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ABSTRACT

In Kiobel v. Royal Dutch Petroleum Co.*, the Supreme Court applied the presumption against extraterritorial application of U.S. law to hold that the Alien Tort Statute (ATS) did not encompass a claim between aliens for misconduct that occurred in another nation. Without much elaboration, the Court stated that the ATS only encompasses claims that "touch and concern the territory of the United States . . . with sufficient force to displace the presumption." As it did in* Sosa v. Alvarez-Machain*, the* Kiobel *Court purported to rest its decision on the original public meaning of the ATS when enacted in 1789. The Court, however, misperceived the original meaning of the statute by accepting two mistaken historical claims about the ATS advanced by academics and lower courts. First, the Court accepted the notion that incidents involving the rights of ambassadors prompted the First Congress to enact the ATS. Second, the Court endorsed the idea that the ATS was originally meant to cover only three "torts" that corresponded to the three criminal offenses against the law of nations emphasized by Blackstone in his* Commentaries*—namely, torts against ambassadors, violations of safe conducts, and claims relating to piracy. Both propositions lack substantial support in the historical record and oversimplify the political context in which the statute was enacted. To address incidents involving ambassadors, the First Congress enacted distinct jurisdictional and criminal provisions, including vesting original jurisdiction over claims by ambassadors in the Supreme Court. Indeed, the First Congress enacted specific jurisdictional and criminal provisions to address all three of the "Blackstone crimes." The ATS served a different purpose. Congress enacted the statute to cover a distinct category of claims by foreign citizens against U.S. citizens for acts of violence that none of these other provisions adequately addressed. The Court's reliance on these two myths in* Sosa *and* Kiobel *led it to misconstrue the ATS and, in certain respects, to unduly narrow the statute's application. In future cases, the Court should abandon these myths and recognize that the ATS was originally meant to apply (1) to a broader range of tort claims by aliens, and (2) only to claims against U.S. citizens—a jurisdictional limitation that the Court has yet to address.*

INTRODUCTION

The Supreme Court has interpreted the Alien Tort Statute (ATS) in only two cases, both decided in the last decade. In both cases, the Court endorsed

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two myths about the ATS advanced by lower courts and academics. The first myth is that assaults on foreign ambassadors during the Confederation era prompted the First Congress to enact the ATS. The second myth is that Congress enacted the ATS in order to provide civil redress for three English crimes identified by Blackstone to punish violations against the law of nations. On closer analysis, neither proposition finds substantial support in the historical record. Rather, available materials suggest that the ATS was designed to remedy a distinct and historically important type of law of nations violation well known to the First Congress, but mostly overlooked today—namely, one nation's failure to redress violence by its citizens against the citizens of another nation.

As enacted in 1789, the ATS provided that "the district courts . . . shall . . . have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States."[1] Litigants and judges rarely invoked this statute for nearly 200 years. Starting in 1980, certain lower federal courts began reading the ATS to allow aliens to sue other aliens in federal courts for violations of customary international law that occurred outside the United States.[2] In two cases this past decade, however, the Supreme Court interpreted the statute more strictly to deny relief. In 2004, in *Sosa v. Alvarez-Machain*, the Court held that the ATS encompasses claims based only on customary international law rules that are as definite and specific as the kinds of rules that it believed the First Congress originally intended the ATS to cover.[3] In the Court's view, Congress most likely meant the ATS to provide civil redress for three categories of criminal offenses against the law of nations that William Blackstone singled out for detailed explanation—violations of rights of ambassadors, safe conduct violations, and piracy.[4] In support of this view, the Court suggested that Congress enacted the ATS in response to incidents involving ambassadors during the Confederation era.[5] In 2013, in *Kiobel v. Royal Dutch Petroleum Co.*, the Court treated both of these assertions—that incidents involving ambassadors prompted the ATS and that the ATS was originally meant to cover the three Blackstone crimes—as uncontroverted.[6] Proceeding from these assumptions, the *Kiobel* Court found another limitation on the reach of the statute. It held that the presumption against extraterritoriality applies to the ATS

1 Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76–77 (codified as amended at 28 U.S.C. § 1350 (2006)). For a more comprehensive examination of the original meaning of this statute, see Anthony J. Bellia Jr. & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. CHI. L. REV. 445, 507 (2011) (analyzing the original meaning of the ATS). Parts of this Article are drawn from that article's examination of the legal background, political context, and text of the ATS.

2 *See* Bellia & Clark, *supra* note 1, at 459 (describing cases).

3 Sosa v. Alvarez-Machain, 542 U.S. 692, 732 (2004).

4 *Id.* at 724, 732; *see* 4 WILLIAM BLACKSTONE, COMMENTARIES *64 (Charles M. Haar ed., 1962).

5 542 U.S. at 716–17.

6 Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1661 (2013).

(even though it is a jurisdictional statute), and thus that the ATS does not apply to claims that fail to "touch and concern the territory of the United States . . . with sufficient force to displace the presumption."[7]

In both *Sosa* and *Kiobel*, the Court purported to rest its decisions on the original meaning of the ATS as enacted in 1789. There is an inadequate basis in the historical record, however, to support the two claims endorsed by the Court. The claim that incidents involving the rights of ambassadors prompted the First Congress to enact the ATS neglects the fact that Congress covered such incidents in other contemporaneous provisions, and overlooks that other law of nations violations also threatened the peace and security of the United States—specifically, torts of violence against aliens. To be sure, assaults against ambassadors posed a greater threat to the peace and security of the United States than assaults against ordinary aliens. But both kinds of violations threatened the new nation's relations with foreign states. Not surprisingly, the First Congress enacted jurisdictional and criminal provisions to deal specifically with both kinds of incidents. Congress protected ambassadors by vesting the Supreme Court with original jurisdiction over claims involving ambassadors in the First Judiciary Act, and by making assaults against ambassadors a federal offense in the Crimes Act of 1790.[8] The First Congress also addressed violence against ordinary aliens by enacting the ATS. Rather than duplicate ambassadorial jurisdiction, the ATS gave federal courts jurisdiction to redress acts of violence by U.S. citizens against private foreign citizens, a distinct type of law of nations violation that neither the Supreme Court's ambassadorial jurisdiction nor any other statutory grant of federal jurisdiction would have adequately covered.

Likewise, there is little evidence to support the additional claim that the First Congress intended the ATS to encompass claims analogous to the three criminal offenses against the law of nations that Blackstone identified in his *Commentaries*—namely, violations of rights of ambassadors, safe conduct violations, and piracy. All of these crimes represented distinct law of nations violations that nations had an obligation to prevent and redress. The First Congress enacted other jurisdictional and criminal provisions to deal with each of these law of nations violations. The ATS dealt with a different problem. Although now generally overlooked by courts and scholars, the law of nations also imposed an obligation on nations to redress violence by their citizens against the citizens of other nations. Congress enacted the ATS to comply with this obligation by giving foreign citizens a federal forum for adjudicating claims against U.S. citizens for acts of violence regardless of the amount in controversy. No other jurisdictional provision covered such claims.

The two myths about the ATS that the Supreme Court perpetuated in *Sosa* and *Kiobel* led the Court astray in ascertaining the original meaning of the statute. In *Sosa*, the Court's belief that the ATS was meant to redress

7 *Id.* at 1669.

8 *See infra* Part II.

assaults against ambassadors and to cover only Blackstone's crimes led the Court to construe the statute too narrowly—specifically, to cover only law of nations violations akin to those crimes.[9] The better reading of the statute in its original political and legal context is that the First Congress authorized federal courts to hear a broader range of claims by private foreign citizens for acts of violence suffered at the hands of U.S. citizens, whether or not such claims corresponded to the narrower set of crimes identified by Blackstone.

In *Kiobel*, the Court reiterated and relied on the same two myths in holding that the ATS applies only to claims that "touch and concern the territory of the United States . . . with sufficient force to displace the presumption against extraterritorial[ity]."[10] In 1789, any claim by an alien against a U.S. citizen for intentional violence—whether it occurred at home or abroad—would have touched and concerned the national security of the United States. Under the law of nations, the United States was obligated to redress all such injuries. If it failed to do so, the offended nation would have just cause to retaliate against the United States through reprisals or war. This obligation extended to injuries that U.S. citizens inflicted upon aliens outside of U.S. territory. Claims involving injuries inflicted by U.S. citizens outside U.S. territory were an important category of wrongs covered by the ATS because, short of extraditing the perpetrator, providing civil redress was the only way that the United States could avoid justified retaliation by the victim's nation.

This Article revisits the two myths about the ATS that the Court embraced in *Sosa* and *Kiobel*—namely, that the primary aim of the act was to redress offenses against ambassadors and, relatedly, that the ATS was originally designed to encompass Blackstone's crimes against the law of nations. Upon review, these claims lack substantial support in the historical record and led the Court to misinterpret the statute in both cases. In future cases, the Court should avoid reliance on these myths and instead recognize that the ATS originally applied to a broad class of tort claims by aliens against U.S. citizens. Specifically, the ATS originally encompassed claims by aliens against U.S. citizens (but only U.S. citizens) for any tort of violence against person or personal property, wherever committed.

Part I describes how the Supreme Court uncritically accepted two unsubstantiated myths about the ATS in *Sosa* and *Kiobel*, and how these myths adversely affected the Court's interpretation of the statute. Part II explains that the First Congress likely enacted the ATS not in response to assaults on ambassadors, but rather in response to state court failures to redress acts of violence by U.S. citizens against ordinary foreign citizens. Part III explains why a reasonable reader of the ATS in 1789 would have understood the ATS not to encompass Blackstone's three crimes against the law of nations, but rather to confer jurisdiction over a broader class of tort claims for acts of violence committed by U.S. citizens against foreigners. Finally, Part IV

9 *Sosa*, 542 U.S. at 724–25.

10 *Kiobel*, 133 S. Ct. at 1669.

explains how the Court's embrace of these myths in *Sosa* and *Kiobel* led it to construe the original meaning of the ATS too narrowly, and how future courts could avoid perpetuating this mistake by recognizing that the ATS originally granted federal courts jurisdiction over a broader range of tort claims by aliens against U.S. citizens.

I. The Supreme Court's Approach to the ATS

Beginning in the 1980s, some lower federal courts read the ATS to allow an alien to sue another alien for international law violations occurring in other nations. In *Filartiga v. Pena-Irala*, the Second Circuit allowed citizens of Paraguay to sue another citizen of Paraguay under the ATS for causing their son's death through torture in Paraguay.[11] The court determined that "deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties."[12] Because the alleged torturer was found and served with process by an alien in the United States, the court reasoned, the ATS provided federal jurisdiction on the ground that the alien was suing for a tort in violation of the law of nations.[13] A potential objection to the court's ruling, however, was that a suit between aliens does not in itself fall within the limited subject matter jurisdiction that Article III authorizes federal courts to exercise. The Second Circuit attempted to resolve this difficulty by contending that the law of nations "has always been part of the federal common law,"[14] and thus that suits between aliens under the ATS arise under federal law for purposes of Article III.[15] Several other circuits followed the Second Circuit's approach.[16] The D.C. Circuit, however, rejected the Second Circuit's reasoning in *Tel-Oren v. Libyan Arab Republic*.[17]

In *Tel-Oren*, Israeli citizens sued several Palestinian organizations, alleging that they were responsible for an armed attack on a civilian bus in Israel that killed and injured numerous civilians and thus amounted to tortious acts in violation of the law of nations.[18] The D.C. Circuit affirmed the district court's dismissal of the complaint in a brief per curiam opinion with each judge on the panel writing a separate concurrence.[19] Judge Harry Edwards indicated that the ATS allowed federal courts to hear some cases alleging

11 Filartiga v. Pena-Irala, 630 F.2d 876, 878 (2d Cir. 1980).

12 *Id.*

13 *Id.* at 888–89.

14 *Id.* at 885.

15 *Id.* at 887 n.22 ("We recognize that our reasoning might also sustain jurisdiction under the general federal question provision, 28 U.S.C. § 1331. We prefer, however, to rest our decision upon the [ATS], in light of that provision's close coincidence with the jurisdictional facts presented in this case.").

16 *See, e.g.*, Abebe-Jira v. Negewo, 72 F.3d 844, 848 (11th Cir. 1996); Hilao v. Estate of Marcos (*In re* Estate of Marcos), 25 F.3d 1467, 1475 (9th Cir. 1994).

17 726 F.2d 774 (D.C. Cir. 1984) (per curiam).

18 *Id.* at 775.

19 *Id.*

violations of established international law, but concluded that terrorism against civilians was not sufficient to support a claim under the statute.[20] Judge Robert Bork concluded that the ATS is solely a jurisdictional statute that does not itself create a private cause of action.[21] In his view, separation of powers precluded federal courts from inferring a cause of action from the ATS or creating a federal common law cause of action for international law violations.[22] Judge Roger Robb concurred on the ground that the dispute presented a nonjusticiable political question.[23] In the aftermath of these conflicting circuit court decisions, courts and commentators continued to debate the meaning of the ATS.[24]

The Supreme Court finally addressed the meaning of the statute in two relatively recent cases, *Sosa v. Alvarez-Machain*[25] in 2004 and *Kiobel v. Royal Dutch Petroleum Co.*[26] in 2013. In *Sosa*, the Court examined how the ATS would have been understood when it was enacted in 1789. In the course of this examination, the Court endorsed two long-standing claims about the ATS—first, that incidents involving ambassadors prompted Congress to enact the statute,[27] and, second, that Congress probably intended the statute to encompass three criminal offenses against the law of nations identified by Blackstone.[28] The Court relied on both of these claims in *Kiobel* as well.[29] The rest of this Part recounts how the Supreme Court came to accept these claims. Parts II and III reveal that, upon closer examination, both propositions lack substantial support in the historical record.

A. Sosa

The Supreme Court interpreted the ATS for the first time in 2004 in *Sosa v. Alvarez-Machain* and unanimously rejected the application of the stat-

20 *Id.* at 781, 796 (Edwards, J., concurring).

21 *Id.* at 811 (Bork, J., concurring).

22 *Id.* at 801.

23 *Id.* at 826–27 (Robb, J., concurring).

24 For analyses of the original meaning of the ATS, see Bellia & Clark, *supra* note 1; Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587 (2002); Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461 (1989); William R. Casto, *The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467 (1986); Anthony D'Amato, *The Alien Tort Statute and the Founding of the Constitution*, 82 AM. J. INT'L L. 62 (1988); William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists,"* 19 HASTINGS INT'L & COMP. L. REV. 221 (1996); Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830 (2006); John M. Rogers, *The Alien Tort Statute and How Individuals "Violate" International Law*, 21 VAND. J. TRANSNAT'L L. 47 (1988); Joseph Modeste Sweeney, *A Tort Only in Violation of the Law of Nations*, 18 HASTINGS INT'L & COMP. L. REV. 445 (1995).

25 542 U.S. 692 (2004).

26 133 S. Ct. 1659 (2013).

27 *Sosa*, 542 U.S. at 716–17.

28 *Id.* at 715.

29 *Kiobel*, 133 S. Ct. at 1666.

ute to the claim at issue. Alvarez (a doctor who was a Mexican national) sued Sosa (a fellow Mexican national), other Mexican nationals, four agents of the U.S. Drug Enforcement Agency (DEA), and the United States for kidnapping him in Mexico and bringing him to the United States to stand trial for the alleged torture and murder of a DEA agent in Mexico.[30] The district court dismissed the claims against the U.S. defendants, leaving only a dispute between aliens. The Supreme Court held that federal courts lacked jurisdiction to hear this dispute under the ATS. The Court began by holding that "the statute is in terms only jurisdictional."[31] The Court characterized as "implausible" the plaintiff's argument that "the ATS was intended not simply as a jurisdictional grant, but as authority for the creation of a new cause of action for torts in violation of international law."[32] It emphasized that the text of the statute, its placement in the Judiciary Act, and "the distinction between jurisdiction and cause of action" known to the Founders[33] all supported the conclusion that "the ATS is a jurisdictional statute creating no new causes of action."[34] At the same time, the Court believed that federal courts could hear a limited number of claims that the First Congress might have had in mind when it enacted the ATS. According to the Court, the "jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time."[35] Those violations, the Court suggested, corresponded to the three crimes against the law of nations discussed by Blackstone in his treatise on the laws of England: infringement of the rights of ambassadors, violation of safe conducts, and piracy.[36] Working from this premise, the Court determined that federal courts today have limited power to recognize new claims "based on the present-day law of nations" so long as they "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized."[37]

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30 *Sosa*, 542 U.S. at 698.

31 *Id.* at 712.

32 *Id.* at 713.

33 *Id.*

34 *Id.* at 724.

35 *Id.*

36 *Id.*

37 *Id.* at 725. Scholars have extensively considered the meaning and import of this holding in *Sosa*. *See, e.g.*, Curtis A. Bradley et al., Sosa*, Customary International Law, and the Continuing Relevance of* Erie, 120 HARV. L. REV. 869, 893–901 (2007) (observing that the scope of causes of action within ATS jurisdiction after *Sosa* remains ambiguous); Eugene Kontorovich, *Implementing* Sosa v. Alvarez-Machain*: What Piracy Reveals About the Limits of the Alien Tort Statute*, 80 NOTRE DAME L. REV. 111, 155–56 (2004) (arguing that modern customary international law is inconsistent with historical antecedents and thus does not satisfy what *Sosa* requires for a cause of action to fall within ATS jurisdiction); Ralph G. Steinhardt, *Laying One Bankrupt Critique to Rest:* Sosa v. Alvarez-Machain *and the Future of International Human Rights Litigation in U.S. Courts*, 57 VAND. L. REV. 2241, 2255 (2004)

In reaching this conclusion, the Court assumed the validity of two important claims. The first was that Congress enacted the ATS in response to two incidents involving foreign ambassadors during the Confederation era. In 1784, a French subject, Charles Julian de Longchamps, insulted and assaulted Francois de Barbee Marbois, the French General Counsel and Secretary of Legation, in Philadelphia.[38] A Pennsylvania state court convicted and sentenced de Longchamps for the offense, but denied Marbois's request for de Longchamps's extradition.[39] The Confederation Congress lacked power to take action other than to pass resolutions and make recommendations to the states. In 1787, during the Federal Convention, a New York constable created another international incident by entering the residence of the Dutch Minister Plenipotentiary to the United States, Pieter Johan van Berckel, with a warrant to arrest a member of his household.[40] Van Berckel protested to John Jay, the American Secretary of Foreign Affairs, but the United States was powerless to provide satisfaction for the offense.[41] Jay lamented to Congress that "the foederal Government does not appear . . . to be vested with any judicial Powers competent to the Cognizance and Judgment of such Cases."[42]

The *Sosa* Court suggested that the ATS was a response by the First Congress to these incidents. The Court began by observing that at the time the ATS was enacted, "[a]n assault against an ambassador . . . impinged upon the sovereignty of the foreign nation and if not adequately redressed could rise to an issue of war."[43] The Court correctly noted that "[t]he Framers responded" to incidents involving ambassadors "by vesting the Supreme Court with original jurisdiction over 'all Cases affecting Ambassadors, other public ministers and Consuls.'"[44] The Court, however, went on to make the further claim that the First Congress was also responding to these incidents when it "created alienage jurisdiction . . . and . . . included the ATS" in the First Judiciary Act.[45] Without much analysis, the *Sosa* Court then concluded that "[u]ppermost in the legislative mind" when Congress drafted the ATS "appears to have been offenses against ambassadors."[46]

(arguing that *Sosa* recognized the continued applicability of international law norms to federal law after *Erie*); Beth Stephens, Comment, Sosa v. Alvarez-Machain*: "The Door Is Still Ajar" for Human Rights Litigation in U.S. Courts*, 70 BROOK. L. REV. 533, 535 (2004) (heralding *Sosa* as a "clear victory" for many human rights activists).

38 Respublica v. De Longchamps, 1 U.S. (1 Dall.) 111, 111–12 (Pa. Ct. Oyer & Terminer 1784).

39 *Id.* at 116.

40 *See* 34 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 109 (Roscoe R. Hill ed., 1937).

41 *Id.* at 111.

42 *Id.*

43 Sosa v. Alvarez-Machain, 542 U.S. 692, 715 (2004).

44 *Id.* at 717 (quoting U.S. CONST. art. III, § 2). Congress implemented this jurisdiction in section 13 of the First Judiciary Act, as the *Sosa* Court recognized. *Id.*

45 *Id.* (citing Judiciary Act of 1789, ch. 20, §§ 9, 11, 1 Stat. 73, 76–77, 80).

46 *Id.* at 720.

A second proposition on which the *Sosa* Court relied was that the ATS was meant to provide redress for the three criminal offenses against the law of nations that Blackstone identified in his *Commentaries on the Laws of England*. Although the *Sosa* Court found that the Marbois and van Berckel incidents likely prompted Congress to enact the ATS, the Court suggested that Congress also meant the ATS to encompass two other kinds of cases as well. According to the Court, "violations of safe conduct were probably understood to be actionable, and individual actions arising out of prize captures and piracy may well have also been contemplated."[47] The Court focused on these cases because they appeared on a list of criminal offenses against the law of nations that William Blackstone compiled in his famous *Commentaries*.[48] Blackstone identified three "principal offences against the law of nations" that English law criminalized: "1. Violation of safe-conducts; 2. Infringement of the rights of ambassadors; and 3. Piracy."[49] "It was this narrow set of violations of the law of nations," the *Sosa* Court reasoned, "admitting of a judicial remedy and at the same time threatening serious consequences in international affairs, that was probably on [the] minds of the men who drafted the ATS with its reference to tort."[50] The Court "found no basis to suspect Congress had any examples in mind beyond those torts corresponding to Blackstone's three primary offenses."[51]

Both of these propositions—that incidents involving ambassadors prompted the ATS and that the ATS was meant to cover Blackstone's three criminal offenses—had been suggested in academic writings and judicial opinions before the Court decided *Sosa*. Several scholars had claimed in published articles that the ATS was a response to the Marbois incident.[52] In addition, certain professors filed an amicus brief in *Sosa* arguing that the ATS was originally meant to cover Blackstone's three offenses.[53] This latter idea appears to have originated in Judge Robert Bork's concurrence in *Tel-Oren v. Libyan Arab Republic*,[54] in which he spent several pages speculating "what [the ATS] may have been enacted to accomplish."[55] He found the idea that the

47 *Id.* (citation omitted).

48 *Id.*

49 4 BLACKSTONE, *supra* note 4, at *68.

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

51 *Id.* at 724.

52 *See* Casto, *supra* note 24, at 491–94; Dodge, *supra* note 24, at 229–30; 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, 26 (1985).

53 Specifically, these professors noted the Continental Congress's 1781 resolution, which enumerated law of nations violations that "followed Blackstone." *See* Brief for Professors of Federal Jurisdiction and Legal History as Amici Curiae Supporting Respondents at 5 n.4, *Sosa*, 542 U.S. 692 (No. 03-339). The brief went on to say that the First Congress "implemented the 1781 resolution's recommendation on civil suits" by enacting the ATS. *Id.* at 8.

54 726 F.2d 774 (D.C. Cir. 1984) (per curiam).

55 *Id.* at 813 (Bork, J., concurring).

ATS was "concerned with the rights of ambassadors" to be "plausible."[56] He turned to Blackstone—"a writer certainly familiar to colonial lawyers"—and explained that Blackstone had identified three principal offenses against the law of nations made criminal by the laws of England: infringement of the rights of ambassadors, violations of safe conducts, and piracy.[57] According to Judge Bork, "[o]ne might suppose that these were the kinds of offenses for which Congress wished to provide tort jurisdiction for suits by aliens in order to avoid conflicts with other nations."[58] At the same time, Judge Bork admitted that these thoughts as to the possible original intention underlying the ATS were "speculative."[59] He offered them "merely to show that the statute could have served a useful purpose even if the larger tasks assigned it by *Filartiga* . . . are rejected."[60] In *Sosa*, the Supreme Court assumed the validity of Judge Bork's speculation.

B. Kiobel

In 2013, in *Kiobel v. Royal Dutch Petroleum Co.*,[61] the Court again relied on the two historical claims endorsed in *Sosa* and seemed to assume that they were matters of established fact. In *Kiobel*, a group of Nigerian nationals (living in the United States as legal residents) filed an ATS suit in federal court against certain Dutch, British, and Nigerian corporations, alleging that they aided and abetted the Nigerian government in committing various international human rights violations in Nigeria, including extrajudicial killings, crimes against humanity, and torture.[62] The Second Circuit held that federal courts lack subject matter jurisdiction under the ATS over claims against corporations,[63] and the Supreme Court initially granted certiorari to decide that question. After argument, however, the Court ordered the parties to brief and argue an additional question: "Whether and under what circumstances the [ATS] allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States."[64]

After reargument, the Supreme Court applied the presumption against extraterritorial application of U.S. law to affirm the Second Circuit's dismissal of the case. The Court acknowledged that the presumption ordinarily is used to determine the extraterritorial application of statutes regulating con-

56 *Id.* at 814–15.

57 *Id.* at 813.

58 *Id.* at 813–14.

59 *Id.* at 815.

60 *Id.* For a discussion of Judge Bork's views on the ATS and their potential impact on the Supreme Court's subsequent decisions, see Bradford R. Clark, Tel-Oren, Filartiga, *and the Meaning of the Alien Tort Statute*, 80 U. CHI. L. REV. DIALOGUE 177 (2013).

61 133 S. Ct. 1659 (2013).

62 *Id.* at 1662–63.

63 Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 149 (2d Cir. 2010).

64 Kiobel v. Royal Dutch Petroleum Co., 132 S. Ct. 1738, 1738 (2012) (mem.) (citation omitted).

duct and reaffirmed *Sosa*'s conclusion that the ATS is "strictly jurisdictional" and thus "does not directly regulate conduct or afford relief."[65] Nonetheless, the Court concluded that "the principles underlying the canon of interpretation similarly constrain courts considering causes of action that may be brought under the ATS."[66] In particular, the Court noted that "the danger of unwarranted judicial interference in the conduct of foreign policy is magnified in the context of the ATS."[67] To rebut the presumption, the ATS would need to evince a clear indication of extraterritoriality, and the Court found no such indication in the text and history of the statute. Quoting Justice Story, the Court thought it "implausible to suppose that the First Congress wanted their fledgling Republic—struggling to receive international recognition—to be the first" nation to pretend to be the "'custos morum of the whole world.'"[68]

In reaching these conclusions, the *Kiobel* Court relied on and strengthened *Sosa*'s two claims about the origins of the ATS. First, the Court asserted as fact that the ATS was enacted in response to incidents involving foreign ambassadors on U.S. soil. The Court described the Marbois and van Berckel incidents, observing that both "notorious episodes involving violations of the law of nations occurred in the United States shortly before passage of the ATS."[69] The Court explained that "[t]he United States was . . . embarrassed by its potential inability to provide judicial relief to foreign officials injured in the United States," and that "[s]uch offenses . . . 'if not adequately redressed could rise to an issue of war.'"[70] From these unexceptional observations, the Court jumped to the conclusion that "[t]he ATS ensured that the United States could provide a forum for adjudicating such incidents."[71] In the Court's view, this history helped to demonstrate that the ATS was originally meant to cover only law of nations violations that occurred in the United States, such as the Marbois and van Berckel incidents.[72]

Second, the *Kiobel* Court treated what *Sosa* regarded as an educated guess—that the ATS was probably meant to encompass Blackstone's three criminal offenses against the law of nations—as more or less an established historical fact. "We explained in *Sosa* that when Congress passed the ATS, 'three principal offenses against the law of nations' had been identified by Blackstone: violation of safe conducts, infringement of the rights of ambassadors, and piracy."[73] The Court concluded that "[t]he first two offenses have

65 *Kiobel*, 133 S. Ct. at 1664 (quoting Sosa v. Alvarez-Machain, 542 U.S. 692, 713 (2004)) (internal quotation marks omitted).

66 *Id.*

67 *Id.*

68 *Id.* at 1668 (quoting United States v. La Jeune Eugenie, 26 F. Cas. 832, 847 (C.C.D. Mass. 1822) (No. 15,551)).

69 *Id.* at 1666; *see* Bellia & Clark, *supra* note 1, at 536.

70 *Kiobel*, 133 S. Ct. at 1668 (quoting *Sosa*, 542 U.S. at 715).

71 *Id.*

72 *Id.* at 1668–69.

73 *Id.* at 1666 (quoting *Sosa*, 542 U.S. at 723–24).

no necessary extraterritorial application,"[74] and that piracy, which occurred on the high seas, is not "a sufficient basis for concluding that other causes of action under the ATS reach conduct that does occur within the territory of another sovereign."[75]

The *Kiobel* Court relied on both of these propositions with no independent analysis of their historical correctness. As the next two Parts explain, however, the historical record does not support the conclusions that offenses against ambassadors moved Congress to enact the ATS and that Congress enacted the ATS to redress claims based upon the three Blackstone crimes.

II. The ATS and Assaults on Ambassadors

The claim that Congress enacted the ATS primarily as a means to remedy assaults against ambassadors lacks substantial support in the historical record. Under the Articles of Confederation, many kinds of law of nations violations—beyond violations of ambassadors' rights—threatened the collective interests of the United States. One of these violations was violence by U.S. citizens against private foreign citizens.[76] Under the law of nations in 1789, if a citizen of one nation committed an act of violence against a citizen of another nation, the offender's nation had to redress the offense by imposing a criminal sanction, extraditing the offender, or providing a civil remedy.[77] If the offender's nation did not provide such redress, it became responsible for the offense, and the victim's nation had just cause to retaliate, including by waging war.[78]

During the Confederation era, such violations of the law of nations were widespread and notorious. U.S. citizens threatened and committed violence against British subjects in particular, and states did not satisfy their obligation under the law of nations to redress such violence.[79] Under the Articles of Confederation, Congress was powerless to redress these law of nations violations.[80] The Constitution was adopted, in part, to enable the federal government to ensure compliance with the law of nations. Read in this historical context, the text of the ATS is better understood as Congress's effort to provide a federal forum for claims of routine violence against private foreign citizens than as an effort to redress a few incidents of violence against ambassadors.[81] The language of the ATS encompasses a broader category of claims than those brought by ambassadors. The ATS gave federal courts jurisdiction over "all causes where an alien"—without regard to his or her status as an ambassador—"sues for a tort only in violation of the law of nations or a treaty

74 *Id.*

75 *Id.* at 1667.

76 We use the word "citizen" as shorthand to refer to all foreign citizens or subjects.

77 Bellia & Clark, *supra* note 1, at 472–75.

78 *Id.* at 476–77.

79 *Id.* at 456.

80 *Id.*

81 *See id.* at 466–67.

of the United States."[82] Moreover, other provisions of the First Judiciary Act specifically addressed incidents involving ambassadors.[83] In short, the Supreme Court's suggestion in *Sosa*—and assertion in *Kiobel*—that the First Congress enacted the ATS to redress offenses like the Marbois and van Berckel incidents is unsubstantiated by the historical record.

A. Violence Against Private Foreign Citizens

This Section describes why a reasonable reader of the ATS in 1789 would have understood it to encompass acts of private violence by aliens against U.S. citizens. Some of the points made in this Section are drawn from our prior article, *The Alien Tort Statute and the Law of Nations*,[84] which explores the matters addressed here in more detail.

Under well-known principles of the law of nations in 1789, a nation became responsible for an intentional injury inflicted by one of its citizens upon the person or personal property of a citizen of another nation if the first nation failed to redress the injury.[85] In such cases, writers on the law of nations described the offending citizen as violating the law of nations, and the offender's nation as having a duty to redress the offense. The offender's nation could avoid responsibility (and potential retaliation) for the offense by redressing the injury in one of three ways: by prosecuting the offender for a crime, by extraditing the offender to the victim's nation, or by providing a civil remedy to the injured alien. American states notoriously failed to redress violence against aliens during the Confederation period in any of these accepted ways, thereby threatening the peace and security of the United States as a whole.

1. Background Principles of the Law of Nations

Writers on the law of nations—well known to members of the First Congress—recognized that nations had an obligation to redress acts of violence by their citizens against foreign citizens. In particular, Emmerich de Vattel's treatise, *The Law of Nations*,[86] was widely read in England and the American states at the time of the Founding.[87] Vattel clearly and directly addressed "*the Concern a Nation may have in the Actions of its Citizens*."[88] "Private persons," he observed, "who are the members of one nation, may offend and ill-treat the citizens of another, and may injure a foreign sovereign."[89] Vattel thus

82 Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77 (codified as amended at 28 U.S.C. § 1350 (2006)).

83 *Id.* § 13, 1 Stat. at 80.

84 Bellia & Clark, *supra* note 1.

85 *Id.* at 455.

86 1 EMMERICH DE VATTEL, THE LAW OF NATIONS (1759).

87 *See* Anthony J. Bellia, Jr. & Bradford R. Clark, *The Federal Common Law of Nations*, 109 COLUM. L. REV. 1, 15–16 & n.50 (2009).

88 VATTEL, *supra* note 86, bk. II, ch. VI, § 71, at 144.

89 *Id.*

considered "what share a state may have in the action of its citizens," and, likewise, "what are the rights and obligations of sovereigns in this respect."[90] Vattel explained that any person who harms a citizen of another nation harms that citizen's nation: "Whoever uses a citizen ill, indirectly offends the state, which ought to protect this citizen."[91] Because every nation owed its citizens a duty of protection, a person who harmed a citizen of another nation also offended that nation itself. According to Vattel, a nation so offended "should revenge the injuries, punish the aggressor, and, if possible, oblige him to make [entire] satisfaction; since otherwise the citizen would not obtain the great end of the civil association, which is safety."[92]

Violation of the rights of ambassadors was an especially egregious type of offense against a foreign nation and could trigger serious consequences. But any act of violence against a private foreign citizen also constituted a distinct (and more common) offense against a foreign sovereign. Vattel addressed the crucial question of when a nation would become responsible for such an offense by one of its citizens. Vattel observed that not all actions of citizens would be imputed to their nations.[93] A nation would be responsible only if it sanctioned the harm that its citizen inflicted. A nation could sanction such harms in one of two ways: by authorizing a transgression ex ante,[94] or by failing to redress a transgression ex post.[95] By definition, a nation assumed full responsibility for any transgressions that it authorized ex ante. Nations became responsible for unauthorized transgressions, however, only if they failed to redress them ex post. Such failures were a serious problem threatening the peace and security of the United States during the Confederation period. According to Vattel, there were three ways that a nation could redress a transgression ex post: inflict a criminal punishment, extradite the offender, or provide a civil remedy.[96] If a nation provided such redress, then "the offended [nation] ha[d] nothing farther to demand."[97] But if a nation refused to take one of these measures, it became responsible to the other nation for an injury inflicted upon that nation's citizen—and, by extension,

90 *Id.*

91 *Id.*

92 *Id.*

93 *Id.* bk. II, ch. VI, § 73, at 144 ("[I]t is impossible for the best regulated state, or for the most vigilent and absolute sovereign, to model at his pleasure all the actions of his subjects, and to confine them on every occasion, to the most exact obedience . . . .").

94 *Id.* bk. II, ch. VI, § 78, at 146 ("[T]he nation in general, is guilty of the base attempt of its members. . . . when by its manners or the maxims of its government it accustoms, and authorizes its citizens to plunder, and use ill foreigners indifferently, or to make inroads into the neighbouring countries, &c.").

95 *Id.* bk. II, ch. VI, § 76, at 145.

96 *Id.* ("[A nation] ought to oblige the guilty to repair the damage, if that be possible, to inflict on him an exemplary punishment, or, in short, according to the nature of the case, and the circumstances attending it, to deliver him up to the offended state there to receive justice.").

97 *Id.*

upon that citizen's nation.[98] As Vattel put it: "The sovereign who refuses to cause a reparation to be made of the damage caused by his subject, or to punish the guilty, or, in short, to deliver him up, renders himself in some measure an accomplice in the injury, and becomes responsible for it."[99]

A nation that failed to redress injuries inflicted by its citizens upon the citizens of another nation was said at the time to have violated the "perfect rights" of the other nation, triggering potentially serious consequences. Although often overlooked today, the law of nations historically recognized a number of perfect rights, including the right to exercise territorial sovereignty, the right to conduct diplomatic relations, the right to exercise neutral rights, and the right to peaceably enjoy liberty.[100] These rights were so important that interference with them provided the offended nation with just cause for reprisals or war.[101] Thus, if one nation failed to redress an injury that its citizen inflicted on an alien, the aggrieved nation could retaliate with force. In addition to Vattel, other prominent writers on the law of nations recognized that a nation's failure to respond appropriately to injuries its members inflicted on foreigners gave the other nation just cause for war.[102] Incidents of this kind were more common during the Confederation era than incidents involving foreign ambassadors, and thus posed an independent threat to the peace and security of the United States.

2. Offenses by U.S. Citizens During the Confederation Era

The claim that the Marbois and van Berckel incidents prompted Congress to pass the ATS ignores evidence that violence by U.S. citizens against private foreign citizens was a more prevalent and immediate problem for the new nation than violence against ambassadors. Although such Founding-era violations of the law of nations are less well known today than offenses against

98 *Id.* bk. II, ch. VI, § 72, at 144 ("If a sovereign, who might keep his subjects within the rules of justice and peace, suffers them to injure a foreign nation, either in its body or its members, he does no less injury to that nation, than if he injured them himself.").

99 *Id.* bk. II, ch. VI, § 77, at 145.

100 *See id.* bk. I, ch. XXIII, §§ 281–83, at 113–14; *id.* bk. II, chs. IV, VII, §§ 49, 54–55, 84, at 137–39, 147–48; *see also* Bellia & Clark, *supra* note 87, at 15–19 (discussing perfect rights under the law of nations).

101 2 VATTEL, *supra* note 86, bk. III, ch. III, §§ 24–26, at 10–11.

102 *See* 1 JEAN JACQUES BURLAMAQUI, THE PRINCIPLES OF NATURAL AND POLITICAL LAW 353 (Thomas Nugent trans., Bumstead 4th ed. 1792) (1748) ("[I]n civil societies, when a particular member has done an injury to a stranger, the governor of the commonwealth is sometimes responsible for it, so that war may be declared against him on that account."); HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE 458 (Innys et al. eds., 1738) (1625) ("Thus we read, that the *Eleans* made War on the *Lacedemonians*, because they would take no Notice of those who had injured them, that is, would neither inflict condign Punishment nor deliver them up. For the Obligation is either to one or the other."); 2 SAMUEL PUFENDORF, DE JURE NATURAE ET GENTIUM LIBRI OCTO bk. VIII, ch. 6, § 12, at 1304 (C.H. Oldfather & W.A. Oldfather trans., Clarendon ed. 1934) (1688) (examining "those ways by which the heads of state become exposed to war because of injuries done by their citizens").

ambassadors, they remain crucial for understanding what moved the First Congress to enact the ATS and to use such broad language in the statute.

Following the War of Independence, American states notoriously violated the law of nations (and perhaps the Paris Peace Treaty itself)[103] by failing to redress tort injuries inflicted by state citizens upon British subjects. The Treaty gave British creditors the right to collect their debts in the United States.[104] It also sought to protect loyalists by giving them time to return and claim property that had been confiscated during the war. Notwithstanding these assurances, state citizens increasingly made violent attacks upon the persons and property of British subjects in America, especially those who had returned to reclaim property or collect debts. Although generally overlooked in discussions of the ATS, such attacks have been well documented.[105]

Failure to redress such violence gave Britain just cause for war against the United States. As a practical matter, however, Britain, like the United States, could ill afford another war at the time.[106] Accordingly, Britain chose to refrain from war and resorted to other forms of retaliation. In time, Britain asserted both the mistreatment of loyalists at the hands of United States citizens and state-imposed impediments to debt recovery by British merchants as reasons for its refusal to give up military posts in North America (as required by the Paris Peace Treaty).[107] American officials became increasingly aware that the United States needed to protect foreign merchants and redress private violence against aliens in order to keep the peace and expand foreign commerce.[108] At least some states made efforts to strengthen the ability of aliens to recover their debts, exercise their commercial rights, and pursue remedies for injuries inflicted at the hands of U.S. citizens. By the time of the Federal Convention, however, many states still had not done enough to foster commerce and maintain peace by preventing and redressing law of nations violations by Americans against foreign citizens.[109]

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103 State failure to redress injuries inflicted upon the person or property of British subjects may have contradicted the Paris Peace Treaty as well, if the injury was inflicted because of "the part" that the British subject "may have taken in the present war." Definitive Treaty of Peace Between the United States of America and His Britannic Majesty, U.S.-Gr. Brit., Sept. 3, 1783, art. VI, 8 Stat. 83 [hereinafter Paris Peace Treaty]. *See generally* Bellia & Clark, *supra* note 1, at 501 n.278.

104 Paris Peace Treaty, *supra* note 103, art. IV.

105 *See* Bellia & Clark, *supra* note 1, at 501 n.280 (listing sources).

106 *See* A.L. BURT, THE UNITED STATES, GREAT BRITAIN, AND BRITISH NORTH AMERICA: FROM THE REVOLUTION TO THE ESTABLISHMENT OF PEACE AFTER THE WAR OF 1812, at 97 (1940).

107 *Id.* at 93–94. Private violence by U.S. citizens against not only British subjects but also citizens of other nations threatened the peace of the United States at this time. In the 1780s, U.S. officials were concerned that hostilities might arise between U.S. settlers and Spanish subjects near the Mississippi River, threatening relations between the United States and Spain. *See* Bellia & Clark, *supra* note 1, at 503.

108 *See* Bellia & Clark, *supra* note 1, at 503.

109 *See id.* at 506.

B. The First Judiciary Act and the ATS

A primary goal of the Constitution was to enable the United States to prevent and redress law of nations violations by states, and thereby strengthen national political authority over questions of war and peace.[110] As explained earlier, state violations of the law of nations went beyond failure to redress offenses against ambassadors. Failure to redress violence against ordinary foreign citizens, and failure to respect rights of British creditors under the Paris Peace Treaty, were more common, and thus potentially more dangerous to the United States. The primary way that the Constitution attempted to strengthen national political authority over war and peace was to transfer significant authority over foreign relations to the federal political branches in Articles I and II.[111] In addition, however, Article III extended federal judicial power to several kinds of cases and controversies that were likely to involve the law of nations: "Cases . . . arising under . . . Treaties"; "Cases affecting Ambassadors, other public Ministers and Consuls"; "Cases of admiralty and maritime Jurisdiction"; and "Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."[112]

Congress implemented all of these heads of jurisdiction in the Judiciary Act of 1789 by establishing lower federal courts and granting them jurisdiction over controversies important to the peace and security of the United States. Congress was concerned with a range of law of nations violations and was not focused exclusively, or even primarily, on interference with the rights of ambassadors. The Judiciary Act of 1789 conferred jurisdiction on the federal courts to hear several important categories of cases implicating the law of nations. Section 13 of the Act provided that "the Supreme Court . . . shall have exclusively all such jurisdiction of suits or proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, as a court of law can have or exercise consistently with the law of nations."[113] This provision enabled the Supreme Court to enforce the immunities of ambassadors, public ministers, and their households under the law of nations. Section 13 also provided that the Supreme Court had "original, but not exclusive jurisdiction of all suits brought by ambassadors, or other public ministers, or in which a consul, or vice consul, shall be a party."[114] This provision authorized ambassadors to pursue redress for infringements of their rights in the Supreme Court, if they so chose. In aggregate, then, section 13 of the First Judiciary Act gave the Supreme Court original jurisdiction to redress violations of the rights of ambassadors, thereby allowing the United States to disavow any violations of those rights by its citizens. As explained,

110 *See id.* at 507.

111 U.S. CONST. art. I; *id.* art. II; *see* Bellia & Clark, *supra* note 1, at 507.

112 U.S. CONST. art. III, § 2.

113 Judiciary Act of 1789, § 13, 1 Stat. 80 (codified as amended at 28 U.S.C. § 1350 (2006)).

114 *Id.* § 13, 1 Stat. at 80–81.

such violations were among the most serious offenses a private citizen could commit against other nations, even if not the most common.

The First Judiciary Act also gave federal courts jurisdiction over other important cases involving the law of nations, including prize cases. Section 9 of the Judiciary Act gave lower federal courts "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction . . . saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it."[115] This jurisdiction included prize cases, a crucial category of cases that the law of nations governed and that could provoke war if not handled properly.[116] One of the prize courts' most important functions was to remedy abuses committed by privateers, such as erroneous capture of a neutral ship or neutral cargo. By providing such remedies, prize courts prevented U.S. responsibility for such misconduct.

In addition, the Judiciary Act gave federal courts jurisdiction to help British creditors vindicate their rights under the 1783 Paris Peace Treaty. The Act gave federal circuit courts original jurisdiction, concurrent with state courts, of all actions in which an alien was a party and the amount in controversy exceeded $500.[117] In such cases, federal courts could enforce the Treaty notwithstanding state laws obstructing debt recovery. Even when the amount-in-controversy requirement forced smaller debt claims into state court, section 25 of the Judiciary Act allowed an alien plaintiff to seek appellate review in the Supreme Court of the United States if the state court obstructed debt recovery in violation of the Treaty.[118]

Taken together, these provisions of the Judiciary Act provided a federal forum, original or appellate, in which aliens could seek civil redress for most offenses against the law of nations that, if not redressed, could give rise to war. Standing alone, however, these provisions left a significant gap because they would not have authorized federal courts to hear a broad category of tort claims that also implicated the law of nations—claims by aliens against U.S. citizens for acts of violence against their persons or personal property. Under the law of nations, the United States was required to redress such torts in at least one of three ways: criminal punishment, extradition, or civil remedy.

The First Congress enacted federal criminal laws to avoid various law of nations violations by the United States, but these laws did not encompass simple acts of violence against aliens. In the Crimes Act of 1790, Congress established that Blackstone's three crimes against the law of nations would now be offenses against the United States[119]—namely, offenses against

115 *Id.* § 9, 1 Stat. at 77.

116 *See* Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1334–37 (1996).

117 Judiciary Act of 1789, § 11, 1 Stat. at 78–79.

118 *Id.* § 25, 1 Stat. at 85–87.

119 The First Judiciary Act gave federal courts exclusive jurisdiction of crimes and offenses "cognizable under the authority of the United States." *Id.* § 9, 1 Stat. at 76–77. But what constituted a crime or offense against the United States was unclear at this time.

ambassadors,[120] safe conduct violations,[121] and piracy.[122] These offenses did not encompass acts of violence by U.S. citizens against aliens who did not enjoy the protection of a safe conduct or diplomatic status. Indeed, no provision of the Crimes Act criminalized simple assaults by U.S. citizens against aliens not protected by a safe conduct. Even if Congress had wanted to criminalize such misconduct, a criminal prohibition could not have fully satisfied the United States' obligations under the law of nations because criminal law did not apply extraterritorially at that time. Accordingly, federal criminal law was not capable of providing redress for private offenses that U.S. citizens committed against aliens within the territorial jurisdiction of another nation.[123] Extradition was not available in 1789 because the United States did not yet have extradition treaties in place. In short, existing federal law was inadequate to redress violence by U.S. citizens against aliens.

In light of the limitations of the First Judiciary Act and the Crimes Act of 1790, Congress almost certainly enacted the ATS to satisfy the United States' obligation to redress private violence against ordinary aliens (as opposed to offenses against ambassadors). Congress did not need to enact the ATS to redress offenses against ambassadors. Congress made the Blackstone crimes—including violations of ambassadorial rights—offenses against the United States and gave federal courts jurisdiction to redress them civilly as well.[124] On the other hand, absent the ATS, federal courts had no adequate means to redress claims by aliens for intentional torts committed by U.S. citizens against their persons or personal property. As we have explained elsewhere, the broad language of the ATS is more naturally read to encompass all such claims rather than a narrow class of claims by ambassadors.[125] The ATS gave federal district courts jurisdiction over claims by "an alien . . . for a tort only in violation of the law of nations or a treaty of the United States."[126] The term "alien" most likely referred to all aliens of nations at peace with the

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Congress had yet to codify crimes against the United States, and the status of federal common law crimes was unsettled. From the late 1790s until 1812, public officials debated whether federal courts had jurisdiction to define and punish common law offenses against the United States in the absence of congressional action. *See* Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1404–19 (2001). The Supreme Court ultimately rejected federal common law crimes in 1812. *See* United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 34 (1812).

120 Crimes Act of 1790, §§ 25–26, 28, 1 Stat. 117–18.

121 *Id.*

122 *Id.* § 8, 1 Stat. at 113–14.

123 A third way to redress torts committed by U.S. citizens against aliens was extradition, but the United States had no clearly established mechanism at the time for extraditing criminal fugitives to other nations. *See* Bellia & Clark, *supra* note 1, at 513.

124 Professor Thomas Lee has set forth several arguments why Congress had no need to give district courts a backup jurisdiction through the ATS in cases involving ambassadors. Thomas H. Lee, *The Three Lives of the Alien Tort Statute: The Evolving Role of the Judiciary in U.S. Foreign Relations*, 89 NOTRE DAME L. REV. 1645, 1654–56 (2014).

125 *See* Bellia & Clark, *supra* note 1, at 515–21.

126 Judiciary Act of 1789, § 9, 1 Stat. 77 (codified as amended at 28 U.S.C. § 1350 (2006)).

United States, not just to ambassadors. The phrase "a tort in violation of the law of nations" combined two terms of art. The term "tort" referred to an intentional injury to an alien's person or personal property, redressable by a common law form of action. The phrase "in violation of the law of nations or a treaty of the United States" limited torts actionable in federal district court to those that the law of nations required the tortfeasor's nation to redress in order to avoid responsibility to the victim's nation under the law of nations. In other words, the text of the ATS authorized federal courts to hear claims by aliens against U.S. citizens to redress intentional injuries to their persons or personal property—injuries that the law of nations imputed to the United States if not adequately redressed.

C. The Marbois and van Berckel Myth

In light of this background, the claim that the Marbois and van Berckel incidents prompted Congress to enact the ATS lacks substantial support in the historical record. To be sure, the Marbois and van Berckel incidents involved serious violations of the law of nations and therefore implicated the peace and security of the United States. If not effectively redressed, an offense against the rights of ambassadors gave the offended nation just cause for war. In response, Congress extended the highest level of federal judicial power—the original jurisdiction of the Supreme Court—to any case affecting an ambassador and also made interference with the rights of ambassadors a federal crime. The law of nations, however, was not a monolithic body of law, and the rights of ambassadors formed only one—albeit important—part of such law. Given Congress's conferral of jurisdiction on federal courts to deal with all manner of violations of ambassadorial rights, it is difficult to conclude that Congress's primary motivation for enacting the ATS was to add another layer of protection for foreign diplomats. The ATS does not mention ambassadors, and the most natural meaning of its broader language ("alien"), read in context, addresses a different law of nations obligation.

By giving federal courts jurisdiction over claims by "alien[s] . . . for a tort only in violation of the law of nations or treaty of the United States," the First Congress enabled federal courts to hear claims by aliens for acts of violence against their persons or personal property inflicted by U.S. citizens. Although the Supreme Court has accepted the suggestion that the Marbois and van Berckel incidents prompted this jurisdictional provision, the most one can say is that these incidents prompted the creation of jurisdiction over cases affecting ambassadors and the establishment of federal crimes to punish infractions of their rights. One cannot say that the Marbois and van Berckel incidents prompted the ATS any more than one can say that they prompted admiralty and maritime jurisdiction, general alienage jurisdiction, or federal crimes against piracy and safe conducts. All of these measures sought to prevent and redress distinct violations of the law of nations.[127]

127 When the Constitution was adopted, there was widespread concern over a variety of violations of the law of nations. In addition to concern over incidents involving ambassa-

In *Sosa*, the Court surmised—without any real support—that what was "[u]ppermost in the legislative mind" when Congress drafted the ATS "appears to have been offenses against ambassadors."[128] In *Kiobel*, the Court perpetuated this myth by observing that the Marbois and van Berckel incidents "occurred in the United States shortly before passage of the ATS,"[129] and that "[t]he United States was . . . embarrassed by its potential inability to provide judicial relief to foreign officials injured in the United States."[130] According to the Court, "[t]he ATS ensured that the United States could provide a forum for adjudicating such incidents."[131] These claims in *Kiobel* were not just extraneous observations about legislative purpose. Rather, they provided an essential part of the rationale for the Court's holding that the ATS does not apply to claims that fail to "touch and concern the territory of the United States . . . with sufficient force to displace the presumption against extraterritorial[ity]."[132] The Court's belief that Congress enacted the ATS in response to the Marbois and van Berckel incidents led it to construe the statute narrowly to cover only law of nations violations that—like those two incidents—occurred in the United States.[133] This finding, however, overlooks the most cogent function that the language of the ATS served in the context in which Congress enacted it—to provide redress to all friendly aliens who suffered violence at the hands of Americans, whether in U.S. territory or abroad.[134]

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dors, the Founders were concerned about unauthorized acts of U.S. privateers against neutral ships, state violations of treaty rights of British creditors, and state failures to redress acts of violence against British subjects and other foreign nationals. The First Judiciary Act gave federal courts jurisdiction to prevent and redress such violations in various provisions. By giving federal courts jurisdiction over admiralty and maritime cases, for example, the First Congress enabled federal courts to exercise prize jurisdiction in a way that respected neutral rights of foreign nations under the law of nations. No one argues that the Marbois or van Berckel incidents prompted Congress to confer admiralty and maritime jurisdiction on federal courts. Instead, it is well established that a separate set of concerns led Congress to ensure that federal courts would hear prize cases. By giving federal courts jurisdiction over claims by aliens against U.S. citizens where the amount in controversy exceeded $500, Congress ensured that British creditors who were owed substantial sums could pursue claims on their debts in a federal court, free from state court bias or obstruction. No one argues that the Marbois or van Berckel incidents prompted Congress to enact alienage jurisdiction. A separate set of concerns—namely state court violations of the Paris Peace Treaty—led Congress to enact alienage jurisdiction.

128 Sosa v. Alvarez-Machain, 542 U.S. 692, 720 (2004).

129 Kiobel v. Dutch Royal Petroleum Co., 133 S. Ct. 1659, 1666 (2013).

130 *Id.* at 1668.

131 *Id.*

132 *Id.* at 1669.

133 *Id.*

134 Moreover, even if one believed that Congress enacted the ATS in response to the Marbois and van Berckel incidents, the Supreme Court has recognized "that the reach of a statute often exceeds the precise evil to be eliminated" and that "it is not, and cannot be, [the Court's] practice to restrict the unqualified language of a statute to the particular evil that Congress was trying to remedy—even assuming that it is possible to identify that evil from something other than the text of the statute itself." Brogan v. United States, 522 U.S.

III. The ATS and the Blackstone Crimes

A second important claim that the Supreme Court treated as an educated guess in *Sosa*—but then as an established fact in *Kiobel*—is that Congress meant the ATS to provide a civil remedy for the three violations of the law of nations that Blackstone identified as criminal offenses in England. Like the first claim that Congress enacted the ATS to redress assaults against ambassadors, this second claim lacks adequate support in the historical record. The Blackstone crimes must be understood in the context of all the judicial mechanisms available in England at the time to redress a broad range of law of nations violations. England—like the United States—used both criminal and civil liability to redress a variety of law of nations violations committed by its subjects against aliens. The Court overlooked this context when it interpreted the ATS—a provision for *civil* jurisdiction—solely by reference to three specific *crimes* against the law of nations under English law.

A. Redress for Law of Nations Violations in English Courts

Like Vattel, Blackstone described several private acts of violence against foreigners as offenses against the law of nations. He explained, moreover, that the offender's nation would become responsible for the offense if it failed to redress the offense, thereby subjecting itself to potential retaliation.[135] England, in order to avoid the unwanted "calamities of foreign war,"[136] redressed the range of injuries that its subjects inflicted upon foreign citizens through both criminal and civil mechanisms.

1. Criminal Mechanisms

As explained above, criminal punishment was one way for a nation to redress injuries inflicted by a citizen upon an alien within the nation's territory and thereby avoid responsibility to the offended nation. The English

398, 403 (1998); *see also* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998) (explaining that "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed"). *See generally* John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70 (2006).

135 As Blackstone explained,

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

4 BLACKSTONE, *supra* note 4, at *68.

136 *Id.*

common law applied generally to punish British subjects who committed wrongs against the person or personal property of foreign citizens in British territory. Such crimes included homicide, mayhem, assault, battery, wounding, false imprisonment, kidnapping, larceny, and malicious mischief.[137] In addition, Blackstone singled out three "principal offences against the law of nations" that English law criminalized not only through the common law, but also through a series of specific statutes: "1. Violation of safe-conducts; 2. Infringement of the rights of ambassadors; and 3. Piracy."[138] A safe conduct or a passport was a privilege that a nation granted to a foreigner in order to ensure safe passage within its borders or territory that it controlled abroad.[139] The rights of ambassadors, as addressed in Part II, were inviolable under the law of nations because such rights were necessary to protect a nation's exercise of all other rights of nations.[140] Thus, assaulting, insulting, arresting, or pursuing process against an ambassador, other public ministers, or their domestics, were all offenses against the law of nations, and were made serious crimes in England. Finally, piracy was "robbery [or] depredation upon the high seas."[141] Piracy constituted a grave offense against countries in a state of peace with the transgressor because each nation had an equal right to use the open sea.[142] After describing these crimes, Blackstone concluded that "[t]hese are the principal cases in which the statute law of England interposes to aid and enforce the law of nations, as a part of the common law, by inflicting an adequate punishment upon offences against that universal law, committed by private persons."[143] Blackstone may have singled out these three crimes as "principal offences" against the law of nations because of their unique character, their immediate potential to trigger hostilities, and their status as statutory crimes in England.

Although these were the three principal offenses against the law of nations that English law criminalized, ordinary common law crimes redressed other, more routine offenses against the law of nations, such as assault and battery against an alien. By punishing British subjects who committed violence against an alien—regardless of whether the alien was a diplomat, under protection of a safe conduct, or on the high seas—England prevented itself from becoming an accomplice and abettor of such misconduct, thereby avoiding national responsibility and denying the offended nation just cause to retaliate. There was no need for Blackstone to single out such crimes as "offences against the law of nations" because common law crimes of this kind were not designed solely to protect aliens and had a more general application. Such crimes most commonly applied to acts committed by British sub-

137 *See id.* at *176–219, *229–50.

138 *Id.* at *68.

139 *See* 2 VATTEL, *supra* note 86, bk. III, ch. XVII, § 265, at 102; 1 BLACKSTONE, *supra* note 4, at *252.

140 *See* 2 VATTEL, *supra* note 86, bk. IV, ch. VI, §§ 78–82, at 140–44.

141 4 BLACKSTONE, *supra* note 4, at *71.

142 *See* 1 VATTEL, *supra* note 86, bk. I, ch. XXIII, § 283, at 114.

143 4 BLACKSTONE, *supra* note 4, at *73.

jects against other British subjects, and in such cases did not implicate the law of nations. When, however, a British subject committed such a crime against an alien, the British subject violated the law of nations, and criminal punishment under a common law crime of England sufficed to redress the injury. By focusing exclusively on the three "principal" crimes identified by Blackstone, the Supreme Court overlooked a less momentous—although still significant—category of crimes against aliens in England.

2. Civil Mechanisms

Criminal punishment was not always an available means for England to redress acts of violence by British subjects against foreigners. Under the law of nations, as adopted in England, a nation's criminal jurisdiction did not extend to acts committed (even by its own citizens) within another nation's territorial jurisdiction. Vattel explained that it is the province of the sovereign "to take cognizance of the crimes committed" within its jurisdiction, and that "[o]ther nations ought to respect this right."[144] In accordance with the law of nations, English law considered crimes and other penal actions to be local, meaning that the nation in which actions arose had exclusive jurisdiction to adjudicate them.[145] Thus, if a British subject committed an act of violence against a foreigner in a foreign land, criminal punishment by England was not an option. Instead, England could redress the injury either by extraditing the offender or by providing a civil remedy. Even for offenses that occurred in England, a civil remedy was available and might even be preferable to criminal redress because a civil remedy allowed an alien to seek redress without executive intervention. Regardless of whether criminal prosecution was an option, a civil tort action was available under English law and provided an important means of redress to aliens who suffered injuries at the hands of British subjects.

It is important to note that the civil remedies available to aliens under English law extended well beyond Blackstone's three crimes. They covered a broader range of intentional torts to persons or personal property recognized at common law. An alien from a nation not at war with England could bring a common law action in an English court against a British subject for any intentional harm to the alien's person or personal property.[146] For

144 1 VATTEL, *supra* note 86, bk. II, ch. VII, § 84, at 147–48.

145 *See* Rafael v. Verelst, (1776) 96 Eng. Rep. 621 (K.B.) [622] (de Grey, C.J.) ("Crimes are in their nature local, and the jurisdiction of crimes is local."); *see also* Anthony J. Bellia Jr., *Congressional Power and State Court Jurisdiction*, 94 GEO. L.J. 949, 959–65 (2006) (explaining the local nature of penal actions during the Founding era).

146 *See* 4 JOHN COMYNS, A DIGEST OF THE LAWS OF ENGLAND 429 (Kyd ed., 4th ed. 1793) ("If a subject attaches the person or goods of any one, who comes by way of amity, truce, or safe-conduct, the chancellor, calling to him any justice of the one bench or the other, on a bill of complaint, may make process against the offender; and may award delivery and restitution of the person, ship or goods."); 1 *id.* at 301 (explaining that "if an alien be within the kingdom with a safe conduct, or under the king's protection, he may have an action, though his king be in enmity," and that "[a]n alien friend may have all personal

example, common law actions were available to aliens for assault, battery, wounding, mayhem, false imprisonment, wrongful taking of goods, and deprivation of possession.[147] There was no need for Blackstone to single out these civil remedies available to aliens as torts in violation of the law of nations in the way that he singled out offenses against ambassadors, safe conduct violations, and piracy as crimes against the law of nations. The latter crimes were *only* crimes against the law of nations and had no application beyond incidents involving aliens. By contrast, ordinary civil remedies applied equally to torts committed by a British subject against an alien and to torts committed by one British subject against another. Nonetheless, such remedies, as applied to torts committed against aliens, played a crucial role in redressing acts of violence in violation of the law of nations. The Supreme Court's assumption that Blackstone's three "principal offences against the law of nations"[148] constituted the *exclusive* list of offenses against the law of nations that the First Congress contemplated in enacting the ATS ignores the fact that generally applicable criminal and civil laws also served to redress additional law of nations violations committed by British subjects against ordinary foreign citizens.

B. The Role of the ATS in U.S. Courts

This background provides essential context for understanding the original role of the ATS in the U.S. legal system. Members of the Founding generation were aware of the variety of mechanisms by which nations could avoid responsibility under the law of nations for the misconduct of their citizens. The First Congress enacted the ATS as part of a larger effort to redress law of nations violations, modeled on the role of English courts in upholding the law of nations. This model included ordinary civil redress for torts of violence committed by citizens against the persons or personal property of aliens.

As explained above, the Judiciary Act of 1789 expressly enabled federal courts to redress offenses that U.S. citizens might commit against ambassadors.[149] It gave federal courts "admiralty and maritime jurisdiction," which enabled federal courts to redress certain offenses against other nations on the high seas.[150] It gave federal courts jurisdiction over claims between aliens and U.S. citizens for more than $500, enabling federal courts to prevent serious treaty violations against British creditors.[151] The First Congress also employed criminal law by adopting the Crimes Act of 1790 within a few

actions, for his goods, or property"); *see also* 1 MATTHEW BACON, A NEW ABRIDGMENT OF THE LAW 5–6 (A. Strahan ed., 5th ed. 1798) (explaining that an alien enemy cannot bring any action in English courts unless "he comes here under letters of safe conduct, or resides here by the king's licence," while an alien friend "may maintain personal actions").

147 3 BLACKSTONE, *supra* note 4, at *118–21, *127–28, *144–54.

148 4 *id.* at *68.

149 *See supra* notes 5–6 and accompanying text.

150 *See supra* notes 115–16 and accompanying text.

151 *See supra* notes 117–18 and accompanying text.

months of enacting the Judiciary Act.[152] The Crimes Act established that Blackstone's three criminal offenses against the law of nations under English law would now be crimes against the United States as well: violation of rights of ambassadors,[153] safe conduct violations,[154] and piracy.[155] The Crimes Act, however, did not criminalize run-of-the-mill acts of violence by U.S. citizens against private aliens who did not enjoy the protection of a safe conduct. The First Congress left such misconduct to be redressed by civil rather than criminal liability at the federal level.

Given this context, it is unlikely that Congress meant the ATS to provide jurisdiction in federal court for civil claims to redress the Blackstone crimes, or that knowledgeable readers would have understood the ATS in this way.[156]

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152 The Judiciary Act gave federal courts exclusive jurisdiction of crimes and offenses "cognizable under the authority of the United States." Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76–77 (codified as amended at 28 U.S.C. § 1350 (2006)). As noted, it was unsettled at the time whether federal courts had power to define and punish common law offenses against the United States, such as the three crimes against the law of nations identified by Blackstone. *See supra* note 119.

153 Crimes Act of 1790, ch. 9, §§ 25–26, 28, 1 Stat. 112, 117–18.

154 *Id.* §§ 25–26, 1 Stat. at 118.

155 *Id.* § 8, 1 Stat. at 113–14.

156 We respectfully disagree with Professor Lee that the ATS was meant to encompass only safe conduct violations, *see generally* Lee, *supra* note 24, as we have explained elsewhere. *See* Bellia & Clark, *supra* note 1, at 530–35. Although the ATS phrase "tort only in violation of the law of nations or a treaty of the United States" encompassed misconduct constituting express or implied safe conduct violations, it also more broadly protected the citizens of nations at peace with one another against violence by a citizen of one nation against a citizen of the other, even if the victim was not under the protection of a safe conduct. *See id.*

Professor Lee reads the ATS to encompass only violations of safe conducts enjoyed by aliens in the United States. In his view, safe conducts should be defined broadly to include a "general implied safe conduct" enjoyed by "all friendly and neutral aliens in the United States" whether or not evidenced by a specific document, treaty, or statute. Lee, *supra* note 124, at 1646 n.4. Professor Lee attributes this view to Blackstone and believes that it "was shared by the First Congress." *Id.* Even assuming that Blackstone held this view, *see* Bellia & Clark, *supra* note 1, at 534 n.421, there is evidence that the First Congress may have held a different view. In 1781, the Second Continental Congress passed a resolution urging state legislatures to adopt measures to redress violations of the law of nations by their citizens. The resolution initially called on the states to criminally punish violations of express safe conducts and "acts of hostility against such as are in amity, league or truce with the United States, or who are within the same, under a general implied safe conduct." 21 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 1136–37 (Gaillard Hunt ed., 1912). In addition, the resolution called on the states to authorize civil suits "for damage sustained by them from an injury done to a foreign power by a citizen" without regard to the existence of a safe conduct. *Id.* at 1137. In 1782, Connecticut responded to this resolution by enacting a statute criminalizing all of the offenses against the law of nations specified by the Continental Congress and by authorizing civil suits against persons who injured "any foreign Power or the Subjects thereof." An Act to Prevent Infractions of the Laws of Nations (1782), *reprinted in* 4 THE PUBLIC RECORDS OF THE STATE OF CONNECTICUT FOR THE YEAR 1782, at 156–57 (Leonard Woods Labaree ed., 1942). This statute gave a civil remedy to any alien injured by an American, regardless of whether the foreign power was

It is more likely that Congress enacted the ATS to provide a civil remedy in federal courts to ordinary aliens who suffered violence at the hands of U.S. citizens rather than to provide yet another means of redressing the Blackstone crimes. No other provision of the Judiciary Act or the Crimes Act reached such violence, yet the First Congress was well aware that aliens notoriously suffered such violence under the Articles of Confederation without any effective means of redress by the United States. The ATS enabled such aliens to seek redress in the form of a civil remedy in federal court.

The most natural reading of the ATS bears out this understanding. Federal court jurisdiction over "all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States"[157] enabled federal courts to hear claims by aliens for intentional torts of violence committed against them by U.S. citizens without regard for the amount in controversy. So understood, the ATS fully satisfied the United States' obligation to redress violence by its citizens against aliens.[158]

C. Reassessing the Blackstone Myth

The Supreme Court's adoption of the Blackstone myth in *Sosa* and *Kiobel* influenced its reasoning in each case. In *Sosa*, the Court held that the ATS applies to claims "based on the present-day law of nations" only if they "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century" crimes that Blackstone identified.[159] As an effort to implement the original meaning of the ATS, this reading is too narrow. The ATS originally encompassed any intentional act of violence that a U.S. citizen inflicted upon an

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in amity, league, or truce with the United States, or whether the alien enjoyed a general implied safe conduct. Likewise, in enacting the ATS, the First Congress did not limit an alien's ability to sue based on the existence of an express or implied safe conduct. This is significant because the First Congress used the phrase in the Crimes Act of 1790 when it made safe conduct violations a federal offense.

Whatever the precise meaning of an implied safe conduct in 1789, our account of the ATS obviates the need to resolve this question because the ATS encompassed claims by non-enemy aliens against U.S. citizens for acts of violence regardless of whether the alien enjoyed the protection of a safe conduct. There is, however, an important difference between Professor Lee's account of the statute and ours. Under our account, the ATS encompassed claims by aliens for acts of violence committed by U.S. citizens within both U.S. and foreign territory. Under Professor Lee's account, the ATS only encompassed claims by aliens for acts occurring in U.S. territory—the only territory in which an alien could enjoy an "implied safe conduct" from the United States. In our view, the ATS was designed to insulate the United States from responsibility to other nations for torts in violation of the law of nations by its citizens wherever they occurred. Professor Lee's reading would have left the United States responsible for torts committed by its citizens against aliens in other countries.

157 Judiciary Act of 1789 § 9(b), 1 Stat. at 76–77.

158 This understanding is also consistent with the requirements of Article III because such ATS suits between aliens and U.S. citizens would necessarily arise "between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." U.S. CONST. art. III, § 2.

159 Sosa v. Alvarez-Machain, 542 U.S. 692, 725 (2004).

alien. The Court's holding that, in order to fall within the purview of the ATS, an act must violate an international norm comparable to the Blackstone crimes unduly restricts the scope of the statute. The ATS made it possible for any friendly alien to sue a U.S. citizen for any intentional tort of violence (such as a simple battery), whether or not it constituted or resembled one of the criminal violations of the law of nations that Blackstone singled out in his *Commentaries*.

In *Kiobel*, the Court perpetuated and strengthened the Blackstone myth by endorsing as historical fact *Sosa*'s suggestion that the ATS was meant to encompass the three Blackstone crimes. As in *Sosa*, this point was important to the Court's analysis. In determining whether the presumption of extraterritoriality should apply to the ATS, the Court relied on the fact that the Blackstone crimes would have generally occurred within the territory of the United States. According to the Court, "[t]he first two [Blackstone] offenses have no necessary extraterritorial application,"[160] and piracy, which occurred on the high seas, is not "a sufficient basis for concluding that other causes of action under the ATS reach conduct that does occur within the territory of another sovereign."[161]

In the Court's view, these observations supported the conclusion that the ATS does not apply extraterritorially. The Court's recognition that the first two Blackstone offenses had no extraterritorial application is uncontroversial. In 1789, no nation could apply its criminal laws in another nation's territory. The Court, however, failed to appreciate an important difference between criminal and civil redress at that time. Unlike criminal remedies, civil remedies were typically available for so-called transient torts—that is, torts that occurred outside a nation's borders. Accordingly, the fact that the Blackstone crimes did not apply extraterritorially says nothing about whether the ATS permitted the imposition of civil liability for conduct occurring abroad. In fact, it was because one nation could not apply its criminal laws to acts occurring in another nation's territory that the ATS provided a useful *civil* remedy for just such misconduct. As explained above, the law of nations required the United States to redress its citizens' violence against friendly aliens in one of three ways: criminal prosecution, extradition, or civil redress. In the case of acts of violence perpetrated by U.S. citizens against foreigners in their own countries, civil redress under the ATS may have been the only available remedy. In 1789, criminal prosecution was not permitted in such cases, and the United States lacked established procedures for extradition. Accordingly, the ATS was a useful mechanism for redressing such misconduct and demonstrating the nation's commitment to other countries to comply with the law of nations.[162]

160 Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1666 (2013).

161 *Id.* at 1667.

162 In this regard, we disagree with Professor Lee's claim that nations had no responsibility under the law of nations at the time Congress enacted the ATS for acts of its private citizens abroad. *See* Lee, *supra* note 124, at 1663. Vattel recognized no such limit on a nation's responsibility to redress violence by its citizens against those of another nation.

IV. The Original Meaning of the ATS

The Supreme Court did not interpret the ATS until 215 years after its enactment. The available records indicate that aliens rarely invoked the statute after its enactment, perhaps because violence against aliens quickly subsided in the 1790s and because state courts may have become more hospitable to aliens' claims against Americans.[163] Because this statute lay dormant for nearly two centuries, it is perhaps understandable that the *Sosa* and *Kiobel* Courts accepted two historical claims about the ATS that had gained currency in academic scholarship and lower court precedent, but that lack substantial support in the historical record. The ATS references "the law of nations," and both myths involve important aspects of that body of law. Nonetheless, the law of nations encompassed a much broader range of claims, and singular focus on the areas addressed by these myths overlooks the more common problem of simple violence by Americans against aliens in the 1780s. Accordingly, in future cases, the Court should abandon these faulty assumptions and proceed on a more accurate historical understanding of the statute. The Court's reliance on these two historical myths has led it to interpret the ATS in ways that are both too narrow and, arguably, too broad when judged against the original meaning of the statute. *Sosa* and *Kiobel* defined the original meaning of the statute too narrowly because in context, the language of the ATS applied to any intentional tort committed by a U.S. citizen against an alien (not just to the Blackstone crimes), whether committed in the United States or abroad (not just in U.S. territory). At the same time, *Sosa* and *Kiobel* would be too broad if read to suggest that ATS jurisdiction originally extended to claims between aliens (a question the Court has not yet decided). As originally enacted, the ATS applied only to claims by aliens against U.S. citizens.

A. Sosa *and* Kiobel *Unduly Narrow the ATS*

According to *Sosa*, the ATS only encompasses violations of international law that are as established and important today as Blackstone's three crimes were in 1789. This holding too narrowly defines the categories of claims to which ATS jurisdiction originally extended. It is unlikely that the First Congress meant to limit the ATS to these categories, or even expected international law to provide the rule of decision in ATS cases. Under law of nations

See Bellia & Clark, *supra* note 1, at 471–77 (describing a nation's responsibility for violence by its citizens against citizens of another nation). To the contrary, Vattel's discussion of a nation's responsibility for acts by its citizens against citizens of other nations presupposes throughout that a nation could authorize or ratify acts of violence that its citizens committed abroad, and thus become responsible for them under the law of nations. Vattel provided specific examples involving a state's responsibility for acts of its citizens committed abroad, such as when the offender "escape[s] and return[s] to his home country." 2 VATTEL, *supra* note 86, bk. II, ch. VI, § 75, at 144. In addition, by describing extradition as a means for a nation to avoid state responsibility for acts of its citizens, *see id.*, Vattel necessarily was referring to state responsibility for acts committed by its citizens in other countries.

163 *See* Bellia & Clark, *supra* note 1, at 525.

principles requiring redress for violence by a nation's citizens against aliens, the First Congress expected municipal (i.e., domestic) law, rather than international law, to govern in ATS cases. Specifically, the First Congress expected that state common law forms of action, as made applicable by the early Process Acts, would provide the cause of action in ATS cases, and that federal courts would apply other governing state or foreign rules of decision depending on where the injury occurred.[164] The First Congress described the "tort" that the ATS encompassed as "in violation of the law of nations" not because international law imposed liability on one person in favor of another for the tort, but rather because the offender's nation would be responsible for the tort under the law of nations if it failed to redress it *under domestic law*. Accordingly, in 1789 the same municipal law would apply whether an alien brought a tort claim under ATS jurisdiction or foreign diversity jurisdiction. ATS jurisdiction was needed because of the $500 amount-in-controversy requirement for foreign diversity jurisdiction. Congress imposed this requirement in order to bar insubstantial British debt claims from federal court, but the requirement also barred almost all tort claims at the time because such claims rarely involved more than $500. The ATS established a specialized instance of foreign diversity jurisdiction over alien tort claims with no amount-in-controversy requirement. As in all diversity cases, domestic rather than international law would have ordinarily provided the relevant rules of decision.[165]

Building on *Sosa*, the *Kiobel* Court further departed from the original meaning of the statute by holding that the ATS does not apply to claims arising outside of the United States unless such claims "touch and concern the territory of the United States . . . with sufficient force to displace the presumption against extraterritorial[ity]."[166] The Court derived this conclusion in part from its assumption that the ATS applied only to the three Blackstone crimes. But, again, the historical and legal context against which Congress enacted the ATS does not support this assumption. Both the foreign diversity jurisdiction provisions of the Judiciary Act (with an amount-in-controversy requirement) and the ATS (without an amount-in-controversy

164 In the Process Acts of 1789 and 1792, Congress directed federal courts generally to apply state common law forms of action. Process Act of 1789, ch. 21, § 2, 1 Stat. 93, 94; Process Act of 1792, ch. 35, § 2, 1 Stat. 275, 276. For a discussion of how the Process Acts defined the forms action available to ATS plaintiffs, see Bellia & Clark, *supra* note 1, at 521–25.

165 Professor Bill Dodge has explained how U.S. courts after *Filartiga* came to apply international law, rather than the *lex loci delicti*, as the rule of decision in ATS cases. *See* William S. Dodge, *Alien Tort Litigation: The Road Not Taken*, 89 NOTRE DAME L. REV. 1577 (2014). Professor Dodge contends that this choice was not a foregone conclusion. In our view, the statute when enacted did not give courts this choice. Professor Lee agrees that "the legal norms the First Congress had in mind when enacting the ATS were not protean international law norms, but rather the domestic law of tort, understood as a noncontract injury to the person or property of the plaintiff." Lee, *supra* note 124, at 1652; *see also* Lee, *supra* note 24, at 838.

166 *Kiobel*, 133 S. Ct. at 1669.

requirement) were purely jurisdictional statutes. Neither supplied a cause of action or the substantive law to be applied once jurisdiction attached. At the time, rules governing conflict of laws may have had something to say about the choice of substantive law in such cases, but they did not deny courts the right to exercise jurisdiction even in cases of transitory torts that occurred in other nations. Accordingly, the First Congress almost certainly would have expected both foreign diversity and ATS jurisdiction to extend to claims by aliens against U.S. citizens regardless of whether the underlying tort claim arose within the territorial jurisdiction of the United States.

In 1789, it was well established that an alien could bring a tort or contract claim arising in one nation in the courts of the defendant's home nation because such actions were "transitory," not "local."[167] Courts did not hesitate to exercise jurisdiction over such actions unless the plaintiff and defendant were both aliens.[168] It has never been controversial that federal courts may exercise foreign diversity jurisdiction over tort claims by aliens against U.S. citizens for acts occurring outside the United States. In 1789, it would have been no more controversial for federal courts to exercise ATS jurisdiction over intentional tort claims by aliens against U.S. citizens for acts occurring outside the United States. Indeed, in 1789, all acts of violence by U.S. citizens against foreign nationals in their own countries would have touched and concerned interests of the United States. The criminal jurisdiction of U.S. courts could not extend to such claims at the time. Thus, unless the federal government was prepared to extradite the perpetrator, civil redress under the ATS was the only means for the United States to satisfy its international obligation and prevent the offended nation from having just cause to retaliate.[169] In light of this background, the *Kiobel* Court's applica-

167 *See* Bellia & Clark, *supra* note 1, at 469.

168 *Id.* at 482–83.

169 This understanding is consistent with the most natural reading of the oft-discussed 1795 opinion of Attorney General William Bradford addressing the attack by a French fleet, joined by American citizens, against the British Sierra Leone Company's colony on the coast of Africa. Breach of Neutrality, 1 Op. Att'y Gen. 57 (1795). Bradford explained that if these offenses had occurred within U.S. territory, the United States could have punished them as criminal offenses. *Id.* at 58. Because, however, U.S. citizens committed the attacks in British territory, the United States had no criminal jurisdiction over the attacks. In Bradford's words, "as the transactions complained of originated or took place in a foreign country, they are not within the cognizance of our courts; nor can the actors be legally prosecuted or punished for them by the United States." *Id.* But even though the attacks occurred outside of the United States, the injured individuals could pursue a civil remedy in federal court using ATS jurisdiction. The fiction underlying transitory actions was that the cause of action traveled with a party into the remote jurisdiction. "[T]here can be no doubt," Bradford explained, "that the company or individuals who have been injured by these acts of hostility have a remedy by a *civil* suit in the courts of the United States; jurisdiction being expressly given to these courts in all cases where an alien sues for a tort only, in violation of the laws of nations, or a treaty of the United States." *Id.* at 59.

In explaining why the Bradford opinion did not foreclose application of the presumption against extraterritoriality in *Kiobel*, the Court stated that "Bradford's opinion defies a definitive reading," and also dealt "with U.S. citizens who . . . violated a treaty between the

tion of the presumption against extraterritoriality to the ATS lacks adequate support in the historical record. In short, both *Sosa* and *Kiobel* interpreted the ATS too narrowly.

B. Interpreting the ATS after Sosa *and* Kiobel

The Supreme Court should recognize that its decisions in *Sosa* and *Kiobel* unduly narrow the scope of the ATS. The original import of the statute supports neither *Sosa*'s tethering modern applications of the statute to the Blackstone crimes nor *Kiobel*'s reliance on the presumption against extraterritoriality.[170]

At the same time, courts should not read these precedents too broadly to permit suits solely between aliens. Consistent with the limits of Article III, the ATS confers subject matter jurisdiction only over claims by aliens against U.S. citizens. The *Sosa* Court had no need to consider or decide the question of party alignment given its conclusion that the plaintiff had failed to allege a tort "in violation of the law of nations" under the ATS.[171] Although *Sosa*

United States and Great Britain." *Kiobel*, 133 S. Ct. at 1668. Under background principles of the law of nations against which Congress enacted the ATS, however, violation of a treaty with extraterritorial application was not necessary to make sense of the Bradford opinion. Even without a treaty, the United States was obligated to redress acts of hostility and violence that U.S. citizens committed against British subjects, whether in U.S. territory or abroad. The ATS fulfilled this obligation.

170 We express no opinion in this Article on whether courts should recognize ATS jurisdiction today over all torts for which a nation was responsible under the law of nations in 1789, or only torts for which nations are responsible under international law today. The right of diplomatic protection currently provides one facet of state responsibility relating to torts against aliens. Scholars trace today's principles of diplomatic protection to the principles of state responsibility for acts of private citizens that Vattel described and that we have discussed here. *See, e.g.*, CHITTHARANJAN F. AMERASINGHE, DIPLOMATIC PROTECTION 10–13 (2008). Principles of diplomatic protection address when a state may obtain protection and reparations from another state for injuries suffered by its citizens in violation of international law. One instance in which a state may exercise its right of diplomatic protection is when a foreign citizen has committed a tortious act against one of that state's citizens and the offender's nation has denied justice to the victim. In such cases, the denial of justice serves as the international law violation predicate to the right of diplomatic protection. Diplomatic protection differs in significant ways from the principles of state responsibility for private acts of violence that Vattel described and that were in effect when Congress enacted the ATS. Whereas Vattel directly imputed responsibility for such a tort to the offender's nation absent redress, diplomatic protection typically would hold the offender's state responsible not for the tort, but for the denial of justice. *See generally id.* (providing an overview of the principles of diplomatic protection). Whether the right of diplomatic protection or other principles of state responsibility provided by international law today should limit the availability of ATS jurisdiction relative to its availability in 1789 presents a translation question that is beyond the scope of this Article. For one approach to how the ATS might apply to actions by U.S. citizens today, see Doug Cassel, *Suing Americans for Human Rights Torts Overseas: The Supreme Court Leaves the Door Open*, 89 NOTRE DAME L. REV. 1773 (2014) (arguing for a case-by-case approach to when the ATS permits adjudication by aliens against Americans for torts committed abroad).

171 Sosa v. Alvarez-Machain, 542 U.S. 692, 736–38 (2004).

involved a claim between two citizens of Mexico, the district court had jurisdiction over the plaintiff's original claims against the United States under the Federal Tort Claims Act and over the claims against the DEA agents under the foreign diversity statute. Because the claims against the Mexican national shared a common nucleus of operative fact with the claims against the U.S. defendants, the federal courts had supplemental jurisdiction even after the claims against the U.S. defendants were dismissed.[172] Accordingly, the Court had no reason to address or decide the question of party alignment under the ATS.

Likewise, the *Kiobel* Court had no reason to consider—and did not consider—any question of party alignment. Because the Court in *Kiobel* dismissed the case by applying the presumption against extraterritoriality, there was no need for the Court to address whether the ATS and Article III allow claims solely between Nigerians. Going forward, lower federal courts remain free—and are arguably obligated—to consider the party-alignment question to ensure that they have subject matter jurisdiction. Indeed, shortly before *Kiobel* was decided, an en banc panel of the Ninth Circuit Court of Appeals divided on this issue in *Sarei v. Rio Tinto*.[173] Judge Ikuta—in a dissent joined by Judges Kleinfeld, Callahan, and Bea—argued that federal courts lack subject matter jurisdiction under the ATS over claims between aliens.[174] Judge Ikuta concluded that *Sosa* had not resolved this question because there the Court had supplemental jurisdiction over the claim before it.[175] Furthermore, she explained, the Court could not resolve the jurisdictional question *sub silentio*.[176] Judge Ikuta's conclusion followed the Supreme Court's longstanding position that courts may not give precedential effect to "unaddressed jurisdictional defects."[177]

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172 *See* 28 U.S.C. § 1367(a) (2006); United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 725 (1966).

173 671 F.3d 736 (9th Cir. 2011) (en banc).

174 *Id.* at 818–19 (Ikuta, J., dissenting).

175 *Id.* at 832.

176 *Id.* at 832–33.

177 Lewis v. Casey, 518 U.S. 343, 352 n.2 (1996) (explaining that "the existence of unaddressed jurisdictional defects has no precedential effect"); *see also* Rasul v. Bush, 542 U.S. 466, 496–97 (2004) (Scalia, J., dissenting) (same). Professor Dodge contends that the Supreme Court's decision in *Kiobel* "finally establishes that Article III jurisdiction exists over ATS suits between two aliens" because "extraterritorial scope 'is a merits question'" which the Court could not have reached in *Kiobel* "unless it had jurisdiction under Article III." Dodge, *supra* note 165, at 1586 n.71 (citation omitted). Regardless of whether Professor Dodge is correct that the extraterritorial scope of the ATS is a merits question, the Court has never treated a merits decision as resolving subject matter jurisdiction when the jurisdictional question was neither discussed nor decided by the Court. *See* Ariz. Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436, 1448 (2011) ("When a potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that no defect existed."); United States v. L.A. Tucker Truck Lines, Inc., 344 U.S. 33, 38 (1952) ("[T]his Court has followed the lead of Mr. Chief Justice Marshall who held that this Court is not bound by a prior exercise of jurisdiction in a case where it was not questioned and it was passed *sub silentio*." (footnote omitted)). Contrary to Profes-

C. *The ATS and Foreign Diversity Jurisdiction*

Although the Supreme Court's decisions in *Sosa* and *Kiobel* have generated substantial academic debate about the original meaning of the ATS, the proper resolution of this debate may have limited practical importance today. Even if the Court adheres to the narrow interpretations of the ATS that it adopted in *Sosa* and *Kiobel*, ordinary foreign diversity jurisdiction now encompasses non-trivial claims that would have fallen within the original scope of ATS jurisdiction. Even after *Sosa* and *Kiobel*, aliens will be able to sue U.S. citizens in federal court for a wide range of torts regardless of whether they compare favorably to the Blackstone crimes or whether they occurred in the United States. Under foreign diversity jurisdiction, aliens may sue U.S. citizens (and corporations) in federal court for any torts committed against them so long as they meet the amount-in-controversy requirement (today more than $75,000). As noted earlier, in 1789 the amount-in-controversy requirement operated to exclude most tort cases from federal court. Today, however, this requirement will exclude far fewer cases. As tort law has developed, most tort plaintiffs who allege intentional acts of violence by defendants can easily meet this threshold amount. As was true in ATS actions in 1789, the governing law in foreign diversity cases will be state law or, possibly, foreign law for actions arising abroad.[178] In 1789, the only real difference between foreign diversity and ATS jurisdiction was the amount-in-controversy requirement. Because that requirement is no longer high enough to bar most tort claims originally contemplated by the ATS, alien tort plaintiffs can now use foreign diversity jurisdiction to pursue the kind of claims that the ATS was originally designed to encompass.

CONCLUSION

In attempting to implement the original meaning of the ATS, the *Sosa* and *Kiobel* Courts mistakenly accepted two myths about the statute—that incidents against ambassadors prompted its enactment, and that it was meant to give federal courts jurisdiction only over claims analogous to the three crimes involving the law of nations that Blackstone identified. On the basis of these myths, the Court unduly narrowed the ATS in both cases. In *Sosa*, the Court held that the ATS encompassed only torts comparable to the three principal criminal offenses in England that Blackstone identified for punishing serious violations of the law of nations. In *Kiobel*, the Court applied the presumption against extraterritoriality to the ATS to preclude its application to claims that do not touch and concern the territory of the United States. Neither of these

sor Dodge's assertion, the *Kiobel* Court could not have resolved the jurisdictional question because it did not address or decide the jurisdictional issue. Accordingly, both the Supreme Court and lower federal courts remain free to consider and decide whether future ATS suits between two aliens exceed the limits of Article III.

178 *See* Roger P. Alford, *The Future of Human Rights Litigation After* Kiobel, 89 NOTRE DAME L. REV. 1749, 1761–64 (2014) (analyzing how municipal law can provide the rule of decision in human rights cases in state court or in foreign diversity jurisdiction).

interpretations finds adequate support in the historical record or the language of the statute. A careful review of the political, legal, and historical contexts in which the ATS was enacted reveals that Congress meant the statute to give federal courts jurisdiction over claims by aliens for a broader range of intentional acts of violence committed against them by Americans. If the Court wishes to implement the understanding of the First Congress, then it should recognize that the ATS had this broader original meaning. At the same time, the Court should recognize that the ATS originally conferred jurisdiction only over suits by aliens against U.S. citizens.