INTRODUCTION

Although courts and commentators have offered a wide range of theories in recent years, the original meaning of the Alien Tort Statute (ATS) has remained elusive. As originally enacted in 1789, the ATS provided “[t]hat the district courts .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.”\(^1\) The statute was rarely invoked for almost two centuries. Courts and commentators have struggled to interpret the ATS 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.” In 1980, lower federal courts began the modern practice of interpreting the ATS broadly to allow foreign citizens to sue other foreign citizens for violations of modern customary international law that occurred outside the United States.\(^2\) In Sosa v Alvarez-Machain,\(^3\) the Supreme Court took a more cautious 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.\(^4\) Specifically, the Court concluded that Sosa’s claim for arbitrary detention did not constitute a tort in violation of the law of

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\(^1\) Act of Sept 24, 1789 § 9, 1 Stat 73, 77.
\(^2\) See, for example, Filartiga v Pena-Irala, 630 F2d 876, 878 (2d Cir 1980) (adjudicating a dispute between Paraguayan citizens for an alleged torture that took place in Paraguay).
\(^3\) 542 US 692 (2004).
\(^4\) Id at 697.
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 today,” it stressed the need for “judicial caution when considering the kinds of individual claims that might implement the jurisdiction conferred by the early statute.” According to the Court, “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.”

Neither the broad approach endorsed by Filartiga nor the cautious approach adopted by Sosa accurately reflects the original purpose of the ATS. In 1789, the law of nations required nations to redress intentional torts committed by their citizens against the citizens of another nation. If a nation failed to redress such injuries, then it became responsible to the other nation for a violation of the law of nations, and gave the other nation just cause for war. The First Congress was undoubtedly aware of these principles and enacted the ATS in order to comply with the United States’ obligations under the law of nations and to avoid the serious consequences of failure to do so.

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’s ability to comply with its various obligations under the law of nations—and thus prevent conflict with other nations. Article III authorized federal court jurisdiction over a number of cases implicating the foreign relations of the United States, including admiralty disputes and cases affecting ambassadors. By enacting the ATS, the First Congress enabled the United States to avoid a particular kind of law of nations violation. Under the law of nations, a nation became responsible for injuries that its citizens inflicted on aliens if it failed to provide an adequate means of redress—by prosecuting the wrongdoer criminally, imposing civil liability, or extraditing the offender to the aggrieved nation. Failure to redress such injuries violated the “perfect rights”

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5 Id at 729.
6 Id at 725.
7 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 M. Blackstone, 4 Commentaries on the Laws of England 68 (Chicago 2002).
8 We use the word “citizens” in this article to refer to citizens or subjects of a nation.
of the alien’s home state, and gave it just cause for war.\textsuperscript{9} 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. Because early federal criminal jurisdiction did not clearly encompass all such harms, the ATS operated as a failsafe provision. The ATS gave British subjects (like all aliens) a right to sue Americans in federal court for torts that, if not redressed through a civil or criminal action, would put the United States in violation of the law of nations.\textsuperscript{10} 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 against the United States for the misconduct of its citizens. This context suggests that the ATS was meant to allow aliens to sue US citizens when necessary to avoid US violations of the law of nations.

At the same time, this context suggests that courts would not have understood the ATS to confer jurisdiction over claims between aliens for acts occurring abroad. 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 put the United States “in violation of the law of nations.” To the contrary, 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.\textsuperscript{11} Under these circumstances, Congress had no reason to authorize—and good reason to avoid—suits between aliens in federal court for acts occurring abroad.\textsuperscript{12}


\textsuperscript{11} 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, 21 (Hilliard, Gray, and Co 1834).

\textsuperscript{12} 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,
In addition to the text of the ATS—and the context against which Congress enacted it—the limited nature of federal judicial power under the Constitution suggests that the ATS was designed to encompass claims arising under the law of nations 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 identity 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.” 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 cases affecting ambassadors), 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.” At the time the ATS was enacted, the law of nations was understood to be general law, not part of the “Laws of the United States.” After the Constitution was ratified, judges and other public officials were sharply divided over whether federal courts had power under Article III to adopt a 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. Even the proponents of federal common law crimes, however, did not maintain that they constituted “Laws of the United States” within the meaning of the Arising Under and Supremacy Clauses. The reference to “Laws” in these clauses referred to positive law adopted by designated stakeholders according to precise procedures set forth in the Constitution. The question debated in the early Republic, by contrast, was whether federal courts had power to recognize a municipal common law for the United States in cases

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14 Id. 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.
otherwise within their Article III jurisdiction (such as controversies to which the United States shall be a party).

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.\textsuperscript{15} Moreover, although scholars continue to debate Sosa’s precise holding, the Court affirmed, as a matter of historical understanding, that “the ATS is a jurisdictional statute creating no new causes of action.”\textsuperscript{16} On this understanding, the statute merely gave aliens a federal forum to adjudicate claims that they had under the law of nations and that happened to fall within Article III jurisdiction, such as controversies between a citizen of a state and a citizen or subject of a foreign state. Thus, the ATS did not create an independent cause of action arising under federal law.\textsuperscript{17}

These considerations suggest that the ATS was originally enacted to enable the United States to avoid a specific, but important, law of nations violation—failure to redress an injury that a US citizen inflicted upon the person or property of an alien. Understanding the ATS as one of the means employed by the First Congress to comply with 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 that the political branches intended to initiate such conflict. The Supreme Court famously endorsed this approach in Murray v Schooner Charming Betsy,\textsuperscript{18} and the same constitutional concerns animate the Court’s adherence to traditional sovereignty-respecting rules like the act of state doctrine. By construing the ATS as a means of satisfying the United States’ obligations under the law of nations, courts could avoid usurping the constitutional prerogatives of the political branches.\textsuperscript{19}

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

\textsuperscript{15} See Bradley, 42 Va J Intl L at 597-616 (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).

\textsuperscript{16} Sosa, 542 US at 724.

\textsuperscript{17} Although ATS suits for torts in violation of “a treaty of the United States” may have arisen under such treaty, it is difficult to conceive of an alien-alien tort claim that would have violated a US treaty.

\textsuperscript{18} 6 US (2 Cranch) 64 (1804).

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.\textsuperscript{20} These theories are too broad because they fail to account for limitations that the law of nations, as referenced in the ATS, and Article III imposed on federal court jurisdiction over alien claims. Others have argued that the ATS was intended to give federal courts jurisdiction over only particular kinds of law of nations violations—for example, violations of safe conducts\textsuperscript{21} or certain kinds of admiralty torts.\textsuperscript{22} Similarly, the Supreme Court itself has concluded that the ATS encompasses only a narrow class of international torts comparable to three international crimes recognized by Blackstone.\textsuperscript{23} These theories are too narrow because they do not include other alien tort claims that members of the Founding generation would have understood the ATS to include in order to satisfy the United States’ obligations under the law of nations.\textsuperscript{24} Still other scholars have contended that history reveals interpretive presumptions that courts should apply to the ATS, including 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.\textsuperscript{25} These theories, however, are anachronistic. Had courts interpreted the ATS too broadly in 1789, they could have violated important principles of the law of nations that the ATS and other acts of the First Congress were meant to uphold.

This Article offers an interpretation of the ATS informed by well-known principles of the law of nations at the time of its adoption and by the limits of Article III. In 1789, the most natural


\textsuperscript{23} Sosa, 542 US at 725.

\textsuperscript{24} 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 bear responsibility for any unredressed tort committed by a United States citizen against a foreign citizen, whether committed in the United States or abroad.

way to read the ATS, given its full legal and historical context, was as a grant of jurisdiction to federal district courts to hear claims by aliens for unredressed harms inflicted upon them by United States citizens. Such harms, if not redressed, placed the perpetrator’s nation in violation of the law of nations, and gave the victim’s nation just cause for war. In light of these background principles, the ATS is best understood as a self-executing, failsafe 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 describes modern judicial applications of the ATS, culminating in *Sosa*. Further, it observes how, after *Sosa*, courts and scholars continue 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 when enacted 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 ATS in light of the full legal and political context surrounding its adoption.

Part II explains background principles of the common law and the law of nations against which Congress enacted the ATS. The ATS gave district courts jurisdiction of “all causes where an alien sue for a tort only in violation of the law of nations or a treaty.” Well-known principles of the law of nations established when a tort would be imputed to a sovereign, thus violating the law of nations. If a citizen of one nation intentionally inflicted an injury upon the person or personal property of a citizen of another, the law of nations required the offender’s nation 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 to redress the injury and to avoid a violation of 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 outside of that nation’s territorial jurisdiction, the law of nations forbade criminal prosecution, leaving civil remedies the only available means of redress.

In light of this legal context, Part III describes the political context that gave rise to the ATS. Members of the Founding generation were deeply concerned that violence by US citizens against aliens would lead the US into a war that the US might not survive. The US could not rely on states to redress such violence, as the States had proven themselves unwilling to do so. Accordingly, the First Congress enacted the ATS as part of a broader scheme 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, the ATS provided a failsafe mechanism that allowed aliens to obtain relief in federal court.

Part IV explains the meaning of the ATS within the broader 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 broader scheme 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 and subsequent statutes.) The US also did not yet have an established administrative structure for the prosecution of crimes. In addition, in the absence of the ATS, federal courts would have been limited to hearing suits between US citizens against aliens where the amount in controversy exceeded $500. Finally, it was unclear in 1789 how the political branches would proceed when other nations requested extradition of U.S. citizens. Accordingly, with states reluctant 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 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 US to avoid responsibility under the law of nations for acts of violence committed by its citizens against aliens. The mere availability of this remedy prevented torts against aliens from triggering US violations of the law of nations because it placed the burden upon the injured alien to bring suit. In other words, the mechanism was self-executing—it did not require the US affirmatively to marshal resources for prosecuting or extraditing an offender. In hindsight, it is not surprising that aliens rarely, if ever, invoked ATS jurisdiction. Over time, state court discrimination against aliens dissipated, some loyalists assimilated into US citizenship, and state courts became more convenient venues for tort litigation. The ATS thus remained a little-used—but symbolically important—backstop, authorizing redress of law of nations violations when 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 involve problems of translation and interpretation that are beyond the scope of this Article. Nonetheless, Part V identifies certain important historical anomalies in current approaches to the ATS. The Sosa Court instructed that courts should only allow claims “comparable to the features of the . . . 18th century paradigms.” The Court, however, misidentified those paradigms. This Part first explains that the historical approach of Sosa rests upon a misunderstanding of the legal and political context surrounding the ATS. Second, this Part explains how history alone does not support certain post-Sosa lower court approaches to the ATS. Although this Part does not purport to resolve most present-day questions surrounding the ATS, it highlights the importance of the ATS’s original legal and political context to any attempt to understand the statute today.

26 Sosa, 542 U.S. at 725.
27 This Article does not address Congress’s power to create federal causes of action by 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 addresses only the question of what jurisdiction Congress in fact conferred on federal courts in 1789 in the ATS.
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 they been brought, such suits would have been consistent with Article III because they would have fallen squarely within the Constitution’s grant of jurisdiction over controversies between US citizens and foreign citizens or subjects.\(^\text{28}\) Beginning in 1980, however, lower federal courts began interpreting the ATS to permit aliens to sue other aliens for conduct 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 anachronistic assumption that the law of nations “has always been part of the federal common law,”\(^\text{29}\) and that suits between aliens under the ATS therefore fell within Article III’s federal question jurisdiction.\(^\text{30}\)

In 2004, the Supreme Court interpreted the ATS for the first time in \textit{Sosa v Alvarez-Machain}. 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,\(^\text{31}\) 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 identified only part of 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 \textit{Bolchos v Darrel},\(^\text{32}\) a French privateer brought an enemy Spanish vessel that it had captured on the high seas into port in South Carolina.\(^\text{33}\) The ship had on board slaves that a Spanish subject had

\(^{28}\) US Const Art III, § 2 (“The judicial Power shall extend to all Cases . . . between a State, or the Citizens thereof, and foreign States, Citizens, or Subjects.”).

\(^{29}\) Filartiga v Pena-Irala, 630 F2d 876, 885 (2d Cir 1980).

\(^{30}\) US Const Art III, § 2 (“The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and all Treaties made, or which shall be made, under their Authority.”).

\(^{31}\) See Ernest A. Young, \textit{Sosa and the Retail Incorporation of International Law}, Harv L Rev F 28 (2007) (observing that the Sosa opinion “has become something of a Rorschach blot”).

\(^{32}\) 3 F Cases 810 (D SC 1795).

\(^{33}\) Id at 810.
mortgaged to Savage, a British subject. Darrel, apparently a US citizen, seized the slaves on behalf of Savage. Bolchos was a suit in admiralty by a French privateer against Darrel, claiming 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.” He concluded, however, that “as the original cause arose at sea, everything dependent on it is triable in the admiralty.”

“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.” In other words, the court concluded that it had two alternative bases for jurisdiction: admiralty and the ATS. The predicate tort under the ATS as an alternative theory of jurisdiction, as Professor Thomas Lee has noted, was “Darrel’s seizure of the slaves on American soil.” To the extent the ATS conferred jurisdiction, then, federal courts had authority to provide a French citizen with a remedy for a US citizen’s wrongful conduct. Such jurisdiction would have prevented France from imputing Darrel’s tort to the United States under the law of nations. Although early Attorneys General had occasion to interpret the ATS, Bolchos contains the only significant judicial discussion of the statute in the early republic.

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 Filartiga v Pena-Irala, the Second Circuit allowed citizens of Paraguay to

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34 Id.
35 Id.
36 Bolchos, 3 F Cases at 810.
37 Id.
38 Lee, 106 Colum L Rev at 893 (cited in note 21).
39 See text accompanying notes 308-309.
40 The only other reference came in Moxon v. The Fanny, 17 F. Cas. 942 (D.C. 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. 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 947.
41 630 F2d 876 (2d Cir 1980).
sue another citizen of Paraguay for wrongfully causing their son’s death 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.” 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. 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.” The court recognized that its “reasoning might also sustain jurisdiction under the general federal question provision, 28 USC § 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.”

Although several circuits have followed Filartiga’s lead, the DC Circuit rejected the Second Circuit’s approach in Tel-Oren v Libyan Arab Republic. Israeli citizens sued several Palestinian organizations alleging that they were responsible for an armed attack on a civilian bus in Israel, which killed and injured numerous civilians and thus amounted to tortious acts in violation of the law of nations. 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 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. The other judges on the panel took an even more restrictive approach. Judge Bork concluded that the ATS is solely a

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42 Id at 878.
43 See id.
44 Id at 885.
45 Filartiga, 630 F2d at 887 n 22.
46 See Abebe-Jira v Negewo, 72 F3d 844, 848 (11th Cir 1996) (concluding that “Congress . . . has recognized that the Alien Tort claims Act confers both a forum and a private right of action to aliens alleging a violation of international law”); Hiloa v Estate of Marcos, 25 F3d 1467 (9th Cir 1994) (aligning its reasoning with that of the Second Circuit “in concluding that the Alien Tort Act, 28 USC § 1350, creates a cause of action for violations of specific, universal, and obligatory international human rights standards”).
47 726 F2d 774 (DC Cir 1984).
48 Id at 781 (Edwards concurring).
jurisdictional statute that does not itself create a private cause of action. In his view, separation of powers precludes federal courts from implying a cause of action from 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.” Judge Robb concurred on the ground that the dispute presented a nonjusticiable political question. He thought that courts lacked judicially manageable standards to decide the international legal status of terrorism, and that they should leave such politically sensitive issues to the executive branch for diplomatic resolution.

Courts and commentators continued to debate the meaning of the ATS prior to the Supreme Court’s decision in Sosa. The Second Circuit continued to take an expansive approach to the statute and allow aliens to sue other aliens for a variety of claims. The DC Circuit, by contrast, continued to take a more cautious approach. 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. Others argued that the ATS was a purely jurisdictional statute that created no federal cause of action. This uncertainty led Congress to enact the Torture Victim Protection Act of 1991. The Act gives individuals (including aliens) a 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. The Act, however, does not resolve the uncertainty surrounding the ATS. Accordingly, the lower courts continued to struggle to interpret and apply the ATS.

49 Id at 801 (Bork concurring).
50 Id at 826–27 (Robb concurring) (noting that “the pragmatic problems associated with proceedings designed to bring terrorists to bear are numerous and intractable”).
51 See Kadic v Karadzic, 70 F3d 232, 236 (2d Cir 1995) (holding that individuals can be sued in their private capacity for “genocide, war crimes, and crimes against humanity”).
52 See Al-Odah v United States, 321 F3d 1134 (DC Cir 2003).
56 In particular, lower courts struggled to decide whether the ATS applied to corporate defendants and imposed aiding and abetting liability.
C. Sosa and the ATS

The Supreme Court finally addressed the ATS in 2004. Sosa arose out of the kidnapping of Humberto Alvarez-Machain (“Alvarez”) in Mexico 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. A federal grand jury indicted Alvarez for murder, but Mexican authorities refused to extradite the defendant for trial in 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. 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. The defendant returned to Mexico and then filed suit in federal court under the ATS and the Federal Tort Claims Act (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.57 The Ninth Circuit affirmed the award under the ATS, but reversed the dismissal of the FTCA claim against the United States.58

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.59 Second, it held that the ATS did not permit Alvarez to sue Sosa for his abduction and detention in Mexico. 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

57 See Alvarez-Machain v United States, 266 F3d 1045, 1049 (9th Cir 2001).
58 See Alvarez-Machain v United States, 331 F3d 604, 641 (9th Cir 2003).
59 Sosa, 542 US at 699.
creating no new causes of action.” The Court, however, rejected the idea that the First Congress passed the ATS “as a jurisdictional convenience to be placed on the shelf for use by a future Congress.” 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. In other words, 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.”

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 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.” 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.” 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.”

The Sosa Court gave several reasons “for great caution in adapting the law of nations to private rights.” At the same time, the Court rejected Justice Scalia’s position that the ATS permits no new claims for violations of modern customary international law. 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

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60 Id at 724.
61 Id at 719.
62 See id at 714, 720 (identifying the three major offenses cited in Blackstone’s Commentaries).
63 Sosa, 542 US at 724.
64 Id (finding “no basis to suspect Congress had any examples in mind beyond” those three).
65 Id at 725.
66 Id at 738.
67 Sosa, 542 US at 728. See text accompanying notes.
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." 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.”

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. It also denied Justice Scalia’s assertion that ATS claims (as contemplated by the Court) necessarily arise under federal law and are thus supported by 28 USC § 1331. Technically, the Court did not have to address the Article III issues in Sosa because it held that Alvarez lacked a cognizable claim under the ATS.

Notwithstanding Sosa, courts and scholars have continued to debate the scope and meaning of the ATS. Lower federal courts have focused primarily on the kinds of torts that qualify under the ATS, and have permitted or dismissed suits on this basis. Moreover, there is continued confusion regarding the kinds of international law violations that trigger the statute.

D. The ATS in Historical Context

In line 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 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

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68 Id at 729.
69 Id at 730.
70 Id at 724.
71 Sosa, 542 US at 731 n 19.
72 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).
nations. The historical context surrounding its adoption, however, reveals that the Sosa Court did not accurately identify this function. The relevant legal and political context evinces that the statute authorized suits by aliens against US citizens for harms that, if left unredressed, would place the United States in violation of the law of nations. Accordingly, Sosa’s historical account of the statute is both too narrow and too broad in certain respects. It is too narrow in suggesting that the ATS originally encompassed only 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, the ATS reasonably would have been understood to encompass all tort claims for intentional injuries that a US citizen inflicted upon the person or property of an alien. The reason is that all such torts—if not remedied—would have placed the United States in breach of the law of nations vis-à-vis the victim’s nation. On the other hand, Sosa is too broad if the opinion is read—as some lower courts have—to assume that the ATS originally permitted one alien to sue another in US courts for conduct occurring outside the territory of the US. The law of nations did not obligate the United States to provide a remedy in such cases, and, to the contrary, was understood by some to preclude adjudication of such disputes.

Our account of the ATS is consistent with the original purpose of the statute to prevent US violations of the law of nations. Interpreting the ATS to provide aliens with a means of redressing intentional harms inflicted by Americans ensured that the United States would not violate the law of nations. This understanding of the ATS also accords with the jurisdictional limits of Article III because every suit by an alien against a US citizen falls squarely within the federal courts’ jurisdiction over controversies “between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.” After examining the original meaning of the ATS in Parts II–IV, we briefly describe tensions between our reading of the statute and present-day approaches in Part V.

II. ALIEN CLAIMS AND THE SOVEREIGNTY OF NATIONS

In the 1780s, states committed a broad range of violations of the law of nations. The Confederation’s inability to remedy or curtail such violations 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 admission of the United States into the European-based system of sovereign states governed by the law of nations.”

Accordingly, “[t]he Constitution employed a number of devices” to advance this purpose—including assigning foreign relations powers to the political branches and excluding states from the exercise of such powers. 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.”

The Constitution allocated “a portion of that duty to the courts” by giving them jurisdiction over cases likely to involve the law of nations. Federal court jurisdiction as a mechanism for upholding the law of nations “could be less explicit” than others “because the framers borrowed it from British practice.”

In the 1780s, the common law of England adopted the law of nations as the municipal law of England. 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.”

The Founders regarded prize cases, in particular, as the “most important part” of admiralty jurisdiction because jurisdiction over such cases was “a necessary appendage to the power of war, and negotiations with foreign nations.” Moreover, English law recognized the rights and immunities of foreign ambassadors and other diplomatic officials in common law cases. Finally, and of most relevance to the ATS, English courts provided various forms of redress for harms that

76 Id. at 991.
77 Id. at 991-94.
78 Id. at 994.
79 Id. at 1000.
80 Id. at 1000-1001.
81 Id. at 1002.
82 The Federalist No. 80.
English subjects inflicted upon foreign citizens. Under the law of nations, failure to provide such redress could place a nation in violation of the law of nations, giving the victim’s nation just cause for war.

The First Congress enacted a number of jurisdictional provisions that mimicked the jurisdiction of English courts to uphold 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 war.

Seen in this light, the ATS, enacted as part of the Judiciary Act of 1789, authorized district courts to hear alien tort claims that might give rise to law of nations violations 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. In order to understand the ATS, it is important to appreciate the kinds of alien claims that would have implicated the perfect rights of foreign nations under the law of nations in 1789. Although all but forgotten today, perfect rights were an especially important subset of the law of nations because their violation gave an aggrieved nation just cause for war. By the late eighteenth century, English judges had incorporated the law of nations—including perfect rights—as “part of the law of England.”

After independence, American states adopted the common law—

84 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 7) (“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, Law and Judicial Duty 62, 349-50 & n 43 (2008) (explaining how the law of nations applied in English courts in the eighteenth century insofar as English law incorporated it).
and, by extension, the law of nations—as part of state law.\textsuperscript{85} A foundational principle of the law of nations at the Founding was that each nation should reciprocally respect certain perfect rights of every other nation to exercise territorial sovereignty, conduct diplomatic relations, exercise neutral rights, and peaceably enjoy liberty.\textsuperscript{86} In addition, each nation was obliged to respect every other nation’s sovereign duty to protect its members.\textsuperscript{87} Law of nations rules respecting alien claims followed from these foundational principles. A nation would violate the law of nations if it failed to redress an injury that its citizen inflicted on the person or personal property of an alien friend—in other words, a citizen of another nation at peace with the first. Under the law of nations, a nation could avoid responsibility for the injury by providing criminal punishment, a civil remedy, or extradition of the offender. Common law courts provided aliens tort remedies when necessary to avoid law of nations violations, thereby respecting the perfect rights of foreign nations and avoiding potential military reprisals for the violation of such rights.

The laws of England accounted for these principles, providing not only criminal punishments but also civil remedies for aliens who suffered injuries to person or personal property at the hands of British subjects. Both citizens and lawfully visiting aliens in amity generally could claim the protection of a nation’s laws.\textsuperscript{88} Aliens within protection could pursue both actions arising locally and transitory actions against citizen-subjects of the host nation.\textsuperscript{89} (Alien enemies, in contrast, were generally not entitled to the

\textsuperscript{86} Emmerich de Vattel, The Law of Nations, or Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns bk 3, ch 3, § 26 (Thomas M. Pomroy 1805) (originally published 1758) (concluding that violations of a nation’s perfect rights are just causes for war).
\textsuperscript{87} Vattel, The Law of Nations bk 1, ch 2, § 17 (cited in note 86) (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 2, ch 6, §§ 71–72 (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]”).
\textsuperscript{88} Philip Hamburger, Beyond Protection, 109 Colum L Rev 1823, 1847 (2009). 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.
\textsuperscript{89} See William M. Blackstone, 1 Commentaries on the Laws of England 372 (Chicago 1979) (describing right of alien 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) (explaining that transitory actions are those filed wherever the defendant may be found and local actions are those relating to real property and penal actions).
protection of a nation’s laws and could seek no redress in its courts. 90) By exercising 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’ actions.

This Part describes the ways in 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. The most serious of such offenses were violence against ambassadors and other public ministers, and interference with the peaceful use of the high seas. But violence against foreign citizens on land also could generate law of nations violations. England provided both criminal punishment and civil redress to avoid responsibility for such offenses—and thus the possibility of war.

90 See Blackstone, 1 Commentaries at 372 (cited in note 89) (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 338, 394 (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.”); Arnold v Sergeant, 1 Root 86, 86 (Conn Super 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 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 subjects of either power had against the other, are revived; for, during the war, they are not extinguished, but merely suspended.”); Bayard v Singleton, 1 Mart 48, 51 (NC Super L & Eq 1787) (“The law of England, which we have adopted, ... does not allow an alien ENEMY any political rights at all).
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 we (and others) have explained, Vattel’s treatise, The Law of Nations, was well known in England and the American states at the time of the Founding. Vattel specifically addressed “the Concern a Nation may have in the Actions of its Citizens.” “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.” He thus 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.” 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.” Pufendorf, another well-known writer on the law of nations, 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.”

A nation owed its members a duty of protection. 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.” 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

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91 See Bellia & Clark, 109 Colum L Rev at 15-16 (cited in note 9); 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 writings of Grotius, Pufendorf, and Burlamaqui “were an essential and significant part of the minimal equipment of any lawyer of erudition in the eighteenth century”); Mark W. Janis, The American Tradition of International Law: Great Expectations 1789-1914, at 57 (“Those meeting at Philadelphia to draft the document were not deficient in formal training in the law of nations.”); David Gray Adler, The President’s Recognition Power, in The Constitution and the Conduct of American Foreign Policy 133, 137 (David Gray Adler & Larry N. George eds., 1996) (“During the Founding period and well beyond, Vattel was, in the United States, the unsurpassed publicist on international law.”); Douglas J. Sylvester, International Law as Sword or Shield? Early American Foreign Policy and the Law of Nations, 32 NYU J Int’l L & Pol 1, 67 (1999) (explaining that in 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”).
93 Id at bk 2, ch 6, § 71 at --- (cited in note 86).
94 Id
95 Id.
97 Id at 691.
possible, oblige him to make entire satisfaction; since otherwise the citizen would not obtain the great end of the civil association, which is safety.”

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.” Public ministers were “necessary instruments in affairs which sovereigns have among themselves, and to that correspondence which they have a right of carrying on.” 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.” 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 their household members, violated the law of nations.

A nation had a duty to protect not only ambassadors and public ministers it received, 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 the 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 might be of prejudice to others. 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 entire security.”

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99 Id at bk 4, ch 6, § 78 at ---.
100 Id at bk 4, ch 5, § 57 at ---.
101 Id at bk 4, ch 7, § 80 at ---.
102 Vattel, The Law of Nations bk 4, ch 7, § 81 at --- (cited in note 86); id at bk 4, ch 8, § 110 at ---.
103 Id at bk 4, ch 7, § 82 at 142.
104 Id at bk 2, ch 6, § 72.
105 Id at bk 2, ch 8, § 104 at ---.
also had a duty not to harm foreigners in their own country, and a duty not to interfere with their use of the open seas. A key question 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 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.” A nation, however, would be responsible 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 others, or to do them an injury, much less should he permit them audaciously to offend foreign powers.” 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.”

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 customizes, and authorizes its

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106 Vattel, The Law of Nations bk 2, ch 7, § 72 at --- (cited in note 86) (discussing the responsibility of nation for authorizing its citizens to harm foreigners in their own countries).

107 See id at bk 1, ch 23, § 282 at --- (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 grounds for commencing hostilities”).

108 Id at bk 2, ch 6, § 73 at ---. 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 individual subjects.” See Pufendorf, 6 De Jure Naturae at 888 (cited in note 96). See also Hugo Grotius, The Rights of War and Peace 454 (“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.”).


110 Id at bk 2 ch 6, § 74 at ---. See also Pufendorf, 6 De Jure Naturae at 888 (cited in note 96) (“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 recognition.”); Jean Jacques Burlamaqui, The Principles of Natural and Politic Law 353 (explaining that for an injury by a nation’s member upon another nation’s member to be imputed to 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, The Rights of War and Peace at 454 (cited in note 108) (“Now among those Methods that render Governors the Accomplices in a Crime, there are two of very frequent Use, and which require to be particularly considered, viz. Toleration and Protection.”).
citizens to plunder and use ill foreigners indifferently, or to make inroads into the neighbouring countries, &c.\textsuperscript{111}

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, to deliver him up to the offended state, there to receive justice.”\textsuperscript{112} 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.”\textsuperscript{113} Thus, “[t]he sovereign who refuses to cause a reparation to be made for the damage done 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.”\textsuperscript{114} But if the sovereign of the transgressor provides appropriate redress, “the offended has nothing farther to demand from him.”\textsuperscript{115} In these passages, Vattel clearly

\begin{footnotes}
\item[111] See Vattel, The Law of Nations bk 2, ch 7, § 78 at --- (cited in note 86) 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, 6 De Jure Naturae at 888 (cited in note 96) (“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, The Principles of Natural and Politic Law at 353 (cited in note 110) (“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, The Rights of War and Peace at 454 (cited in note 108) (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”).
\item[112] Vattel, The Law of Nations bk 2, ch 6, § 76 at --- (cited in note 86) 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 screening him from punishment.” Burlamaqui, The Principles of Natural and Politic Law at 353 (cited in note 110); see Grotius, The Rights of War and Peace at 458 (cited in note 108) (“[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”)
\item[113] Vattel, The Law of Nations bk 2, ch 6, § 72 at --- (cited in note 86)
\item[114] Id at bk 2, ch 6, § 77 at ---
\item[115] 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
\end{footnotes}
described that a nation was responsible for redressing injuries that its citizens inflicted upon the person or property of foreign citizens. It is less clear whether a nation was responsible for redressing injuries that aliens within the nation’s territorial jurisdiction (and thus with its protection and subject to its laws) inflicted upon other aliens.

If a nation failed to redress injuries by its citizens upon citizens of another nation, or infringements of the rights of their ambassadors, the nation violated the perfect rights of the other nation and gave it just cause for reprisals or war. A nation, he explained, has the “right . . . not to suffer any of its privileges to be taken away, or any thing which lawfully belongs to it.” Indeed, Vattel explained, “[t]his right is perfect, that is, accompanied with the right of using force to make it observed.” This idea of perfect rights was deeply rooted in writings on the law of nations and well known to members of the founding generation. Thus, if one nation failed to redress an injury that its citizen inflicted on a foreigner, the aggrieved nation could retaliate with force. Vattel, Burlamaqui, Pufendorf, and Grotius all recognized that a nation’s failure to

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. See id at bk 2, ch 7, § 80 at --. 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.” See id at bk 2, ch 7, § 77 at --.

11 Id at bk 2, ch 5, § 66. See also id at Preliminaries, § 17 at -- (“The perfect obligation is that which produces the right of constraint; the imperfect gives another only a right to demand.”). A perfect right, understood in the law of nations, was a right that the holder-nation could carry into execution—including by force—without legal restrictions. See Bellia and Clark, The Federal Common Law of Nations at 15–19 (cited in note 9) (discussing perfect rights under the law of nations). If one nation violated the perfect rights of another, the aggrieved nation had just cause to compel the corresponding duty by waging war. Vattel, The Law of Nations Preliminaries, § 22 at -- (cited in note 86).

11 See, for example, Burlamaqui, The Principles of Natural and Politic Law at 348 (cited in note 110) (“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 . . . .”); Samuel Pufendorf, I De Jure Naturae et Gentium Libri Octo 127 (Clarendon 1934) (C.H. and W.A. Oldfather, trans) (originally published 1688) I PUFENDORF, supra note 119, at 127 (“Now an unjust act, which is done from choice, and infringes upon the perfect right of another is commonly designated by the one word, injury.”); Samuel Pufendorf, 3 De Jure Naturae et Gentium Libri Octo 1294 (Clarendon 1934) (C.H. and W.A. Oldfather, trans) (originally published 1688) (describing 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. de Martens, Summary of the Law of Nations, Founded on the Treaties and Customs of the Modern Nations of Europe 273 (William Cobbett trans., Philadelphia, Thomas Bradford 1795) (“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.”); Alberico Gentili, 2 De Jure Belli Libri Tres 106 (Clarendon 1933) (John C. Rolfe, trans) (originally published 1612) (“Because [the Sanguinines] had aided and received the enemies of Hannibal, he had a perfect right to make war upon them.”); Christian Wolff, 2 Jus Gentium Methodo Scientifica Petraractatum § 73 (Clarendon 1924) (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).
appropriately respond to injuries its members inflicted on foreigners or ambassadors gave the other nation just cause for war.\textsuperscript{119} 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.”\textsuperscript{120}

B. Redress for Offenses Against the Law of Nations Under the Laws of England

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

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

Blackstone, like Vattel, described certain private acts as having the potential to cause the actor’s nation to offend the law of nations—specifically, unauthorized acts of violence against foreigners. In effect, these were provisional offenses against the law of nations: 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 the duty of the government, under which they live, to animadvert upon them with a becoming severity, that

\textsuperscript{119} See Burlamaqui, The Principles of Natural and Politic Law at 353 (cited in note 110) (“In 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 an 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, 6 De Jure Naturae at 888 (cited in note 96) (examining “those ways by which the heads of states become exposed to war because of injuries done by their citizens”); Grotius, The Rights of War and Peace at 458 (cited in note 108) (“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.”).

\textsuperscript{120} Vattel, The Law of Nations bk 2, ch 6, § 72 (cited in note 86). 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 when nations treated strangers ill, “[a]ll other nations had a right to unite their forces in order to chastise them.” Id at bk 2, ch 8, § 104 at --, 154.
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.121

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 violated the law of nations, and that could subject the home nation to “the calamities of a foreign war.”

Criminal punishment was one way for a nation to redress injuries to foreigners and avoid responsibility for its citizens’ misconduct. 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.122 In addition, Blackstone identified three “principal offenses against the law of nations” that the English Parliament criminalized by statute: “1. Violation of safe-conducts; 2. Infringement of the rights of embassadors; and 3. Piracy.”123 If a nation authorized these offenses by its citizens ex ante, the act itself would violate the law of nations. If, however, a nation did not authorize these offenses by its citizens ex ante, the act would violate the law of nations only if the nation failed to redress it. To call such unauthorized acts “offenses against the law of nations” was shorthand for “provisional offenses against the law of nations,” as the offense only justified retaliation by force if the transgressor’s nation became responsible for it by failing to redress it.

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121 Blackstone, 4 Commentaries at 68 (cited in note 7).
122 See id at 176–219, 229–250.
123 Blackstone, 4 Commentaries at 68 (cited in note 7) (listing these as the gravest wrongs against the law of nations).
a) **Violation of safe conducts.**

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

As to the first, violation of safe-conduct or passports, expressly granted by the king or his embassadors to the subjects of a foreign power in time of mutual war; or committing acts of hostilities 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.  

A safe conduct or a passport was a privilege that a nation granted a foreigner to pass safely within its sovereign territory or territory that it controlled abroad. 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.”

A passport, in contrast, generally privileged persons who had no particular disability from traveling in a foreign land; it simply rendered doubtless their security in traveling through that country.

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124 Id


126 Vattel, *The Law of Nations* bk 3, ch 17, § 265 (cited in note 86) (emphasis added). See also Blackstone, 1 *Commentaries* at 260 (cited in note 89) (“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.”).

127 Vattel, *The Law of Nations* bk 3, ch 17, § 265 at --- (cited in note 86) (“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 . . .”). But see Blackstone, 1 *Commentaries* at 260 (cited in note 89) (“But passports under the king’s sign-manual, or licenses from his ambassadors abroad, or now more usually obtained [than safe conducts], and are allowed to be of equal validity.”). In certain instances, it appears, a passport could exempt a foreigner from a general prohibition on passage through a nation. Vattel, *The Law of Nations* bk 3, ch 17, § 265 at --- (cited in note 86) (explaining that a “passport” could operate to exempt a person “from some general prohibition”).
Blackstone recognized that safe-conducts could be “express” or “implied.” By “express” safe conduct, Blackstone meant protection “expressly granted by the king or his embassadors” through papers issued to a particular subject of a foreign country. By “a general implied safe conduct,” Blackstone meant a safe conduct that a nation granted not to individuals by letter, but to a class of persons who “are in amity, league, or truce with us.”\(^{{128}}\) By criminalizing violence against aliens in amity with, and present in, British territory, and aliens otherwise lawfully present 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.**

Blackstone also described infringements of the rights of ambassadors as criminal offenses against the law of nations under English law. 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.\(^{{129}}\) 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.”\(^{{130}}\) Individuals pursuing process against ambassadors or their servants “though wantonness or insolence” were “violators of the law 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.”\(^{{131}}\) Insulting or arresting ambassadors, other public ministers, or their domestics also qualified as offenses against the law of nations.\(^{{132}}\)

c) **Piracy.**

Finally, Blackstone explained that “the crime of piracy, or robbery and depredation upon the high seas, is an offense against the

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128 Blackstone, 4 Commentaries at 68 (cited in note 7) (noting that such visitors in amity have an implied right of safe passage).
129 See text accompanying notes 99–102.
130 Blackstone, 4 Commentaries at 70 (cited in note 7).
131 Id at 70–71.
132 See In re Hasling, 21 Eng Rep 274, 274 (Ch 1755) (explaining that insulting or arresting ambassadors or their trains was a violation of law of nations and disturbance of the public repose).
universal law of society.” 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 against him.” 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. If a nation failed to redress an act of piracy committed by one of its citizens, the offended 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.

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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 part of the common law: by inflicting an adequate punishment upon offences against that universal law, committed by private persons.”

By punishing subjects who committed both statutory and common law crimes against foreigners, England prevented itself from becoming an accomplice or abettor of them, thereby denying the offended nation just cause to pursue satisfaction and justice through war.

2. Civil remedies as redress.

In addition to criminal punishments, English law provided common law civil remedies to aliens who suffered injuries to person or personal property at the hands of British subjects.

a) The law of nations and alien tort claims against British subjects

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133 Blackstone, 4 Commentaries at 71 (cited in note 7).
134 Id at 71 (explaining that “every community hath a right, by the rule of self-defence, to inflict that punishment upon him”).
136 The statute of 28 Hen VIII ch 15 enacted that piracy should be tried before special commissioners—the admiral (or his deputy) and three or four others, typically including two common law judges—and “the course of proceedings should be according to the law of the land,” in other words the common law. Blackstone, 4 Commentaries at 268–69 (cited in note 7). See also id at 71 (describing 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
137 Id at 72.
English writers recognized that an alien who entered British territory by way of amity or under safe conduct could bring a common law action in an English court against a British subject for harm to person or personal property.\textsuperscript{138} 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.\textsuperscript{139} Indeed, in some instances, a civil remedy was the only available redress, short of extradition of 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 sovereign “to take cognisance of the crimes committed” within its jurisdiction, and that “[o]ther nations ought to respect this right.”\textsuperscript{140} 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.\textsuperscript{141} One reason for this principle was that the offended nation had exclusive jurisdiction to determine what penalty fit the crime and to collect the penalty owing for the crime.\textsuperscript{142} For another country to exercise such jurisdiction would in itself give offense to the nation with territorial jurisdiction over the act.\textsuperscript{143} Accordingly, criminal punishment was not an available means of redressing acts of violence committed by British subjects against foreigners outside of Great Britain.

\begin{footnotes}
\footnote{138}{See Comyns, \textit{7 A Digest of the Laws of England} at Praerogative § B 5 (cited in note) at 429 (“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, \textit{1 A Digest of the Laws of England} at Alien § C 5 (cited in note) 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”); Bacon, \textit{1 A New Abridgment of the Law} 5–6 (cited at note) at 5–6 (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,” and that an alien friend “may maintain personal actions”).}

\footnote{139}{William M. Blackstone, \textit{3 Commentaries on the Laws of England} 118-21, 127-28, 144-54 (Chicago 1979).}

\footnote{140}{Vattel, \textit{The Law of Nations} bk 2, ch 7, § 84 at 148.}

\footnote{141}{See Wolf v Oxholm, 105 Eng Rep 1177, 1180 (KB 1817) (“No country regards the penal laws of another.”); Oden v Folliot, 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.”); Rafael v Verelst, 96 Eng Rep 621, 622 (KB 1776) (DeGrey) (“Crimes are in their nature local, and the jurisdiction of crimes is local.”).}

\footnote{142}{See Bellia, \textit{Congressional Power and State Court Jurisdiction} at 961–64 (cited in note 89) (describing these and other reasons why penal actions were understood to be local).}

\footnote{143}{See text accompanying note.}
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For such acts, the only appropriate forms of redress under the
law of nations were extradition or a civil remedy. In *East India Co. v. Campbell*, 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.” But if the government
chose not to extradite, its 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. *Rafael v Verelst*, provides an example. Rafael,
an Armenian, brought an action against Verelst, a British subject, for
a false imprisonment inflicted in foreign parts. Chief Justice
DeGrey 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, and *sequuntur forum rei*.”

Thus, where the criminal law was unavailable to remedy a
provisional law of nations violation, a civil tort remedy was an
available means of redress. Moreover, even when criminal
prosecution was an option—for acts of violence committed by
British subjects against foreigners within British territory—a civil
tort action remained available and provided 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—
solely by reference to the three criminal offenses 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 broad range of remedies was necessary if England
wished to avoid responsibility to foreign nations for all such injuries.

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144 (1749) 27 Eng. Rep. 1010 (Ex.).
145 Id. at 1011.
146 See text accompanying notes--.
148 Id at 621–22.
149 Id at 622–23.

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b) The law of nations and alien claims local to other nations.

Although English law provided aliens with a range of remedies for harms inflicted by British subjects, it did not provide jurisdiction over alien claims that were local to another nation. English law was well attuned to avoiding law of nations violations. Under the law of nations, sovereigns declined to exercise jurisdiction over actions that were local to another sovereign. 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. Reflecting the law of nations, English law understood actions asserting rights in real property to be local. 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.

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150 Bellia, Congressional Power and State Court Jurisdiction at 957 (cited in note 89) (explaining that local laws had no force in a foreign country).
151 See Rafael, 96 Eng Rep at 622–23 (explaining that jurisdiction over real property is local, “the subject being fixed and immovable”); William M. Blackstone, 3 Commentaries on the Laws of England 294 (Chicago 1979) (describing actions for recovery of possession of land damages for trespass as local); 1 Sir John Comyns, 1 A Digest of the Laws of England Action § 117 (1780N 1 (5th ed 1822) (explaining that “[e]very action for recovery of 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 89).

Real property, Vattel explained, “ought to be enjoyed according to the laws of the country where they are 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.” See Vattel, The Law of Nations bk 2, ch 8, § 103 at (cited in note 86).

152 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.” See Blackstone, 1 Commentaries at 372 (cited in note 89). Blackstone also thought that alien ownership of real property in England might subject the nation “to foreign influence.” See id. Thus, to protect England’s territorial sovereignty, an alien could only acquire “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 well accorded with the law of nations. Writers on the law of nations, including Vattel, explained that a nation should decide for itself whether aliens could own real property there. See Vattel, The Law of Nations bk 2, ch 8, § 114 at (cited in note 86).

An alien could, however, bring an action in English courts asserting personal property interests. Blackstone, 1 Commentaries at 372 (cited in note 89). After independence, states initially adopted the common law rule that aliens could not hold a permanent interest in real property of the state. For example, in 1788, in an opinion joined by Oliver Ellsworth, the Supreme Court of Connecticut 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 favour of commerce, alien merchants may hold leases in houses and stores . . . .” See Aphtrup v Backus, 1 Kirby 407, 413 (Conn 1788). See also Baynard v Singleton, 1 Martin at 48, 51 (N.C. 1787) (explaining “[t]hat it is the policy of all nations and states, that the lands within their government should not be held by foreigners”; thus, “by the civil, as well as by the common law of England, aliens are incapacitated to
Likewise, judges and other writers were reluctant to have local courts embrace claims between aliens for acts occurring abroad because they could implicate foreign sovereignty and therefore foreign relations. In 1774, in *Mostyn v Fabrigas*, Lord Mansfield suggested that English courts may have no jurisdiction over personal trespass actions arising abroad between non-resident foreigners because such actions were local to the foreign state, just as crimes were local. Fabrigas brought an action of trespass for an assault and imprisonment that occurred on the island of Minorca against Mostyn, the English governor of Minorca. Mostyn argued, among other things, that the cause of action could not be tried in England because it arose abroad. Mansfield rejected this argument, holding that a transitory action arising abroad against a British subject may be brought in an English court. In the process, however, Mansfield distinguished a case arising abroad between non-resident 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 against the peace of the King; but the breach of the peace is merely local, though the trespass against the person is transitory.

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

Mansfield never had occasion squarely to consider a tort action arising abroad between foreigners, it seems, because such

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154 Id at 1026.
155 Id at 1029.
156 See id at 1030.
157 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.” See Blackstone, 3 *Commentaries* at 301 (cited in note). He did not provide any further explanation of the grounds for this plea.
actions were rarely, if ever, brought in English courts.\textsuperscript{159} Given eighteenth century transportation and communication, it would have been unusual for two Frenchmen with a dispute arising exclusively in French territory to both be casually in England 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 may be revealing of a deeper point under the law of nations.

In addition to Mostyn, there is evidence to suggest that courts believed that exercising such jurisdiction would offend the territorial sovereignty of the nation in which the action arose. Over a century before Mostyn, the Scotch Court of Sessions explained that it would not hear a contract action between two Englishmen that arose entirely outside of Scotland. In Vernor v Elvies,\textsuperscript{160} the court stated that “[t]he Lords will not find themselves Judges betwixt two Englishmen, being in this country not \textit{animo remandendi sed negociandi tantum} [with the intention of remaining, but just on business], specially in matters of debt contract forth of this country.”\textsuperscript{161} Only if a debt had been contracted to be paid in Scotland would the court “be judges in that case.”\textsuperscript{162}

English and continental treatises illuminate the territorial sovereignty concerns underlying Vernor and Mansfield’s hypothetical in Mostyn. In his seventeenth-century treatise \textit{De Jure Maritimo et Navali}, Charles Malloy 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.\textsuperscript{163} 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.”\textsuperscript{164} France ultimately dismissed the action on the ground that it rested within the exclusive

\textsuperscript{159} 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.” \textit{Molony v Dows}, 8 Abb Pr 316, 329–30 (NY Common Pleas Sup. 1859). Regarding Mostyn, the New York court explained: “The only thing bearing upon the subject is the remark of Lord Mansfield in Mostyn a. 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.

\textsuperscript{160} Vernor v Elvies, 6 Mor Dict of Dec 4788 (Sess 1610).

\textsuperscript{161} Id at 4788.

\textsuperscript{162} Id.

\textsuperscript{163} See \textit{Charles Malloy, De Jure Maritimo et Navali} 475–76 (7th ed 1722).

\textsuperscript{164} Id at 475.
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.” 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. (Molloy referred to the Statute of Praemunire, 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. Molloy’s discussion highlights England’s longstanding interest in protecting its own territorial jurisdiction—and its appreciation, as Mansfield evinces in Mostyn, of other nations’ reciprocal interest.

In addressing the jurisdiction of nations over disputes between foreigners, Vattel also presumed that it would be improper for a nation to exercise jurisdiction over an alien-alien claims arising abroad unless the defendant alien had established domicile in the forum territory. Vattel began his analysis by describing the centrality of territorial sovereignty: “The sovereignty united to the domain establishes the jurisdiction of the nation in her territories, or the country that belongs to her. It is her province, or that of her sovereign, to exercise justice in all the places under her jurisdiction, to take cognisance of the crimes committed, and the differences that arise in the country.” He then 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 domicile, 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.” In other words, the dispute should be resolved by the

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165 Id
166 Id
167 The statute provided:
   It is agreed that all people of the king’s allegiance, of whatever condition they may be, who deal with anything outside the realm in a plea of which the cognisance belongs to the king, or sues in another’s court to undo or impeach the judgments returned in the king’s court, they, their attorneys, maintainers and notaries shall be outside the king’s protection, and their lands, goods and chattels forfeited to the king; and they shall be taken where they are found and imprisoned and ransomed at the king’s will; and in the event that they may not be found, then they shall be put in exigent and outlawed by due process.
   27 Edw III, 8Stat 1, ch 1 (1353). The statute was originally aimed to check papal patronage, see William Holdsworth, 1 A History of English Law 585–86 (3d ed 1922).
169 Id at bk 2, ch 8, § 103 at (cited in note 86).
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 excluded the judge of 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 would 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.”

These principles were especially important because they implicated perfect rights, and therefore peace among nations. Modern treatises contain little or no discussion of perfect rights because they are no longer recognized under international law. Perfect rights played an important role in shaping the common law. 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:

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 none 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 other nations ought the most scrupulously to respect, if they would not do it an injury.

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170 Id


According to Vattel, a nation had “a right of refusing to suffer” such interference.” 173 “To govern itself according to its pleasure, is a necessary part of its independence.” 174 Unless a nation has 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.” 175 Accordingly, English courts had good reasons for refusing to adjudicate disputes between non-resident aliens arising abroad.

Even in admiralty cases, courts were cognizant of respecting the territorial sovereignty of other nations. For example, in 1817 the British Court of Admiralty was careful not to extend its admiralty jurisdiction into the penal jurisdiction of France. 176 Admiralty courts were also cognizant of other nations’ interest 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’ nation. In 1799, the Court of Admiralty was mindful that it could intrude upon the territorial jurisdiction of other nations by resolving local disputes between its citizens. In The “Two Friends”, 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 it from the French. 177

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173 Id at bk 2, ch 4, § 57 at.
174 Id
175 Id
176 In The Louis, (1817) 165 Eng Rep 1464 (Adm), 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. “[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 1477. 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 cognizance 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, and 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.

177 (1799) 165 Eng Rep 174 (Adm).
One objection to the court’s jurisdiction was that the salvage claim should “be enforced in America, because the ship is an American ship, and the parties are American sailors.” 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. 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.” Thus, the court explained, “[t]here might be good reason . . . why this Court should decline to interfere in such cases, and should remit them [the foreign parties] to their own domestic forum.” “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.” This case provides further evidence 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 imposed jurisdictional limitations respecting the territorial sovereignty of other nations. For example, federal courts in admiralty followed a “general rule not to take cognizance of disputes between the masters and crews of foreign ships,” but instead to refer “them to their own courts.” As one district court explained, “[r]eciprocal policy, and the justice due from one friendly nation to another, calls for such conduct in the courts of either country.” Similarly, the Supreme Court and state courts recited without

178 Id at 176.
179 Id at 176-77.
180 Id at 177.
181 Id
182 Id
183 Willendon v. Forsoket, 29 F. Cas. 1283, 1284 (D.C.Pa. 1801) (No. 17,682).
184 Id. See also Thompson v. The Catharina, 23 F. Cas. 1028, 1028 (D.C. Pa. 1795) (No. 13,949) (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”).
questioning the law of nations’ prohibition on adjudicating penal actions arising within another nation’s territorial jurisdiction.\textsuperscript{185} Although alien-alien claims for acts occurring abroad 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 offend the law of nations as well.

For example, in \textit{Brinley v Avery},\textsuperscript{186} the Superior Court of Connecticut held in 1786 that Connecticut courts lacked jurisdiction over a contract action arising abroad between two British subjects.\textsuperscript{187} 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.”\textsuperscript{188} 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.”\textsuperscript{189} Avery claimed that no such actions can be maintained “by the law of nations”\textsuperscript{190} or “by the laws of England.”\textsuperscript{191} Finally, Avery argued that British courts would not respect a Connecticut judgment in this case, allowing the plaintiff to pursue a second judgment there.\textsuperscript{192} Brinley’s argument in replication was that he, being an alien friend—a subject of Britain, which was “at amity, and in league with

\textsuperscript{185} In 1825, John Marshall wrote that “[t]he [c]ourts of no country execute the penal laws of another.” See \textit{The Antelope}, 23 US (10 Wheat) 66, 123 (1825) (holding that there is no American jurisdiction over a foreign vessel on international waters). See also \textit{Rose v Himely}, 8 US (4 Cranch) 241, 280 (1808) (Marshall) (stating that “[t]his 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, \textit{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.”); \textit{Stuquenneeg v Taylor}, 5 SCL (3 Brev) 7, 7 (1811) (“[C]rimes, and rights of real property, are local.”).

\textsuperscript{186} 1 Kirby 25 (Conn 1786).
\textsuperscript{187} Id at 25.
\textsuperscript{188} Id at 25.
\textsuperscript{189} Id at 26.
\textsuperscript{190} \textit{Brinley}, 1 Kirby at 26. \textit{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 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.” 1 \textit{Vattel}, \textit{The Law of Nations} at bk 2II, ch. 7VII, §§ 84–85, 148 at (cited in note 86). 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.
\textsuperscript{191} \textit{Brinley}, 1 Kirby at 26.
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.\footnote{\text{Id} at 27.} The court ruled for Avery. The reported decision was simply: “The plea in abatement ruled sufficient.”\footnote{\text{Id} at 22.} 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.\footnote{\text{Brinley v Avery}, 2 Kirby 22 (Conn 1786).} The first authority he cited was Lord Kames’s \textit{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.”\footnote{\text{Id} at 22.} 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.

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 perfect 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, the citizen owed allegiance at home and abroad.\footnote{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 \textit{Commentaries} at 369–70 (cited in note 89).} A sovereign 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 it imposed on its subjects and to prevent England from violating the perfect rights of the plaintiff’s nation. 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. 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 DeGrey held that the plaintiff’s alienage did not bar the action, “for this is no objection in personal actions.” In addition to torts, 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. 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.

All in all, English law was finely attuned to avoiding law of nations violations in the adjudication of a broad array of alien claims.

* * *

Under the law of nations, as adopted in England, one means by which a nation could avoid violating the perfect rights of other nations was by hearing alien tort claims against its citizens. One cannot understand the original meaning of the ATS without appreciating this legal context. As Part IV explains, the ATS

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199 Id at 622.
200 See Matthew Bacon, A New Abridgment of the Law 35 (1736 5th ed 1798); Henry Home Kames, Historical Law-Tracts 48–49 (3d ed 1761); Freeman v King, 84 Eng Rep 196, 196 (KB 1666); Freeman v King, 12 Keble 315, 84 Eng. Rep. 196 (K.B.); Holman v Johnson, 1 Cowp. 342, (1775) 98 Eng Rep 1120, 1121 (KB 1775) (Mansfield); Odwyer v Salvador, Dickens, 371, (1763) 21 Eng Rep 313, 313 (Ch 1763).
201 As Lord Henry Home Kames described Vernor v Elvies in his Historical Law Tracts, “the court of sessions . . . , 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.” Kames, Historical Law-Tracts at 246 (cited in note). Kames additionally explained:

A covenant bestows a jurisdiction on the judge of the territory where it is made, provided the party be found 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 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 at 245–46.
provided civil redress for injuries that US citizens inflicted upon foreign citizens, whether in the United States or abroad. In the First Judiciary Act, Congress sought to replicate English criminal and civil mechanisms for avoiding law of nations violations. Unlike English courts, federal courts lacked general common law jurisdiction over civil claims, and states had denied aliens access to their courts. Moreover, in 1789 the criminal law of the US was ill-defined and its enforcement mechanisms were not yet established. Even criminal prohibitions imposed by statute did not apply extraterritorially at the time, and the prospect of extraterritorial offenses against aliens by US citizens was real, given that the United States shared borders with British (and Spanish) territory. In context, the ATS provided a self-executing—and therefore failsafe—civil tort remedy that enabled the US to avoid responsibility for acts of violence by US citizens against foreign citizens.

Before explaining the First Judiciary Act in more detail, however, the next Part describes the political context that generated an immediate need for the US to replicate English judicial mechanism for avoiding law of nations violations. Violations of the law of nations by American states under the Articles of Confederation, including their failure to redress private acts of violence against British subjects, gave Great Britain just cause for war against the fledgling United States. Although Britain could ill afford another war at this time, the US aspired to be accepted as a member of the European community of nations and obviate any threat of war that could terminate the newly formed Union.

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 provide redress for private offenses to other nations. Certain states directly violated the 1783 Treaty of Paris (and therefore the law of nations) by impeding British creditors from recovering debts. They also violated the customary 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, hindering commerce 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 obviate the threat of armed conflict. The states’ ongoing violation of the law of nations was a precipitating cause of the Federal Convention of 1787.

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, including by authorizing federal court jurisdiction in cases likely to implicate the law of nations. Of course, such jurisdiction included cases arising under treaties, cases of admiralty and maritime jurisdiction, and cases affecting ambassadors. Of even greater importance for our purposes, the Constitution authorized federal court jurisdiction over controversies between foreign citizens and United States citizens. Pursuant to this jurisdictional grant, the First Congress authorized federal district court jurisdiction over claims by “an alien for a tort only in violation of the law of nations.” This provision, as Part IV explains, provided a self-executing means for the US to avoid responsibility for the kinds of offenses that this Part describes.

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. Americans 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 peace required the United States to redress private offenses to other nations. In 1781, the Second Continental Congress resolved that state legislatures should take measures to redress violations of the law of nations by private citizens. 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:

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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.\(^{203}\)

In other words, the Committee found that (1) states courts were not adequately punishing law of nations violations by private persons; (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. 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.\(^{204}\)

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:

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, authorised and received as such by the United States in Congress

\(^{203}\) Id at 1136.

\(^{204}\) See text accompanying notes 92–98.
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.\(^\text{205}\)

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.\(^\text{206}\) 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, 


\(^{206}\) Id at 1136.
justified an armed response, threatening the escalation of hostilities.²⁰⁷

The second recommendation called upon states to punish acts of hostility against foreign citizens subjects “in amity, league or truce with the United States, or who are within the same, under a general implied safe conduct.”²⁰⁸ 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.²⁰⁹

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.”²¹⁰ 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.”²¹¹ The obligations that nations assumed in treaties were understood to give treaty partners corresponding perfect rights. “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.”²¹²

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 resolution encouraged states to establish tribunals to hear other offenses against the law of

²⁰⁷ See text accompanying notes—.
²⁰⁹ It is possible that the first clause of this second recommendation was meant to cover only piracy against aliens in amity and the second clause acts of hostility against any alien lawfully present in a state. (Blackstone appears to have used “general implied safe conduct” as shorthand to denote the lawful presence of an alien within the Crown’s dominions. See text accompanying notes—.) Under either reading, the two clauses, taken together, would encompass the same offenses—acts of hostility against aliens lawfully present in the United States and aliens in amity on the high seas.
²¹¹ Id at 1137.
nations “not contained in the foregoing enumeration.”213 The second resolution—an early precursor to the kind of civil remedy later established by the ATS—called on states to “authorize 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.”214 This recommendation envisioned civil redress for both the criminal offenses already enumerated and private law of nations violations that the criminal law did not reach. In this way, the recommendation sought to supplement and reinforce the proposed criminal penalties, thereby providing additional assurance that the United States would not be held responsible by other nations for the misconduct of its citizens.215

B. Ongoing Law of Nations Violations

Notwithstanding these resolutions, state violations of the law of nations persisted throughout the 1780s. Two sets of violations are noteworthy. First, states violated 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 or redress law of nations violations by the United States.

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.”216 Britain demanded this provision, and the American negotiators knew that ongoing trade with Britain required

214 Id at 1137.
215 Id at 1136.
216 See Treaty of Peace, 8 Stat 80 at Art IV (cited in note).
reliable debit and credit across the Atlantic. Nonetheless, this provision provoked controversy. Debtor planters and farmers resisted debt payment to British creditors, and states continued various impediments to the recovery of such debts. Pennsylvania, for example, continued a 1781 law refusing judicial process to British creditors seeking to recover debts. Maryland and Virginia allowed debtors to make discounted payments into the state treasury in exchange for certificates declaring that their debts owed to British creditors were discharged. 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.”

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. Even more ominously, American resistance to British debt recovery threatened reprisals—or war. Under the law of nations, treaty obligations were understood to give treaty partners corresponding perfect rights. American writers well appreciated that state resistance to British debt recovery threatened to impede commerce and provoke reprisals, if not war.

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218 Id at 68–69.
219 Id at 277–79.
221 See id.
223 Jensen, *The New Nation* at 188 (cited in note 217) (noting that, “[u]nlike American merchants, they could not use American courts to collect bad debts”).
224 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, *The Law of Nations* bk 2, ch 12, § 164 (cited in note 86) (describing the dual perfect rights and perfect obligations that accompany treaties).
225 Politicians and political writers well understood these implications of states’ impeding British creditors from recovering debts owed them. In 1784, a political writer, “Lysurgus,” criticized Pennsylvania’s refusal to afford process to British creditors in a letter to the Freeman’s Journal:

The restraint laid in 1781 [in Pennsylvania], and continued last year upon the ultimate process for debts, contradicting as it does 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.
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 bitterly complained about South Carolina’s failure to afford British merchants appropriate legal process.\footnote{Letter from Charleston, London Times, Dec 28, 1785.} In February 1786, Lord Carmarthen refused to engage John Adams on Britain’s failure to withdraw from its military posts in the United States—\footnote{Treaty of Peace, 8 Stat 80 at Art VII (cited in note).} in violation of the Paris Peace Treaty\ because the United States had failed to remove impediments to debt collection by British creditors.\footnote{Lord Carmarthen wrote: https://dl.dropboxusercontent.com/u/3381430/CarmarthenLetters.pdf} Carmarthen attached a list of grievances of British debtors, which the London Times published in September 1786.\footnote{Substance of Lord Carmarthen’s Answer to the Requisition of his Excellency John Adams, London Times, Sept 5, 1786.} The grievances listed, state by state, the acts, ordinances, and edicts that obstructed British creditors from recovering debts in state courts.\footnote{Id.} In Georgia, the grievances specifically noted, “the judges from the bench have declared, that no suit shall be proceeded in, if brought by a British subject, while, on the contrary, they allow British subjects to be sued by their creditors.”\footnote{Id.} In other states, “although the courts appear to be open, the lawyers are afraid to prosecute for British debts.”\footnote{Id.} In 1790, the editor of A Review of the Laws of the United States of North America, published in London,\footnote{William Otridge and John Otridge, A Review of the Laws of the United States of North America (London 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.} noted that, even where state
courts afforded process to British creditors, it is “too frequently evaded to the injury of the British creditor.”\textsuperscript{234} 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 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.\textsuperscript{235} London merchants engaged in organized political activity to demand satisfaction of American debts.\textsuperscript{236}

2. Failing to redress acts of violence against British subjects

In addition to thwarting British creditors in violation of the Paris Peace Treaty, states violated the customary law of nations by not redressing tort injuries inflicted by state citizens upon British subjects. (In some instances, this violated the Treaty as well.\textsuperscript{237}) In the 1780s, state citizens made violent attacks upon the persons and property of British subjects in America. The president of the Continental Congress, Elias Boudinor, feared that post-War acts of violence by New York Whigs were so extreme as to possibly “involve us in another War.”\textsuperscript{238}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{234} Id at 12.
\item \textsuperscript{235} Id at 11–12.
\item \textsuperscript{236} Katharine A. Kellock, London Merchants and the pre-1776 American Debts, printed in 1 Guildhall Studies in London History 109, 113 (1974).
\item \textsuperscript{237} 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.
Treaty of Peace, 8 Stat 80 at Art IV (cited in note) (promising that persons participating in the war will not be harmed in the future because of that participation, and that those already in custody will be restored). 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, a treaty violation could arise. Id.
\item \textsuperscript{238} Oscar Zeichner, The Loyalist Problem in New York After the Revolution, 21 NY Hist 286, 289 (1940).
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\end{footnotesize}
Acts of violence against loyalists and their property that persisted after the 1783 peace treaty have been well documented. 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 confiscated property of British subjects. The treaty gave loyalists twelve months to return and claim their property without interference. In fact, confiscations continued and loyalists were often injured or killed upon their return.

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.” 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.” The writer appreciated 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.” 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.

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241 Id.
242 Id.
243 Id.
244 Americanus, Letter to Mr. Loudon, New York Packet, Dec. 12, 1785, at 1 (cited in note 240).
“Americanus” implored New Jersey to “endeavor to suppress rather than appear to boast of actions which must reflect disgrace on our government.” Violence against foreigners, in addition to being “in the highest degree disgraceful to us as a nation,” would deter foreigners from “sett[ling] among us” and “venturing their property.”

Such unrestrained violence gave Britain just cause for war against the United States. In reality, however, Britain, like the United States, could ill afford another war at this time. 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 Treaty of Peace). 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 US and Spain.

3. State attempts to provide redress

Over time, writers and public officials increasingly came to appreciate that the survival 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

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245 Id.
246 Id.
248 See id at 94.
249 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 Documents of the Emerging Nation at 210 (cited in note). See also Louis Guillaume Otto, Queston of the Mississippi (1786), reprinted in 3 American History Told by Contemporaries: National Expansion 1783–1845, 150, 150–54 (Albert Bushnell Hart, ed., 1901) (describing threat of hostilities and potential subjection of American settlers on the Mississippi to England). “Frankland” was the short-lived state into which the western part of North Carolina had organized itself as early as 1786 after declaring independence. See Z.F. Smith, The History of Kentucky 442 (1892).
merchants.\footnote{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.” See Alexander Hamilton, A Letter from Phocion to the Considerate Citizens of New York (1784), in 3 The Papers of Alexander Hamilton: 1782–1786 at 483, 485 (Harold C. Syrett and Jacob E. Cooke, eds 1982).

\footnote{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.” An Act for Ascertaining the Rights of Aliens and Pointing Out a Mode for the Admission of Citizens (Feb 7, 1785), reprinted in Allen D. Candler, 19 The Colonial Records of the State of Georgia, pt 2, 375 (1911). Maryland similarly justified its law: “[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 this 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. 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 (Nov 25, 1789), reprinted in William Patterson, Laws of the State of New Jersey 93 (1800).

\footnote{See, for example, An Act to Enable Aliens to Purchase and Hold Real Estates within this Commonwealth (Feb 11, 1789), reprinted in Alexander Dallas, 2 Laws of the Commonwealth of Pennsylvania 645 (1793) (authorizing aliens to purchase and hold real estate in Pennsylvania, as this would “introduce[e] large sums of money into this state” and “induce[e] such aliens as may have acquired property to follow their interest, and become useful citizens”).

\footnote{An Act for Ascertaining the Rights of Aliens and Pointing out a Mode for the Admission of Citizens (Feb 7, 1785), reprinted in Allen D. Candler, 19 The Colonial Records of the State of Georgia, pt 2, 375 (1911).

\footnote{North Carolina enacted that “any complaint made of wrong done or contract broken by, or to any foreigners, transient persons, owners, masters, supercargoes or mariners of foreign vessels, or any seafaring men” would be decided “agreeable to the laws merchant and maritime, and amongst civilized nations, and the decision shall be made within twelve days from the notice issued.” An Act to Establish in the Towns of Edenton, Washington, New Bern and Wilmington, Courts for the Speedy Decision of Mercantile Transactions with Foreigners and Transient Persons and of Maritime Affairs (1784), in 24 Acts of the North Carolina General Assembly 686-87. See also An Act Providing for the speedy Administration of Justice Between Subjects of His Most Christian Majesty and Citizens of the United States, reprinted in 4 The Public Records of the State of Connecticut for the Year 1782, 157-158 (Leonard W. Labaree ed., 1942) (providing special process for “Matters of Dispute and Controversy . . . between Citizens of the United States and Subjects of his most Christian Majesty, occasionally here on Commercial or other Business, and about soon to leave the State”). In 1787, Virginia repealed its act giving merchants of nations that recognized the independence of the United States a summary remedy on the ground that it was “partial” to foreigners relative to Virginia citizens. An Act to Repeal Part of An Act for the Protection and Encouragement of the Commerce of Nations, Acknowledging the Independence of the United States of America, ch. 23 (1787), in 12 The Statutes at Large; Being a} Certain states attempted to encourage commerce by 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.\footnote{In the coming years, certain states would allow aliens to own real property.\footnote{In 1785, Georgia enacted a statute providing that aliens could use its courts to sue for debts and damages arising after 1782.\footnote{Other states provided expedited judicial process for transient foreign merchants.\footnote{These formal measures were}}) In 1785, Georgia enacted a statute providing that aliens could use its courts to sue for debts and damages arising after 1782. Other states provided expedited judicial process for transient foreign merchants.\footnote{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 evidence available, it appears that Connecticut was the only state to have acted in response to the 1781 Confederation Congress Resolution 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.\textsuperscript{255} From 1780 to 1784, Ellsworth also was a member of the Governor’s Council, or Upper House, of the Connecticut legislature.\textsuperscript{256}

In 1782, during Ellsworth’s tenure, the Connecticut legislature enacted a statute criminalizing specified violations of the law of nations:

\begin{quote}
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 Pasport, 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
\end{quote}

\textsuperscript{254} Evidence shows that Ellsworth was present in Congress in Philadelphia from June to September 1781, but then absent until December 1782. 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).

\textsuperscript{255} Flanders, 2 Lives and Times at 116 (cited in note 255).
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.  

This Act encompassed all criminal offenses that the Continental Congress had encouraged states to punish. The Connecticut Act additionally authorized Connecticut courts to adjudicate “any other Infractions or Violations of or Offences against the known received and established Laws of Civilized Nations, agreably to the Laws of this State, or the Laws of Nations.”

The last section of the Act provided a civil remedy for injury to the persons or property of foreign subjects and their nations:

If any Injury shall be offered and done by any Person or Persons whatsoever to any foreign Power or to the Subjects thereof, either in Their 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.

This provision was consistent with the Continental Congress’s recommendation that states “authorize 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.” The common law context against which this provision was enacted did not recognize jurisdiction over certain alien claims, including claims by alien enemies, claims to real property located abroad, or penal claims arising extraterritorially. Four years after this act was passed, Connecticut courts refused in Brinley v. Avery to adjudicate an action between aliens that arose


260 1 Kirby 25 (Conn 1786).
extraterritorially. Against this context, the most reasonable import of this provision was that it primarily established a civil remedy for injuries inflicted by Americans upon the citizens of foreign nations.

* * *

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 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 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 against 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. 261

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.” 262 He concluded that the Confederation “therefore cannot prevent a war,” 263 and is fundamentally flawed. One of the Convention’s top priorities, therefore was designing 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.

263 Id at 25.
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 part of an effort by the First Congress to ensure that the United States would comply with the law of nations and avoid giving foreign nations just cause for war. Article III of the Constitution authorizes federal court jurisdiction over several categories of cases likely to involve 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.  

The Founders understood that federal jurisdiction over cases likely to implicate key branches of the law of nations—mimicking the jurisdiction of English courts—was necessary to foster commerce and avoid war. 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.

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

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264 See Bellia and Clark, 109 Colum L Rev at 37–38 (cited in note 9) (noting additionally that some framers wanted to go further to give federal jurisdiction over all cases arising under the law of nations).
266 US Const Art III, § 2.
the high seas, or failure to redress injuries that its members inflicted on foreign citizens gave the offended nation just cause for retaliation.267

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 section, 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 First Congress enable federal courts to keep the United States from violating the law of nations. Accordingly, the First Congress gave federal courts jurisdiction of important civil cases implicating the law of nations. First, it gave the Supreme Court original jurisdiction over cases by or against ambassadors and other public ministers.268 Second, it gave district courts original jurisdiction over admiralty and maritime cases.269 Third, it gave circuit courts original jurisdiction over suits where an alien is a party and the amount in controversy exceeded $500.270 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.271 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—claims for personal injuries that US citizens inflicted upon aliens in amity. 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,"272 but the ability of federal courts to recognize and enforce federal common law crimes was not yet established. The US also had yet to establish

267 See notes Error! Bookmark not defined.— and accompanying text (delineating the offenses and potential forms of redress).
268 Act of Sept 24, 1789 § 13, 1 Stat at 80.
269 Act of Sept 24, 1789 § 9, 1 Stat at 77.
270 Act of Sept 24, 1789 § 11, 1 Stat at 78.
271 Act of Sept 24, 1789 § 25, 1 Stat at 92.
272 Act of Sept 24, 1789 § 9, 1 Stat at 76-77.
fully functioning administration for commencing criminal prosecutions. Moreover, although Congress codified 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 States had no treaties providing for extradition of fugitive criminals until the Jay Treaty of 1794 with Great Britain.

Because the United States lacked other reliable means of redressing acts of violence by US citizens against aliens, Congress included the ATS in the Judiciary Act in order to provide a civil remedy for such misconduct and to ensure that the United States would not be held responsible under the law of nations for a failure to redress it. 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 provisions of Article III, which authorized federal courts to hear controversies between the citizens of a (US) state and the citizens of a foreign nation.

A. Enlisting Federal Court Jurisdiction to Avoid War

The First Judiciary Act conferred jurisdiction on federal courts to hear important classes of cases likely to affect the foreign relations of the United States. Much of this jurisdiction was designed to ensure that the United States would comply with its obligations under the law of nations. In particular, the Act conferred jurisdiction over matters—such as cases affecting ambassadors and cases of admiralty and maritime jurisdiction—that today’s commentators recognize as implicating the law of nations. The ATS was also an essential means of ensuring that the United States would not violate the law of nations by failing to redress injuries that its citizens inflicted upon the persons or personal property of foreign citizens. Understood in its full historical context, therefore, the ATS was a crucial mechanism for addressing a particular kind of injury to aliens that, if not redressed, could lead the United States into war.
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.” 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.” This provision authorized ambassadors to pursue redress for infringements of their rights in the Supreme Court, if they chose. Thus, the First Judiciary Act gave the Supreme Court original jurisdiction to redress violations of the rights of ambassadors, thereby allowing the United States to disavow offenses its citizens might commit against those rights. These were among the most serious offenses a private citizen could give to other nations.

Moreover, Section 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.” 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. 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. Nations often authorized their citizens to make such captures and prize courts allowed privateers to

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273 Act of Sept 24, 1789 § 13, 1 Stat at 80–81.
274 Act of Sept 24, 1789 § 13, 1 Stat at 80–81.
275 Act of Sept 24, 1789 § 9, 1 Stat at 73, 77 (delineating examples of such cases, including all seizures under US laws of “ impost, navigation or trade” in specified waters and on the high seas).
276 See Bradford R. Clark, Federal Common Law: A Structural Reinterpretation, 144 U Pa L Rev 1245, 1334–37 (1996) (describing prize cases as those in which courts determined whether the captors of vessels seized at war should be awarded title following the allowance of such prizes under the law of nations, and in which courts remedied the abuses of the prize-taking system).
277 Id at 1334.
obtain title to seized property through judicial condemnation in admiralty. Perhaps prize courts’ most important function, however, was to remedy any abuses committed by privateers—such as the erroneous capture of a neutral ship or neutral cargo—and thereby prevent US responsibility for such misconduct. As Justice Johnson explained in 1808, “[a] seizure on the high seas by an unauthorised individual, is a mere trespass.”

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 unmeritily attacked or injured.” The effect of such redress was to disavow “the unauthorised act of an individual.”

Finally, the Judiciary Act 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. In such cases, federal courts could enforce the Treaty against state laws obstructing debt recovery. The Judiciary Act also provided that such actions were removable by an alien to a federal circuit court from state court. In addition, even when the amount-in-controversy requirement forced debt actions to be brought in state court, an alien could seek review in the Supreme Court of the United States under Section 25 of the Judiciary Act if the state court obstructed debt recovery in violation of the 1783 Peace Treaty. In sum, all of these provisions of the

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278 Id
280 Id at 283.
281 Act of Sept 24, 1789 § 11, 1 Stat at 77 (including also cases where the amount in controversy exceeds $500 and the suit was brought by the United States or the dispute is between a citizen of the state where the suit was brought and another state) 73, 78.
282 In fact, federal courts began doing so in the mid-1790s. See Honkirk v Bell, 7 US (3 Cranch) 454, 458 (1806) (holding that treaty prevented pre-war operation of state statute of limitations on British debts); Ware v Hylton, 3 US (3 Dall) 199, 285 (1796) (holding that 1783 peace treaty required American debtors to pay British creditors notwithstanding Virginia act authorizing discharge); Georgia v Brailsford, 3 US (3 Dall) 1, 5 (1794) (holding that 1783 peace treaty required American debtors to pay British creditors notwithstanding sequestration of debts by Georgia).
283 Act of Sept 24, 1789 § 12, 1 Stat at 78.
284 Under Section 25, a party could seek review of a state court judgment against the validity of a treaty, upholding a state authority alleged to violate a treaty, or construing a treaty against a right claimed under it. Act of Sept 24, 1789 § 25, 1 Stat at 85–86 (specifying that in such cases, the Supreme Court could remand the case for final decision or may “proceed to a final decision” if the case has already been once remanded). 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, 355–54 (1821) (holding that to hold otherwise would be to subject supreme laws to “State usurpation”); Martin v Hunter’s Lessee, 14 US (1 Wheat) 304, 380–81 (1816) (stating that to hold otherwise would be to the detriment of defendants, who would be discriminated against in states’ interpretation of the highest laws, and that
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 claims by aliens against US citizens for acts of violence against their persons or 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 in high-profile cases after the Revolutionary War and required 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 alienage jurisdiction would have denied a federal forum for most tort claims at the time. Finally, as explained in the next section, federal criminal law was not sufficiently established, in substance or enforcement, to redress acts of violence by US citizens against aliens. The ATS filled this void.

2. Criminal offenses against the United States

A nation’s obligation under the law of nations to redress injuries to aliens theoretically could be satisfied through criminal punishment or extradition of the offending citizen. 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.” 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 court common law criminal jurisdiction 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. The Supreme

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286 Act of Sept 24, 1789 § 9, 1 Stat at, 76–77 (providing district court jurisdiction); Act of Sept 24, 1789 § 11, 1 Stat at 78–79 (providing circuit court jurisdiction).
Court ultimately rejected federal common law crimes in 1812. Even if federal criminal law had been clearly established in 1789, there remained to be established effective mechanisms for enforcing it.

In addition, the United States had no clearly established mechanisms allowing extradition of 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.” Without established federal criminal laws or extradition to redress private offenses against foreign citizens, a civil remedy would provide the most reliable means of redressing such offenses and avoiding reprisals under the law of nations.

Even with 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” to criminalize each of the principal offenses against the law of nations that Blackstone described as a crime in England. First, the 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 person of an ambassador or other public minister.” 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.”

288 United States v. Hudson & Goodwin, 11 US (7 Cranch) 32, 34 (1812) (holding that courts have “certain implied powers,” but denying that “jurisdiction of crimes against the state” was among those powers).
290 US Const Art I, § 8, cl 10.
291 Crimes Act of 1790 ch 9, § 28, 1 Stat 112, 118 (requiring no more than three years in prison and a discretionary fine for these offenses). 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 21).
292 Crimes Act of 1790 ch 9, §§ 25-26, 1 Stat 112, 118.
Congress made piracy a crime against the United States, triable in the district where the offender was apprehended.\textsuperscript{293}

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.”\textsuperscript{294} 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 that the Crimes Act of 1790 established. Notably absent from the Crimes Act were private acts of violence against aliens in amity who did not hold an express safe conduct. 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 outside the territorial jurisdiction of the United States.\textsuperscript{295} In 1789, such offenses were likely to occur in close proximity to the United States because European powers—including Great Britain—retained territory surrounding the original United States. In England, additional 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 received the common law after independence,\textsuperscript{296} but had proved themselves 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.\textsuperscript{297} Congress could, however, use Article III alienage jurisdiction to enable federal courts to hear tort claims by aliens against US citizens, regardless of the amount in controversy.

\textsuperscript{293} Crimes Act of 1790 § 8, 1 Stat 112, 113–14.
\textsuperscript{294} Blackstone, 4 Commentaries at 73 (cited in note 7) (providing the common law and statutory basis for the three cases in which England enforces the law of nations).
\textsuperscript{295} Accordingly, it is not true, as Professor 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 25) (arguing that the criminalization of offenses by citizens against aliens should have “largely addressed” the Founders’ fear of the consequences of violations of the law of nations). 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 a possible or politically feasible alternative.
\textsuperscript{296} See Bellia & Clark
\textsuperscript{297} Id
3. Alien tort claim jurisdiction

The ATS filled an important 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. 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,” the First Congress ensured that at least one form of redress satisfying the United States’ obligations under the law of nations was available. For a new nation seeking to join the ranks of the European powers but lacking established administrative structures or resources, the ATS provided the US with a self-executing civil mechanism that did not require any affirmative federal executive action.

Taken in historical context, the language of the ATS was not puzzling but had a clear import. The phrase “for a tort” meant for an injury to an alien’s person or personal property. The phrase “in violation of the law of nations or a treaty of the United States” limited the kinds of alien torts within federal district court jurisdiction to those for which the US would be responsible under the law of nations if not redressed by one of the three means recognized by the law of nations. Such torts primarily, if not exclusively, included torts committed by US citizens with force against alien friends. Such torts, whether committed in the US or abroad, would have provisionally violated the law of nations until disavowed by the United States through appropriate redress. It is unclear whether the word “only” modified “tort” or “in violation of the law of nations or a treaty of the United States.” The better reading, it seems to us, is that “only” modified the latter phrase, emphasizing that only torts in violation of the law of nations fell within the jurisdiction that the ATS conferred.

298 Act of Sept 24, 1789 § 9, 1 Stat at 77.
299 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 her person or property.” Blackstone, 4 Commentaries at 117 (cited in note 7).
300 Blackstone observed “that all civil injuries are of two kinds, the one without force or violence, as slander or breach of contract; the other coupled with force and violence, as batteries or false imprisonment.” Blackstone, 3 Commentaries at 118 (cited in note 7). When Vattel described citizens of one nation who “offend and ill-treat the citizens of another,” or “plunder or use ill foreigners,” he appears to have meant to include actions committed, in Blackstone’s words, “with force.” See Vattel, The Law of Nations bk. 2, ch. 7, § 78 at --- (cited in note ---).
301 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 contract or debt actions—
The language of the ATS, fairly construed, did not encompass claims between aliens. The law of nations placed no obligation on the United States to remedy torts claims arising abroad between two aliens, tort claims against an enemy alien or fugitive, or tort claims implicating permanent rights to real property. 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”) excluded them. It is unclear whether, at the time, the law of nations imposed any obligation on a nation to remedy torts committed by an alien within the nation’s territorial jurisdiction against another alien. Even if the law of nations were understood to impose such an obligation, however, the ATS would not likely have been understood to cover such claims. As we explain in the next section, the ATS would have been most reasonably construed to comport with Article III alienage jurisdiction, which does not encompass claims between aliens.

This understanding of the ATS is consistent with common law rules governing alien claims. The ATS was a jurisdictional provision; it did not create a cause of action. The first Process Act referred federal courts to common law forms of proceeding in adjudicating cases within their jurisdiction. These common law forms of action were more than adequate to provide aliens with the redress required by the law of nations. In the Process Act of 1789, the First Congress 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.” 302

The Act distinguished cases of actions that had to be brought in state court unless the amount in controversy exceeded $500. The word “only,” however, may well modify “in violation of the law of nations or a treaty of the United States”—in other words, “in violation of the law of nations or a treaty of the United States only.” 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 Act of Sept 24, 1789 § 23, 1 Stat at 73, 85 (“in cases only where the writ of error is served”); Act of Sept 24, 1789 § 30, 1 Stat at 89 (“shall be done only by the magistrate taking the deposition”); Act of Sept 24, 1789 § 32, 1 Stat at 91 (“except those only in cases of demurrer”); id (“those only which the party demurring shall express as aforesaid”). In one instance, it modifies a verb. See Act of Sept 24, 1789 § 27, 1 Stat at 897 (“take only my lawful fees”). If “only” modifies “tort,” it would be to emphasize that district court jurisdiction is not available for breaches of contract that, if not redressed would violate a treaty right. If “only” modifies “in violation of the law of nations,” it emphasizes that aliens only may sue for torts that, if not redressed, violate the law of nations, not other torts (such as those against enemy aliens, another alien, or certain real property rights). Little turns on this distinction, however, as in either instance the word “only” was used merely to provide emphasis. The ATS bears the same meaning without it as with it.

302 Act of Sept 29, 1789, ch 21, § 2, 1 Stat 93, 93–94 (repealed 1792); Act of May 8, 1792, ch 36, § 2, 1 Stat 275, 276. In 1792, Congress reaffirmed that a federal court should apply “the forms of writs, executions, and other process,” and “the forms and modes of proceeding” in actions at law that the supreme court of the state in which it sat applied, subject to a grant of residual authority to the federal courts to make “such alterations and additions as the said courts respectively shall in their discretion
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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.”

In 1789, the “substance” of a common law cause of action (as it is called today) was defined according to the writ by which a plaintiff commenced an action. To commence an action, the 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.

The Process Act directed courts of the United States to use the same writs as were used and allowed under the laws of the state in which they sat. Although states deviated from English common law in various respects, their writ systems largely preserved the requirements for bringing common law 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.

In addition, it did not allow aliens to maintain an action in ejectment or to recover a freehold in real property, as aliens could not own real property.

As previously discussed, the common law did not recognize alien claims to real property located abroad. Moreover,

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303 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.” Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275, 276 (repealed 1872). By and large, the courts did not exercise this residual authority. 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, ch. 255, § 5, 17 Stat. 196, 197 (repealed 1934). Rather than apply 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.


305 See Andrew J. Kent, A Textual and Historical Case against a Global Constitution, 95 Georgetown L. J. 463, 527–28 (2007) (defining “alien enemies” as those whose home country was at war with one’s own country, and noting that they lacked any legally enforceable rights).

306 See Barges v. Hogg, 2 NC 558, 558 (1797) (“An alien cannot maintain ejectment, or any action for the recovery of a freehold—aliens are not allowed to acquire real property.”).
common law judges and treatise-writers suggested that common law courts should not hear claims between non-resident aliens for acts occurring abroad. As a jurisdictional provision, the ATS gave federal courts jurisdiction over a category of common law claims. It did not change—but rather took as given—the forms of proceeding that state common law, incorporated through the Process Act, recognized in favor of aliens. The interaction of the ATS and the Process Act was thus sufficient to redress claims by aliens against US citizens for all torts “in violation of the law of nations.”307

To be sure, the ATS was partially redundant of other jurisdictional provisions in the Judiciary Act that could satisfy America’s 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 at the time 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 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.308 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

307 Even if the common law did recognize claims between aliens for acts occurring abroad, it does not follow that the ATS conferred jurisdiction of such claims because the US was not responsible for hearing such 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.” 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.

308 1 Op Atty Gen 57, 58 (1795).
jurisdiction thereof; and, as such, are punishable by
indictment in the district or circuit courts. 309
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.” 310 “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 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. 311
For acts of hostility committed abroad, the ATS provided the
exclusive means of avoiding customary law of nations and treaty
violations that the criminal law did not reach.
In application, it is not surprising that ATS jurisdiction was
rarely actually invoked. Given the difficulties of travel at the time, it
would have been unusual for the kind of ATS plaintiff Bradford
described—and alien injured by a US citizen overseas—to come to
the US to sue. In the United States, alien victims of violence often
left rather than remain and pursue a remedy in US courts. 312
In any event, violence against loyalists greatly subsided in the late 1780s.
Many loyalists resettled elsewhere 313 or assimilated into US
citizenship. 314 Although the ATS remained symbolically important,

309 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 9) (noting that the United States judges initially assumed the
nation had adopted the common law, including crimes against the law of nations). The Supreme Court
settled the debate in Hudson & Goodwin, 11 US (7 Cranch) at 34, when it held that there is no criminal
common law of the United States.
310 1 Op Atty Gen at 58.
311 Id at 59. The acts of hostility he addressed violated not only the customary 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.
Treaty of Amity, Commerce and Navigation, Between His Brittanic Majesty and the United
States of America, Art XXI, 8 Stat 116 (Nov 19, 1794).
312 See Brown, at 175-76 (cited in note 239).
313 Id. at 192.
314 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
state courts may have quickly 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 personal injury claims by foreign citizens against US citizens—respects 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.”315 Controversies between US citizens and foreign citizens fall squarely within this jurisdictional grant. Controversies between or among foreign citizens do not.316

The Court made clear in the first decades following ratification that the other alienage provision of the Judiciary Act of 1789—found in Section 11—was limited to claims by or against US citizens. Section 11, as explained, conferred original jurisdiction on the circuit courts of suits “where the matter in dispute exceeds . . . five hundred dollars, and . . . an alien is a party.”317 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,318 a Quebec inhabitant brought an action in federal circuit court against another Quebec inhabitant upon a promissory obligation arising in Quebec.319 “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.”320 The court held this plea to be good, and refused to exercise jurisdiction over the case.321 Similarly, a circuit court refused to exercise Section 11 jurisdiction over an alien-alien claim in 1799 in

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316 Curtis Bradley has argued that the ATS was meant to implement the alienage jurisdiction of Article III, requiring a US citizen defendant. Bradley, 42 Va J Int L at 626–29 (cited in note) (arguing that the requirement of a US citizen defendant is consistent with Article III and implicit in the ATS, and that the Supreme Court construed the statute in that manner early on), and that suits for violations of the customary law of nations would not have been understood to fall within Article III “arising under” jurisdiction. Bradley, 42 Va J Int L at 597 (cited in note). We agree with those conclusions.
317 Act of Sept 24, 1789 § 11, 1 Stat at 78.
318 29 F Cases 141 (CC D Mass 1794).
319 Id at 141.
320 Id at 141.
321 Id.
Fields v Taylor. The report of the decision indicates that the court refused to exercise Section 11 jurisdiction over a claim between two British subjects on notes made in England. A note indicates that “this decision was not founded on principles of the common law, but rather upon the limited jurisdiction of the federal courts under the constitution and laws of the United States.”

A year later, in 1800, the Supreme Court held that Section 11 must be read in light of Article III limitations on federal judicial power. In Mossman v Higginson, the Court explained:

[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.

In 1807 in Montalet v Murray, the Court considered whether Section 11 authorized jurisdiction over a debt action between two foreign citizens. “The Court was unanimously of opinion that the courts of the United States have no jurisdiction of cases between aliens.” Likewise, in Hodgson v Bowerbank, Chief Justice John Marshall rejected the argument that Section 11 of “[t]he judiciary act gives jurisdiction to the circuit courts in all suits in

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322 9 F Cases 41 (CC D Mass 1799).
323 Id at 42.
324 Id. At common law, as explained, courts refused, in the few cases that exist, to exercise jurisdiction over alien-alien claims arising abroad. See notes–and accompanying text. A court would exercise jurisdiction over an alien-alien debt claim if the debt was to be paid in the forum country. See note and accompanying text (noting that the nation in which a contract was made had territorial sovereignty over the debt that the contract created). It is not clear from the report in Fields whether there was a common law basis for jurisdiction. Fields, 9 F Cases at 42. In any event, the court appears to have rested its decision upon the limitations of Article III. Id.
325 4 US (4 Dall) 12 (1800).
326 Id at 12 (emphasis omitted).
327 8 US (4 Cranch) 46 (1807).
328 The action was brought by a New York plaintiff upon assignment from a foreign citizen. Id at 46–47 (stating that the notes were originally made to Monsieur Caradeaux de la Caye, whose citizenship is unclear). Under Section 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.” Act of Sept 24, 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. Montalet, 8 US (4 Cranch) at 47.
329 Montalet, 8 US (4 Cranch) at 47.
330 9 US (5 Cranch) 303 (1809).
which an alien is a party.\textsuperscript{331} “Turn to the article of the constitution of the United States [Article III],” he explained, “for the statute cannot extend the jurisdiction beyond the limits of the constitution.”\textsuperscript{332}

The reasons for reading Section 11 alienage jurisdiction not to extend to alien-alien claims equally apply to Section 9 ATS jurisdiction. Section 9 jurisdiction over “causes where an alien sues for a tort only in violation of the law of nations” ultimately rests on the same Article III jurisdictional authorization as Section 11 alienage jurisdiction: controversies “between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.”\textsuperscript{333} Article III provides no other general warrant for jurisdiction over claims between aliens—even for violations of the customary law of nations. As we have explained elsewhere, the Article III 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”\textsuperscript{334} did not encompass claims governed by the law of nations unless enacted federal law incorporated it.\textsuperscript{335} Early claims that the law of nations was federal common law must be 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, specifically that federal common law suffices to generate “arising under” jurisdiction. In the criminal cases in which it was argued that federal courts hear federal common law crimes, including offenses against the law of nations, the United States was party, which alone sufficed to give Article III jurisdiction. As the Supreme Court correctly held in Sosa, the ATS was merely a jurisdictional grant; it was not meant to create a federal cause of action or incorporate the law of nations as federal law.\textsuperscript{336}

\textsuperscript{331} Id at 304 (emphasis omitted).
\textsuperscript{332} Id. See also Jackson v Twentyman, 27 US (2 Pet) 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.”).
\textsuperscript{333} US Const Art III, § 2.
\textsuperscript{334} Id.
\textsuperscript{335} Bellia and Clark, 109 Colum L Rev at 38–40 (cited in note 9) (arguing that while some American officials called the law of nations the law of the land, Article III demonstrates that they did not want to incorporate it into the constitution).
\textsuperscript{336} The ATS also provided jurisdiction over alien tort claims in violation of “a treaty of the United States.” Act of Sept 24, 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
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 alien claims only for acts of violence by US citizens. But if the statue was at all unclear in this regard, separation of powers concerns almost certainly would have led courts to construe it in this way, rather than in a manner that could infringe the territorial sovereignty of other nations. In the first few decades after ratification, the Supreme Court was careful not to take the lead over the political branches in sanctioning violations of the law of nations. Violations of other nations' perfect rights would give them just cause for war against the United States. When acts of Congress did not clearly violate the sovereign rights of other nations, the Court read them to respect those rights. In this way, the Court did not generate conflicts that Congress had not clearly authorized and 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 not to violate the law of nations was Murray v Schooner Charming Betsy. Congress enacted the Non-Intercourse Act of 1800 during the undeclared hostilities with France. The Act prohibited commercial intercourse between residents of the United States and residents of any French territory. In Charming Betsy, the Court held that this Act did not authorize 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. Writing for the Court, Chief Justice Marshall explained that a federal statute “ought never to be construed 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.”

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citizens against aliens. See 1783 Treaty of Peace, 8 Stat at 82, Art V (cited in note) (giving British subjects rights to be in United States for a given time for specified purposes); Lee, 106 Colum L Rev at 836–37 (cited in note 21) (describing implied safe conduct that 1783 Treaty of Peace 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 ensured that federal court jurisdiction of alien tort claim for violations of the customary law of nations complied with the limitations of Article III.

337 Federal Non-Intercourse Act, ch 10, § 1, 2 Stat 7, 8 (1800) (expired 1801) (stating that any US ship that was “sold, bartered, entrusted, or transferred” for the purpose of ending up in French territory was subject to forfeit).

338 The Charming Betsy, 6 US (2 Cranch) at 64–65, 120–21 (describing the sale of the vessel and noting that the Danish burgher, although born in America, was now a Danish subject).

339 Id at 118.
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.” By applying this canon of construction, Marshall ensured that Congress, rather than the Court, would determine whether the United States should risk foreign conflict by interfering with perfect rights under the law of nations to engage in neutral commerce.

Under this analysis, unless the ATS clearly authorized federal district courts to hear cases that rested within another nation’s exclusive territorial sovereignty, federal courts would not have heard them. At the time, separation of powers concerns led the Court to read acts of Congress to avoid law of nations violations. Given the import of the ATS as a mechanism to avoid law of nations violations, it is unlikely that courts would have read it to authorize jurisdiction that even arguably violated 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, its relationship to ambassadorial and admiralty jurisdiction, and the meaning of the word “alien.” This section discusses these questions in light of the original meaning of the ATS.

1. The ATS and safe conduct violations

Thomas Lee has argued that the ATS was intended to give federal courts jurisdiction over safe-conduct violations. Safe-conduct violations, if not redressed, could give the nation of the injured alien just cause for retaliation. We agree that safe-conduct violations comprised an important part of the jurisdiction that the ATS was originally understood to confer. In England, most violence by British subjects against aliens would have constituted safe

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340 Id at 119 (emphasis omitted).
conduct violations. In the early United States, however, this was not the case. If the United States were to avoid law of nations violations for acts of violence against aliens, it needed a tort remedy that encompassed more than safe conduct violations.

English law generally protected the persons and personal property of aliens in amity who were present in English territories:342 “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.”343 In other words, under English law, a subject of another nation that was in “amity”—or peaceful relations—with England could freely travel to England.344 In the English tradition, most aliens in amity would have fallen under the protection of express or implied safe conducts. As Professor Lee has pointed out,345 Magna Carta granted foreign merchants safe passage during peace and certain protections during war.346 Treaty provisions also could grant classes of foreign citizen-subjects safe passage, as did Article V of the 1783 Paris Peace Treaty.347 Blackstone appears to have more generally used “implied

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342 Under the law of nations, as Blackstone explained, “it is left in the power of all states, to take such measures about the admission of strangers, as they think convenient.” Blackstone, 1 Commentaries at *259 (cited in note 89). See also Vattel, The Law of Nations bk 2, ch 7, § 94 (cited in note 86) (“The sovereign may forbid the entrance of his territory either in general, to every stranger, or in a particular case, or to certain persons, or on account of certain affairs, according as he shall find it most for the advantage of the state.”); id. at bk 2II, ch. 8VIII, § 100 at (“Since the lord of the territory may forbid its being entered when he thinks proper, he has, doubtless, a power to make the conditions on which he will admit of it.” (internal citations omitted)).

343 Blackstone, 1 Commentaries at *259–60 (cited in note 89).

344 See Calvin’s Case, 77 Eng Rep 377, 383 (KB 1608) 7 Co. 1, 21, 77 Eng. Rep. 377, 383 (K.B.); 4 Sir John Comyns, 7 A Digest of the Laws of England Praerogative § 429 B 5 (17805th ed 1826) (“[A] subject of a king in amity may come without license, or safe-conduct.”); Comyns 1 A Digest of the Laws of England id. at Alien § 302 C 7 (cited in note) (“Aliens not enemies, may safely dwell in the realm.”). Vattel noted that “even in the countries where every stranger freely enters, the sovereign is supposed to allow him access, only upon this tacit condition, that he be subject to the laws; I mean the general laws made to maintain good order, and which have no relation to the title of citizen or of subject of the state.” See Vattel, The Law of Nations bk 2, ch 8, § 101 (cited in note 86). But see id. at bk 2. II, ch. 9IX, §§ 123 at 160 (explaining that “nobody could entirely deprive them of this right [of passage]; but the exercise of it was limited by the introduction of domain and property” (internal citations omitted)); id at bk 211, ch 10X, § 132 at 163 (“The master of a country may only refuse the passage on particular occasions, where he finds it prejudicial or dangerous.”).

345 Lee, 106 Colum L. Rev at 874–75 (cited in note 21) (noting that a “general implied safe conduct was . . . extended to alien merchants under the English domestic law of the Magna Carta”).

346 Article V provided that British subjects and others “shall have free liberty to go to any part or parts of any of the thirteen United States and therein to remain twelve months unmolested in their endeavors to obtain the restitution of such of their estates, rights, and properties as may have been confiscated.” Definitive Treaty of Peace between the United States of America and his Britannic Majesty, 8 Stat 80, Art V (1783) Treaty of Peace, supra note 216, at art. V. For examples of other treaties granting safe passage to classes of aliens, see Lee, 106 Colum L. Rev at 875–79 (cited in note 21) (listing and categorizing safe passage rights—protection, rights of burial and testament, contingent wartime rights, and implied rights—created by other treaties).
safe conduct” as shorthand to describe the status of any foreigner in amity lawfully present in British territory who did not hold (or need) an express safe conduct or passport. Specifically, he described as a crime “committing acts of hostilities against such as are in amity, league, or truce with us, who are here under a general implied safe conduct.”

The situation, however, in the United States was different. The United States, unlike England, did not have extensive treaties with other nations providing implied safe conducts, nor did it have any other national laws generally granting implied safe conducts. Whereas Blackstone largely could equate aliens “in amity, league, or truce” with England with those “who are here under an implied safe conduct,” officials in the United States could not. The 1781 Continental Congress resolution called upon state legislatures 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 . . . .” Likewise, the 1782 Connecticut statute punished “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.” Without extensive treaties or other national laws granting implied safe conducts, the US needed to redress acts of violence against any aliens in amity, not just those under protection of an express or implied safe conduct. Accordingly, the ATS language “for a tort only in violation of the law of nations” would

348 In this passage, Blackstone seemingly equates foreigners “in amity, league, or truce” with England with those “who are here under an implied safe conduct.” In an earlier passage, Blackstone wrote that “without [a safe conduct] but by the law of nations, no member of one society has a right to intrude into another.” Blackstone, 1 Commentaries at 259 (cited in note 89). Richard Woodnesson, 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 Woodnesson, Lectures on the Law of England 51 n.1 (1834) (quoting Blackstone, 1 Commentaries at *259 (cited in note 89)). William Carey Jones, in his edition of Blackstone’s Commentaries, argued that Woodnesson’s critique was unfounded. See William M. Blackstone, 1 Commentaries on the Laws of England 259 n.13 (William Carey Jones ed 1915). 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 of 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.

349 Blackstone, 4 Commentaries at 68 (cited in note 7).

350 Id.


have encompassed any act of violence against an alien by the US citizen, including safe conduct violations.

Furthermore, the ATS had a special role to play in remediating private offenses committed extraterritorially against alien friends. Under the law of nations, neither Blackstone’s three criminal offenses nor the criminal laws of the United States could reach extraterritorial acts. If, however, an injured alien brought a transitory civil action in a federal court, the ATS enabled the court to afford a remedy. Even if an injured alien did not have the means to bring such an action, the mere existence of the ATS signaled to other nations that the United States was willing to afford a remedy, thus disavowing the offense to the other nation.

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 because Congress enacted the Judiciary Act partly in response to two incidents involving foreign ministers—Marbois and Van Berkel.\(^{353}\) In response, Curt Bradley has contended that neither incident in fact provided the impetus for the ATS.\(^{354}\) 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. First, Section 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.”\(^{355}\) Lee argues that this recognized concurrent jurisdiction over ambassadors’ suits in the Supreme Court and state courts.\(^{356}\) Limiting federal court jurisdiction over ambassadors’ suits to the Supreme Court comported with the elevated protection the law of nations afforded ambassadors.\(^{357}\) 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

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\(^{355}\) Act of Sept 24, 1789 ch. 20, § 13, 1 Stat at 73, 80.

\(^{356}\) Id at 856.

\(^{357}\) Id at 855–58 (cited in note 21).
to give district courts concurrent jurisdiction of tort actions brought by ambassadors. 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 the Supreme Court). If Supreme Court justices were riding circuit, state courts in proximity to the national capital would be the natural alternative forum.

Second, Lee argues that the constitutional counterpart to “alien” in the ATS is “foreign . . . Citizens or Subjects” in Article III. Article III 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.” 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.

Finally, Lee argues, the term “alien,” as used elsewhere in the Judiciary Act, does not refer to “ambassadors.” Section 12 authorizes defendants to remove to federal circuit court suits “commenced in any state court against an alien.” Because Article III (and necessarily the Judiciary Act) did not allow plaintiffs ever to file suits against ambassadors in state court, “alien” in Section 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.

With respect to admiralty jurisdiction, little might appear to hinge at first glance on whether the ATS was understood to confer jurisdiction over piracy. Section 9 of the Judiciary Act gave district courts jurisdiction “of 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.” It might appear to make little difference whether an alien marine tort claim

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360 Id at 857–58.
361 Id at 853.
364 Id at 854.
365 Act of Sept 24, 1789 § 9, 1 Stat at 73, 76–77.
fell within district court ATS jurisdiction, as a district court would have jurisdiction over such 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 very broad, encompassing all marine torts.\(^{368}\) It is difficult to imagine a piracy case that a district court would not have authority to redress under its admiralty and maritime jurisdiction.\(^{369}\) Lee persuasively argues that the First Congress probably did not intend the admiralty and alien tort provisions of Section 9 to confer overlapping jurisdiction for piracy claims.\(^{370}\) That Section 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.”\(^{371}\) 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.”\(^{372}\)

In 1795 in *Bolchos v Darrel*,\(^{373}\) described in Part I, a federal district court appears to have appreciated that these two grants of jurisdiction served distinct functions. In this prize suit by a French privateer against a US citizen claiming that a ship at its cargo was lawful prize,\(^{374}\) District judge Thomas Bee concluded that “as the original cause arose at sea, everything dependent on it is triable in the admiralty.”\(^{375}\) “Besides,” he remarked, “as the 9th section of the judiciary act of congress gives this court concurrent jurisdiction with

\(^{368}\) Lee, 106 Colum L Rev at 866–67 (cited in note 21). 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) (No 3776).

\(^{369}\) Id, 106 Colum L Rev at 867–68 (cited in note 21).

\(^{370}\) Id at 868–69.

\(^{371}\) Id at 868. Lee persuasively argues against competing interpretations. See id at 868–70.

\(^{372}\) Id at 870 (noting that scholars have shown that prize jurisdiction fell under the exclusive admiralty jurisdiction of district courts). Professor Joseph Sweeney has argued, to the contrary, that Section 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. Sweeney, 18 Hastings Intl & Comp L Rev at 482 (cited in note 22). Scholars have criticized this reading on several grounds. See, for example, Lee, 106 Colum L Rev at 870 (cited in note 21). (refuting Sweeney’s reading on ground that “tort” was not a term used in the law of prize when the Judiciary Act was enacted); Dodge, *Historical Origins*, 19 Hastings Intl & Comp L Rev at 244 (cited in note 20) (rejecting Sweeney’s use of term “tort”); Bradley, 42 Va J Intl L at 617 (cited in note) (arguing that “a generally-worded grant of jurisdiction to the federal courts would have been a strange way” of fulfilling the purpose Sweeney describes).

\(^{373}\) 3 F Cases 810 (DC SC 1795) (No 1,607).

\(^{374}\) Id at 810.

\(^{375}\) *Bolchos*, 3 F Cases at 810 (citing other cases to this effect).
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.

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.”

3. The meaning of the “alien”

M. Anderson Berry has argued that the term “alien” in the
ATS refers only to citizens of foreign nations residing in the United
States. He deduces this from the fact that “alien” replaced
“foreigner” in the enacted version of the bill.

On July 20, 1789, the Senate submitted a bill for House approval providing, in relevant
part, district court jurisdiction “of all causes where a foreigner
sues for a tort only in violation of the law of nations.” The House kept
this provision, changing only the word “foreigner” to “alien.”

“Alien,” Berry argues, was understood to denote a foreigner resident
in another country, not any foreign citizen. Thus, he contends that
the purpose of this change was to limit ATS jurisdiction to plaintiffs
resident in the United States.

If this explanation of the change from “foreigner” to “alien”
is correct, it does not follow that the ATS should be read to preclude
jurisdiction over claims by aliens against U.S. 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
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

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376 Id (citations omitted).
377 Lee, 106 Colum L Rev at 893 (cited in note 21).
378 M. Anderson Berry, Whether Foreigner or Alien: A New Look at the Original Language of the
379 See id at 318 (tracing the history of this alteration).
380 A Bill to Establish the Judicial Courts of the United States, 4, ll 6, 7 ((New-York:Printed by
Thomas Greenleaf,), microformed on Early American Imprints, No. 45683 (Readex Microprint
Corp.).[SNC]
381 1 Journal of the House of Representatives of the United States 115–16 (1789).
383 [CITE]
injuries inflicted abroad. 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. If “alien” meant a foreign resident in the United States, the ATS still would provide jurisdiction over actions by aliens injured by US citizens abroad. To pursue such an action, however, the foreigner would have to travel to the United States and thus come within the protection of its laws.

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. Article III authorizes federal court jurisdiction over “Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.” The House may have used the word “alien” to denote “Citizens or Subjects” of foreign states, in contrast to foreigners who could claim no country—viz. 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 foreign citizens-subjects, 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. Limiting suits to “aliens” rather than “foreigners” was consistent with this purpose.

V. HISTORICAL MEANING AND PRESENT-DAY ATS APPLICATIONS

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. In the present day, courts and scholars have struggled to apply the ATS as a practical matter in a range of contexts. Most judges and scholars have considered historical understandings of the ATS determinative of—or at least relevant to—how courts should apply it today. 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

385 See id.
386 US Const Art III, § 2.
387 It is also worth noting that 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 id at 1922.
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—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.” 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 against its citizens—that were unknown in 1789 (and with which it would have violated the law of nations for another nation’s courts to interfere). Thus, the predicate law for 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 alien’s nation just cause to wage war. Thus, a core underlying purpose of the ATS has largely disappeared. Finally, the status of customary international law as a rule of decision has changed. In *Erie Railroad v. Tompkins*, the Supreme Court rejected the concept of general law, and the post-*Erie* status of customary international law continues to be vigorously debated. These developments raise difficult questions of statutory interpretation, including whether and how courts should apply the original meaning of statutory texts or interpret statutes more dynamically in light of evolving circumstances.

It is not our goal to resolve the translation problems that these developments generate for the ATS. Rather, our primary goal is to recapture the import of the ATS in its original legal and political context. Nonetheless, to the extent that courts and scholars have relied heavily upon history, it is worth pointing out important historical misunderstandings and tensions in present-day judicial

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explanations of the statute. The Sosa Court instructed that courts should only allow claims under the ATS that are “comparable to the features of the . . . 18th century paradigms.” Although we believe that the Court mischaracterized the 18th century paradigms that the ATS referenced, we recognize that all of the Justices sought to limit application of the ATS to the paradigmatic tort claims that it originally encompassed—and that the Court is unlikely to change this approach. In light of the paradigmatic tort claims that the ATS originally encompassed, historical understandings alone do not support certain present-day applications of the ATS. In this Part, we explain why. First, we identify the errors in the Sosa Court’s historical explanation of the ATS. The Supreme Court’s historical explanation of the statute is too narrow because it purports to limit the ATS to claims that are closely analogous to the three crimes that Blackstone described as violations of the law of nations. The ATS meant to provide a remedy where the government was unable or unwilling to provide one through the criminal law. Second, we identify tensions between two post-Sosa applications of the ATS and its historical meaning. Historical understandings of the ATS run counter to (1) exercising ATS jurisdiction over alien-alien claims for acts occurring abroad, and (2) denying all corporate liability under the ATS. These examples are merely illustrative of present-day applications that history alone cannot justify. The examples demonstrate, however, the importance to present-day litigation of understanding the ATS in the full legal, political, and historical context—especially since courts continue to purport to interpret the statute in accordance with its original meaning.

A. Sosa and the ATS

Sosa gave the Supreme Court its first opportunity to interpret the ATS. As explained in Part I, Alvarez, a Mexican doctor, sued Sosa, other Mexican nationals, four US DEA agents, and the United States for kidnapping Alvarez and bringing him to the US 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 suggested that the statute should be construed in
accordance with the First Congress’s original objectives. 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.”\textsuperscript{393} 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.”\textsuperscript{394} Although the Court “found no basis to suspect that Congress had any [other] examples in mind,”\textsuperscript{395} it assumed that courts have 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.”\textsuperscript{396}

The Court offered five reasons “for judicial caution” in exercising this power.\textsuperscript{397} First, “the prevailing conception of the common law has changed since 1789 in a way that counsels restraint in judicially applying internationally generated norms.”\textsuperscript{398} 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 \textit{Erie}.

\textsuperscript{399} Third, “a decision to create a private right of action is one better left to legislative judgment in the great majority of cases.”\textsuperscript{400} 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.”\textsuperscript{401} 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.”\textsuperscript{402} According to the Court, “[t]hese reasons argue for great caution in adapting the law of nations to private rights.”\textsuperscript{403}

\textsuperscript{393} Sosa, 542 US at 724.
\textsuperscript{394} Id.
\textsuperscript{395} Id.
\textsuperscript{396} Id at 725.
\textsuperscript{397} Sosa, 542 US at 725.
\textsuperscript{398} Id.
\textsuperscript{399} Id at 726citing \textit{Erie R Co v Tompkins}, 304 US 64 (1938).
\textsuperscript{400} Sosa, 542 US at 727.
\textsuperscript{401} Id.
\textsuperscript{402} Id at 728.
\textsuperscript{403} Id at 728.
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.\textsuperscript{404} 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,”\textsuperscript{405} and then show that the government in question, as a matter of state policy, practiced, encouraged, or condoned prolonged arbitrary detention.\textsuperscript{406} 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.”\textsuperscript{407} Accordingly, the Court reversed the lower courts’ refusal to dismiss Alvarez’s ATS claim.

The background of the ATS suggests that the Supreme Court’s historical approach to identifying torts in violation of the law of nations is too narrow. The ATS was not adopted to grant federal courts jurisdiction merely to hear a narrow class of torts against aliens recognized by international law and analogous to the three international crimes Blackstone identified. Rather, the ATS was designed to avoid state responsibility for a much broader range of intentional torts committed by US citizens against aliens. Indeed, we argue that the ATS was enacted in part because the criminal law was insufficient to uphold the United States’ obligations under the law of nations. 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 a violation of the law of nations, giving the alien’s home country just cause for war.\textsuperscript{408} The ATS was adopted to ensure the availability of a civil remedy in all such cases and thereby prevent US violations of the law of nations.\textsuperscript{409} 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 “international” torts (like “piracy”). Rather, it more broadly encompassed any intentional harm inflicted on an alien that would

\textsuperscript{404} Sosa, 542 US at 738.
\textsuperscript{405} Id at 737.
\textsuperscript{406} Id.
\textsuperscript{407} Id at 738.
\textsuperscript{408} See note 308 and accompanying text (discussing this problem).
\textsuperscript{409} See notes 309–311 and accompanying text (discussing the ATS as a remedy).
have required the perpetrator’s nation to provide a remedy or become responsible under the law of nations for the underlying misconduct.

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 Federal Employees Liability Reform and Tort Compensation Act. The lower courts approved the substitution, and the Supreme Court did not review this question. Therefore, when the case came before the Court, it involved only a claim by one Mexican national against another. A hypothetical variation on the facts of Sosa, however, helps to illustrate why the Court’s interpretation of the ATS too narrowly defines the statute’s historical import.

Suppose that a private US citizen—a relative of the murdered DEA agent—had travelled to Mexico, 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 ground that (as in Sosa) the conduct in question did not amount to a tort in violation of the law of nations. By contrast, as enacted in 1789, the ATS would have permitted an alien like Alvarez to sue a US citizen for an intentional tort triggering the United States’ duty under the law of nations to provide a remedy. Failure to provide a remedy in such cases would have rendered the United States responsible for the injury and placed it in violation of the law of nations. The ATS was enacted precisely to avoid such violations by giving aliens injured by US citizens a reliable forum in which to obtain redress for any and all intentional torts. This hypothetical illustrates why the Sosa Court’s historical explanation of the ATS is too narrow.

B. Historical Practice and Present-Day Applications

Certain lower court applications of the ATS also lie in tension with its original import. Two are illustrative—application of the ATS to claims by aliens against other aliens for acts occurring outside the United States, and refusal to allow corporate liability in

410 See Alvarez-Machain v United States, 266 F3d 1045, 1053 (9th Cir 2001), citing 28 USC § 2679. The Act provides that the exclusive civil remedy for most wrongful conduct by federal employees acting within the scope of their employment is a FTCA action against the United States. See 28 USC § 2679(b)(1) (stating that Sections 28 USC § 1346(b) and 28 USC § 2672 provide the exclusive remedy).

cases brought within the ATS. The first rests upon an unduly permissive view of the ATS’s original scope, the latter upon an unduly restrictive view. These examples illustrate the danger of justifying present-day applications of the ATS by reference to mistaken notions of its historical meaning.

1. Suits between aliens

The historical meaning of the ATS does not in itself support the lower courts’ continuing practice of allowing aliens to sue other aliens under the ATS. The ATS was enacted to remedy harms suffered by aliens at the hands of US citizens. These were the only harms that the United States was required to remedy under the law of nations. Adjudication of 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 the First Congress almost certainly wished to avoid.  

Moreover, Article III does not support this lower court practice. Article III extends the judicial power to controversies between citizens of a state and foreign citizens or subjects.  It does not extend the judicial power to controversies between citizens or subjects of foreign nations unless they fall within one of the other 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.  As Sosa recognized, the ATS “is in terms only jurisdictional.”  It does not purport to create a federal cause of action or adopt the law of nations as a matter of federal law. Such steps were unnecessary because using diversity jurisdiction to give aliens a federal forum in which to pursue tort claims against US citizens fully satisfied the United States’ obligations under the law of nations to provide a remedy for the misconduct of its citizens.

In Filartiga v Pena-Irala, 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

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412 See notes—and accompanying text (describing alien-alien claims arising abroad and noting that it was considered a violation of respect for foreign sovereigns to adjudicate such claims).

413 US Const Art III, § 2.

414 Id (extending authority 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”).

415 Sosa, 542 US at 714.

416 Id at 724 (stating that “the ATS is a jurisdictional statute creating no new causes of action”).
citizen of Paraguay for torturing their son in Paraguay.\footnote{Filartiga, 630 F2d at 878 (noting that the action was for the wrongful death of the Filartigas’ son).} 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.”\footnote{Id at 878.} The court believed 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.”\footnote{Id at 885.} Most lower courts have followed Filartiga’s lead in allowing suits between aliens under the ATS,\footnote{See, for example, Kadic v Karadzic, 70 F3d 232, 250 (2d Cir 1995) (permitting aliens to sue Serbian leader for alleged torture and rape); In re Estate of Ferdinand Marcos, 25 F3d 1467, 1475 (9th Cir 1994) (allowing aliens to sue former Philippine President for torture). But see Tel-Oren v Libyan Arab Republic, 726 F2d at 775 (dismissing suit by aliens against the PLO for an armed attack on a civilian bus).} and this practice has continued after Sosa.\footnote{See id at 34–37.}

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.”\footnote{Richard H. Fallon, Jr, et al, Hart and Wechsler’s The Federal Courts and the Federal System 685 (Foundation 5th ed 2003).} To be sure, federal courts applied certain rules derived from the law of nations in the exercise of their Article III jurisdiction—particularly their admiralty and foreign diversity jurisdiction.\footnote{See Bellia and Clark, 109 Colum L Rev at 39–40 (cited in note 9) (citing cases involving “national peace and harmony”).} They did not apply such rules, however, because they constituted a form of supreme federal law.\footnote{Bellia and Clark, 109 Colum L Rev at 39–40 (cited in note 9) (citing cases involving “national peace and harmony”).} Rather, as we have recently explained, federal courts historically applied the law of nations as a means of upholding the constitutional prerogatives of Congress and the President to conduct foreign relations and decide momentous questions affecting war and
peace.\textsuperscript{425} Thus, there is no basis for concluding that either the Founders or the First Congress would have 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 \textit{Sosa} Court did not have to confront the Article III issue because the district court had subject matter jurisdiction over Alvarez’s original claims against the United States under the FTCA\textsuperscript{426} and against the DEA agents based on diversity of citizenship.\textsuperscript{427} 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.”\textsuperscript{428} Accordingly, the district court had supplemental jurisdiction over Alvarez’s claims against Sosa.\textsuperscript{429} Indeed, the Court’s opinion in \textit{Sosa} went out of its way not to endorse the idea that ATS claims 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.\textsuperscript{430} In addition, the Court denied 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.”\textsuperscript{431} 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.”\textsuperscript{432} 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.”\textsuperscript{433}

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\textsuperscript{425} See id at 55–75.
\textsuperscript{426} 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).
\textsuperscript{427} See 28 USC § 1332(a)(2) (granting jurisdiction over suits between “citizens of a State and citizens or subjects of a foreign state”).
\textsuperscript{429} See 28 USC § 1367(a) (granting supplemental jurisdiction over cases that form part of “the same case or controversy”).
\textsuperscript{430} See, for example, \textit{Sosa}, 542 US at 724 (“ATS is a jurisdictional statute creating no new causes of action.”).
\textsuperscript{431} Id at 745 n * (Scalia concurring in part and concurring in the judgment).
\textsuperscript{432} Id at 731 n 19.
\textsuperscript{433} Id
\end{flushleft}
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 nations generally lacked power to apply their laws extraterritorially. 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. Article III, moreover, 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 original scope of the ATS does not in itself support present-day ATS jurisdiction of alien-alien claims, especially claims arising from acts occurring outside the United States.

2. Corporate liability

The historical scope of the ATS also does not in itself categorically exclude corporate liability, as some lower federal courts have recently held. In 1789, the rationale for permitting suits by aliens against individual US citizens under the ATS would seem to support suits against US corporations for intentional torts committed against aliens. In either case, the United States would become responsible for their misconduct if it failed to redress the harm they caused. Here again, however, Sosa’s incomplete historical account has forced lower courts into potentially unduly restrictive analyses. In Kiobel v. Royal Dutch Petroleum Co., the Second Circuit rejected corporate liability under the ATS. The case involved a class action by Nigerian residents claiming that Dutch, British, and Nigerian corporations aided and

434 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 Stewart Jay, The Status of the Law of Nations in Early American Law, 42 Vand L Rev 819, 821, 839-45 (1989). Given America’s 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. See Torture Victims Protection Act of 1991 (TVPA), Pub L No 102-256, 106 Stat 73 (1992), codified at 28 USC §1350 (establishing a civil right 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.

435 See Murray v Schooner Charming Betsy, 6 US (2 Cranch) 64 (1804); see also Bellia & Clark.

436 ___ F.3d ___ (2d Cir. 2010).
abetted the Nigerian government in committing human rights violations under international law. Speaking for the court, Judge Cabranes framed the question as whether “the jurisdiction granted by the ATS extend[s] to civil actions brought against corporations under the law of nations.”

In light of Sosa, the court answered this question by looking to whether the law of nations itself recognized corporate liability. According to the court, “customary international law has steadfastly rejected the notion of corporate liability for international crimes, and no international tribunal has ever held a corporation liable for a violation of the law of nations.” Under these circumstances, the court concluded that “plaintiffs fail to allege violations of the law of nations, and plaintiffs’ claims fall outside the limited jurisdiction provided by the ATS.” Judge Leval concurred in the judgment of dismissal, but disagreed with the court’s approach to corporate liability. In his view, because international law is silent on the question, courts are free to apply domestic principles of corporate liability as a remedy under the ATS.

Kiobel highlights the fundamental problem with the Supreme Court’s historical approach in Sosa. The Court instructed courts to “require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms.” The Second Circuit employed this approach and found that “imposing liability on corporations for violations of customary international law has not attained a discernable, much less universal, acceptance among nations of the world.” Applying Sosa, the court concluded that corporate liability “is not a rule of customary international law that we may apply under the ATS.”

Kiobel illustrates why the Supreme Court’s historical account in Sosa was misguided. Under the law of nations, any intentional tort by a US citizen against an alien requires the United States to provide a remedy. Congress enacted the ATS to provide such a remedy, and thereby satisfy its international obligations. When the

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437 Id. at __.
438 Id. at __.
439 Id. at __.
440 See id. at __ (Leval, J., concurring only in the judgment).
441 Sosa, 542 US at 725.
442 Id.
443 Id. at __.
444 See supra notes __-__ and accompanying text.
ATS was enacted, there were relatively few corporations and they usually had a narrow scope of authority. This may help to explain why the question has not arisen until recently. Nonetheless, the purpose of the ATS arguably favors corporate liability. Corporations are traditionally regarded as creatures of the state.444 It would seem to follow, therefore, that if an ATS remedy was necessary to prevent US responsibility for the acts of its citizens, then a similar remedy was necessary to avoid US responsibility for the acts of its corporations.

At a minimum, the question that Sosa has forced lower courts to ask respecting corporate liability is anachronistic. In 1789, the question would have been whether a nation had to provide redress to avoid a law of nations violation for the acts of an entity that it incorporated. The question the Court has forced today—whether a corporate act itself violates international law—does not correlate with the kinds of claims that the ATS originally encompassed, namely claims for harm that a nation was obliged to redress under the law of nations.

Indeed, our research suggests that courts are asking anachronistic questions more generally regarding which torts qualify under the ATS. After Sosa, the key inquiry has been whether the alleged tort rises to the level of a specific, universal, and obligatory violation of the law of nations. Sosa suggested that courts should recognize only a narrow class of torts analogous to founding era violations of safe conducts, the rights of ambassadors, and piracy.445 Once courts move beyond universally condemned offenses like genocide, however, they have difficulty ascertaining which torts satisfy the Sosa standard.446 Some look to pre-Sosa precedent,447 while others apply a strict state action requirement on the theory that the law of nations originally governed relations between states and that state participation is necessary to give rise to a law of nations violation.448 Using these standards, lower courts have interpreted the ATS to preclude some suits by aliens against US citizens and corporations alike for tortious conduct.

446 See Sarei v Rio Tinto PLC, 650 F Supp 2d 1004, 1020–26 (CD Cal 2009) (concluding that torture, genocide and war crimes—but not environmental torts—are of universal concern).
447 See, for example, Presbyterian Church of Sudan v Talisman Energy, Inc., 582 F3d 244, 254–56, 259 (2d Cir 2009) (looking to Second Circuit cases decided prior to Sosa).
448 See Sinaltrainal v Coca-Cola Co, 578 F3d 1252, 1265 (11th Cir 2009) (stating that “ATS claims generally require allegations of state action because the law of nations are the rules of conduct that govern the affairs of a nation, acting in its national capacity”).
The statute was not originally restricted to a narrow class of torts that inherently violated the law of nations. Rather, it provided a means of redressing any and all intentional torts committed by US citizens against aliens. The reason is that, at the time the ATS was adopted, the United States’ failure to redress such injuries would have rendered it responsible to foreign nations for its citizens’ misconduct. The history of the ATS suggests that the First Congress enacted the statute to permit aliens to seek redress in federal court for any intentional harm inflicted by US citizens.

This section is not meant to resolve any of the difficult translation problems that adherence to the original meaning of the ATS poses for courts. As explained, the predicate law of nations for ATS jurisdiction has significantly transformed since 1789, a core underlying purpose of the the ATS (avoiding war) has largely dissipated, and the Supreme Court has long rejected the jurisprudential assumptions that surrounded general law in 1789. This section is simply meant to highlight that any historical approach to the ATS must begin with a proper understanding of its original scope.

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 all nations to redress intentional harms inflicted by their citizens on the citizens or subjects of foreign nations. A nation’s failure to provide such redress gave the other nation just cause for war. The First Congress was undoubtedly aware of these principles of the law of nations, and enacted both federal criminal statutes and the ATS in order to comply with them. From this perspective, current judicial approaches to the ATS rest upon misconceptions of its original meaning. In Sosa, the Supreme Court signaled that only a narrow handful of torts—analagous 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 requiring redress to avoid putting the United States in violation of the law of nations. Lower federal courts, following Sosa’s misguided historical
approach, have recognized ATS jurisdiction over claims that it was not originally meant to cover (for example, suits by aliens against other aliens for torts occurring outside the United States), and denied ATS jurisdiction over claims that it originally may have covered (for example, claims against corporations). 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 accord with the expectations of the First Congress.