> Lee, 106 Colum L Rev at 893 (cited in note 33).

<sup>450</sup> 542 US at 725.



two other contested aspects of the ATS's original meaning: whether the statute conferred jurisdiction over claims by aliens against non-US citizens and whether "the law of nations" referenced in the statute constituted a form of federal common law, such that ATS cases arise under federal law for purposes of Article III.

Recognizing that the Supreme Court is likely to adhere to its historical approach of asking how the First Congress most likely understood the statute, we evaluate *Sosa's* analysis in light of the original meaning that we have identified.

#### A. The Historical Determinations of *Sosa*

*Sosa* gave the Supreme Court its first significant opportunity to interpret the ATS. As explained in Part I, Alvarez (a Mexican doctor) sued *Sosa* (a Mexican national), other Mexican nationals, four US DEA agents, and the United States for kidnapping Alvarez and bringing him to the United States to stand trial for the alleged torture and murder of a DEA agent in Mexico. The district court substituted the United States for the DEA agents and then dismissed all claims against the US. The Supreme Court upheld this dismissal and ruled that the ATS claim against *Sosa* and the other Mexican defendants should have been dismissed as well. The Court repeatedly suggested that the statute should be construed in accordance with the First Congress's original expectations. According to the Court, Congress wished to grant lower federal courts jurisdiction to hear a limited number of "private causes of action for certain torts in violation of the law of nations."<sup>451</sup> Such causes of action consisted of "those torts corresponding to Blackstone's three primary offenses [against the law of nations]: violation of safe conducts, infringement of the rights of ambassadors, and piracy."<sup>452</sup> Although the Court "found no basis to suspect Congress had any [other] examples in mind," it assumed that courts have a limited common law power to recognize new claims "based on the present-day law of nations" so long as they "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 we have recognized."<sup>453</sup>

The Court offered five reasons "for judicial caution" in exercising this power.<sup>454</sup> First, "the prevailing conception of the common law has changed since 1789 in a way that counsels restraint in judicially

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<sup>451</sup> *Id.* at 724.

<sup>452</sup> *Id.*

<sup>453</sup> *Id.* at 724–25.

<sup>454</sup> *Sosa*, 542 US at 725.

applying internationally generated norms.”<sup>455</sup> Second, there has been “an equally significant rethinking of the role of the federal courts in making” common law since the Court’s decision in *Erie*.<sup>456</sup> Third, “a decision to create a private right of action is one better left to legislative judgment in the great majority of cases.”<sup>457</sup> Fourth, “the potential implications for the foreign relations of the United States of recognizing [new private causes of action for violating international law] should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs.”<sup>458</sup> Fifth, courts “have no congressional mandate to seek out and define new and debatable violations of the law of nations, and modern indications of congressional understanding of the judicial role in the field have not affirmatively encouraged greater judicial creativity.”<sup>459</sup> According to the Court, “[t]hese reasons argue for great caution in adapting the law of nations to private rights.”<sup>460</sup>

Applying this cautious approach, the Court concluded that Alvarez’s claim for arbitrary abduction and detention in Mexico did not qualify as a tort “in violation of the law of nations” within the meaning of the ATS.<sup>461</sup> The Court noted that to establish a violation of international law, Alvarez would have had to “establish that Sosa was acting on behalf of a government when he made the arrest” and then show that the government in question, as a matter of state policy, practiced, encouraged, or condoned prolonged arbitrary detention.<sup>462</sup> Even assuming that Sosa was acting on behalf of a government, the Court concluded “that a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy.”<sup>463</sup> Accordingly, the Court reversed the lower courts’ refusal to dismiss Alvarez’s ATS claim.

In reaching this conclusion, the Supreme Court made four important determinations. The Court’s first key determination—that the ATS is jurisdictional, creating no cause of action—accurately reflects the ATS’s original import. The Court explained that “[a]s

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<sup>455</sup> Id at 725.

<sup>456</sup> Id at 726, citing *Erie Railroad Co v Tompkins*, 304 US 64, 78 (1938) (“[T]here is no federal general common law.”).

<sup>457</sup> *Sosa*, 542 US at 727.

<sup>458</sup> Id.

<sup>459</sup> Id at 728.

<sup>460</sup> Id.

<sup>461</sup> *Sosa*, 542 US at 738.

<sup>462</sup> Id at 737.

<sup>463</sup> Id at 738.

enacted in 1789, the ATS gave the district courts ‘cognizance’ of certain causes of action, and the term bespoke a grant of jurisdiction, not power to mold substantive law.”<sup>464</sup> This finding, the Court rightly concluded, follows from the jurisdictional nature of § 9.

The Court’s second and third key determinations, by contrast, unduly narrow the statute. The second determination was that the defendant had to be acting on behalf of a government rather than acting on his own initiative. The third determination was that the ATS conferred jurisdiction to hear only claims analogous to the three criminal offenses against the law of nations that Blackstone emphasized under English law. Specifically, the Court found that, in enacting the ATS, the First Congress had in mind “those torts corresponding to Blackstone’s three primary offenses: violation of safe conducts, infringement of the rights of ambassadors, and piracy.”<sup>465</sup> This approach incorrectly assumes that the torts actionable under the ATS were limited to a small subset of torts that violated international norms. This approach led the Court to construe the ATS narrowly but leave the door “ajar” to recognition under the statute of “a narrow class of international [torts] today.”<sup>466</sup> Without purporting to identify “the ultimate criteria for accepting a cause of action subject to jurisdiction under” the ATS, the Court was “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 [the ATS] was enacted.”<sup>467</sup>

The ATS was not adopted, however, to grant federal courts jurisdiction merely to hear a narrow class of torts committed by individuals acting on behalf of a government and analogous to the three international crimes that Blackstone singled out.<sup>468</sup> Rather, the statute

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<sup>464</sup> Id at 713.

<sup>465</sup> *Sosa*, 542 US at 724. The *Sosa* Court may have drawn this idea from an amicus brief noting that the enumeration of law of nations violations in the Continental Congress’s 1781 resolution “followed Blackstone,” who identified three principal offenses against the law of nations. See Brief of Professors of Federal Jurisdiction and Legal History as *Amici Curiae* in Support of Respondents, *Sosa v Alvarez-Machain*, No 03-339, \*5 n 4 (US filed Feb 27, 2004) (available on Westlaw at 2004 WL 419425) (explaining that the Continental Congress passed a resolution in 1781 to redress violations of the law of nations). The brief went on to say that the First Congress “implemented the 1781 resolution’s recommendation on civil suits” by enacting the ATS. Id at \*8.

<sup>466</sup> *Sosa*, 542 US at 729.

<sup>467</sup> Id at 732.

<sup>468</sup> The ambassadorial and admiralty provisions of the first Judiciary Act already encompassed claims for two of Blackstone’s violations, offenses against ambassadors and piracy. The federal criminal code, however, did not reach run-of-the-mill harms inflicted by US citizens on aliens—harms that the law of nations required the United States to redress. See Part IV. The

was designed to redress ordinary torts committed by private US citizens against aliens. The reason was simple: any intentional common law tort committed with force by a US citizen against the person or property of an alien constituted a violation of the law of nations and imposed an obligation on the United States to redress the injury or become responsible to the alien's nation. Thus, it was the basic party alignment—rather than some specific characteristic of the underlying intentional tort—that triggered jurisdiction under the ATS.

Under the law of nations, if the United States failed to redress any intentional injury inflicted on an alien or his property by an American citizen, then the United States itself became responsible for the violation of the law of nations, giving the alien's home country just cause for war.<sup>469</sup> The ATS was adopted to ensure the availability of a civil remedy in all such cases and thereby prevent US responsibility for its citizens' offenses against aliens.<sup>470</sup> Accordingly, the ATS's reference to "all causes where an alien sues for a tort only in violation of the law of nations" was not historically restricted to conduct taken on behalf of a government or to Blackstone's partial list of criminal violations of the law of nations. Rather, it more broadly encompassed any intentional harm inflicted on an alien that would have required the perpetrator's nation to provide a remedy or accept responsibility under the law of nations for the underlying offense. This reading of the ATS—rather than the Court's narrower approach—more accurately reflects the First Congress's assumption "that federal courts could properly identify some international norms as enforceable in the exercise of § 1350 jurisdiction."<sup>471</sup>

A hypothetical variation on the facts of *Sosa* helps to illustrate why the Court's second and third determinations unduly narrow the statute. In *Sosa*, Alvarez sued not only Mexican nationals, but also four DEA agents (who were US citizens) for their part in his abduction and detention. These defendants moved to substitute the United States as the defendant pursuant to the FTCA.<sup>472</sup> The lower courts approved the substitution,<sup>473</sup> and the Supreme Court did not

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ATS was enacted in part to supplement the criminal law and satisfy all of the United States' obligations under the law of nations.

<sup>469</sup> See notes 139–52 and accompanying text.

<sup>470</sup> See Part IV.A.

<sup>471</sup> *Sosa*, 542 US at 730.

<sup>472</sup> The FTCA provides that the exclusive civil remedy for most wrongful conduct by federal employees acting within the scope of their employment is an FTCA action against the United States. See 28 USC § 2679(b)(1) (stating that 28 USC § 1346(b) and 28 USC § 2672 provide the exclusive remedy).

<sup>473</sup> See *Alvarez-Machain v United States*, 266 F3d 1045, 1053–54 (9th Cir 2001) (reviewing only the question whether 28 US § 2679 is the proper vehicle for the substitution, not whether the substitution was proper).

review this question. Therefore, when the case came before the Court, it involved only a claim by one Mexican national against another. Now consider the following hypothetical. Suppose that a private US citizen—a relative of the murdered DEA agent—had travelled to Mexico on his own initiative, abducted Alvarez, and brought him to the United States to stand trial. *Sosa* would require federal courts to dismiss an ATS claim by Alvarez against his abductor on the grounds that the defendant was not acting on behalf of a government and that (as in *Sosa*) the conduct in question was not actionable because it alleged a violation of an “international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when [the ATS] was enacted.”<sup>474</sup> In 1789, however, any common law tort of force—such as kidnapping or battery—would have violated the law of nations if committed by a US citizen against an alien. Moreover, the law of nations obligated the United States to redress the harm or subject itself to retaliation by the victim’s nation. The ATS was enacted precisely to avoid such retaliation by giving aliens injured by US citizens a reliable federal forum in which to obtain redress for any and all intentional torts. This hypothetical illustrates why the *Sosa* Court’s attempts to impose a state action requirement and to identify “a narrow class of international norms” cognizable under the ATS unduly narrow the original meaning of the statute.<sup>475</sup>

The Court’s fourth historical determination—that the common law provided a remedy for law of nations violations encompassed by the ATS—is partially correct but warrants further explanation to avoid confusion in future cases. The Court asserted that “[t]he 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>476</sup> The First Congress did not, however, understand the common law—what the Court characterized as “the ambient law of the era”<sup>477</sup>—to provide causes of action in federal courts of its own force. Rather, in 1789, Congress itself gave federal courts specific legislative instructions on how and when to

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<sup>474</sup> *Sosa*, 542 US at 732. In addition, under *Sosa*, an ATS suit would presumably be unavailable in this hypothetical because the defendant was not “acting on behalf of a government when he made the arrest.” *Id.* at 737 (suggesting that ATS claims made against a defendant not acting on behalf of a government would be too broad to fit within the narrow class of tort claims allowed under the statute).

<sup>475</sup> *Id.* at 729.

<sup>476</sup> *Id.* at 724.

<sup>477</sup> *Id.* at 714.

apply the common law forms of action in cases within their jurisdiction. As explained, § 14 of the Judiciary Act authorized federal courts to issue common law writs that “may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law.”<sup>478</sup> The First Congress soon thereafter provided in the Process Act of 1789 that “the forms of writs and executions . . . in the circuit and district courts, in suits at common law, shall be the same in each state respectively as are now used or allowed in the supreme courts of the same.”<sup>479</sup> Although the *Sosa* Court correctly concluded that federal courts would employ the common law forms of action in ATS cases, the Court was apparently unaware that Congress had expressly directed federal courts to do so in these statutes. Thus, when Congress conferred jurisdiction upon federal courts to hear alien claims “for a tort only in violation of the law of nations or treaty of the United States,” it fully expected them to recognize and employ the common law causes of action then in use.

The practice of using state forms of action in federal court continued until the adoption of the Federal Rules of Civil Procedure in 1938.<sup>480</sup> The Rules abolished reliance on the state forms of action and proceeding and established that “in all civil actions and proceedings in the United States District Courts,”<sup>481</sup> “[t]here is one form of action—the civil action.”<sup>482</sup> Even today, however, *Erie* requires federal courts sitting in diversity to apply the substantive law of the state in which they sit.<sup>483</sup> Accordingly, in a suit by an alien against a US citizen—a type of diversity action—state tort law remains available to federal courts as a means of redressing torts “in violation of the law of nations.” Thus, today, as in 1789, state law supplies an important means—a cause of action for intentional torts—by which federal courts exercising jurisdiction under the ATS can remedy torts committed by US citizens against aliens.

## B. Unresolved Historical Questions

The *Sosa* Court did not directly address two important and interrelated questions that have arisen under the ATS in the last three

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<sup>478</sup> Judiciary Act of 1789 § 14, 1 Stat at 82.

<sup>479</sup> Process Act of 1789 § 2, 1 Stat at 93–94. In the Process Act of 1792, Congress reaffirmed this provision and conferred some discretion on federal courts to alter such forms. Process Act of 1792 § 2, 1 Stat at 276. See note 365 and accompanying text.

<sup>480</sup> Prior to authorizing the Supreme Court to promulgate rules of practice and procedure in 1934, Congress enacted the Conformity Act of 1872, which instructed federal district courts to follow the procedural rules of the state applicable at the time the case was filed. See note 365.

<sup>481</sup> FRCP 1.

<sup>482</sup> FRCP 2.

<sup>483</sup> See *Erie*, 304 US at 78.

decades: whether the Act applied to claims by aliens against non-US citizens and whether the law of nations principles underlying ATS cases constituted a form of federal common law capable of generating Article III “arising under” jurisdiction. These historical questions, which have been debated by lower courts and scholars for three decades, are important because, both before and after *Sosa*, some lower courts have allowed aliens to sue non-US citizens under the statute, and the only way to establish jurisdiction over such suits under Article III is to conclude that they arise under federal law.

The historical meaning of the ATS does not in itself support the lower courts’ practice of allowing aliens to sue other aliens under the ATS for conduct occurring outside the United States. The ATS was enacted to remedy harms suffered by aliens at the hands of US citizens. These were the only torts that would have violated the law of nations (from the United States’ perspective) and that the law of nations would have required the United States to remedy to avoid responsibility for the torts. Because states had failed to provide aliens with a reliable means of redressing such harms, the First Congress gave federal courts jurisdiction to hear alien tort claims under the ATS. Using the ATS to adjudicate suits between aliens for conduct occurring outside the United States could have been perceived as an intrusion on the territorial sovereignty of other nations—a perception that the First Congress almost certainly wished to avoid.<sup>484</sup>

Moreover, Article III does not support the recent lower court practice of permitting one alien to use the ATS to sue another alien in federal court. Article III extends the judicial power to controversies between citizens of a state and foreign citizens or subjects.<sup>485</sup> It does not extend the judicial power to controversies between citizens or subjects of foreign nations unless they fall within one of Article III’s precise jurisdictional categories, such as cases affecting ambassadors, cases of admiralty and maritime jurisdiction, or cases arising under the Constitution, laws, and treaties of the United States.<sup>486</sup> As *Sosa* recognized, the ATS “is in terms only jurisdictional.”<sup>487</sup> It did not create a federal cause of action or adopt the law of nations as a matter of federal law.<sup>488</sup> Such steps were unnecessary in 1789 because diversity jurisdiction fully sufficed to give aliens a federal forum in which to pursue tort claims against US citizens. Likewise, giving

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<sup>484</sup> See Part II.C.

<sup>485</sup> US Const Art III, § 2, cl 1.

<sup>486</sup> US Const Art III, § 2, cl 1.

<sup>487</sup> 542 US at 712.

<sup>488</sup> Id at 724 (stating that “the ATS is a jurisdictional statute creating no new causes of action”).

federal courts jurisdiction over such cases fully satisfied the United States' obligations under the law of nations to redress the misconduct of its citizens toward aliens.

Lower federal courts have provided little historical support for their use of the ATS to adjudicate disputes between aliens. In *Filartiga*, the Second Circuit began the modern practice of interpreting the ATS to allow one alien to sue another for violations of international law outside the United States. In that case, as described in Part I, citizens of Paraguay sued another citizen of Paraguay for torturing their son in Paraguay.<sup>489</sup> The court concluded that the alleged conduct qualified as a tort in violation of the law of nations within the meaning of the ATS because “deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties.”<sup>490</sup> The court stated that its exercise of jurisdiction was consistent with Article III because the case arose under “the law of nations, which has always been part of the federal common law.”<sup>491</sup> Most lower courts have followed *Filartiga*'s lead in allowing suits between aliens under the ATS,<sup>492</sup> and this practice has continued after *Sosa*.<sup>493</sup>

The Second Circuit's assertion that the law of nations has always been part of federal common law is anachronistic and lacks a convincing basis in the historical record. Federal common law is a modern construct. Prior to the twentieth century, courts did not recognize “federal rules of decision whose content cannot be traced by traditional methods of interpretation to federal statutory or constitutional commands.”<sup>494</sup> To be sure, federal courts applied certain

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<sup>489</sup> *Filartiga*, 630 F2d at 878.

<sup>490</sup> *Id.*

<sup>491</sup> *Id.* at 885.

<sup>492</sup> See, for example, *Kadic v Karadžić*, 70 F3d 232, 250 (2d Cir 1995) (permitting aliens to sue a Serbian leader for alleged torture and rape); *In re Estate of Ferdinand Marcos*, 25 F3d 1467, 1475–76 (9th Cir 1994) (allowing aliens to sue the former Philippine president for torture). But see *Tel-Oren*, 726 F2d at 775 (dismissing a suit by aliens against the PLO for an armed attack on a civilian bus).

<sup>493</sup> Aliens continue to sue other aliens under the ATS for torts occurring outside the United States. For example, in *Amergi v Palestinian Authority*, 611 F3d 1350 (11th Cir 2010), the estate of an Israeli citizen who was shot and killed while driving in the Gaza Strip sued the Palestinian Authority and the PLO under the ATS and alleged that the defendants had deliberately targeted and killed unarmed civilians. *Id.* at 1353–54. Applying the strict *Sosa* standard, the Eleventh Circuit dismissed the claim on the ground that the allegations did not amount to a tort in violation of the law of nations. *Id.* at 1365.

<sup>494</sup> Richard H. Fallon Jr, Daniel J. Meltzer, and David L. Shapiro, *Hart and Wechsler's The Federal Courts and the Federal System* 685 (Foundation 5th ed 2003). See Henry Paul Monaghan, *Supremacy Clause Textualism*, 110 Colum L Rev 731, 741 (2010) (“The modern



rules derived from the law of nations in the exercise of their Article III jurisdiction—particularly their admiralty and foreign diversity jurisdiction.<sup>495</sup> They did not apply such rules, however, because they constituted a form of supreme federal law.<sup>496</sup> Rather, as we have recently explained, federal courts applied the law of nations when necessary to uphold the constitutional prerogatives of Congress and the President to conduct foreign relations and decide momentous questions affecting war and peace.<sup>497</sup> Federal courts sitting in diversity also interpreted and applied branches of the law of nations—like the law merchant—as a form of general law not binding on the state courts. Thus, there is no real basis for concluding that either the Founders or the First Congress understood suits between aliens arising under the law of nations to constitute cases arising under the Constitution, laws, and treaties of the United States within the meaning of Article III.

The *Sosa* Court did not have to confront either the Article III issue or the party-alignment issue for two reasons. First, the Court concluded that Alvarez had not alleged a tort “in violation of the law of nations” within the meaning of the statute. Given this statutory holding, the Court had no need to consider either the appropriateness of the party alignment under the ATS or the constitutional issue that such an alignment would have raised. Second, the district court had an independent constitutional and statutory basis for subject matter jurisdiction over Alvarez’s original claims against the United States (under the FTCA)<sup>498</sup> and over Alvarez’s claims against the US DEA agents (based on diversity of citizenship).<sup>499</sup> Because Alvarez’s tort claims against *Sosa*, the United States, and the DEA agents all arose from a common nucleus of operative fact, the claims formed part of a single constitutional “case” for purposes of Article III.<sup>500</sup> Accordingly, the Supreme Court had no need to decide whether the claims brought by Alvarez (an alien) against *Sosa* (another alien) arose under federal law for purposes of Article III.<sup>501</sup> Indeed, the Court’s opinion in *Sosa*

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conception of federal common law—judge-made law that binds both federal and state courts—simply did not exist circa 1788.”).

<sup>495</sup> See Bellia and Clark, 109 Colum L Rev at 39–40 (cited in note 17).

<sup>496</sup> See *id.* at 34–37.

<sup>497</sup> See *id.* at 55–75.

<sup>498</sup> See 28 USC § 1346(b)(1) (granting district courts exclusive jurisdiction over “civil actions on claims against the United States” for wrongs caused by wrongful or negligent acts of federal employees acting in the course of their duties).

<sup>499</sup> See 28 USC § 1332(a)(2) (granting jurisdiction over suits between “citizens of a State and citizens or subjects of a foreign state”).

<sup>500</sup> See *United Mine Workers of America v Gibbs*, 383 US 715, 725 (1966).

<sup>501</sup> See 28 USC § 1367(a) (granting supplemental jurisdiction over cases that form part of “the same case or controversy”).

went out of its way not to endorse the idea that ATS claims necessarily arise under federal law within the meaning of Article III and federal jurisdictional statutes. As noted, the Court repeatedly stressed that the ATS is purely a jurisdictional statute that creates no federal cause of action.<sup>502</sup> In addition, the Court rejected Justice Scalia's assertion that "a federal-common-law cause of action of the sort the Court reserves discretion to create would 'arise under' the laws of the United States, not only for purposes of Article III but also for purposes of *statutory* federal-question jurisdiction."<sup>503</sup> According to the Court, its position did not imply that "the grant of federal-question jurisdiction would be equally as good for our purposes as § 1350."<sup>504</sup> Thus, the Court did not conclude that the ATS created a *federal* common law cause of action. Rather, the Court merely concluded that the ATS "was enacted on the congressional understanding that courts would exercise jurisdiction by entertaining some common law claims derived from the law of nations."<sup>505</sup>

In 1789, judges and treatise writers appreciated that hearing suits between aliens for acts occurring outside a nation's territorial jurisdiction could implicate other nations' territorial sovereignty. Interpreting the ATS to grant aliens a federal cause of action in such cases would have undermined—rather than furthered—the First Congress's goal of complying with the law of nations because that law generally constrained a nation's ability to apply its laws extraterritorially.<sup>506</sup> The Constitution's allocation of powers over foreign relations provided an additional reason for avoiding any such interpretation of the statute if at all possible.<sup>507</sup> Moreover, with the

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<sup>502</sup> See, for example, *Sosa*, 542 US at 724 ("[T]he ATS is a jurisdictional statute creating no new causes of action.").

<sup>503</sup> *Id.* at 745 n \* (Scalia concurring in part and concurring in the judgment).

<sup>504</sup> *Id.* at 731 n 19 (majority). Indeed, the Court stated that its holding was "consistent with the division of responsibilities between federal and state courts after *Erie*, . . . [while] a more expansive common law power related to 28 U.S.C. § 1331 might not be." *Id.*

<sup>505</sup> *Id.*

<sup>506</sup> See Michael D. Ramsey, *International Law Limits on Investor Liability in Human Rights Litigation*, 50 Harv Intl L J 271, 284–92 (2009) (discussing the limits of prescriptive jurisdiction under customary international law). In 1789, the United States was a weak nation and could ill afford to violate the law of nations. See Jay, 42 Vand L Rev at 821, 839–45 (cited in note 396). Given America's current status as a global superpower, modern Congresses may be less concerned with how other nations will react to a decision to grant aliens a federal cause of action against other aliens in exceptional circumstances. Consider, for example, TVPA § 2, 106 Stat at 73 (establishing a civil cause of action against individuals who torture or subject individuals to extrajudicial killing). Unlike ATS claims, suits under the TVPA do not depend on diversity jurisdiction because they arise under a federal statute and thus satisfy both Article III and 28 USC § 1331.

<sup>507</sup> See *Charming Betsy*, 6 US (2 Cranch) at 118. See also Anthony J. Bellia Jr and Bradford R. Clark, *The Political Branches and the Law of Nations*, 85 Notre Dame L Rev 1795, 1803–04

exception of cases affecting ambassadors and cases of maritime and admiralty jurisdiction, Article III did not extend the judicial power of the United States to claims between aliens that did not arise under the Constitution, laws, or treaties of the United States. For these reasons, the ATS—taken in its full historical context—would not have been understood to encompass alien–alien claims, especially claims arising from acts occurring outside the United States.

Although most judges and scholars consider historical understandings of the ATS at least relevant, they have struggled to apply the statute today. Of course, analyzing present-day disputes in light of the original scope of the ATS generates difficult problems of translation and interpretation. First, customary international law today treats international responsibility for injuries to aliens differently than the law of nations treated it in 1789. In 1789, the law of nations obliged a nation to provide some form of redress—criminal, civil, or extradition—in order to avoid responsibility for acts of violence by its citizens against aliens. Today, international responsibility for private torts against aliens is generally limited to cases in which there has been a “denial of justice.”<sup>508</sup> More generally, the law of nations (today called customary international law) has undergone a significant transformation. Today customary international law recognizes violations—especially by a nation or its officials against its own citizens—that were unknown in 1789. Not only did other nations have no obligation to redress “violations” of this kind, but any attempt to do so would have itself contradicted the law of nations’ traditional principles of territorial sovereignty. Thus, the predicate law for present-day ATS jurisdiction bears scant resemblance to the law of nations of 1789. Second, under customary international law today, unredressed private harms to aliens no longer give the aliens’ nations just cause to wage war.<sup>509</sup> Thus, a core underlying purpose of the ATS has largely disappeared. Finally, the use of customary international law as a rule of decision has changed. In *Erie*, the Supreme Court rejected the concept of “federal general common law,”<sup>510</sup> and the post-*Erie* status of customary international law

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(2010) (describing “the judiciary’s adherence to the law of nations as a means of preserving the constitutional prerogatives of the political branches”); Bellia and Clark, 109 Colum L Rev at 64–74 (cited in note 17) (arguing that the Constitution allocates to the political branches the power to make decisions with the potential to violate the law of nations).

<sup>508</sup> See Paulsson, *Denial of Justice* at 4 (cited in note 354).

<sup>509</sup> *Id.* at 17.

<sup>510</sup> See 304 US at 78. For a recent argument that general law continues to play a significant role notwithstanding *Erie*, see Caleb Nelson, *The Persistence of General Law*, 106 Colum L Rev 503, 505–07 (2006) (arguing that “rules that are not under the control of any single jurisdiction, but instead reflect principles or practices common to many different jurisdictions,” play an

continues to be vigorously debated.<sup>511</sup> These developments raise difficult questions of statutory interpretation, including whether courts should apply the original meaning of statutory texts or interpret statutes more dynamically in light of evolving circumstances. While it is not our goal to resolve the translation problems that these developments generate for the ATS,<sup>512</sup> we note that none of these issues can be resolved without first recovering an accurate understanding of the ATS in its full legal, political, and historical context.

### CONCLUSION

The current debate regarding the scope and meaning of the ATS has lost sight of the historical context in which the statute was enacted. In 1789, the law of nations imposed several important obligations on the United States, including respect for treaties, the rights of ambassadors, and judicious use of admiralty jurisdiction. The law of nations, however, also obligated nations to redress all intentional harms inflicted by their citizens on the citizens or subjects of foreign nations. In common law nations, such harms could be described as “torts” in violation of the law of nations. A nation’s failure to provide redress in such cases gave the other nation just cause for war. The First Congress was undoubtedly aware of these

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important role when federal courts decide cases “[i]n the absence of guidance from written federal law” or “in the interstices of federal statutes”).

<sup>511</sup> See, for example, Curtis A. Bradley and Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 Harv L Rev 815, 816 (1997) (arguing that the “modern view” that customary international law has the status of international law is contrary to notions of representative democracy, federal common law, separation of powers, and federalism); Harold Hongju Koh, *Is International Law Really State Law?*, 111 Harv L Rev 1824, 1826–27 (1998) (rebutting the “revisionist view” of Curtis Bradley and Jack Goldsmith); Gerald L. Neuman, *Sense and Nonsense about Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 Fordham L Rev 371, 371–72 (1997) (arguing that Bradley and Goldsmith “neglect[] the effect of denying federal character to the ‘old’ customary international law, which addresses the rights of states against each other and, to some degree, the treatment of foreign nationals” and that they “overlook[] the need to provide rules of decision for lower-level executive officials and judges”); Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law after Erie*, 66 Fordham L Rev 393, 397 (1997) (criticizing Bradley and Goldsmith for assuming that customary international law was part of the general common law that *Erie* rejected). For an excellent overview of this debate, see generally Ernest A. Young, *Sorting Out the Debate over Customary International Law*, 42 Va J Intl L 365 (2002). We have recently argued that federal courts historically followed key principles of the law of nations in order to uphold the Constitution’s allocation of foreign affairs and war powers to the political branches of the federal government. See Bellia and Clark, 109 Colum L Rev at 5–7 (cited in note 17).

<sup>512</sup> For a recent argument that courts should resolve such problems by applying federal common law to all aspects of ATS litigation, see Ingrid Wuerth, *The Alien Tort Statute and Federal Common Law: A New Approach*, 85 Notre Dame L Rev 1931, 1932–33 (2010).

principles of the law of nations, and it enacted both federal criminal statutes and the ATS in order to comply with them. From this perspective, current judicial approaches to the ATS reflect some misperceptions about its original meaning. In *Sosa*, the Supreme Court endorsed the idea that only a narrow handful of “international” torts—analogueous to three criminal offenses against the law of nations under English law in 1789—are actionable under the ATS. In fact, the ATS was originally meant to give an alien the right to sue a US citizen in federal court for any intentional tort to person or personal property, because any such tort—if perpetrated by an American against an alien—would have violated the law of nations and required the United States to redress the harm. The historical context also suggests that the ATS was not originally meant to encompass suits between aliens, as some lower courts have assumed it does. The United States had no clear obligation to provide redress in such cases, and adjudication of such disputes itself could violate the territorial sovereignty of foreign states under the law of nations. The ATS was designed to remedy the states’ failure to provide adequate redress to aliens injured at the hands of early Americans and, in so doing, to satisfy the United States’ obligations under the law of nations. Recognizing the full historical context of the ATS is necessary if courts are to achieve the Supreme Court’s goal of faithfully interpreting the statute in accordance with the expectations of the First Congress.