The Diversity Theory of the Alien Tort Statute

MICHAEL G. COLLINS*

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INTRODUCTION

The history of archeology is replete with the unearthing of riches buried for centuries. Our legal history does not, however, offer a single archeological discovery of new, revolutionary meaning in reading an old judiciary enactment.

—Justice Felix Frankfurter**

Justice Frankfurter did not live to see the decision in Filartiga v.

* Professor of Law, Tulane Law School.
Pena Irala. There, the Second Circuit Court of Appeals dusted off an almost 200 year-old jurisdictional statute and concluded that a federal court could hear—as a case “arising under” federal law within the meaning of Article III—a suit brought by two Paraguayan citizens against a Paraguayan official over an act of political torture that took place in Paraguay. Despite Frankfurter’s skepticism regarding such discoveries, legal scholarship has been kind to Filartiga and its now familiar chain of reasoning: (1) The Alien Tort Statute (ATS), first enacted as part of the 1789 Judiciary Act, permits an alien to bring suit in federal court “for a tort only in violation of the law of nations”; (2) the law of nations now proscribes certain egregious violations of human rights, including official torture; (3) the law of nations, like many other aspects of international law, is a species of federal common law; (4) therefore, an alien’s tort suit alleging a gross violation of fundamental human rights “arises under” federal law within the meaning of Article III of the Constitution (thus making the alien status of the defendant irrelevant).

There was a brief flicker of judicial dissent to some of these conclusions in the various opinions in Tel-Oren v. Libyan Arab Republic, but none of the opinions questioned the federal nature of the law of nations issues present in Filartiga. Recently, however, some scholars—including Curtis Bradley—have begun to attack the soundness of decisions like Filartiga by focusing on what may be their weakest link: the assumption that customary international law or the law of nations is genuinely federal law, especially in its newest guises. The attack has apparently struck a nerve, as will (one suspects) Bradley’s

1. 630 F.2d 876 (2d Cir. 1980).
2. Act of Sept. 24, 1789, ch. 20, § 9, 1 Stat. 73, 77.
3. To get a sense for the largely positive academic response to Filartiga, see the collection of articles in THE ALIEN TORT CLAIMS ACT: AN ANALYTICAL ANTHOLOGY (Ralph G. Steinhardt & Anthony D’Amato eds., 2001), and the description of other scholarship in the Appendix (id. at 405-31).
5. For a full treatment of the scholarly challenge posed by Bradley and others, see the discussion by Ernest Young in this Symposium. Ernest A. Young, Sorting Out the Debate Over Customary International Law, 42 VA. J. INT’L L. 365 (2002).
current offering. Although there have been other historical studies of the ATS, none before Bradley's in this Symposium has made a sustained inquiry into the question of whether the framers of the Constitution (or the ATS) would have included the unwritten law of nations within Article III's grant of jurisdiction over cases "arising under" federal law, and thus whether enforcement of the law of nations under the ATS could be justified under this grant.

Although I am inclined to agree with the general thrust of his argument that the law of nations was not considered to be among the "Laws of the United States" referenced in Article III, I think that there was some uncertainty (or confusion) as to whether cases implicating the law of nations would have been thought to arise under federal law or the Constitution. (Indeed, this uncertainty is borne out by one of the earliest full-dress Congressional discussions of the federalness of the "old" law of nations for Article III purposes, albeit a half century later.)

Nevertheless, such early uncertainty about the federal nature of the law of nations itself suggests the wisdom of awaiting clearer input from the political branches before using the ATS to enforce, as federal law, the "new" law of nations associated with cases like Filartiga. The argument becomes even stronger when this uncertainty is coupled with the evidence adduced by Bradley suggesting that the law of nations was thought to be implemented through certain provisions of Article III, other than that for cases arising under federal law.

Nevertheless, I do not read the ATS, as Bradley does, as requiring "alienage diversity" in all cases—i.e., the presence of a U.S. citizen as a defendant. It does little damage to his thesis to assume that the statute was understood as enforcing those Article III provisions designed to implement the law of nations, including admiralty jurisdiction, the provision for jurisdiction over ambassadors, other public ministers and consuls, as well as the alienage diversity provision. As a consequence of this friendly amendment, there may be some cases that would come within the ambit of the ATS (as originally understood) that would pit one alien against another. But such cases, perhaps of limited importance today, would likely not have been thought of as arising under federal law within the meaning of Article III.

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8. See infra text accompanying notes 148-171.
I. IMPLEMENTING THE LAW OF NATIONS UNDER ARTICLE III

A. Non-enforcement and the Confederation

There can be little doubt that the constitutional framers placed a high priority on creating national institutions and a governmental structure that would secure the new Republic’s place in the international community and avoid offense to other nations or cause for war, for the national government’s weakness under the Articles of Confederation had put a considerable strain on foreign relations.9 For example, the obligation to rely on the states to execute federal policy made enforcement of treaties difficult, while judicial sanction of violators of the law of nations was hit or miss.10 As Bradley notes, Blackstone and other eighteenth-century authorities considered a sovereign’s failure to remedy a violation of the law of nations “done by one of his subjects” as implicating the non-remedying nation in the underlying violation, thus threatening world peace.11

In addition, state courts had proved reluctant to enforce private debts owed foreigners, or to allow them to reclaim property confiscated during and after the Revolutionary War.12 These events, too, were a source of international tension. A treaty with England in 1783 designed to address those failures proved ineffective, as debts due under the treaty “were never recovered, until after the adoption of the constitution, by suits brought in the national courts.”13 The Confederation era was

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11. Blackstone stated that “where the individuals of any state” violate the law of nations, “the government under which they live” has a duty to respond. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 68 (1769); see Curtis A. Bradley, The Alien Tort Statute and Article III, 42 VA. J. INT’L L. 587, 624 (2002).
13. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1692, at 569-70 n.1 (1833); see also Ware v. Hylton, 3 U.S. (3 Dall.) 199, 270-71 (1796)
also witness to the much ballyhooed assault of the French Consul General Marbois\textsuperscript{14} by a French citizen in 1784, and the later invasion of the New York apartment of the Dutch Ambassador by local police.\textsuperscript{15} Congress had no power to punish such violations, however, or to coerce the states to punish them—it could only exhort. The imposition of civil liability for law of nations violations was also largely out of the hands of the national government.\textsuperscript{16}

The helplessness of the national government in this respect was revealed in what some have considered to be the forerunner of the Alien Tort Statute: the Confederation era Congress’s recommendation in 1781 that the states enact laws for punishing and otherwise remedying infractions of the laws of nations.\textsuperscript{17} Congress’s main worry was that the U.S. could not effectively disavow (to the offended “prince”) a violation of the law of nations committed “by a citizen of the United States,” absent a provision for “regular and adequate punishment.” In addition to this effective-disavowal argument, Congress indicated that for the avoidance of war the U.S. might have to compensate injured victims, in which case the wrongdoing “citizen” should have to make effective reimbursement to the U.S. out of his own pocket.\textsuperscript{18}

Congress’s first recommendation was for states to criminalize a handful of offenses against the law of nations. According to Congress, the “most obvious” such offenses were violations of “safe conducts” or passports, “infractions of the immunities of ambassadors” (both on Blackstone’s familiar list of law of nations violations),\textsuperscript{19} treaty

\(\text{(Opinion of Iredell, J.). Among other things, the 1783 treaty provided that British creditors would “meet with no lawful impediments” in collecting debts contracted for before the treaty, and that confiscated estates belonging to “real British subjects” would be restored and that there would be no future confiscations. Treaty of Peace, Sept. 3, 1783, U.S.-Gr. Brit., art. IV-V, 8 Stat. 80, 82, T.S. No. 104.}\)

\(\text{14. See Republica v. DeLongchamps, 1 U.S. (1 Dall.) 111 (1784). On the notoriety of the Marbois incident among the founders, see Casto, supra note 7, at 492-93 & n.143.}\)

\(\text{15. DEPT OF STATE, 3 THE DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES OF AMERICA 443 (1837).}\)

\(\text{16. There was federal appellate power in cases of “prize” which involved the legality of captures of ships and enemy cargo during wartime, and which would implicate rights of foreigners and the law of nations. See ARTS. OF CONFEDERATION art. IX, § 1 (1777). Congress also exercised a power granted in article IX of “appointing courts for the trial of piracies and felonies on the high seas,” by appointing state courts to hear such cases. Michael G. Collins, Article III Cases, State Court Duties, and the Madisonian Compromise, 1995 WIS. L. REV. 39, 119-20 (1995).}\)

\(\text{17. 21 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 1137 (Gaillard Hunt ed., 1912) (Nov. 23, 1781).}\)

\(\text{18. Id.}\)

\(\text{19. Blackstone’s familiar list included “violations of safe-conducts” or passports, “infringement of the rights of [a]mbassadors” and “piracy.” 4 BLACKSTONE, supra note 11, at 68-71.}\)
violations, and acts of hostility against those “such as are in amity; league or truce with” the United States. The states were also urged to establish a court, or vest one already existing, with power to resolve these and other law of nations offenses. At the tail end of these recommendations Congress added a proposal for the states’ creation of a civil remedy for violations of the law of nations in favor of the victim against the wrongdoer, and another for suits by the U.S. for reimbursement against citizen wrongdoers. Whether the resolution can be read as supporting aliens’ suits against non-citizens as well as citizens is the subject of dispute, although, as Bradley notes, it generally has not been so read.

While these pre-Constitutional events, however interpreted, cannot determine the understanding of the framers of Article III or the ATS, they show concern for addressing law of nations violations against aliens, and the need for a federal role in securing criminal sanctions as well as civil relief. But as Justice Story later noted, the 1781 proposal “like other recommendations, was silently disregarded, or openly refused.” Subsequent efforts fared no better.

B. Implementation and the Constitution

The Constitution gives Congress various powers to regulate matters of international concern without having to enlist the states’ services, including a role in treaty making, the power to regulate commerce with foreign nations, the power to declare war, and a power to define and punish piracy, high seas felonies, and offenses against the law of nations. The Supremacy Clause even makes pre-existing treaties the

20. Id. at 68.
21. See Bradley, supra note 11, at 622-23. As I see it, the private suit provision must have been designed to enforce either of Congress’s two rationales mentioned in its recommendations, or both: U.S. reimbursement/avoidance-of-war or effective disavowal. If the former, it was expressly associated with citizen violations of the law of nations; but if the latter, Congress also meant to limit it to cases where the U.S. could not effectively disavow acts “by a citizen of the U.S.,” as it clearly stated earlier in the resolution. In short, both rationales for the various recommendations in 1781 appear to understand citizen violations.
22. 3 STORY, supra note 13, at 523 n.3.
23. A nearly similar fate befell a Marbois-inspired resolution, see 28 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 315 (John C. Fitzpatrick ed., 1933) (Apr. 27, 1785), that Congress recommend to the states that they enact laws to punish such insults. And a last-ditch effort by Congress to have states repeal laws frustrating enforcement of U.S. treaties like that of 1783 was effectively mooted by the adoption of the Constitution. See infra note 26.
24. U.S. CONST. art. II, § 2, cl. 2. Late in the Constitutional Convention the Executive was given the power, with the advice and consent of the Senate, to make treaties and appoint ambassadors. See Rakove, supra note 9, at 4-13.
supreme law of the land. In addition, the Constitution takes states out of the business of negotiating treaties and authorizing the capture of enemy vessels, and places limits on their ability to provide local debtor relief. The judicial article itself was designed with particular attention to law of nations concerns, with its grants of admiralty jurisdiction, alienage jurisdiction, ambassador cases, and cases arising under treaties. As discussed below, what seems striking is how often references to the law of nations were made in connection with these judicial grants during the framing and ratification, but hardly at all in the discussion of jurisdiction over cases arising under federal law.

For example, Article III includes a grant of admiralty jurisdiction in substantial part because maritime cases, both in their public law and private law dimensions, “so generally depend on the laws of nations, and so commonly affect the rights of foreigners.” Prize jurisdiction—“the most important part of maritime causes according to Hamilton”—was exercised according to the law of nations and was already partially secured to the federal government under the Articles of Confederation. Prize jurisdiction typically involved captures by American citizens of ships or cargoes belonging to foreign nationals, given that prize cases were generally litigated in the courts of the captor. Justice Story later spoke of prize jurisdiction as “a necessary appendage to the power of war, and negotiation” and argued that federal jurisdiction must exist over such cases lest “the peace of the whole nation” be jeopardized by the actions of “one of its members.” But even the private side of admiralty, then largely limited to the oceans, was understood as likely involving foreign parties, so international repercussions could also arise from a decision to arrest a foreign vessel.

26. U.S. CONST. art. VI, cl. 2; see WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 324 (2d ed. 1829) (noting that it was the Constitution’s provision for federal judicial power that resolved the problem of treaty enforcement).

27. U.S. CONST. art. I, § 10, cl. 1 (preventing states from making paper money lawful payment for debts and proscribing retrospective laws impairing contractual obligations); see THE FEDERALIST NO. 44, at 300-01 (James Madison) (Jacob E. Cooke ed. 1961) (noting foreign policy implications attending debtor relief by states).

28. THE FEDERALIST NO. 80, supra note 27, at 538 (Alexander Hamilton). On a motion to eliminate any constitutional reference to lower federal courts at the constitutional convention, James Wilson objected, urging that admiralty presented “a scene in which controversies with foreigners would be most likely to happen.” 1 Farrand, supra note 10, at 124.

29. THE FEDERALIST NO. 80, supra note 27, at 538 (Alexander Hamilton).

30. See THE FEDERALIST NO. 83, supra note 27, at 568 (Alexander Hamilton) (recognizing that prize cases turned on the law of nations); United States v. La Jeune Eugenie, 26 F. Cas. 832, 844 (C.C.D. Mass. 1822) (No. 15,551) (“Cases of prize, which are emphatically under the administration of the law of nations. . .”) (Story, Circuit Justice).

31. See United States v. Peters, 3 U.S. (3 Dall.) 121, 126 (1795).

32. 3 STORY, supra note 13, at 529 (§ 1662).
in connection with a civil proceeding.\textsuperscript{33}

Suits affecting ambassadors, other public ministers, and consuls constituted another category of cases closely linked to law of nations issues.\textsuperscript{34} Indeed, the law of nations provided ambassadors and public ministers with immunities from process that limited their ability to be sued for violations of "municipal" law.\textsuperscript{35} As noted above, failure to redress injuries to these parties could also implicate law of nations concerns. The instances of assaults on foreign dignitaries often recounted in discussions of the ATS, therefore, may not only have been an impetus for the constitutional grant of power to Congress to criminalize such actions,\textsuperscript{36} but also for ensuring the availability of a forum for any claim these parties might bring or have brought against them, including civil claims. By placing such cases within the original jurisdiction of the Supreme Court, Article III insured that a federal forum would be available if lower federal courts went unrepaired or were given minimal jurisdiction.\textsuperscript{37}

As Bradley argues, Article III’s alienage diversity provision, which extended the federal judicial power to suits between U.S citizens and foreign citizens, was itself a by-product of law of nations concerns and concerns for "peace with foreign nations."\textsuperscript{38} The law of nations seems to have operated on two levels here: foreigners needed an impartial forum for cases directly raising law of nations questions (including claims that the law of nations had been violated); and foreign citizens needed

\textsuperscript{33} See generally Jonathan M. Gutoff, Original Understandings and the Private Law Origins of the Federal Admiralty Jurisdiction: A Reply to Professor Castro, 30 J. MAR. L. & COM. 361, 370-74, 398-99 (1999) (discussing founding era authority); 3 STORY, supra note 13, at 531-32 (§ 1664) (providing for federal jurisdiction in non-prize admiralty cases was to make matters “more satisfactory to foreigners”).

\textsuperscript{34} See RAWLE, supra note 26, at 108 (noting that "the most prominent subjects" under the law of nations “relate to the persons and privileges of ambassadors”).

\textsuperscript{35} See 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 37-39 (1826). Consuls were not so lucky, being amenable to ordinary process in courts of competent jurisdiction, unlike ambassadors and ministers. See id.; see also 3 STORY, supra note 13, at 522-23 (§§ 1653-1654) (making a similar observation).

\textsuperscript{36} U.S. CONST. art. I, § 8, cl. 10 (giving Congress the power to "define and punish ... offenses against the Law of Nations"); see also 1 Farnmd, supra note 10, at 25 (noting paucity of state laws “to punish the offender” who violated ambassadorial rights).

\textsuperscript{37} See Collins, supra note 16, at 107-110.

\textsuperscript{38} 2 Elliot’s DEBATES, supra note 10, at 493 (statement of James Wilson); see also 4 id. at 158 (statement of William R. Davie) (linking such cases to the “peace of the Union”); cf. James Monroe, Some Observations on the Constitution, in 5 Storing, supra note 10, at 278, 303-04 (noting the "questionable propriety" of alienage jurisdiction but adding that "[t]he principal argument in its favor appears to be that of securing the United States from the danger of controversies under the partial decisions of those individual states"). Similar concerns underlay Article III’s provisions for states suing foreign citizens or foreign countries. See THE FEDERALIST NO. 80, supra note 27, at 541.
nondiscriminatory access to remedies for ordinary disputes with U.S. citizens—dual concerns present in the grants of ambassador and admiralty jurisdiction as well. In both areas state courts had proved less than reassuring, and yet the U.S. was answerable for any denial of justice in either area. The failure to enforce ordinary property and contract rights of foreigners that were specifically secured by treaties would only heighten any law of nations problems. In this respect, the alienage diversity provision was closely linked to the enforcement of treaty obligations and the interests of foreigners. Although Article III independently grants jurisdiction over cases arising under treaties (thus making alienage jurisdiction somewhat redundant in this respect), a typical beneficiary of a U.S. treaty would be a foreign party, making his adversary a U.S. citizen.

That the admiralty, ambassadorial, alienage, and treaty provisions were closely associated with implementation of the law of nations is important in another respect. If the law of nations was genuinely federal law, there would be somewhat less need to spell out the individual instances of party-based and subject matter-heads of jurisdiction in Article III. Indeed, one might even explain the rationale for listing these other party-based grants and admiralty as grounded in part in the recognition that the unwritten law of nations would not be federal law giving rise to jurisdiction pursuant to the federal question provisions of Article III. This recognition, in turn, helps explain why several early

39. See 2 Elliot’s DEBATES, supra note 10, at 493 (statement of James Wilson) (noting that sovereigns were bound to provide justice in ordinary debt cases involving a citizen and a foreigner); see also Kenneth C. Randall, Federal Jurisdiction Over International Law Claims: Inquiries into the Alien Tort Statute, 18 N.Y.U. J. INT’L L. & POL. 1, 20-21 (1985) (discussing how offense might arise from a failure to remedy).

40. See, e.g., 4 Elliot’s DEBATES, supra note 10, at 158-59 (statement of William R. Davie); 2 id. at 493 (statement of James Wilson).

41. 1 Farrand, supra note 10, at 238 (referring to the "security of foreigners where treaties are in their favor"); see 2 Elliot’s DEBATES, supra note 10, at 489-90, 492-93 (statements of James Wilson) (linking treaty enforcement and alienage jurisdiction); see also Bradley, supra note 11, at 615-18 (noting alienage-treaty enforcement link); cf. 3 STORY, supra note 13, at 569-70 (§ 1692) (linking alienage jurisdiction to the promotion of commerce with foreign nations); 3 Elliot’s DEBATES, supra note 10, at 583 (statement of James Madison) (observing that foreigners may be less likely to trade or reside in U.S. because of actions of state courts).

42. From a modern perspective, it might seem odd that alienage diversity could be envisioned as a vehicle for federal court treaty enforcement; but a similar possibility attended enforcement of the Constitution through the U.S. citizen diversity provision for citizens of different states. See Ann Woolhandler, The Common Law Origins of Constitutionally Compelled Remedies, 107 YALE L.J. 77, 89-111 (1997).

43. See, e.g., 4 Elliot’s DEBATES, supra note 10, at 158 (statement of William R. Davie) (stating that Treaties of the U.S. “involve in their nature not only our own rights, but those of foreigners”).

44. Cf. Burley, supra note 7, at 468 (concluding that the ATS can be justified “only as an exercise of the federal question” provision of Article III).
proposals for the judicial article included language referring to the law of nations alongside language providing for certain cases arising under federal laws and treaties, only to disappear once the various party-based and other nonfederal question grants came to be formulated, while language referencing treaties and federal laws remained.\footnote{See, e.g., 3 Farrand, supra note 10, at app. 117, app. 608 (indicating that the Pinckney plan sought federal jurisdiction only over the “trial of questions arising on the law of nations, the construction of treaties, or any of the regulations of Congress in pursuance of their powers”); 2 id. at 157 & n.15 (indicating that version of William Paterson’s New Jersey plan surfaced in the Committee of Detail made provision for all cases of piracy, capture, high-seas felonies, and ambassador cases plus “all Cases in which Foreigners may be interested in the Construction of any Treaty, or which may arise on any Act for regulating Trade or collecting Revenue or on the Law of Nations, or general commercial or marine Laws”); see also 1 id. at 244 (providing Madison’s notes on Paterson’s plan but without any reference to the trio: law of nations or general commercial or marine laws); infra note 47. \textit{But see} Louis Henkin, \textit{International Law as Law in the United States}, 82 Mich. L. Rev. 1555, 1560 n.22 (1984) (referring to the Pinckney and Paterson plans and stating, “[t]he law of nations was linked with treaties in earlier drafts of what became article III of the Constitution; there is no evidence that its elimination was intended to deny federal status to international law”\textstatus{).\footnote{See Bradley, supra note 11, at 598-99.}}}

C. \textit{Reading} Federalist 80

It is this entire group of jurisdictional provisions, not just alienage, to which I believe Alexander Hamilton refers in \textit{Federalist 80} in his discussion of heads of Article III that relate to “the Peace of the Confederacy.” As Bradley rightly observes, this peace-of-the-confederacy justification is clearly \textit{not} linked to cases arising under federal laws and the Constitution, for which Hamilton provides a different rationale.\footnote{2 Farrand, supra note 10, at 39 (Journal); see id. at 46 (Madison); id. at 132-33 (Committee of Detail); id. at 146-47 (Committee of Detail). During the framing of Article III, cases “arising under laws passed by the general legislature” (or “the Natl. laws”) was a category apart from “questions that involve the National peace and harmony”; the two categories, moreover, made up the entirety of the agreed content of the federal judicial power before the...} Rather, Hamilton’s focus in this section is on justifying federal jurisdiction over matters in which constituent “parts” of the Union (the states) might otherwise subject the “whole” to foreign reprisal. “As the denial of or perversion of justice by the sentences of courts, . . . is with reason classed among the just causes of war, it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned.” This division between cases arising under federal law and those relating to the peace of the confederacy parallels the drafting process for Article III, which also resulted in two broad groupings—“cases arising under laws passed” by Congress and such cases “as involve the National peace and harmony.”\footnote{47. See Bradley, supra note 11, at 598-99.} It was the latter grouping that would be subdivided into the
various party-based grants that implicated law of nations issues along with admiralty.\footnote{48}

Importantly, Hamilton explains that there is no point in trying to distinguish between cases "arising upon treaties and the law of nations" and more garden-variety cases in which an alien is a party, because the denial of justice even in the latter actions might also be seen as "an aggression upon his sovereign."\footnote{49} Because "national questions" are so often involved in suits "in which foreigners are parties," Hamilton concludes that it makes sense to provide for federal jurisdiction "in all those in which they are concerned." I agree with Bradley that it is doubtful that Hamilton is saying Article III's alienage provision confers jurisdiction in all suits involving aliens, including, for example, ordinary suits at common law arising between two aliens;\footnote{50} but Hamilton is not referring just to cases in which an alien is diverse from a U.S. citizen. His language is reminiscent of early constitutional proposals that focused on creating jurisdiction over "all" cases involving foreign citizens.\footnote{51} As those proposals were eventually made more specific by

\footnote{48} See supra notes 45 & 47 (describing drafting process); see also Stewart Jay, The Status of the Law of Nations in Early American Law, 42 Vand. L. Rev. 819, 830 (1989) (observing that references in earlier drafts to the law of nations disappeared and that the Constitution "parceled matters dealing with the law of nations into the separate categories of jurisdiction now appearing in article III"); Arthur M. Weisburd, The Executive Branch and International Law, 41 Vand. L. Rev. 1205, 1221-23 (1988) (making a related point and noting that "the federal question grant [was] simply not relevant" to jurisdiction over law of nations matters); Young, supra note 5, at 426-27. For a contrary reading of Federalist No. 80, see, for example, Anthony D'Amato, The Alien Tort Statute and the Founding of the Constitution, 82 Am. J. Int'l L. 62, 65 (1988), and Trajano v. Marcos, 978 F.2d 493, 502 (9th Cir. 1992) (stating, in partial reliance on Federalist No. 80, that "[t]here is ample indication" that Article III's "arising under" provision was meant to cover "all cases which concern foreigners").

\footnote{49} See supra note 27, at 536 (Alexander Hamilton). The coupling of suits involving aliens with "peace of the Union" and avoidance of giving "just causes of war" through a denial of justice was not unique to Hamilton. Elliot's Debates, supra note 10, at 158-59 (statement of William R. Davie).

\footnote{50} Before the constitutional convention, James Madison also stated that any federal judicial power should extend to "all cases which concern foreigners, or inhabitants of other States." Letter from James Madison to Edmund Randolph (Apr. 8, 1787), in 2 The Papers of James Madison 632-33 (Henry D. Gildin ed., 1840). But Madison may have no more meant to urge jurisdiction in a case between two aliens than in a case between two inhabitants of another state—i.e., his two scenarios presuppose an in-state citizen. Similarly, the statement of William Grayson, noted by Bradley, supra note 11, at 619, to the effect that Article III might place foreigners in a "better" position than "our own" citizens did not necessarily refer to allowing aliens to sue each other in federal court. Rather it may simply have acknowledged that federal courts might give aliens relief in a suit against a citizen when a state court might not give it in a suit between co-citizens. See also infra note 51.

\footnote{51} Hamilton's plan proposed appellate jurisdiction over "all causes... in which the citizens of foreign nations are concerned." 3 Farrand, supra note 10, at 618; see id. at 626 (reproducing
various grants in Article III, Hamilton is more likely referring to the relevant provisions of Article III that could pick up aliens as parties to litigation and which might implicate law of nations concerns, not just the alienage diversity provision.

I believe that this is shown by the remainder of Federalist 80. Toward the end of the essay, Hamilton refers to cases involving "treaties" and "ambassadors, other public ministers and consuls" as belonging to the same class as those involving "the preservation of the national peace"—i.e., the same category in which he places alienage diversity. The provision for ambassadorial jurisdiction would obviously implicate cases in which foreigners are parties, including questions of treaties and the law of nations. And aliens would also be in the largest class of those seeking to vindicate rights under a U.S. treaty whose interpretation would also implicate the law of nations. Similarly, although Hamilton offers an independent justification for admiralty jurisdiction elsewhere in Federalist 80, he expressly concludes that those cases too belong in the peace-of-the-confederacy category. In short, it is possible to make sense of Hamilton's (and others') language referring to "all" cases in which aliens are concerned as referring to all those Article III provisions designed to safeguard national peace and in

draft with similar language). Edmund Randolph's Virginia plan proposed original and appellate jurisdiction over piracies and high seas felonies and captures, "cases in which foreigners or citizens of other States applying to such jurisdictions may be interested," revenue collection, impeachments and a catch-all "questions which may involve the national peace and harmony." 1 id. at 22. Paterson's plan included appellate jurisdiction over "all Cases in which Foreigners may be interested in the Construction of a Treaty." 2 id. at 157.

52. THE FEDERALIST NO. 80, supra note 27, at 540 (Alexander Hamilton); see also William S. Dodge, Congressional Control of Supreme Court Appellate Jurisdiction: Why the Original Jurisdiction Clause Suggests an "Essential Role," 100 YALE L.J. 1013, 1025-26 (1991) (viewing Federalist No. 80 as addressed to both alienage and ambassador cases). For other examples of those who followed Hamilton's linkage of treaty, alienage, ambassadorial cases and national peace and harmony, see Daniel J. Meltzer, The History and Structure of Article III, 138 U. PA. L. REV. 1569, 1581 n.38 (1990).

53. THE FEDERALIST NO. 80, supra note 27, at 538 (Alexander Hamilton) (stating that such suits "so generally depend on the laws of nations, and so commonly affect the rights of foreigners, that they fall within the considerations which are relative to the public peace").

54. See, e.g., 3 Elliot's DEBATES, supra note 10, at 570-71 (statement of Edmund Randolph) (stating that "to perpetuate harmony" with foreign powers, the Constitution covered treaty cases, ambassador cases, and "all those concerning foreigners"); id. at 530 (statement of James Madison) (stating that the "general policy" of Article III is to "prevent all occasions of having disputes with foreign powers. . . and remedy partial decision"); Essay by a Georgian, GAZETTE OF THE STATE OF GEORGIA, Nov. 15, 1787, reprinted in 5 Storing, supra note 10, at 129, 135 (favoring federal jurisdiction over all cases involving "foreign states, foreign citizens or subjects"); Essays of Brutus No. 15, NEW YORK JOURNAL, Mar. 20, 1788, reprinted in 2 id. at 437 (noting Article III's provision for "all cases in which a foreigner is a party," yet speaking elsewhere only of citizen-foreign suits); see also supra note 50 (discussing statements of Madison and Grayson); supra note 51 (discussing Hamilton, Randolph, and Paterson plans).
which foreigners might be parties, including alienage diversity.

D. The Judiciary Act of 1789

The Judiciary Act of 1789\textsuperscript{55} allocated the jurisdiction discussed above in a way that left at least some cases that might raise law of nations questions (or involve aliens) out of the federal courts altogether, but most such cases were included in one fashion or another. Article III's ambassador jurisdiction was secured in the Supreme Court as an original matter, although jurisdiction over suits brought by such parties was nonexclusive.\textsuperscript{56} Admiralty jurisdiction was conferred as an original matter on the district courts, exclusive of state courts. Jurisdiction over cases implicating the construction of treaties was secured by appellate review of state court decisions in favor of persons claiming treaty-based rights under section 25 of the Act by the Supreme Court, as well as originally in the lower federal courts through the ATS and alienage jurisdiction. But alienage jurisdiction was only partially implemented. As scholars have pointed out,\textsuperscript{57} the circuit courts' amount-in-controversy requirement left many debt, property, and tort cases between aliens and citizens for the state courts in the first instance. The ATS, however—which lacked an amount in controversy requirement—kept some subset of those cases that the alienage provision would have excluded for amount in controversy reasons in federal court (at the district court level).\textsuperscript{58} Whether the ATS was meant to include other, non-diversity cases brought by aliens (such as suits by ambassadors) is a subject that I treat in Part III below.

It seems that the potential distinction that Hamilton made in *Federalist* 80 between (a) first-tier cases involving aliens (as he put it) "arising upon treaties and the law of nations"; and (b) second-tier cases involving aliens arising on other matters—a distinction which he said did not matter for Article III purposes—apparently did matter when it came to the overall structure of the 1789 Judiciary Act. Cases brought by (non-ambassadorial) foreigners against U.S. citizens alleging

\footnotesize{\textsuperscript{55} Act of Sept. 24, 1789, ch. 20, 1 Stat. 73 (1789).

\textsuperscript{56} Under section 13, jurisdiction in suits against ambassadors and other public ministers was original and exclusive in the Supreme Court; suits by them were original but nonexclusive, as was the case with all suits by or against consuls. See id. at 80-81. To the extent states instituted criminal proceedings against foreign diplomats or others in violation of exclusive federal jurisdiction, the only policing mechanism under the 1789 statute would be on direct review of a conviction. See Davis v. Packard, 32 U.S. (7 Pet.) 276 (1833). There was originally no ability to enjoin or otherwise arrest a prosecution by way of habeas corpus. See Ex parte Cabrera, 4 F. Cas. 964 (C.C.D. Pa. 1805) (No. 2,278) (Washington, Circuit Justice), see also infra Part IV.

\textsuperscript{57} Holt, supra note 12, at 1487-88; Johnson, supra note 12, at 18-19.

\textsuperscript{58} Casto, supra note 7, at 507-08.}
ordinary common law actions which could not meet the $500 requirement missed out on a federal forum. Such cases were the very ones that made up Hamilton's second class of alienage cases—a class he did not want to exclude from Article III for risk of state courts causing offense by denying foreign plaintiffs a remedy. In Congress, the danger of offending state courts by not letting them hear these ordinary and monetarily less significant cases in the first instance proved weightier, and compromise prevailed. Yet, even in these second-class alienage cases, if a state court denied an alien's right to recover a debt or denied an alien's claim to property in violation of a U.S. treaty, a federal forum review was also guaranteed by the 1789 Judiciary Act.

Although Article III was imperfectly implemented, the ATS was important in helping the 1789 Judiciary Act protect against the "denial of justice" to aliens and avoid a just cause for war. Cases under the ATS involved aliens whose claims easily fit within Hamilton's first tier as "arising under treaties or the law of nations." Between the ATS, admiralty, and ambassadorial jurisdiction (which could pick up a great many cases implicating law of nations questions, including torts in violation of the law of nations), the vast majority of cases implicating law of nations questions could be brought by an alien in an original federal forum, without any amount in controversy requirement. And, where diversity was present, ATS suits of sufficient pecuniary moment could also go to the circuit courts. There was, therefore, little risk of

59. These excluded cases would have encompassed many ordinary suits for debts owed to British creditors that states had sometimes refused to enforce, treaties notwithstanding. Supra note 13. In addition, the ATS would not cover cases raising law of nations questions but not alleging a tort in violation of the law of nations.


61. Act of Sept. 24, 1789, ch. 20, § 25, 1 Stat. 73, 85-87 (1789). Thus, any law of nations questions surrounding a treaty's interpretation would be addressed by the Supreme Court, at least in a case of the treaty's underenforcement. See Fairfax's Devises v. Hunter's Lessee, 11 U.S. (7 Cranch) 603 (1813). In addition, debt or other claims of aliens that were defeated because of a contract-impairing law could also be reviewed directly.

62. But see Burley, supra note 7, at 465-69. Anne-Marie Slaughter (formerly Burley) argues against such a reading in order to show that the statute, even originally, had higher (and strikingly modern) purposes, beyond ambassadorial protection or keeping the U.S. out of war by denials of justice to aliens. Apart from the dearth of evidence for such an aspirational reading, the territorialist views of the framers make any such reading highly unlikely, at least as an originalist matter. See infra note 112.

63. See infra text accompanying note 128.
"unjust verdicts" in cases brought by aliens alleging violations of the law of nations. But there remained some residuum risk of offense if a state court rendered an "unjust" verdict in a run-of-the-mill case that turned on state law, or if a case directly implicated a law of nations question but did not involve a "tort only in violation of the law of nations" (and could not satisfy the admiralty, alienage, or ambassadorial provisions).

One last provision of the 1789 Act that helped to implement the law of nations in ATS cases was section 34 of the judiciary statute—the Rules of Decision Act.64 If the law of nations was indeed federal law it would have applied in common law actions in federal courts as a matter of the Supremacy Clause and through the language of section 34, which declares that if "the constitution, treaties or statutes" of the U.S. "otherwise require or provide," state law will not apply.65 Nevertheless, it is possible, if not preferable, to read section 34 as having permitted the unwritten law of nations to apply in appropriate cases without supposing the law of nations to be federal law, or that federal statutes or the Constitution somehow required or provided for its application. Section 34 only speaks of state laws as supplying the relevant decisional rule "in cases where they apply." As William Fletcher has shown, cases implicating "general law" principles applied by the early federal courts in the exercise of their jurisdiction were effectively treated as cases in which state law simply did not apply.66 Under this view, the law of nations operated as an independent body of general law, neither federal nor state,67 that supplied a rule of decision in cases within the federal courts' jurisdiction, state law to the contrary (perhaps) notwithstanding.68

64. Act of Sept. 24, 1789, ch. 20, § 34, 1 Stat. 73, 92 (1789). The provision did not purport to apply to admiralty cases.
65. Obviously, the law of nations is not a federal statute (or a treaty or the Constitution), but that might not answer the arguably separate question whether the Constitution (or a statute or treaty) "requires" or "provides" for the application of the law of nations in a given case.
66. William A. Fletcher, The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance, 97 HARV. L. REV. 1513, 1527 (1984) (noting that the proper distinction was "local" (in which case state law applied) versus "general" (in which case it did not)); cf. Peter S. DuPonceau, A Dissertation on the Nature and Extent of the Jurisdiction of the Courts of the United States 101 (1824) (stating that federal courts "are bound to take the common law as their rule of decision whenever other laws, national or local, are not applicable").
67. Stewart Jay, Origins of Federal Common Law: Part Two, 133 U. PA. L. REV. 1231, 1322 (1985) ("[A]dmiralty and the law of nations were considered to be neither state law nor laws of the United States."). I therefore disagree with Bradley's suggestion that the 1789 Congress would have understood state law to apply in favor of the law of nations in federal court under section 34. See Bradley, supra note 11, at 601-02; see also infra note 68.
68. See A True Federalist, INDEPENDENT CHRONICLE, Mar. 2 & 6, 1797, in 5 THE
II. THE UNCERTAIN STATUS OF THE LAW OF NATIONS

To say that the law of nations might be protected primarily by constitutional grants of jurisdiction other than Article III’s provision for federal question jurisdiction does not necessarily mean that the law of nations was not perceived as among the federal “laws” of which Article III speaks. Treaties, after all, can be enforced through common law actions brought under alienage diversity jurisdiction (or potentially the ATS), and such cases can also be within the general “arising under” provisions of Article III. But I am inclined to agree that as an historical matter it is doubtful whether the unwritten law of nations was considered to be federal law rather than general law, though the question is not without difficulty.

More importantly, even if, in 1789, the law of nations was seen as falling into one of the various categories of general law, that does not answer the question of how it should be treated today, a problem Ernest Young addresses in this Symposium. In the modern era, the Court has transformed some previously general law principles into federal common law largely because cases like Erie Railroad v. Tompkins seem to offer little room for independent bodies of law—neither state nor federal—to operate of their own force in federal court. If the framers of the ATS understood that state law would not apply in a particular area, one ought to consider how (or whether) to give effect to that understanding, even if they also once supposed that federal law would not apply either. Thus, there may be room to argue that certain features of the law of nations—particularly the “old” law of nations, such as the immunities of foreign officials or foreign states—might be candidates for federal common law today, even though many of them have since been addressed by statute or treaty. But for many of the same reasons that revisionist scholars have argued, the “new” law of nations—like contemporary international law in general—may present a

69. See Young, supra note 5.
70. Admiralty is the obvious example. Even here, however, there is doubt about the extent to which admiralty law ought to be considered genuinely federal law in either the Supremacy Clause or Article III sense. Ernest A. Young, Preemption at Sea, 67 GEO. WASH. L. REV. 273, 312-25 (1999).
71. 304 U.S. 64 (1938).
72. See Henkin, supra note 45, at 1555-61 (agreeing that, pre-Erie, the law of nations was common law, not federal law or state law).
73. See, e.g., Neuman, supra note 6, at 390-91 (discussing consular immunity). But cf. Young, supra note 70 (rejecting such a translation to either state or federal law).
less compelling case for treatment as federal common law.74 Besides, even if certain features of the law of nations now warrant federal common law treatment, the question remains as to whether the ATS itself, if not originally grounded in Article III’s federal question provisions, should be read that way retroactively (with the possibly unintended jurisdictional consequences such a move would entail). I will not address these arguments here, but will focus instead on the problem of early understanding of the ATS and the law of nations.

A. “Laws” Means “Statutes”?

The evidence that the federal “laws” referred to in Article III were statutory laws is considerable. As Bradley demonstrates, contemporaneous references to the law of nations as part of "the law of the land" or "our law" or "the common law"—references that could include a whole range of nonfederal matters such as the law merchant and maritime law—were commonplace at the time of the Framing, Ratification, and First Judiciary Act, as well as in early judicial decisions and the writings of early commentators.75 Such descriptions fit better with an understanding of section 34 that independent bodies of nonfederal, non-state law would supply a rule of decision for the federal courts, but only when they otherwise had jurisdiction.76 Indeed, although the phrase “law of the land” is often used to describe the law of nations, the prefix “supreme” is regularly missing. Moreover, the law of nations was mentioned by early commentators as a category separate and apart from federal laws and the Constitution, as was the common law and other bodies of law with which the eighteenth century would have been familiar.77 By contrast, statements to the effect that the law of


75. See Bradley, supra note 11, at 609 (discussing authority).

76. Chief Justice Marshall provides a nice illustration (in a non-section 34 setting) of how the law of nations could be a rule of decision but not federal law. Although he believed that an admiralty court was “bound” by the law of nations as part of the law of the land, The Neriede, 13 U.S. (9 Cranch) 388, 423 (1815), he also considered admiralty cases not to arise under federal law within the meaning of Article III, precisely because they involved pre-existing law. American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 545-46 (1828) (noting that admiralty law was a body of pre-existing law), discussed in Bradley, supra note 11, at 611 & n.106; see also A.M. Weisbord, State Courts, Federal Courts, and International Cases, 20 YALE J. INT’L L. 1, 30-33 (1995) (making the comparison between The Neriede and Canter).

77. “The common law, the civil law, the law commercial and maritime, the law of nature and nations, the constitutional and federal laws of our country, and the jurisprudence of the different states, form together the aggregate of the great body of American law.” Du Ponceau, supra note 66, at 181; see also 1 St. George Tucker, Blackstone’s Commentaries with Notes of Reference to the Constitution and Laws of the Federal Government of
nations was one of the laws of the United States were less frequent. That, at least, is how I would characterize Chief Justice Jay’s remarks (made on more than one occasion) which seem to equate the law of nations with the “Laws of the United States,” rather than to try to harmonize them with the rest of the statements which appear to cut in the other direction.  

The argument that the federal “laws” referred to in Article III are statutory laws is strengthened when one simultaneously considers, as Bradley does, Article III’s language of “laws” alongside the language of the Supremacy Clause (with its legislature-referencing “laws made in pursuance of the Constitution” paralleling “treaties made or which shall be made” elsewhere in the same clause), with the implementing provisions of section 25 of the 1789 Act governing direct review of state courts (focusing primarily on “statutes”), and with the Rules of Decision Act governing lower federal courts. William Crosskey’s argument as to why Article III should be read as incorporating a different and broader meaning of federal “laws” than that of the Supremacy Clause is hardly obvious and seems to be grounded in an idiosyncratic understanding that all general common law should be considered part of the laws of the United States under Article III.

As with statutes, treaties, and the Constitution, there is a strong

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THE UNITED STATES AND OF THE COMMONWEALTH OF VIRGINIA app. at 430 (1803) ("[T]he law of nations, the common law of England, the civil law, the law maritime, the law merchant, or the lex loci, or law of the foreign nation, or state, in which the cause of action may arise or shall be decided, must in their turn be resorted to as the rule of decision. . . . So that each of these laws may be regarded, so far as they apply to such cases, respectively, as the law of the land."). As Bradley shows, Tucker believed that cases arising under federal law were limited to cases implicating federal statutes. Bradley, supra note 11, at 605.

78. See Bradley, supra note 11, at 610 & nn.111-12. Jay’s references to the “Laws of the United States” make his remarks (at a verbal level at least) somewhat stronger than the typical equation of the law of nations with “the law of the land,” even if jurisdictional consequences were not at issue. For other arguably somewhat stronger statements (but also where jurisdiction was not at issue) see United States v. The Ariadne, 24 F. Cas. 851, 856 (D. Pa. 1812) (No. 14,465) (referring, in admiralty case, to “the laws of the United States (the laws of nations being included in them”)); 1 Op. Att’y Gen. 26, 27 (1792) (Randolph) (stating that the “law of nations, although not specially adopted by the constitution or any municipal act, is essentially a part of the law of the land” whose “obligation commences and runs with the existence of a nation”). The latter statement of Edmund Randolph simultaneously associates the law of nations with the Constitution and laws, while also revealing its status as something other than supreme federal law.

79. Section 25 does have a potential disjunction between federal “statutes” at one point and federal “laws” at another, but it is doubtful that the distinction mattered.

80. See Bradley, supra note 11, at 598-99.

81. See 1 WILMINGTON CROSSLEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 620-38 (1953). According to Crosskey, the general common law (including the law of nations) was among the federal “laws” for Article III purposes, but not for Article VI Supremacy Clause purposes.
federal interest in seeing law of nations questions resolved uniformly. But that interest could largely be accommodated by the jurisdictional provisions relating to foreign officials, admiralty, and alienage diversity (and by direct review of cases from state court to vindicate treaty-based rights). In addition, if cases raising law of nations issues could have been treated as examples of cases arising under federal law, it is arguable that these more specific grants would have been somewhat superfluous, at least to the extent that they were directed toward picking up law of nations issues. As noted in Part I, it is even plausible to suppose that these more specific and mostly party-based provisions relating to foreign representatives, admiralty, and alienage were included in Article III at least in part because of an understanding that law of nations issues did not involve questions of federal law, and yet needed to be addressed in the federal courts.

B. "Laws" Includes the Law of Nations?

The original understanding is not without its ambiguities. In 1789, the law of nations appeared to occupy a high if not unique position within the hierarchy of general law categories. It was thought to have a binding quality to it, even if other than in a Supremacy Clause sense. In addition, at least some in the founding generation supposed that the law of nations would not only supply federal courts with a rule of decision, but that it could trump state statutory law. The trumping of state statutes in diversity cases involving general commercial law was

82. See THE FEDERALIST NO. 3, supra note 27, at 15 (John Jay) (stating that "under the national Government, treaties and articles of treaties, as well as the laws of nations, will always be expounded in one sense").

83. See supra text at notes 44-45.

84. St. George Tucker, for example, tries at one point to separate the common law and the law of nations, giving only the latter effect as "law of the land," although still not as federal law. 1 TUCKER, supra note 77, at 421, 428-30.

85. See, e.g., The Nereide, 13 U.S. (9 Cranch) 388, 423 (1815) (stating, in an admiralty case, that "the Court is bound by the law of nations which is part of the law of the land"); Ware v. Hylton, 3 U.S. (3 Dall.) 199, 227 (1796) (Chase, J.) (stating that the "general" (as distinguished from the "conventional, or customary") law of nations "binds all nations"); 3 Elliot's DEBATES, supra note 10, at 502 (statement of George Nicholas) (noting that the law of nations is "superior to any act or law of any nation"). None of these statements references the Supremacy Clause, however. Beth Stevens states that the law of nations "played a somewhat different role" than did "general common law rules" that might be ignored or adopted by the states as suited their condition. Beth Stephens, The Law of Our Land: Customary International Law as Federal Law After Erie, 66 FORDHAM L. REV. 393, 411-12 (1997) (noting, in connection with drafting of Offenses Clause, that legislative "definition" of the law of nations was considered to be awkward).

86. See A True Federalist, supra note 68, at 630; but cf. Bradley, supra note 11, at 603 n.68 (discussing opinions of certain Justices in Ware v. Hilton, 3 U.S. (3 Dall.) 199, 227 (1796), indicating that, under section 34, a state statute would control over the law of nations).
not unheard of, but was nonetheless fairly exceptional. 87 Also, a few of
the statements to the effect that the law of nations was the law of the
land (such as Chief Justice Jay’s) come a bit closer to the view that the
law of nations is federal law and binding as such. Hamilton, for
example, once argued that the law of nations was among the “laws” that
the President shall “take care” to enforce under Article II. 88

The short life of common law federal crimes may provide some
support for the understanding that cases brought for violations of the
law of nations can arise under federal law. It is true, as Bradley notes,
that the grant of criminal jurisdiction in the 1789 Act was not pegged
to the federal question provision of Article III, but might be supported by
any constitutional grant of jurisdiction. 89 Prosecutions for law of nations
violations in admiralty cases, for example, did not require that the law
of nations be jurisdiction-conferring or that such cases be considered as
arising under federal law or the Constitution. 90 But it is difficult to see
what ostensible Article III basis might have existed for common law
criminal proceedings brought in the name of the United States (and not
implicating admiralty, treaties, or foreign officials), other than as arising
under federal law or the Constitution. For example, some perceived that
a case could arise under federal law even when the underlying norm that
was violated was not itself one of the laws of the United States. A
common law prosecution for counterfeiting bank bills of the Bank of the
United States was once said to arise under the laws creating the Bank, 91
and a federal prosecution involving a bribe of a U.S. official was said to
arise under the law creating the office. 92 To be sure, these cases

87. See, e.g., Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842). For a rare example of the Court’s
ignoring a state remedy-limiting statute that was contrary to general principles of commercial
law, see Watson v. Tarpley, 59 U.S. (18 How.) 517, 521 (1855).
88. Alexander Hamilton, Letters of Pacificus, No. 1 (June 29, 1793), in 15 THE PAPERS OF
ALEXANDER HAMILTON 33-34, 43 (Harold C. Syrett ed., 1969) [hereinafter Hamilton’s Papers];
see also DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789-
1801, at 180 (1997) (“The opinion that the law of nations was one of the ‘laws’ the President was
bound to execute was widespread in 1793...”). Hamilton’s remarks, however, were made in
support of executive power to construe the country’s obligations under the law of nations in
dealing with other nations—not as a limitation on that power. See also 1 Op. Att’y Gen. 566, 570
(1822) (William Wirt) (indicating, as justification for the exercise of Presidential power, that
“laws” under Take Care Clause were “not merely the constitution, statutes, and treaties of the
United States, but those general laws of nations which govern the intercourse between the United
States and foreign nations”).
89. See Bradley, supra note 11, at 603.
90. See, e.g., Henfield’s Case, 11 F. Cas. 1099, 1102 (C.C.D. Pa. 1793) (No. 6,360) (noting
in an admiralty-based criminal prosecution also implicating a treaty that the laws of nations “form
a very important part of the laws of our nation”).
92. In United States v. Worrall, a common law prosecution for bribing a federal official,
Attorney General Rawle argued that the case arose under federal law because it arose under the
implicated statutory laws, but only in the background; the important point is that the underlying crime was not federal, but a creature of the common law. Such reliance on genuine federal laws in the background, rather than on a violation of any federal law, may be a loose way of thinking about what it means for a case to arise under federal law in the Article III sense, but, given such reasoning, it is not inconceivable that suits for violations of the law of nations could have been thought to arise under other federal “laws,” if such laws existed, whether or not the law of nations was itself considered federal law.

There were also some in the founding generation who may have thought that a case involving law of nations violations arose under the Constitution, even if it did not implicate a violation of federal law or the Constitution. For example, William Rawle—who clearly did not think that the law of nations was a federal “law” within the meaning of the Supremacy Clause—thought that a federal criminal action for violations of common law norms, including the law of nations, would “arise under the Constitution.” Mistaken or not, a similar point was made by Justice Paterson when he said that a particular common law prosecution for a law of nations violation arose under the Constitution. But because this understanding of “arising under” may have been based on the fact that the U.S. brought the case at issue to vindicate its own interests, these statements do not necessarily imply that a civil suit for a law of nations violation would have been thought to arise under the Constitution.

law creating the federal official's position. 2 U.S. (2 Dall.) 384, 392 (C.C.D. Pa. 1798) (No. 16,766) (“If no such office had been created by the laws of the United States, no attempt to corrupt such an officer could have been made. . . .”).


94. Nevertheless, it is not immediately obvious in a suit between two non-ambassadorial aliens what background U.S. “laws” might have been thought to be in the picture sufficient for a case to be said to arise out of them.

95. Rawle stated that a prosecution like that in “the case of De Longchamps”—i.e., the Marbois case—would be within the class of cases that could be said to “arise[c] under the Constitution.” RAWLE, supra note 26, at 264; see also id. at 271 (supposing that federal common law criminal prosecutions generally would arise under the Constitution). His rationale was that the “full right to the punishment of offenses against the law of nations” devolved on the U.S. on the formation of the Constitution. Id. at 259, 261-63.

96. See Bradley, supra note 11, at 608 n.88 (quoting Paterson); id. at 609 & n.96 (noting apparently similar view of Chief Justice Marshall).

97. The idea that these cases arose under the Constitution may have been linked to law of nations inspired ideas about inherent powers of national self-preservation that accompanied the creation of the Constitution. See Stephen B. Presser, The Supra-Constitution, the Courts, and the Federal Common Law of Crimes: Some Comments on Palmer and Preyer, 4 L. & Hist. Rev. 325, 328-30 (1986).

98. See, e.g., RAWLE, supra note 26, at 254 (“Of a civil nature, nothing can properly be said to arise under the Constitution, except contracts to which the United States are parties.”). There are other difficult suggestions that certain specific heads of Article III party-based jurisdiction
Although debate over federal common law crimes was rhetorically charged, there was at least some sentiment (or perhaps only fear) by the late 1790s that the common law might itself be a species of federal law, with implications for a similar understanding for the law of nations.\footnote{See Stewart Jay, Origins of Federal Common Law: Part One, 133 U. PA. L. REV. 1003, 1011, 1083-93 (1985) (discussing debate over common law of crimes and the more general concern that the common law might be considered federal law); Kathryn Preyer, Jurisdiction to Punish: Federal Authority, Federalism and the Common Law of Crime in the Early Republic, 4 L. & Hist. Rev. 223, 237 n.46 (1986) (noting spillover of debate over common law of crimes to civil arena).} The main worry was that if the equation was valid, then, under prevailing understandings about coterminous power, Congress would be vested with virtually unlimited power.\footnote{See G. Edward White, Recovering Coterminous Power Theory: The Lost Dimension of Marshall Court Sovereignty Cases, in Origins of the Federal Judiciary: Essays on the Judiciary Act of 1789, at 68-77 (Maeva Marcus ed., 1989); see also Madison’s Report on the Virginia Resolutions (Jan. 1800), reprinted in 4 Elliot’s Debates, supra note 10, at 546, 563-67 (noting the vastness of congressional power were the common law to be treated as part of the “laws” of the U.S.).} It was only with the demise of federal common law crimes, beginning with United States v. Hudson & Goodwin,\footnote{11 U.S. (7 Cranch) 32 (1812).} that suggestions that the common law might be federal law finally began to subside. Before then, the issue was still up in the air, even outside of the criminal setting.

Finally, it’s worth recalling that the law of nations was teamed with “treaties” in the Alien Tort Statute. To the extent that the ATS allowed for suits in tort for violations of treaties, it was implementing Article III’s “arising under” jurisdiction.\footnote{This would be true even if a citizen defendant would have been the typical violator of any then-extant U.S. treaties. See Bradley, supra note 11, at 609-10.} Although the inference is not a strong one, perhaps this could suggest that the whole statute, not just one part, was designed to enforce the arising under provisions of Article III. The linkage of the law of nations to federal law was also visible in the Offenses Clause, giving Congress the power to make a law of nations violation a federal crime. The latter, of course, is only a power to make the law of nations federal criminal law by statute, and is a legislative, not judicial power.\footnote{See U.S. CONST. art. I, § 8, cl. 10.} But given Congress’s power to federalize the law of nations, perhaps the ATS should be viewed as a legislative effort to implement this same power civilly (as noted below), by delegating it to the federal courts as necessary and proper to criminal law enforcement.

also presented cases arising under the Constitution. See 3 STORY, supra note 13, at 503 n.2 (noting views of Madison and Tucker).
C. **Delegated Lawmaking?**

The delegation possibility has been suggested by David Currie and others, and was alluded to in *Filartiga*—namely, that the Alien Tort Statute can be squared with Article III if it is seen as a congressional delegation to the federal courts in the shape of an ostensibly jurisdictional statute to fashion federal common law concerning law of nations violations. By this reading, the ATS either implicitly federalized the law of nations or authorized the federal courts to do so. But the suggestion presents a number of difficulties insofar as the framers’ understanding of the ATS is concerned, just a few of which are sketched here.

First of all, the lawmaking-delegation argument is, by Currie’s own estimate, anachronistic. Unwritten law developed by eighteenth century judges was not perceived as an act of lawmaking so much as law finding; the law of nations was “out there” to be discovered just like the law merchant was in diversity actions. It is therefore doubtful that the 1789 Congress would have intended to delegate judicial lawmaking as such. And even if a jurisdictional provision like the ATS could be perceived as implicitly conferring the power to develop substantive law, for many of the reasons noted above, there is no more reason to suppose that the 1789 Congress had “federal” common law in mind when it created jurisdiction over alien tort cases than it did when it established diversity jurisdiction for citizens of different states.

Second, even if one makes liberal allowance for the fact that, as Justice Story once remarked, the law of nations is not static, any

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104. *See Currie, supra note 88, at 52 n.308; Stephens, supra note 85, at 408; see also Textile Workers v. Lincoln Mills, 333 U.S. 448 (1957) (concluding that ostensibly jurisdictional provision in federal labor statutes acted as implied grant of power to fashion federal common law).*

105. *I agree that the ATS does not itself create a federal cause of action. *See Bradley, supra note 11, at 591-95; see also Dodge, supra note 7, at 7 (observing that the relevant action would be grounded in the general law); Casto, supra note 7, at 480 (suggesting that the argument that the ATS creates a cause of action is “frivolous”).*

106. *See Currie, supra note 88, at 52 n.308; cf. Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42 (1825) (observing that strictly legislative powers cannot be delegated to courts).*

107. *See MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, at 7 (1977) (stating that the common law was understood to be “discovered” by judges not “made”); see also Bradly & Goldsmith, supra note 74, at 359 (noting that “[t]he First Congress lacked our positivist and realist conceptions of common law,” and that Lincoln Mills-style federal common law was “probably unthinkable”).*

108. *Furthermore, in the criminal setting, it was concluded early on that the power to define and punish law of nations violations was essentially non-delegable. *See United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32 (1812).*

109. *See United States v. La Jeune Eugenie, 26 F. Cas. 832, 846 (C.C.D. Mass. 1822) (No. 15,551) (Story, Circuit Justice). Story made the point in an ultimately unsuccessful effort to add...*
supposed delegation begins to run riot when the dimension of change in the law of nations and international law is as fundamental as it has been in the last half century. It is not simply that new wrongs have been added to the list of law of nations violations (and as a matter of federal law), rather, the law of nations has taken on a vast new jurisdictional reach, in contrast to what were the fundamentally territorialist views of the founding generation. The seismic nature of the change also supposes that, in the course of delegation, the ATS’s grounding in the preservation of “national peace and harmony” and avoidance-of-war has largely been jettisoned.

the slave trade to the list of practices barred by the law of nations. See id.


111. The modern law of nations is said to be characterized by the development of rapidly evolving norms that rely on something less than actual state practice and genuine consensus. See Bradley & Goldsmith, supra note 110, at 838-42.

112. See Bradley, supra note 11, at 592-93 (noting territorialist views of the founding era). As Hamilton once stated, quoting Emmerich de Vattel, “[I]t does not belong to any foreign Power to take cognizance of the administration of a sovereign of another country, to set himself up as judge of his Conduct or to oblige him to alter it.” Alexander Hamilton, Letters of Pacificus, No. 2, in Hamilton’s Papers, supra note 88, at 60; see also Casto, supra note 7, at 485 n.97 (discussing Oliver Ellsworth’s territorialist approach to legislative jurisdiction); Randall, supra, note 39, at 60-61 (agreeing that framers of the ATS would not likely have intended an extraterritorial application of the statute other than for a tort committed abroad by a U.S. citizen, or on the high seas).

113. In this regard, Attorney General William Bradford’s 1795 Opinion regarding the availability of a suit under the ATS against American citizens who aided the French and harmed British subjects off the coast of Sierra Leone in violation of U.S. neutrality is not to the contrary. See 1 Op. Att’y Gen. 57 (1795), discussed in Bradley, supra note 11, at 629 & n.183. It is altogether unexceptionable that a federal court would be able to exercise subject matter jurisdiction in a civil suit by a British citizen against a U.S. citizen for injuries occurring abroad, or that a U.S. citizen abroad would be bound to observe the neutrality provisions of a U.S. treaty. In fact, in the same Opinion, Bradford rejected the possibility that, if the events in question took place within another country’s territory, the U.S. could punish the Americans criminally. Id.; cf. Rose v. Himely, 8 U.S. (4 Cranch) 241, 279 (1807) (Marshall, C.J.) (noting that “the legislation of every country is territorial; that beyond its own territory, it can only affect its own subjects or citizens”). See also infra note 120 (noting that universal jurisdiction over piracy was consistent with territorialist views, not inconsistent with them).

114. Compare Koh, supra note 6, at 1841 n.87 (noting the avoidance-of-war focus of the founding generation), with Burley, supra note 7 (taking issue with this perspective).
A third and related issue is whether, with respect to the challenged behavior involved in cases like Filartiga, Congress has (or would have been thought to have) the prescriptive power to delegate in the first place.\textsuperscript{115} I do not mean to press the point too hard. Even without the aid of a treaty, Congress has wide powers in the foreign arena, including a specific power to define and punish law of nations offenses—a power which the modern Congress views as allowing it to provide an express federal cause of action for cases like Filartiga.\textsuperscript{116} Once Congress acts, separation of powers and federalism concerns are minimized, particularly in areas outside state legislative competence.\textsuperscript{117} Many assume that in matters relating to foreign affairs there is simply no limit to federal action (apart from those thought to be supplied by international law)\textsuperscript{118}—an assumption implicating larger questions regarding foreign affairs “exceptionalism.”\textsuperscript{119} But unless one is prepared to make that assumption, one should at least consider whether there is not some question regarding Congress’s Article I basis for exercising extraterritorial legislative jurisdiction over ostensibly intrastate, noncommercial actions, like those in Filartiga, and whether the Congress that framed the ATS would have supposed it to have such power. Principles of “universal jurisdiction”\textsuperscript{120} do not eliminate the

\textsuperscript{115} See Casto, supra note 7, at 485. Absent an elaborate theory of “protective jurisdiction” under Article III, jurisdiction over ATS cases as ones arising under federal law would be problematic if they did not implicate federal law as an element of the rule of decision respecting the defendant’s conduct. Cf. Jeffrey M. Blum & Ralph G. Steinhardt, Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act After Filartiga v. Pena-Irala, 22 HARV. INT’L L.J. 53, 99-101 (1981) (noting that if a protective jurisdiction rationale is used and nonfederal law is applied in ATS cases, it is problematic whether the case arises under federal law within the meaning of Article III, even if it is assumed that Congress otherwise has prescriptive jurisdiction); Scott A. Rosenberg, Note, The Theory of Protective Jurisdiction, 57 N.Y.U. L. REV. 933 (1982) (presenting a broad theory of protective jurisdiction grounded in federal “interests” rather than in Article I powers).


\textsuperscript{117} See Jay, supra note 67, at 1321-22.


\textsuperscript{119} See Curtis A. Bradley, Symposium Overview: A New American Foreign Affairs Law?, 70 U. COLO. L. REV. 1089, 1096 (1999) (“Foreign affairs exceptionalism is the view that the federal government’s foreign affairs powers are subject to a different, and generally more relaxed, set of constitutional restraints than those that govern its domestic powers.”).

\textsuperscript{120} See RESTATEMENT (THIRD) OF FOREIGN RELATIONS OF THE UNITED STATES § 404 (1987). Piracy is sometimes called the eighteenth century’s analog to modern human rights violations insofar as jurisdiction could be exercised by any country where the pirate—an enemy
question, because they only indicate what a nation may or may not do consistent with international law. "If extraterritoriality violates the Constitution, it makes little difference that it complies with the relevant principles of international law."121 Apart from possible internal limits, limits on legislative jurisdiction and choice of law arising from the Fifth Amendment—ratified after the ATS—may also restrict the statute's extraterritorial reach in some settings.122

III. THE "DIVERSITY ONLY" THESIS

Even if it is assumed that a case implicating the unwritten law of nations does not, for that reason alone, arise under federal law or the Constitution within the meaning of Article III, one is not forced to conclude that the Alien Tort Statute only covers cases implicating alienage diversity. Rather, the statute could extend to any case brought by an alien and otherwise permitted under Article III, such as an ambassador suit or a case in admiralty, both of which can be between aliens. Bradley, however, appears to exclude these other categories based less on the language of the ATS than on the structure of the 1789 Judiciary Act. While including them may risk undoing his neat coupling of the human race—was found, the extraterritorial nature of his acts notwithstanding. See, e.g., Blum & Steinhardt, supra note 115, at 61 (suggesting that "the magnitude of the threat posed by the acts" was the basis for considering pirates enemies of the human race). But piracy on the high seas was probably actionable in any country because the wrongdoing was outside of any official sanction, outside of any particular sovereign's territory, and because the pirate acted "indiscriminately," thus making war against all. See, e.g., United States v. Baker, 24 F. Cas. 962, 965 (C.C.S.D.N.Y. 1861) (No. 14,501) (Nelson, Circuit Justice) (stating that piracy violated the law of nations because it involved "making war upon all mankind indiscriminately"); Davison v. Seal-Skins, 7 F. Cas. 192, 193 (C.C.D. Conn. 1835) (No. 3,661) (Thompson, Circuit Justice) ("A pirate is one who acts solely on his own authority, without any commission or authority from a sovereign state."); see also 4 BLACKSTONE, supra note 11, at 71 (justifying universal proscription of piracy as based on right to national self defense); EMMERICH DE VATTEL, THE LAW OF NATIONS; OR, PRINCIPLES OF THE LAW OF NATURE: APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS § 232, at 177-78 (1787) (including "poisoners, assassins, and incendiaries" along with pirates as punishable anywhere, because of their threat to the "common safety" and "public security" of "all nations"); 1 KENT, supra note 35, at 174 (noting that federal piracy laws were "intended to punish offences against the United States, and not offences against the human race"); see generally G. Edward White, The Marshall Court and International Law: The Piracy Cases, 83 AM. J. INT'L L. 727, 728, 735 (1989) (viewing early piracy decisions as illustrative of Marshall Court's willingness to look to nonfederal principles of law of nations and natural law to decide cases where jurisdiction otherwise existed). In any event, piracy-related cases were specifically accounted for under Article III's admiralty grant.

121. Lea Brilmayer & Charles Norchi, Federal Extraterritoriality and Fifth Amendment Due Process, 105 HARV. L. REV. 1217, 1244 (1992). Brilmayer and Norchi were discussing Fifth Amendment limits on extraterritoriality, however, not intrinsic limits on congressional power.

122. Id. at 1239-60. Nevertheless, Brilmayer and Norchi see international law as obviating any Fifth Amendment limitation on alien tort jurisdiction under the universal jurisdiction principle.
of the alienage diversity provision with the ATS, it avoids the risk of interpreting similar words in the 1789 Act differently, as discussed below. Also, including them may better comport with the more-than-alienage focus of *Federalist* 80, which sees the law of nations as being enforced through a handful of Article III provisions that the ATS may have been designed to help implement (if somewhat redundantly of other statutory grants).

A. "Ambassador Protection"

Bradley's proposed reading comes close to excluding ambassadors and other officials as potential plaintiffs under the ATS, even when diversity is otherwise present. If so, that is certainly a peculiar result in light of his diversity-only reading of the statute. Although Bradley is probably right that the primary impetus for the ATS was not ambassadorial protection (which was substantially achieved by Supreme Court original jurisdiction and implementation of the Offenses Clause), I am not persuaded that the framers of the ATS meant to exclude these parties from the class of those who could sue under the statute.

First of all, the ATS expressly provides for district court jurisdiction "where an alien sues for a tort only in violation of the law of nations." So long as the term "alien" in the 1789 Act was understood as embracing "ambassadors, other public ministers and consuls," provided they are also foreign citizens or subjects, their cases would be included. 123 Such a reading is hardly a stretch, either now or in 1789. Admittedly, one might speculate that the drafters' specific mention of these officials in one part of the ATS was intended to exclude them from the class of "aliens" mentioned elsewhere, but there is no evidence that the drafters so intended. Furthermore, the circuit courts 124 and later the full Court 125 had no trouble concluding that consular status did not preclude "alien" status for purposes of general alienage jurisdiction in the circuit courts under section 11 of the 1789 Judiciary Act. If those

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124. *See,* e.g., St. Luke's Hosp. v. Barclay, 21 F. Cas. 212, 214 (C.C.S.D.N.Y. 1855) (No. 12,241) (concluding, in civil action in circuit court, that district court jurisdiction in suits against consuls is exclusive only of the state courts); Bixby v. Janssen, 3 F. Cas. 488, 488 (C.C.S.D.N.Y. 1869) (No. 1,452) (noting that presence of a foreign consul as a party would confer jurisdiction in civil proceeding in circuit courts); *see also* cases cited infra note 127; *cf.* Gittings v. Crawford, 10 F. Cas. 447 (C.C.D. Md. 1838) (No. 5,465) (Taney, Circuit Justice) (upholding a civil suit brought by U.S. citizen against a foreign consul as within district court's jurisdiction); *id.* at 451 (supposing that in a petty suit brought by a consul, the lower federal courts could constitutionally exercise jurisdiction).

decisions fairly reflect the Congress’s original understanding, it would be peculiar to read “alien” in section 11 as including such officials and then in section 9 (covering the district courts) as excluding them.

Also, reading the ATS to include foreign dignitaries as plaintiffs presents no constitutional problem. Whether or not ATS suits arise under federal law, they would be picked up by Article III’s ambassadorial jurisdiction provisions (without regard to the defendant’s citizenship). To be sure, foreign officials alleging a tort in violation of the law of nations would have had the right to seek the Supreme Court’s original jurisdiction, but the framers of the 1789 Judiciary Act clearly assumed that the Supreme Court’s original jurisdiction was nonexclusive, and early on the circuit courts affirmed Congress’s authority to allow consular cases in lower federal courts. Consequently, under the easiest reading of the Judiciary Act (and one that conforms to its framers’ understandings about the nonexclusive nature of the Supreme Court’s original jurisdiction), under section 11 of the Act, a circuit court would be able to hear an alien official’s action

126. Even if there may have been some founding era uncertainty over the constitutionality of assigning original jurisdiction to the lower federal courts, see infra note 127, the relevant intent insofar as the ATS is concerned is that of the framers of the 1789 judiciary statute. Those framers clearly proceeded on the assumption that the Supreme Court’s original jurisdiction could be shared with the lower federal courts, as in section 9’s conferment of jurisdiction to the district courts over suits against consuls and vice-consuls. Consequently, there is no reason to suppose that they might have harbored doubts about whether ambassadorial officials (such as consuls) could bring ATS suits in the lower courts. See, e.g., 1 Kent, supra note 35, at 294-95 (noting apparent understanding of statute’s framers); 3 Story, supra note 13, at 482-83 (§ 1707) (making similar observation); see also James E. Pfander, Rethinking the Supreme Court’s Original Jurisdiction in State-Party Cases, 82 Cal. L. Rev. 555, 564 & n.26 (1994) (noting how 1789 Act proceeded on assumption that Supreme Court’s original jurisdiction was nonexclusive).

127. See Gittings, 10 F. Cas. at 449-51 (upholding power of Congress to confer on lower federal courts jurisdiction in suits involving consuls); id. at 448 (referring to 1794 grand jury charge by Chief Justice Jay in lower court criminal proceeding against a consul); United States v. Ravara, 2 U.S. (2 Dall.) 297 (C.C.D. Pa. 1793) (concluding (per Justice Wilson and Judge Peters) that original jurisdiction of Supreme Court under Article III was nonexclusive in criminal action against consul, over a dissent by Justice Iredell). There was some founding era uncertainty over whether any of the Supreme Court’s original jurisdiction could be conferred on the lower federal courts. Reinforcing that uncertainty was Chief Justice Marshall’s statement in Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803), that Article III not only disabled Congress from conferring on the Court as part of its original jurisdiction, matters that are within its appellate jurisdiction, but also disabled Congress from making the Court’s original jurisdiction appellate. Yet Marshall basically confessed error as to the second point, in Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 399 (1821) (discounting the earlier suggestion in Marbury as a “general expression[!]” that went “beyond the case”). See also id. at 397 (noting long practice of lower federal courts hearing, and the Supreme Court reviewing, claims asserted in admiralty cases by consuls). Even if the Supreme Court definitively addressed the problem only “late” in the game (i.e., in 1884 in Bors), the circuit courts were of a single mind early on, Iredell’s lone dissent in Ravara notwithstanding. See also Pfander, supra note 126, at 621-22 (arguing that the framers of Article III also intended to allow for such concurrent jurisdiction).
against a U.S. citizen for a tort in violation of the law of nations if the suit was for more than $500.\footnote{128} Under section 9 of the act, a district court could hear the same suit under the ATS, although it alone could hear the case if it was brought for a lesser sum and/or the suit were brought against another alien. In this respect, there is some decoupling of sections 9 and 11, since section 11 requires an alien to be pitted against a citizen, whereas section 9 (on this reading) would not. But concurrent jurisdiction between the two courts is only "as the case may be."

If foreign officials were excluded from the class of aliens who can sue under the ATS, the only "concurrent" jurisdiction alternative to the Supreme Court in a suit against another alien, as in the Marbois case, would be in state court. As the Court later stated in *Ames v. Kansas*, "to deprive an ambassador, public minister or consul of the privilege of suing in any court he chose having jurisdiction of the parties and the subject matter of his action, would be, in many cases, to convert what was intended as a favor into a burden."\footnote{129} The geographical inconvenience to foreign-citizen consuls in ATS cases would have been particularly great in 1789. Consuls were locally based commercial representatives of foreign nations,\footnote{130} and might be compelled to repair to the nation's capitol in ATS-type cases implicating less than $500 or to take their chances in state court.\footnote{131} Other provisions relating to district court jurisdiction in suits against consuls suggest that the 1789 Congress had their convenience in mind (as well as their adversaries') at a more general level.\footnote{132}

\footnote{128.} Even though neither the alienage provision of section 11 nor the removal provisions of section 14 speak in terms of diversity with a U.S. citizen (as is also true of the ATS), the 1789 Judiciary Act's draftsman, Oliver Ellsworth, read section 11 as referring to alien-citizen suits only, as did the Supreme Court early on. See Bradley, *supra* note 11, at 622-23.


\footnote{130.} See Dodge, *supra* note 52, at 1026 n.77; Meltzer, *supra* note 52, at 1606 n.129.

\footnote{131.} Insofar as consuls are concerned, the argument that the original jurisdiction of the Supreme Court under Article III was designed with geography in mind does not succeed, because consuls often resided outside the beltway. See Dodge, *supra* note 52, at 1025-26; cf. Akhil Reed Amar, *Marbury, Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443, 476 (1989) (suggesting that geography greatly accounts for the original jurisdiction provision for ambassadors, other public ministers and consuls).

\footnote{132.} Although the geographical inconvenience argument may not work as well with foreign representatives other than consuls, it would make no sense to conclude that consuls could bring ATS actions, but ambassadors and other public ministers could not. It is not much of an argument that the ATS statute might have been a little over-inclusive (and redundant) insofar as those individuals are concerned; cf. *Ames*, 111 U.S. at 464 (supposing that even ambassadors could benefit from convenience of a local forum).
Nor do the 1789 Act's references to exclusive and concurrent jurisdiction suggest that foreign officials should be excluded from suing under the ATS in the lower federal courts. To be sure, the grant of jurisdiction in the district court over ATS suits only says that it is concurrent with state courts or circuit courts—not with the Supreme Court. From this failure of the ATS to cross-reference the Supreme Court's original ambassadorial jurisdiction, some have suggested that the district court's ATS jurisdiction is only for aliens who are not foreign representatives or consuls.\(^{133}\)

The problem with this suggestion is that federal statutes respecting lower federal court jurisdiction do not now, nor did they in 1789, make reference to sharing jurisdiction with the Supreme Court's nonexclusive original jurisdiction.\(^{134}\) For example, in section 9 of the 1789 Act, which provides the district courts with jurisdiction over "all suits" against consuls "exclusively of" the state courts, there is no reference back to the Supreme Court's expressly nonexclusive jurisdiction over suits against consuls.\(^{135}\) Nor is there any reference in section 11's alienage provisions to the Supreme Court's nonexclusive jurisdiction in suits against consuls; yet suits against them as aliens were entertained by the circuit courts, as noted above. In addition, reading a statement of concurrent jurisdiction with one or two courts as being impliedly exclusive of a third court is unusual, particularly when acknowledgements of concurrency in federal jurisdictional grants cannot confer jurisdiction that does not exist otherwise, and when such provisions are typically inserted to avoid reading a jurisdictional grant as somehow exclusive.

B. \textit{Admiralty and the ATS}

Listing ATS suits to those in which a U.S. citizen is a defendant

\(^{133}\) See Burley, \textit{supra} note 7, at 473 (stating "if [Supreme Court nonexclusive jurisdiction] was intended as a link to the district courts jurisdiction, logic would dictate a reciprocal reference in section 9"). The argument that the framers of the 1789 Act may have supposed that criminalizing assaults on foreign dignitaries was the way Marbois-type cases would be handled risks proving too much because the same might be said of any tort in violation of the law of nations brought by an alien, and yet Congress clearly provided for civil jurisdiction over such cases in the district courts, as well as in the Supreme Court for foreign dignitaries.

\(^{134}\) Today, for example, the Supreme Court's original jurisdiction in actions brought against consuls is nonexclusive. See 28 U.S.C. § 1251(b)(1). Nevertheless, the district court provisions do not reference the fact that the district courts share it with the Supreme Court, and only indicate that their jurisdiction is exclusive of the state courts. See 28 U.S.C. § 1351(1).

\(^{135}\) Nor was there a cross reference in the criminal provisions of section 9 or section 11 pursuant to which a consul could be prosecuted in the district courts or circuit courts, depending on the crime, although such jurisdiction is also available originally in the Supreme Court. See United States v. Ravara, 2 U.S. (2 Dall.) 297 (1793).
would also eliminate from that provision suits that arise from certain acts of tortious wrongdoing relating to seizures on the high seas, at least when aliens were suing one another, as in the early case of _Bolchos v. Darrel_. There would be no constitutional problem with including such suits under the ATS since the ATS could be seen as implementing, in part, the admiralty jurisdiction conferred on the federal judiciary under Article III. Bradley can rightly enlist Thomas Sergeant, an early commentator on the Constitution in support of the position that suits under the ATS "must be against a citizen of a state," but as Bradley elsewhere notes, Sergeant himself adds "if not in the admiralty." 

Torts in violation of the law of nations could easily arise in connection with captures of ships under the law of prize, as Pat Sweeney has argued. Because of section 9's provision for district court jurisdictional exclusivity of all "civil actions" in admiralty and maritime matters, suits brought in connection with these high seas captures might have been thought to be within the federal courts' prize jurisdiction alone, in keeping with English practice. According to Sweeney, however, some states had deviated from the English model during the era of Confederation and allowed courts other than prize courts to hear such cases. Such courts might have included non-prize admiralty courts ("instance" courts) which heard ordinary civil matters, and in some jurisdictions, common-law courts. The ATS provision, he argues, was designed to reaffirm that such cases, when brought by an alien, could be heard outside of the prize jurisdiction of the federal courts and, when available, in state court. 

Whether a case would be heard as part of the federal courts' instance
versus prize jurisdiction in admiralty, of course, makes little difference. But *Bolchos* itself suggests that there may have been some uncertainty about the reach of admiralty to some high-seas capture-related torts. There, the district court stated that it was “at first doubtful” whether admiralty jurisdiction existed over a land-based tort against a French citizen by a British citizen, which arose in connection with a high seas seizure. English precedents cited by the court appeared to draw into admiralty’s prize jurisdiction all aspects of cases arising from illegal seizures on the high seas, as noted above. But given the ATS, the district court “dismiss[ed] all doubt” about jurisdiction. That the expression of jurisdictional doubt was apparently not entirely overcome by reference to the British authorities supports the suggestion that the ATS filled a potential gap (or at least uncertainty) in the statutory grant of admiralty jurisdiction, and therefore was not simply redundant of it.

The ATS could be read as securing a common law remedy for torts committed on the high seas over and above any common law admiralty remedy that might be shared with the states, and with the circuit courts, if alienage jurisdiction were met. Some argue that if the ATS were so read, however, it would be redundant of another admiralty-related provision in section 9 (“saving to suitors, in all cases, the right to a common law remedy, where the common law is competent to give it”). But the latter clause added nothing to the jurisdiction of the district courts or the circuit courts. The common law remedy available to “suitors” could be sought in the federal courts only if the prerequisites for diversity were met, and even then such suits could go only to the circuit court, not the district court. By contrast, under the ATS’s affirmative grant of subject matter jurisdiction, such suits could be brought in the district court (by aliens) even without clearing a

142.  Dodge, supra note 7, at 248.
143.  The tort involved the seizure and sale of slaves from the ship by the agent of the mortgagee of the slaves.
144.  Cf. Dodge, supra note 7, at 249-50. In *Moxon v. The Fanny*, 17 F. Cas. 942 (D. Pa. 1793) (No. 9,895), the court turned back a claim under the ATS as not for a “tort only” because the plaintiff (the libellant) sought the return of specific property as well as damages. But the court seemed to acknowledge that a proceeding for a “marine trespass” for damages might be brought under the ATS, apparently in admiralty. Id. at 26-27.
145.  Act of Sept. 24, 1789, ch. 20, § 9, 1 Stat. 73, 77 (1789); see Dodge, supra note 7, at 249 (arguing that the ATS would be redundant of the saving-to-suitors clause). William Dodge is right to see even nonprize-related high seas torts as within the ambit of the ATS, and that section 9 and the ATS would overlap in coverage in may cases. See id. But the ATS would pick up where the savings-to-suitors clause left off, for the reasons noted in the text.
146.  The same suit, not seeking a common law remedy, could be brought in the district court as an admiralty action.
jurisdictional amount requirement and perhaps without a U.S. citizen being party to the suit.\textsuperscript{147} The law was also unsettled as to whether there was a “common law remedy” for true high seas torts at all, thus potentially rendering the “saving to suitors” clause useless for aliens alleging high seas torts in violation of the law of nations.\textsuperscript{148} If such suits were seen as outside the jurisdiction of some state courts (as happened in \textit{Bolchos}), the ATS could be read as making available a federal forum when none existed under state law.\textsuperscript{149}

IV. DETOUR: DRESS REHEARSAL FOR THE MODERN DEBATE

Interestingly, the modern dispute over the federalness of the law of nations was foreshadowed in lengthy debates in the antebellum Congress almost a half century after the enactment of the ATS. In 1842, Congress amended the federal habeas corpus statutes\textsuperscript{150} to allow an alien held in custody by state or federal officials for actions taken under orders of a foreign state (and whose validity turned on a question of the law of nations) to seek his release.\textsuperscript{151} Although the events giving rise to the statute and the propriety of such immunity have been dealt with before,\textsuperscript{152} it was the treatment of the Article III basis for federal court

\begin{enumerate}
\item[147.] Diversity would not be required, but only if the ATS were seen as implementing the admiralty clause of Article III even while providing a common law remedy—an issue that is not without difficulty. \textit{Cf.} Meltzer, \textit{supra} note 52, at 1593-95 (suggesting that saving-to-suitors suits might be within the admiralty jurisdiction under Article III).
\item[148.] Jonathan Gutoff suggests that there may have been doubt during the founding era (albeit quickly erased) whether prize jurisdiction—which, under English practice, might have included some prize-related tort claims that the ATS might cover—was conferred under section 9 at all. Gutoff, \textit{supra} note 33, at 385-88 (discussing \textit{Glass v. Sloop Betsey}, 3 U.S. (3 Dall.) 6 (1794), which resolved lower federal courts’ split regarding conferral of such jurisdiction). If he is right, then the ATS may have made clear that such alien-initiated prize-related suits could be heard in the federal courts nevertheless. On this reading, the ATS would have added something to existing admiralty jurisdiction under section 9.
\item[149.] Clearly, not all state courts would have considered that torts relating to high seas seizures were within their jurisdiction, as happened in \textit{Bolchos} itself, even if some did.
\item[150.] Under the 1789 Judiciary Act, habeas extended only to those in federal custody, and by a later amendment, to persons in state custody for an act done in pursuance of federal law. \textit{See} Act of Sept. 24, 1789, ch. 20, \S\ 14, 1 Stat. 73, 81 (1789) (limiting habeas to those held in federal custody); Act of Mar. 2, 1833, ch. 57, \S\ 3, 4 Stat. 632, 633 (extending habeas to those held in custody for acts done pursuant to federal authorization).
\item[151.] Act of Aug. 29, 1842, ch. 257, 5 Stat. 539 (extending pre-trial habeas to those in federal or state custody for any act done under “the authority of” a foreign government “the validity and effect of which depend upon the law of nations”). As originally proposed, the bill would have allowed habeas to those in state or federal custody for any act done “under or by virtue of the constitution, or any law or treaty of the United States, or claimed under the law of nations, or commission, or authority of any foreign State or sovereignty.” \textit{Cong. GLOBE}, 27th Cong., 2d Sess. 443 (1842); \textit{see also id.} at 729 (giving an alternative proposal for the bill).
jurisdiction that makes the debates significant today—even if it offers only a post-originalist window on the subject.

At first blush, one might wonder why there was any difficulty at all. A habeas action brought by an alien against a U.S. citizen (the custodian) would seem to be a civil suit satisfying the alienage provisions of Article III. For whatever reason, no one seems to have raised this point in the course of the debates. Instead, another party-based head of Article III jurisdiction was invoked: Controversies between a State and a foreign citizen. This seems to have been offered as a justification, since the bill appeared to cause a kind of temporary removal of the pending criminal action. The big problem here, as opponents of the bill pointed out, was whether under Article III “controversies” between states and foreign citizens included criminal cases at all. Not content to rely on the party-based argument, supporters of the bill also argued that Article III’s provision for cases arising under federal law provided a “clearer” basis for law of nations-based habeas. Like their modern day descendants, they argued from an amalgam of federal legislative powers dealing with foreign affairs to conclude that Congress “must, under some clause,” have authority to place any controversies that impacted “foreign citizens” and “foreign relations” in the federal courts. They relied on early proposals at the Constitutional Convention and on Federalist 80 to argue that federal judicial power should extend to all cases involving the “national peace and harmony,” and should be able to “determin[e] . . . all judicial questions affecting . . . foreign relations.” The bill was “necessary and proper” to carrying out those

to a high profile murder prosecution in the New York state courts of a British citizen (Alexander McLeod) who claimed that the killing arose out of an act of war that warranted protection under the law of nations. People v. McLeod, 25 Wend. 483 (N.Y. 1841). The New York high court considered McLeod’s pretrial claim that under the law of nations he ought to be immune from prosecution, but, after a thorough analysis of the relevant precedents respecting the law of nations, it rejected the argument. McLeod was later acquitted.

153. CONG. GLOBE, 27th Cong., 2d Sess. app. at 538 (1842) (Sen. Choate) (“Civil suits by a State against aliens are triable in the national courts, for the preservation of the national peace. Why should not criminal charges, also, . . . be so tried on the same policy?”). 154. Id. at app. 613 (Sen. Walker); see also Meltzer, supra note 52, at 1575-76 (noting foundering era support for proposition that “controversies” were understood not to encompass criminal cases).


156. Id. at app. 537 (Sen. Choate).

157. Id. (Sen. Choate). Choate noted that federal jurisdiction over persons “pleading the laws of nations in their defense must, under some clause, and by some denomination or other be found to be also given.” Id.

158. Id. at app. 537 (Sen. Choate). Senator Berrien also invoked references to the “tranquility and peace of the Union” and Federalist 80, to conclude that “the framers of the Constitution . . . manifested an extraordinary solicitude to vest in the federal jurisdiction the right
powers and duties relating to international affairs, they said, as well as the express power to define and punish offenses against the law of nations.159

At times, supporters suggested that the unwritten law of nations was on a par with laws and treaties, and that the law of nations had been "repeatedly decided" to be federal law.160 Nevertheless, Senator Choate, one of the chief spokespersons for the bill, seemed to acknowledge the force of the argument that there needed to be federal statutory law to satisfy the "arising under" provision of Article III. He confidently stated that the proposed habeas cases would arise under a federal law because, with the new habeas provision, "[t]hey arise under this very statute."161 An opponent of the bill pointed out the obvious—namely that a jurisdictional provision alone could not make a case arise under federal law.162

Senator Walker weighed in for the opposition. He observed that the general principles behind the shaping of the judicial article—such as promoting the national peace and harmony—had been boiled down to particulars in Article III, and those particulars did not admit of the law of nations as a species of federal law.163 As with other areas of the Constitution, broad ends were to be effectuated by specific means. Senator (later President) Buchanan attacked the original bill's reference to the "Constitution," "laws," and "treaties," and then its reference to "two other classes of cases, unknown to the Constitution:... those arising under the law of nations, and under the commission of a foreign sovereign."164 He suggested that the law of nations could be considered a part of U.S. law only in the sense that it would supply a rule of decision in a federal court that otherwise had subject matter jurisdiction,

of deciding upon all cases, between foreigners and this country, affected by the law of nations."

Id. at 444.

159. Id. at app. 540 (Sen. Choate).
160. Id. at 444 (Sen. Berrien). Referring to United States v. Smith, 18 U.S. (5 Wheat.) 153 (1820), Berrien stated:
   It might be asked, was the law of nations any part of the laws of the United States? It was a question not dependent on general argument: the Judicial tribunal of the United States had repeatedly decided that the law of nations was part of the code of the United States[.]

Id.

161. Id. at app. 540 (Sen. Choate).
162. Id. at app. 619 (Sen. Walker).
163. Id. at app. 616 (Sen. Walker) ("But the judicial power was not extended to all cases under the law of nations; for it was extended to special specified cases arising under the law of nations, which would have been superfluous and nugatory had it been previously extended to all cases.").

164. Id. at app. 383 (Sen. Buchanan); see also supra note 151 (quoting language of original bill).
in the same way that foreign law would apply in a proper case, but it could not supply a constitutional basis of jurisdiction on its own.\footnote{Id at app. 387. It is doubtful whether the defendant in \textit{McLeod} could have successfully sought direct review in the U.S. Supreme Court, even assuming there was a final judgment. See Bradley, \textit{supra} note 11, at 604-05 (noting consistent treatment of law of nations as not presenting a federal question for direct review). \textit{But see} Bederman, \textit{supra} note 152, at 526 & n.50 (arguing that defendant could have sought direct review).}

Opponents also made the argument that the law of nations was not among the “laws” of the United States, because it was not made by Congress in pursuance of the Constitution, as called for by the Supremacy Clause, rather, it was “already made . . . by the world.”\footnote{\textit{Id}. at app. 614 (Sen. Walker); \textit{see also} \textit{id}. at app. 557 (Sen. Calhoun) (raising federalism concerns with the bill).} They also invoked federalism and separation of powers concerns, stating that if federal courts undertook “the boundless range of power arising under the law of nations, undefined and undefinable; to become the arbiter of the peace of nations” federal judges would be exercising a “power never assigned to [them] by the Constitution,” and that it would be injurious, not beneficial to foreign relations.\footnote{\textit{Id}. at app. 616 (Sen. Walker).} Were the law of nations federal law, they said, Congress could send all cases involving bills of exchange (also governed by the law of nations) and treaty violations exclusively between other nations (similarly so governed) to the federal courts,\footnote{\textit{Id}. at app. 616 (Sen. Walker).} and the President would be bound to carry this broad law of nations into effect.\footnote{\textit{Id}. at app. 616 (Sen. Walker); \textit{see also} \textit{id}. at 729 (Sen. Preston).}

In the end, the bill passed, despite the doubtful rationales given in support of it. Perhaps not too much may be drawn from the fact of passage. There may have been no majority for either the party-based rationale or the federal-question rationale, although a perfectly good Article III justification for such jurisdiction would appear to exist in Article III’s alienage provision. In any event, the structure of the bill as originally proposed makes clear that federal “laws” were considered distinct from the “law of nations,” even though some supporters argued that the latter were the equivalent of the former. But the debate—reminiscent of the modern debate and perhaps equally inconclusive—shows that uncertainty over the federal status of even the

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\footnote{\textit{Id}. at app. 614 (Sen. Walker); \textit{see also} \textit{id}. at app. 557 (Sen. Calhoun) (raising federalism concerns with the bill).}

\footnote{\textit{Id}. at app. 616 (Sen. Walker).}

\footnote{\textit{Id}. at app. 616 (Sen. Walker); \textit{see also} \textit{id}. at 729 (Sen. Preston).}

“old” law of nations was evident fairly early on, just as it suggests the
shape of the current argument regarding the domestic status of the new
law of nations.

CONCLUSION

Toward the beginning of his article, Professor Bradley quotes Judge
Friendly’s famous quip about the uncertain origins of the ATS, that it is
a kind of “legal Lohengrin.”170 But while Lohengrin’s lineage may have
been a secret to those around him, it would have been no secret to the
audience: He was the offspring of Parsifal, the keeper of the Holy
Grail.171 Some have admitted that “[t]he rediscovery of the Alien Tort
Statute was much like finding the Holy Grail.”172 And why not? Like
other legal archeological discoveries that Justice Frankfurter cautioned
against, it is almost too good to be true. By incorporating an unwritten
and ever evolving law of nations—often developed outside our
domestic political processes, and with a prominent role played by
academics—the ATS is uniquely configured to take on the meaning the
sincerest human rights advocates wish it to possess, and as supreme
federal law no less. That should be enough to qualify it as miraculous in
anyone’s book.

170. IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975) (“[N]o one seems to know
whence it came”).
171. See JOHN W. FREEMAN, THE METROPOLITAN OPERA STORIES OF THE GREAT OPERAS
172. David J. Bederman, Dead Man’s Hand: Reshuffling Foreign Sovereign Immunities in
(notting that “it is common to think of the Holy Grail as a tool that will serve only virtuous
purposes. The philosophers’ stone, by contrast, is not picky.”).