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The Original Source of the Cause of Action in Federal Courts: The Example of the Alien Tort Statute

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INTRODUCTION

FEDERAL common law causes of action—actions created neither by Congress nor by state law—have long generated debate among judges and scholars. In *Erie Railroad Co. v. Tompkins*, the Supreme Court famously rejected "federal general common law."[1] Nonetheless, the Court has cautiously embraced several specific enclaves of federal common law over the ensuing decades.[2] The question of federal judicial power to recognize federal common law causes of action arises in a range of contexts in the field of federal courts. For instance, may federal courts recognize an implied cause of action for the violation of a federal statute that does not itself create a cause of action? Relatedly, may federal courts recognize an implied cause of action for the violation of the Constitution when neither the Constitution nor a federal statute specifically creates one? Although courts and scholars continue to debate these questions, they have not reached a consensus on how to resolve them.

Recently, the power of federal courts to recognize federal common law causes of action has emerged as a key question under the Alien Tort Statute ("ATS").[3] Congress enacted the ATS in 1789 as part of the First Judiciary Act. The ATS grants federal courts subject matter jurisdiction over claims by aliens for torts in violation of the law of nations, but creates no cause of action itself.[4] In the last decade, the Supreme Court has twice interpreted the ATS and, in the process, has suggested that, although the statute is purely jurisdictional, federal courts have limited power to recognize a small handful of federal common law causes of action when exercising this jurisdiction.[5]

Over time, judges and scholars have reached different conclusions in different contexts about the power of federal courts to recognize federal common law. From the Founding through the nineteenth century, the Supreme Court did not recognize any "federal common law"—that is, "federal rules of decision whose content cannot be traced directly by traditional methods of interpretation to federal statutory or constitutional

[1] 304 U.S. 64, 78 (1938).

[2] See, e.g., Bradford R. Clark, Federal Common Law: A Structural Reinterpretation, 144 U. Pa. L. Rev. 1245, 1264–66 (1996); Henry J. Friendly, In Praise of Erie—And the New Federal Common Law, 39. N.Y.U. L. Rev. 383, 407–09 (1964).

[3] 28 U.S.C. § 1350 (2012).

[4] Id.

[5] See Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1663 (2013); Sosa v. Alvarez-Machain, 542 U.S. 692, 724 (2004).

commands."[6] To be sure, in certain cases, exemplified by the Supreme Court's decision in *Swift v. Tyson*,[7] early federal courts applied general law—a transnational source of law that included the law merchant, the law maritime, and the law of state-state relations. General law, however, did not preempt contrary state law or create causes of action. Moreover, general law was not federal common law. Unlike modern federal common law, general law neither supported federal question jurisdiction nor preempted contrary state law. The Supreme Court stopped applying general law as such in 1938 when it held in *Erie* that "[t]here is no federal general common law."[8] Nonetheless, following *Erie*, the Court recognized several distinct "enclaves" of federal common law. In recent decades, the Court has been reluctant to recognize new enclaves because of concerns that judicial creation of federal common law is in tension with *Erie*, and with principles of separation of powers and federalism more generally.[9]

Against this background, the Supreme Court interpreted the ATS for the first time in 2004. In *Sosa v. Alvarez-Machain*, the Court concluded that "the ATS is a jurisdictional statute creating no new causes of action."[10] Nonetheless, the Court believed that "[t]he jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time."[11] The Court rested this belief on the assumption that the First Congress would have understood "the ambient law of the era" to provide the causes of action that federal courts would adjudicate in exercising their ATS jurisdiction.[12] In other words, the Court "assume[d] that the First Congress understood that the district courts would recognize private causes of action," derived from ambient law, "for certain torts in violation of the law of nations."[13] On the basis of this assumption, the Court suggest-

[6] Richard H. Fallon Jr., John F. Manning, Daniel J. Meltzer & David L. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System 607 (6th ed. 2009) [hereinafter Hart & Wechsler]; see Henry P. Monaghan, Supremacy Clause Textualism, 110 Colum. L. Rev. 731, 741 (2010) ("The modern conception of federal common law—judge-made law that binds both federal and state courts—simply did not exist circa 1788.").

[7] 41 U.S. (16 Pet.) 1, 18–19 (1842).

[8] 304 U.S. at 78.

[9] Clark, supra note 2, at 1248–50.

[10] 542 U.S. at 724.

[11] Id.

[12] Id. at 714.

[13] Id. at 724.

ed that federal courts today may "recognize private claims under federal common law" for a narrow range of international law violations.[14] Commentators have generally embraced *Sosa*'s vision of ambient law and federal judicial power at the Founding with little independent historical analysis or verification.[15]

In fact, the claim that early federal courts relied on "the common law" in the abstract to supply causes of action in civil suits rests on a false historical premise. Ambient or general law neither supplied nor was understood by the Founders to supply the cause of action in civil cases (including ATS cases) within the jurisdiction of early federal courts. Rather, Congress enacted specific statutes that prescribed the civil causes of action available in federal courts, as well as related matters. Although the full import of these statutes is largely overlooked today, they provide important context for understanding the kind of judicial power that federal courts exercised within their limited subject matter jurisdiction. Members of the First Congress considered and debated many aspects of federal judicial power over civil disputes—including whether litigants would enjoy the right to a jury trial,[16] how expansively federal courts would exercise equity jurisdiction,[17] how expensive and otherwise inconvenient federal litigation would be,[18] and how federal courts would order executions on their judgments.[19] In addition to these questions, but integrally related to them, Congress considered and provided the source of the causes of action available in federal court. The resolution of all these questions depended in large part on the forms of proceeding that federal courts generally would use in civil cases. Congress addressed these questions by enacting a series of early federal statutes that specified the forms and modes of proceeding that federal courts were to apply.

[14] Id. at 732.

[15] See infra notes 78–81 and accompanying text.

[16] See, e.g., 1 Annals of Cong. 85–86 (1789) (Joseph Gales ed., 1834) (statement of Rep. Burke) [hereinafter Documentary History of the First Federal Congress] (expressing concern with measures that "will materially affect the trial by jury").

[17] See Kristin A. Collins, "A Considerable Surgical Operation": Article III, Equity, and Judge-Made Law in the Federal Courts, 60 Duke L.J. 249, 269 (2010) (describing Members' distrust of equity).

[18] 1 Annals of Cong. at 814 (statement of Rep. Livermore).

[19] See, e.g., id. at 839–44 (statement of Rep. Stone) (expressing concern with the manner in which executions would proceed on federal court judgments).

To understand these statutes, one must understand the status of the common law in the United States prior to their enactment. Before the Constitution was adopted, state courts generally relied on common law forms of proceeding to adjudicate cases before them. During British rule, the colonies had applied common law as British law. After independence, the individual states chose to adopt the common law as state law. Each of the original thirteen states took action to receive the common law—including its forms and modes of proceeding—by statute, constitutional provision, or judicial decision. The resulting state law forms of proceeding defined the remedies that were available to plaintiffs for particular wrongs, and how state courts would determine a plaintiff's right to a particular remedy. In other words, the traditional forms of proceeding adopted by the states defined the causes of action available to plaintiffs and the procedures to be used for adjudicating them. Over time, individual states molded these forms of proceeding in response to local circumstances, resulting in variations among state causes of action.

Accordingly, when Congress exercised its power to create lower federal courts in 1789,[20] there was no single body of "common law" that applied throughout the United States. Congress made no attempt to follow the states' lead by adopting its own version of the common law as a whole for the nation, in part because any such attempt would have exceeded enumerated federal powers as then understood. Nor did Congress adopt uniform forms of proceeding for use in federal court, apparently because it was unable (or unwilling) to do so.[21] Rather, in the Process Acts of 1789 and 1792, Congress instructed inferior federal courts adjudicating common law suits to borrow the forms and modes of proceeding then in use by the states in which they sat. In this legislation, Congress balanced the need to create an effective federal judiciary with a desire to heed anti-Federalist concerns about consolidated national power at the expense of the states.[22] Members of Congress argued that the

[20] U.S. Const. art. I, § 8, cls. 9, 18.

[21] See 4 The Documentary History of the Supreme Court of the United States, 1789–1800, at 112 (Maeva Marcus et al. eds., 1992) (describing the "inability or unwillingness" of the First Congress "to agree on uniform rules for the operation of the federal courts").

[22] See id. at 108 (explaining that in framing a federal court system "those who favored a strong, centralized federal court system had to contend with those who feared a loss of autonomy by the individual states"); see also 1 Julius Goebel, Jr., History of the Supreme Court of the United States: Antecedents and Beginnings to 1801, at 492, 510 (Paul A. Freund ed.,

interests of the people would be "more secure under the legal paths of their ancestors, under their modes of trial, and known methods of decision."[23] Accordingly, the First Congress established a "species of continuity" with diverse state practices by adopting the forms of proceeding of each state as the governing forms of proceeding for federal courts located in that state.[24] In cases in equity and admiralty, the First Congress directed federal courts to use the traditional forms of proceeding that applied in such cases. In doing so, Congress did not leave federal courts free to derive the causes of action they would employ from "ambient law." Rather, Congress specifically adopted several preexisting, well-developed bodies of law for use in federal court.

This original source of the cause of action in federal courts has been largely forgotten by today's lawyers and judges, not only because it is no longer relevant to their work, but also because modern legal sensibilities no longer identify "process" as the source of a "cause of action."[25]

1971) (describing the tension between consolidated federal court system and anti-Federalist concerns).

[23] 1 Annals of Cong. at 833 (statement of Rep. Jackson); see also id. at 858 (statement of Rep. Stone) (describing mischiefs if state and federal courts had different modes of executions); Bank of the U.S. v. Halstead, 23 U.S. (10 Wheat.) 51, 59 (1825) ("This course was no doubt adopted, as one better calculated to meet the views and wishes of the several States, than for Congress to have framed an entire system for the Courts of the United States, varying from that of the States Courts.").

[24] 1 Goebel, supra note 22, at 458; see also id. at 473 (describing "the localization of the federal inferior courts").

[25] Although courts and scholars have largely left unexamined the relationship between the Process Acts and the causes of action available in federal courts, certain scholars have examined federal judicial and legislative power over modern matters of procedure in light of the Process Acts. See Amy Coney Barrett, Procedural Common Law, 94 Va. L. Rev. 813, 864–76 (2008) (discussing the Process Acts in examining whether federal courts have an inherent authority to govern their own procedure absent legislation from Congress); Amy Coney Barrett, The Supervisory Power of the Supreme Court, 106 Colum. L. Rev. 324, 368–71 (2006) (discussing the Process Acts in examining the inherent supervisory power of the Supreme Court); Benjamin H. Barton, An Article I Theory of the Inherent Powers of the Federal Courts, 61 Cath. U. L. Rev. 1, 23–27 (2011) (describing the Process Act and the Judiciary Act as reflecting the proposition that "the first Congress considered its Article I power over court process and procedure to be plenary"); Margaret H. Lemos, The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine, 81 S. Cal. L. Rev. 405, 414–16 (2008) (considering the respective responsibilities of Congress and courts in crafting procedural rules); Robert J. Pushaw, Jr., The Inherent Powers of Federal Courts and the Structural Constitution, 86 Iowa L. Rev. 735, 747–51 (2001) (discussing the framework of the Process Act of 1789); William F. Ryan, Rush to Judgment: A Constitutional Analysis of Time Limits on Judicial Decisions, 77 B.U. L. Rev. 761, 770–75 (1997) (arguing that both history and precedent reveal that the legislature and not the courts had primary control over court procedure).

When Congress adopted the Process Acts of 1789 and 1792, however, legal and equitable forms of proceeding defined the specific causes of action available to litigants. In light of this background, the First Congress contemplated that federal courts would hear only those causes of action already available under existing legal and equitable forms of proceeding. At the time, lawyers, judges, and other public officials understood that these forms of proceeding—not ambient law—defined the causes of action available to litigants. Once established, this connection would have been sufficiently obvious to members of the First Congress and the judiciary that it warranted little, if any, discussion.

This background has important implications for interpreting the ATS. The Supreme Court has self-consciously sought to identify and implement the First Congress's understanding of the ATS. The Court has proceeded, however, on the false premise that the First Congress assumed that federal courts would adopt causes of action in ATS cases by looking to "the 'brooding omnipresence' of the common law then thought discoverable by reason."[26] The Process Acts demonstrate that the First Congress made no such assumption. Instead, the Process Acts instructed federal courts adjudicating any of the legal claims over which they had subject matter jurisdiction—including ATS claims—to apply the forms of proceedings used by the courts of the state in which they sat. Neither early congressional legislation nor early federal judicial practice supports the Supreme Court's suggestion that courts today should employ novel—and artificially narrow—federal common law causes of action in ATS cases. To the contrary, long-standing historical practice suggests that state law may continue to define the causes of action available when federal courts exercise jurisdiction under the ATS—not under the now-defunct Process Acts, but under *Erie* and the Rules of Decision Act.

This Article will proceed as follows. Part I will describe how the Supreme Court has recently interpreted the ATS to authorize the creation of limited federal common law causes of action. The Court's approach is based on the mistaken historical premise that the ambient law of the era—rather than the Process Acts—would have supplied the causes of action available to early federal courts exercising jurisdiction under the ATS.

[26] *Sosa*, 542 U.S. at 722 (quoting S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting)).

Part II will describe how the Process Acts of 1789 and 1792 adopted state forms of proceeding in cases at law and traditional forms of proceeding in equity and admiralty as the causes of action available in federal court. The Process Acts marked a victory for opponents of expansive federal judicial power, especially insofar as the Acts required federal courts to follow state forms of proceeding in common law cases.

Part III will describe how early federal courts understood their authority to entertain legal and equitable causes of action. In a range of contexts across jurisdictional grants, federal courts adjudicated only those causes of action authorized by the Process Acts of 1789 and 1792, absent contrary instructions from Congress in other statutes.

Part IV will describe some of the implications of this history for the source of the cause of action in ATS cases. Although this Article will not attempt to work out all of the implications of the history it presents, this Part will use the ATS to illustrate how a proper understanding of the original source of the cause of action in federal court can both inform and transform debates over federal judicial power.

I. THE CAUSE OF ACTION IN ATS CASES

The ATS is a jurisdictional provision originally adopted as part of Section 9 of the Judiciary Act of 1789. As enacted, it 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."[27] Although Section 9 gave federal courts jurisdiction over these "causes," it did not define the causes or specify the source of law that would define them. Litigants and courts rarely invoked the statute for almost 200 years. In the 1980s, litigants and courts rediscovered the ATS, invoking it to adjudicate cases between aliens arising outside of the United States.[28] At first, some lower federal courts suggested that customary international law itself could supply the cause of action in such cases. The Supreme Court, however, declined to adopt this position in *Sosa v. Alvarez-Machain*.[29] Instead, the Court indicated that federal courts could recognize only a limited num-

[27] Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76–77 (codified as amended at 28 U.S.C. § 1350 (2012)).

[28] See, e.g., Filartiga v. Pena-Irala, 630 F.2d 876, 878 (2d Cir. 1980).

[29] 542 U.S. 692 (2004).

ber of federal common law causes of action that corresponded to a narrow set of examples that the Court believed the First Congress might have had in mind when it enacted the ATS. The Court justified this approach on the ground that early federal courts applying the ATS would have found causes of action in ambient common law. Because *Erie* abandoned general common law in 1938, the *Sosa* Court suggested that courts today may use federal common law to fill the void.

This Part will describe in more detail how lower federal courts and the Supreme Court have interpreted the ATS—and, in particular, how they have defined the source of the cause of action in ATS cases. Because the *Sosa* Court attempted to identify and implement the expectations of the First Congress, this Part will begin by discussing the original role and meaning of the ATS in the First Judiciary Act. As the remainder of this Article will explain, both the Supreme Court and the lower federal courts have failed to identify correctly how the First Congress would have understood the source of the cause of action in ATS cases.

A. The Original Function of the ATS

In other work, we have explained that the First Congress included the ATS in the Judiciary Act of 1789 as a form of foreign diversity jurisdiction. This jurisdiction provided aliens with the option of suing Americans in federal (as opposed to state) court for intentional torts of violence against their person or personal property.[30] In so doing, the ATS satisfied the United States' obligation under the law of nations to redress such harms. Although one need not accept this understanding of the ATS to appreciate how the *Sosa* Court misidentified the source of the cause of action in ATS cases, we offer a brief summary in order to place these issues in their full historical context. Under the law of nations, a nation became responsible for an intentional tort of violence that its citizen committed against the person or personal property of a friendly alien if the tortfeasor's nation did not redress the harm in one of three ways. The nation could criminally punish the offender, extradite the offender to the victim's nation, or provide a civil remedy to the foreign victim.[31] If the offender's nation failed to redress the injury in one of these ways,

[30] See Anthony J. Bellia Jr. & Bradford R. Clark, The Alien Tort Statute and the Law of Nations, 78 U. Chi. L. Rev. 445 (2011) [hereinafter Bellia & Clark, Alien Tort Statute and Law of Nations] (analyzing the original meaning of the ATS).

[31] See id. at 474–75.

the victim's nation had just cause to retaliate against the offender's nation, including by waging war.[32]

Following the United States' independence from Great Britain, violence by Americans against aliens (especially British subjects returning to recover their debts and property) posed a threat to the peace and security of the new nation. During the Confederation era, Congress urged the states to redress such violence by their citizens, but only Connecticut enacted legislation for this purpose. In addition, state courts and juries were notorious for favoring Americans over British subjects in the years immediately following the War of Independence. With the adoption of the Constitution in 1789, Congress obtained the means to bypass the states and redress such violence at the federal level. Congress could have made all violence by Americans against friendly aliens a federal crime, but this would have placed the decision whether to prosecute in the hands of federal officials who were not yet in place. In addition, criminal actions would not have redressed violence committed by U.S. citizens in other nations because at the time criminal jurisdiction could not reach acts committed abroad. In the alternative, Congress could have encouraged the President to extradite Americans who committed serious torts against aliens abroad, but the United States did not yet have extradition treaties with other nations.

Under these circumstances, the First Congress chose to satisfy the United States' obligation to redress such violence by allowing aliens to pursue a civil remedy for it in the newly minted federal courts. When Congress created lower federal courts, it gave them jurisdiction to hear claims by aliens for torts in violation of the law of nations. This was a shorthand way of referring to torts committed by Americans against aliens which, if not redressed, were attributable to the United States as a violation of the law of nations. Article III of the Constitution authorized this jurisdictional grant as a species of foreign diversity jurisdiction. In theory, some of these alien tort cases might have fallen within the federal courts' standard foreign diversity jurisdiction. As a practical matter, however, the five-hundred-dollar amount-in-controversy requirement for ordinary foreign diversity jurisdiction would have left most alien tort cases in state court. The ATS filled this gap because it lacked an amount-in-controversy requirement. Accordingly, the ATS allowed federal courts to hear all claims by all aliens who suffered an intentional in-

[32] See id. at 476–77.

jury to person or personal property at the hands of Americans, thereby ensuring that the United States would meet its obligation under the law of nations to redress such injuries.[33]

B. The ATS in the Lower Federal Courts

For reasons that are not entirely clear, aliens rarely invoked jurisdiction under the ATS in the decades following its enactment, at least in recorded cases. In some instances, aliens subject to violence at the hands of Americans may have left the country rather than remain and pursue legal redress.[34] At the same time, commercial relations improved in some respects between the United States and Great Britain, especially after the Jay Treaty of 1794.[35] The treaty both strengthened trade between the two nations and resolved American debts to British creditors. Although tensions endured between the two nations, American merchants increasingly came to embrace British subjects as important trading partners, rather than as enemies. In turn, British subjects may have been content to pursue ordinary tort remedies in state court rather than invoke the federal courts' ATS jurisdiction. Perhaps for these reasons, federal courts mentioned the ATS in only two early cases—*Moxon v. The Fanny* (decided in 1793)[36] and *Bolchos v. Darrel* (decided in 1795).[37] Neither case sheds much light on the scope of ATS jurisdiction[38] because both were libel actions—a traditional form of action in admiralty—that fell within the federal courts' independent grant of admiralty and maritime jurisdiction.

The ATS remained essentially dormant for almost two centuries until 1980, when the U.S. Court of Appeals for the Second Circuit invoked the statute in *Filartiga v. Pena-Irala*.[39] There, the court allowed citizens

[33] From this perspective, both the ATS and the general foreign diversity provision of the Judiciary Act of 1789 were distinct exercises of Article III foreign diversity jurisdiction. The ATS was limited to suits by aliens for torts in violation of the law of nations, but had no amount-in-controversy requirement. The general foreign diversity provision encompassed all suits between aliens and Americans, but had a strict amount-in-controversy requirement. For extensive treatment of the matters discussed in this section, see Bellia & Clark, Alien Tort Statute and Law of Nations, supra note 30.

[34] See Bellia & Clark, Alien Tort Statute and Law of Nations, supra note 30, at 525.

[35] Treaty of Amity, Commerce and Navigation, U.S.-Gr. Brit., Nov. 19, 1794, 8 Stat. 116.

[36] 17 F. Cas. 942, 947–48 (D. Pa. 1793) (No. 9,895).

[37] 3 F. Cas. 810, 810–11 (D. S.C. 1795) (No. 1,607).

[38] See Bellia & Clark, Alien Tort Statute and Law of Nations, supra note 30, at 458–59, 459 n.56.

[39] 630 F.2d 876, 878 (2d Cir. 1980).

of Paraguay to sue another citizen of Paraguay for torturing and killing their son in Paraguay. The court concluded that "deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties."[40] The court found that the ATS conferred federal jurisdiction over the case because an alien was suing for a tort in violation of the law of nations.[41] Because the suit was solely between aliens, however, it did not obviously fall within the limited subject matter jurisdiction conferred by Article III. The Second Circuit resolved this problem by asserting that the law of nations "has always been part of the federal common law."[42] On this view, the court determined that customary international law both provided the cause of action and supported federal question jurisdiction under Article III.

Four years later, the D.C. Circuit declined to apply the Second Circuit's approach when it decided *Tel-Oren v. Libyan Arab Republic*.[43] Israeli citizens sued the Palestine Liberation Organization ("PLO"), Libya, and several other 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 several torts in violation of the law of nations (including terrorism, torture, and genocide).[44] The D.C. Circuit affirmed the dismissal of the complaint in a per curiam opinion, with all three judges writing separate concurrences. Judge Edwards seemed to favor *Filartiga*'s approach to the ATS, but emphasized that the statute allowed federal courts to hear only a narrow range of cases alleging violations of established international law—such as genocide, slavery, and systematic racial discrimination. Judge Edwards concluded that the PLO's actions against civilians did not rise to the level of a claim under the statute.[45] Judge Robb concurred on the ground that the dispute presented a nonjusticiable political question because courts should leave

[40] Id.

[41] See id. at 878–79.

[42] Id. at 885–86. *Filartiga*'s assertion that the law of nations "has always been part of the federal common law" is anachronistic and inconsistent with the way in which early federal courts understood the law of nations. See Bellia & Clark, Alien Tort Statute and Law of Nations, supra note 30, at 547–48.

[43] 726 F.2d 774, 775 (D.C. Cir. 1984) (per curiam).

[44] Id.

[45] Id. at 781, 796 (Edwards, J., concurring).

politically sensitive issues, such as the international legal status of terrorism, to the executive branch for diplomatic resolution.[46]

In a widely cited opinion, Judge Bork concluded that the ATS was solely a jurisdictional statute that conferred no cause of action. In the course of his opinion, Judge Bork made several important points that correctly anticipated certain aspects of the Supreme Court's subsequent interpretation of the ATS.[47] First, he addressed the source of the cause of action in ATS cases. He maintained that "it is essential that there be an explicit grant of a cause of action before a private plaintiff be allowed to enforce principles of international law in a federal tribunal."[48] Second, he stressed the constitutional separation of powers. In his view, "The crucial element of the doctrine of separation of powers in this case is the principle that '[t]he conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—'the political'—Departments.'"[49] Third, Judge Bork offered some thoughts regarding the original meaning of the ATS. He began by rejecting *Filartiga*'s broad reading of the statute to authorize a cause of action whenever a plaintiff alleges a violation of international law. Judge Bork found no evidence that Congress intended *Filartiga*'s broad reading when it enacted the statute.[50] Accordingly, he interpreted the statute more narrowly in light of the Founders' goal of opening "federal courts to aliens for the purpose of avoiding, not provoking, conflicts with other nations."[51]

Although it was unnecessary to his decision, Judge Bork offered some speculative thoughts regarding "what [the ATS] may have been enacted to accomplish."[52] He looked to Blackstone—"a writer certainly familiar to colonial lawyers"—and explained that Blackstone identified three principal offenses against the law of nations incorporated by the law of England: violation of safe conducts, infringement of the rights of ambassadors, and piracy.[53] According to Judge Bork, "[o]ne might suppose

[46] Id. at 826–27 (Robb, J., concurring).

[47] See Bradford R. Clark, *Tel-Orin*, *Filartiga*, and the Meaning of the Alien Tort Statute, 80 U. Chi. L. Rev. Dialogue 177, 177 (2013).

[48] *Tel-Orin*, 726 F.2d at 801 (Bork, J., concurring).

[49] Id. (second alteration in original) (quoting Oetjen v. Cent. Leather Co., 246 U.S. 297, 302 (1918)).

[50] Id. at 811–16.

[51] Id. at 812.

[52] Id. at 813.

[53] Id.

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."[54] Lower federal courts continued to struggle with the meaning of the ATS prior to the Supreme Court's 2004 decision in *Sosa*.

C. The ATS in the Supreme Court

The Supreme Court interpreted the ATS for the first time in 2004, and concluded that the only causes of action that federal courts may adjudicate under the statute are those that courts recognize as a matter of federal common law. In *Sosa v. Alvarez-Machain*,[55] 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.[56] The district court dismissed the claims against the U.S. defendants, leaving only a dispute between aliens (Mexican nationals). The Supreme Court held that federal courts lacked jurisdiction to hear the dispute under the ATS. The Court began by holding that "the statute is in terms only jurisdictional."[57] Indeed, 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."[58] The Court 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[59] all supported the conclusion that "the ATS is a jurisdictional statute creating no new causes of action."[60]

Nonetheless, the *Sosa* Court indicated that federal courts could hear a limited number of claims under the ATS. According to the Court, "Sosa [the defendant] would have it that the ATS was stillborn because there

[54] Id. at 813–14. Judge Bork acknowledged that his thoughts as to the original meaning of the ATS were "speculative," but 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." Id. at 815.

[55] 542 U.S. 692, 692 (2004).

[56] Id. at 698.

[57] Id. at 712.

[58] Id. at 713.

[59] Id. at 712–13.

[60] Id. at 724.

could be no claim for relief without a further statute expressly authorizing adoption of causes of action."[61] The Court rejected this position. Instead, the Court concluded that the "jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time."[62] Echoing Judge Bork's speculation in *Tel-Orin*, the Court suggested that these violations corresponded to the three crimes against the law of nations discussed in Blackstone's *Commentaries*: infringement of the rights of ambassadors, violation of safe conducts, and piracy.[63] From this premise, the Court concluded that the ATS gives federal courts jurisdiction to adjudicate a limited number of 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 eighteenth-century paradigms we have recognized."[64]

Of most relevance for present purposes is that the *Sosa* Court concluded that the First Congress (1) did not provide a cause of action in ATS cases and (2) would have expected federal courts to rely on unwritten law to provide one. In particular, the Court assumed that Congress understood early federal courts to have inherent power to draw on general common law—"the ambient law of the era"—to supply causes of

[61] Id. at 714.

[62] Id. at 724; see also id. at 719 (stating that "there is every reason to suppose that the First Congress did not pass the ATS as a jurisdictional convenience to be placed on the shelf for use by a future Congress or state legislature that might, someday, authorize the creation of causes of action").

[63] Id. at 724.

[64] Id. at 725. Scholars have extensively considered the meaning and import of the Court's decision in *Sosa*. See, e.g., Curtis A. Bradley, Jack L. Goldsmith & David H. Moore, *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) (arguing that *Sosa* recognized the continued applicability of international law norms to federal law after *Erie*); Beth Stephens, *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).

action in cases within the federal courts' subject matter jurisdiction, including ATS cases.[65] "[I]n the late 18th century," the Court explained, "positive law was frequently relied upon to reinforce and give standard expression to the 'brooding omnipresence' of the common law then thought discoverable by reason."[66] Although the *Sosa* Court acknowledged that ambient common law no longer supplies causes of action in federal court, it suggested that federal courts today may "recognize private claims [for the international law violations that the ATS covers] under federal common law."[67] The Court stressed, however, several reasons why federal courts should use this federal common law power sparingly, and it refused to recognize a cause of action for the international law violation that the plaintiff alleged.[68] Ultimately, the Court concluded that the lower court erred in permitting the plaintiff to pursue his claims for kidnapping and arbitrary detention under the ATS because these claims were not sufficiently analogous to the Blackstone crimes to warrant adjudication under the statute.

The Supreme Court construed the ATS a second time in *Kiobel v. Royal Dutch Petroleum Co.*, and simply repeated *Sosa*'s account of the source of the cause of action in ATS cases.[69] The plaintiffs 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.[70] The Second Circuit held that the ATS does not give federal courts subject matter jurisdiction over claims against corporations,[71] and the Supreme Court initially granted certiorari to review that determination. 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

[65] *Sosa*, 542 U.S. at 714.
[66] Id. at 722 (quoting S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting)).
[67] Id. at 732.
[68] Id. at 725–28.
[69] 133 S. Ct. 1659, 1663 (2013).
[70] Id. at 1662–63.
[71] Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 149 (2d Cir. 2010).

violations of the law of nations occurring within the territory of a sovereign other than the United States."[72]

Following re-argument, the Supreme Court applied the presumption against extraterritorial application of U.S. law to affirm the dismissal of the case. The Court acknowledged that the presumption ordinarily is used to determine the extraterritorial application of substantive statutes that regulate conduct, and it reaffirmed *Sosa*'s conclusion that the ATS is "strictly jurisdictional"[73] and thus "does not directly regulate conduct or afford relief."[74] 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."[75]

In reaching this conclusion, the *Kiobel* Court reiterated *Sosa*'s assumptions regarding the source of the cause of action in ATS cases. Quoting *Sosa*, the Court explained that the ATS's "grant of jurisdiction is . . . 'best read as having been enacted on the understanding that the common law would provide a cause of action for [a] modest number of international law violations.'"[76] The *Kiobel* Court explained that in *Sosa* "[w]e thus held that federal courts may 'recognize private claims [for such violations] under federal common law.'"[77] Given the policies underlying the presumption against extraterritorial application of U.S. law, the Court concluded that the presumption applies to the federal common law causes of action that courts may recognize in ATS cases.

Many scholars have endorsed the Supreme Court's view that the First Congress would have expected federal courts to derive the cause of action in ATS cases from ambient common law. Some scholars have specifically claimed that in 1789 courts would have applied preexisting common law causes of action in exercising their jurisdiction under the ATS.[78] Other scholars have claimed that in 1789 federal courts pos-

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

[73] *Kiobel*, 133 S. Ct. at 1664 (quoting *Sosa*, 542 U.S. at 713) (internal quotation marks omitted).

[74] Id.

[75] Id. According to the Court, to rebut the presumption, the ATS would have to evince a clear indication of extraterritoriality, and the Court found no such indication. Id. at 1663–69.

[76] Id. at 1663 (quoting *Sosa*, 542 U.S. at 724).

[77] Id. (alteration in original) (quoting *Sosa*, 542 U.S. at 732).

[78] See, e.g., William S. Dodge, The Historical Origins of the Alien Tort Statute: A Response to the "Originalists", 19 Hastings Int'l & Comp. L. Rev. 221, 239 (1996) ("[T]he First Congress understood that torts in violation of the law of nations would be cognizable at common law, just as any other tort would be."); David H. Moore, An Emerging Uniformity

sessed and would have exercised judicial power to create general common law causes of action.[79] In recent years, numerous scholars have embraced and recited the *Sosa* Court's suggestion that general common law originally supplied the cause of action in ATS cases[80] and beyond.[81]

As the remainder of this Article will explain, however, these judicial and scholarly accounts contradict the actual historical source of the causes of action that early federal courts adjudicated. Federal courts did not derive the cause of action in cases within their subject matter jurisdiction from general principles of the common law. Rather, federal

for International Law, 75 Geo. Wash. L. Rev. 1, 35 (2006) ("The First Congress's intent that federal courts recognize a limited number of common-law causes of action based on the law of nations was easy to achieve at the time the ATS was enacted, as federal courts could legitimately apply [customary international law] as general federal common law.").

[79] See, e.g., Brad R. Roth, Sosa v. Alvarez-Machain; United States v. Alvarez-Machain, 98 Am. J. Int'l L. 798, 800 (2004) (observing that before 1938 federal courts had "authority to establish substantive causes of action under 'general common law'" (quoting Erie Railroad Co. v. Tompkins, 304 U.S. 64, 78 (1938)); Beth Stephens, *Sosa*, the Federal Common Law and Customary International Law: Reaffirming the Federal Courts' Powers, Proceedings of the Annual Meeting, 101 Am. Soc'y of Int'l L. 269, 269–70 (2007) (arguing that "[s]ince the framing of the Constitution, the federal courts have had the power to apply customary international law as a rule of decision and to recognize a common-law cause of action for violations of international law . . . as a fundamental judicial power, not dependent on the authorization of the other branches of government").

[80] Such articles address both the ATS and other questions about federal court jurisdiction. See, e.g., Sarah H. Cleveland, Commentary on *Kiobel v. Royal Dutch Petroleum*: The *Kiobel* Presumption and Extraterritoriality, 52 Colum. J. Transnat'l L. 8, 12 (2013) ("*Sosa* held that the ATS was a jurisdictional statute, enacted with the expectation that the common law would provide a cause of action through judicial law development."); William S. Dodge, Alien Tort Litigation: The Road Not Taken, 89 Notre Dame L. Rev. 1577, 1578 (2014) (describing *Sosa* as "clarifying that the cause of action came not from the ATS itself but from federal common law"); Chimène I. Keitner, State Courts and Transitory Torts in Transnational Human Rights Cases, 3 U.C. Irvine L. Rev. 81, 88 (2013) (citing *Sosa* for the claim that "[t]he cause of action came from the common law of the time, which included customary international law" (internal citation marks omitted)); Howard M. Wasserman, Jurisdiction and Merits, 80 Wash. L. Rev. 643, 677 (2005) ("[T]he [*Sosa*] Court stated that federal Common Law in existence in 1789, incorporating principles of international law and the law of nations, provided the applicable substantive law for the actions that federal courts had been empowered to adjudicate.").

[81] See Anya Bernstein, Congressional Will and the Role of the Executive in *Bivens* Actions: What Is Special About Special Factors?, 45 Ind. L. Rev. 719, 726 (2012) ("At the time the U.S. Constitution was written, a common law cause of action was simply presumed to exist, and for at least a century after the Constitution was framed, individuals could sue public officials who had violated their constitutional rights for damages."); Carlos M. Vázquez & Stephen I. Vladeck, State Law, the Westfall Act, and the Nature of the *Bivens* Question, 161 U. Pa. L. Rev. 509, 539 (2013) (arguing that because "the common law was regarded as part of the 'general' law" during the pre-*Erie* era, federal courts "interpreted and applied the common law according to their own best judgment" (internal citation omitted)).

courts borrowed state causes of action in suits at common law (such as ATS suits) because the First Congress enacted statutes instructing them to do so. Because the Supreme Court's stated goal in ATS cases has been to identify and implement the expectations of the First Congress,[82] the Court should reconsider its approach to the ATS in light of this history.

II. THE PROCESS ACTS AND THE CAUSE OF ACTION

As discussed, in *Sosa v. Alvarez-Machain*, the Supreme Court surmised that the First Congress expected federal courts exercising jurisdiction under the ATS to find the applicable causes of action in the "ambient" common law of the era.[83] Members of the First Congress, however, did not rely on notions of ambient law to supply the causes of action available in the newly-created federal court system. Rather, they specifically provided the applicable causes of action by statute. The next two Parts will explain this legislation—and federal judicial practice pursuant to it—and the last Part will reexamine *Sosa* in light of this history.

When the First Congress considered how to set up the federal judiciary, a struggle occurred between those who favored a centralized national judiciary with its own distinctive procedures and those who wanted to tie federal judicial procedures to local state law and practice. Those who opposed a centralized federal judiciary prevailed in many respects, including with respect to the causes of action that would be available to federal courts in common law cases. Rather than leave federal courts free to find or create causes of action on the basis of their own conceptions of the common law, the First Congress enacted specific statutes—most importantly, the Process Acts of 1789[84] and 1792[85]—that specified the causes of action to be used in federal courts. It is easy today to overlook the role that these provisions played in the work of early federal courts because today's legal regime is so different. Congress wrote these early statutes in eighteenth-century legalese, little contemporaneous ex-

[82] See, e.g., *Sosa*, 542 U.S. at 732 (stating that "federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when [the ATS] was enacted").

[83] Id. at 714. See also id. at 726 (describing "'general' common law" as the source of causes of action in early federal courts (internal citation omitted)).

[84] Act of Sept. 29, 1789, ch. 21, 1 Stat. 93 (repealed 1792).

[85] Act of May 8, 1792, ch. 36, 1 Stat. 275 (repealed 1872).

position of their meaning survives, and they no longer govern how federal courts operate. But read in light of background understandings of a "cause of action" in 1789, these statutes prescribed the causes of action that early federal courts were authorized to adjudicate. The background understandings that illuminate the meaning of these provisions may be largely unfamiliar to modern readers. These understandings were elementary, however, to eighteenth-century lawyers. Read in context, the Process Acts directed federal courts to apply state law causes of action in common law cases, and traditional equitable remedies in cases in equity.

This Part will explain, first, the concept of the cause of action that prevailed in 1789 when the First Congress took up the question of what causes of action federal courts should apply. It then explains how members of the First Congress sought to ensure the application of local state law in federal courts, including state common law causes of action, and why Congress did not leave federal courts free to discern the existence of causes of action from abstract conceptions of the common law. Finally, this Part will describe the statutes that Congress enacted to regulate the causes of action available in federal court, and how these statutes precluded federal courts from defining causes of action in accordance with general common law principles. Early federal statutes defined the causes of action available in federal court, most importantly by adopting state law causes of action for use in common law cases.

A. Causes of Action in the Late Eighteenth Century

To understand how early acts of Congress defined the causes of action available in federal court, one must appreciate two important facets of judicial practice in England and America in 1789. First, local law, not general law, determined the existence of a cause of action in English and American courts. In other words, each sovereign determined for itself—as a matter of local law—the kind of injuries for which its courts would provide remedies. There was no transnational, general law system that defined causes of action or their availability. Second, local forms of proceeding supplied the causes of action available to litigants. In other words, a plaintiff had a cause of action if the local law of the sovereign provided a form of proceeding that supplied a remedy for the kind of injury the plaintiff had suffered. This background provides essential context for understanding the early acts of Congress that established the causes of action available in federal courts. In the Process Acts of 1789

and 1792, Congress required federal courts to apply state forms of proceeding in actions at law, and thus to employ state law causes of action for common law cases within their jurisdiction.

1. A Matter of Local Law, Not General Law

The Supreme Court's opinion in *Sosa* stated that the First Congress would have expected federal courts to look to the "common law" for causes of action in ATS cases.[86] It is not entirely clear what the Court meant in this regard. There are several indications, however, that the Court equated "the common law" with the kind of "general law" that the Supreme Court applied as a rule of decision in *Swift v. Tyson*.[87] For example, quoting Justice Holmes, the Court stated that "[w]hen [the ATS] was enacted, the accepted conception was of the common law as 'a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute.'"[88] This description is a direct reference to the kind of general law that the Court applied under the *Swift* doctrine and later rejected in *Erie*. Similarly, the Court referred to the common law at the time of the ATS's enactment as "the ambient law of the era,"[89] suggesting that it was part of a general law that sovereigns shared in common, as opposed to the local law of a particular sovereign.[90]

The *Sosa* Court's suggestion that ambient or general common law would have supplied the cause of action in early ATS cases is at odds with historical practice because general law did not supply causes of action in English and early American courts. Rather, local law supplied the cause of action at that time. To understand the *Sosa* Court's error, one

[86] *Sosa*, 542 U.S. at 724, 729.

[87] 41 U.S. (16 Pet.) 1, 18–19 (1842).

[88] *Sosa*, 542 U.S. at 725 (quoting Black and White Taxicab & Transfer Co. v. Brown and Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)).

[89] Id. at 714.

[90] A fair reading of *Sosa* suggests that when the Court referred to "the common law" and "the ambient law of the era," it was referring to the kind of general common law applied by federal courts during the *Swift* era. Of course, the federal courts' application of general law pre-dated *Swift* and expanded after that decision. See Anthony J. Bellia Jr. & Bradford R. Clark, General Law in Federal Court, 54 Wm. & Mary L. Rev. 655, 677–87 (2013) [hereinafter Bellia & Clark, General Law in Federal Court] (describing the federal courts' early application of general law). Even if one thinks that the *Sosa* Court's use of the phrases "the common law" and "the ambient law of the era" refers to something other than general law, our point is simply that these phrases do not appear to refer to state common law forms of action under the Process Acts.

must appreciate the distinction between general law and local law that prevailed when Congress enacted the ATS. Although English courts routinely applied unwritten law to cases before them, they did not treat all forms of unwritten law as one undifferentiated mass. Rather, the laws of England drew a significant distinction between local law and general law.

Local law was law that governed only within the jurisdiction or borders of a particular sovereign.[91] In other words, local law was law local to a sovereign state or nation (not necessarily, as we use the phrase today, local to a subunit of government, such as a county or town). "Matters subject to local law were typically those that occurred within the territorial jurisdiction of the state and affected only that state, such as trusts and estates, property, local contracts, civil injuries, and crime."[92] Local law could be written (an act of the legislature) or unwritten (a matter of common law).[93] By contrast, general law referred to law applicable not just in one sovereign, but in all civilized nations, based on custom and the law of reason.[94] "Matters governed by general law originally were those of interest to more than one state, such as commercial transactions between citizens of different states, maritime matters, and the relations between sovereign states."[95] The law merchant, the law maritime, and the law of state-state relations—all branches of general law—governed such matters, respectively.[96] Like local law, general law could be incorporated into written law (a legislative act) or unwritten law (the common law).

Local law, not general law, defined the causes of action that a litigant could pursue in English and American state courts after the War of Independence. Blackstone began his chapter on "the cognizance of private wrongs" in English courts by explaining that local English law defined the causes of action that any court of England could hear.[97] "Every nation must and will abide by its own municipal laws" regarding the jurisdiction of its courts and what causes of action will be permitted, "which

[91] Id. at 665–67 (defining local law and distinguishing it from general law).
[92] Id. at 666.
[93] Id.
[94] Id. Blackstone equated the idea of "general law" with the "law of nations," describing general law to include the law of state-state relations, the law merchant, and the law maritime. 4 William Blackstone, Commentaries *66.
[95] Bellia & Clark, General Law in Federal Court, supra note 90, at 666.
[96] Id.
[97] 3 Blackstone, supra note 94, at *86–87.

various accidents conspire to render different in almost every country in Europe."[98] To be sure, once local law provided a cause of action, general law might supply a rule of decision for resolving the case. But English courts did not look to general law to define the causes of action they could hear; rather, they looked exclusively to the local law of England, written or unwritten.

Thus, if the *Sosa* Court, in saying that early federal courts found causes of action in "ambient law" or "common law," meant that early federal courts found causes of action in general law, then the Court was simply mistaken. In 1789, lawyers and judges understood local law, not general common law, to define the causes of action available in English and American state courts. If, instead, the *Sosa* Court meant that early federal courts would find causes of action by reference to some source of local common law—such as the local common law of England—the Court also was mistaken. By statute, Congress required federal courts to borrow common law causes of action from local state law. We will return to this point after explaining, in the next Section, how late eighteenth-century lawyers understood the concept of the cause of action.

2. The Cause of Action in English Law

In the late eighteenth century, lawyers and judges trained in the English common law tradition understood the availability of a cause of action to be determined by whether local law provided a form of proceeding capable of redressing the harm in question. This understanding is fundamentally different from the way in which lawyers and judges understand the concept of a cause of action today. Today, we consider the cause of action to be governed by substantive law. We typically ask whether a person who has suffered an injury is legally entitled to request a judicial remedy for that injury. If so, that person has a cause of action.[99] At the Founding, the question proceeded differently because forms and modes of proceeding defined the existence of a cause of action. At law, there were predetermined forms of action that authorized certain remedies. An injured plaintiff could seek a judicial remedy only if he could fit his case into an established form of action by pleading sufficient facts to demonstrate that he was entitled to the writ in question.

[98] Id. at *87.

[99] See Anthony J. Bellia Jr., Article III and the Cause of Action, 89 Iowa L. Rev. 777, 792–99 (2004) (explaining the development of modern understandings of causes of action).

As William Blackstone explained, the specific remedy that a particular writ provided was the "foundation of the suit."[100] "When a person has received an injury, and thinks it worth his while to demand a satisfaction for it, he is to consider . . . what redress the law has given for that injury; and thereupon is to make application or suit . . . for that particular specific remedy . . . ."[101] A cause of action existed at law, then, when a form of action provided a remedy for the kind of injury that the plaintiff had suffered.[102]

For these reasons, the cause of action was inextricably bound up with the available forms of proceeding. One had a cause of action if and only if one satisfied the legal determinants necessary to obtain a remedy afforded by a particular form of proceeding.[103] As F.W. Maitland explained, in the late eighteenth century, "the forms of action are given," and "the causes of action must be deduced therefrom."[104] Henry John Stephen likewise explained in his influential 1824 treatise on pleading that "the enumeration of writs, and that of actions" is "identical."[105] As this system worked in the eighteenth century, the availability of the remedy determined the existence of a cause of action, rather than the existence of a cause of action determining the availability of a remedy.

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[100] 3 Blackstone, supra note 94, at *272.

[101] Id. at *272–73.

[102] See Bellia, supra note 99, at 784–89 (describing the concept of a legal cause of action that prevailed at the time of the Founding); see also G. Edward White, Tort Law in America: An Intellectual History 9–10 (2d ed. 2003) (describing how common law writs determined, for example, the substance of tort law). The growth and decline of the writ system is described in John H. Langbein, Renee Lettow Lerner & Bruce P. Smith, History of the Common Law: The Development of Anglo-American Legal Institutions 87–100, 377–402 (2009).

[103] See Bellia, supra note 99, at 783.

[104] F.W. Maitland, The Forms of Action at Common Law: A Course of Lectures 6 (A.H. Chaytor & W.J. Whittaker eds., 1936). As Maitland further explained it, an aggrieved person might "find that, plausible as his case may seem, it just will not fit any one of the receptacles provided by the courts and he may take to himself the lesson that where there is no remedy there is no wrong." Id. at 4–5.

[105] Henry John Stephen, A Treatise on the Principles of Pleading in Civil Actions 8 (Philadelphia, Abraham Small 1824) (footnotes omitted). As Stephen explained more extensively,

> An original writ . . . is essential to the due institution of the suit. These instruments have consequently had the effect of limiting and defining the right of action itself; and no cases are considered as within the scope of judicial remedy, in the English law, but those to which the language of some known writ is found to apply, or for which some new writ, framed on the analogy of those already existing, may, under the provision of the Statute of Westminster 2, be lawfully devised. The enumeration of writs, and that of actions, have become, in this manner, identical.

Id. (footnotes omitted).

The prerogative courts of equity and admiralty had a similar conception of the cause of action. Although equity began as a flexible alternative to law for aggrieved persons to draw upon the reserve justice of the Crown,[106] by the late eighteenth century equity and law had become "equally artificial," differing only in their forms and modes of proceeding.[107] In equity and admiralty, a plaintiff commenced a suit by filing a bill or a libel, respectively, specifying the right or title upon which the court could grant a particular remedy. If such pleadings failed to specify these matters, then the plaintiff had no cause of action and would not prevail. In this regard, courts of equity at the time had "no more discretionary power than Courts of Law."[108]

To understand how the First Congress defined the causes of action available in federal courts, it is important to appreciate the terminology that defined causes of action in this system. In cases at law, a plaintiff generally would commence an action by seeking an appropriate "writ." In common law courts, "there were a certain number of writs which differed very markedly from each other."[109] Each writ corresponded to a particular "form of action."[110] Blackstone explained that a plaintiff would request a specific "original writ" in order to pursue a "specific remedy" in the form of action that the writ designated.[111] Examples of original common law writs—designating particular forms of action—included ejectment (to recover possession of real property), detinue (to recover possession of personal property based upon a superior right), replevin (to recover possession of personal property wrongfully taken), debt (to recover money due), covenant (to recover for breach of a promise under seal), special assumpsit (to recover damages for breach of con-

[106] See Bellia, supra note 99, at 789.

[107] 3 Blackstone, supra note 94, at *434. For a discussion of how intensive doctrinalization limited the discretion of courts of equity, beginning in the late seventeenth century and continuing through the early nineteenth century, see Langbein, Lerner & Smith, supra note 102, at 351–54.

[108] 1 Henry Maddock, A Treatise on the Principles and Practice of the High Court of Chancery, at viii (2d Am. ed. Hartford, Oliver D. Cooke & Sons 1822).

[109] Maitland, supra note 104, at 5.

[110] Id.

[111] 3 Blackstone, supra note 94, at *272. As examples, he explained,

> As, for money due on a bond, an action of *debt*; for goods detained without a force, an action of *detinue* or *trover*; or, if taken with force, and action of *trespass vi et armis*; or, to try the title of lands, a *writ of entry* or action of trespass in *ejectment*; or, for any consequential injury received, a special action *on the case*.

Id. at *273 (emphasis in original).

tract), general (indebitatus) assumpsit (to recover damages in quasi contract), trespass (to recover damages for physical interference with person or property), trespass on the case (to recover damages for wrongful acts resulting in indirect interference with person or property), and trover (to recover damages for the conversion of chattel).[112] Judges and writers on the common law used the phrases "form of action" and "form of proceeding" synonymously to denote the kind of action that a particular writ authorized a plaintiff to pursue.[113] (They also used the phrase "form of proceeding" more broadly to denote the remedies that a plaintiff could pursue in equity as well.) If a plaintiff could fit his injury into a particular form of proceeding designated by a writ, the plaintiff was said to have a "cause" or a "cause of action."

Each form of proceeding was its own miniature legal system. As Maitland explained, each "procedural pigeon-hole" designated by an original writ "contain[ed] its own rules of substantive law."[114] Moreover, each form of proceeding required its own "method of pursuing and obtaining" a remedy in court.[115] In other words, "each cause of action" defined by a writ "had its own mini-civil procedure system" regarding matters such as summons, proof, and remedies.[116] Lawyers and judges sometimes used the phrase "mode of proceeding" to describe the particular method of obtaining redress under a given form of proceeding,[117]

[112] Roscoe Pound, Readings on the History and System of the Common Law 349–50 (1913).

[113] See, e.g., 3 Blackstone, supra note 94, at *271 (explaining, with respect to the writ system, that the "forms of proceeding are in all material respects the same" in the common law courts of Westminster). As an example of how these terms were used by courts, in *Jefferson v. Bishop of Durham*, (1797) 126 Eng. Rep. 804 (C.P.) 812–13; 1 Bos. & Pul. 105, 120–21, a question before the court was "[w]hether a writ of prohibition lies in the Court of Common Pleas to restrain a bishop from committing waste in the possession of his see." Id. at 812–13. To determine whether the writ would lie, Chief Justice Eyre examined "the forms of proceeding contained in books of very high authority." Id. at 813. For an example from a reported case in America, see *Black v. Digges's Executors*, 1 H. & McH. 153, 155 (Md. 1744) (explaining that a writ of "*indebitatus assumpsit* will not lie but where debt will lie" and "[t]hat neither *indebitatus assumpsit* nor debt will lie upon any collateral undertaking, though *assumpsit* will, and the difference between the actions arises from the different form of proceeding").

[114] Maitland, supra note 104, at 4.

[115] 3 Blackstone, supra note 94, at *115.

[116] Langbein, Lerner & Smith, supra note 102, at 96.

[117] See, e.g., The King v. Almon, (1765) 97 Eng. Rep. 94 (K.B.) 101; Wilm. 243, 259 (considering attachment and trial by jury as different "modes of proceeding").

and sometimes they used "mode of proceeding" as a synonym for "form of proceeding."[118]

Some forms of proceeding offered remedies for common legal injuries. Writs of trespass, for example, offered remedies for many common legal harms. Blackstone described the kinds of familiar injuries for which writs of trespass provided remedies:

> [B]eating another is a trespass; for which . . . an action of trespass *vi et armis* in assault and battery will lie: taking or detaining a man's goods are respectively trespasses; for which an action of trespass *vi et armis*, or on the case in trover and conversion, is given by the law: so also non-performance of promises or undertakings is a trespass, upon which an action of trespass on the case in *assumpsit* is grounded.[119]

Other forms of proceeding were less common. For example, "the old writ of admeasurement of pasture" provided a specific remedy for a narrowly defined legal injury.[120] "By that mode of proceeding," as Justice Buller explained in 1790, "if the defendant put more cattle on the common than he ought, the plaintiff was entitled to have a certain quantity admeasured to the defendant; the excess then is the injury in these cases."[121] However broadly or narrowly applicable, a writ that fit the plaintiff's alleged injury was necessary to commence an action at law. Without an applicable writ—and thus without a form of action/proceeding through which to pursue a remedy—a plaintiff had no cause of action.

In England, both the common law and statutes defined the forms and modes of proceeding available in English courts.[122] When a statute provided the form of proceeding, courts in England and America considered themselves bound to follow the statutory form.[123] English courts also

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[118] See, e.g., Mason v. Sainsbury, (1782) 99 Eng. Rep. 538 (K.B.) 539; 3 Dougl. 61, 63 (argument of counsel) (arguing that "a man who has two remedies may pursue either of them, and that it is no defence to say he has another mode of proceeding").

[119] 3 Blackstone, supra note 94, at *208.

[120] Hobson v. Todd, (1790) 100 Eng. Rep. 900 (K.B.) 901; 4 T. R. 71, 74.

[121] Id.

[122] 1 Blackstone, supra note 94, at *67.

[123] For an example of an English case, see *Goodwin v. Parry*, (1792) 100 Eng. Rep. 1185 (K.B.) 1186; 4 T. R. 577, 578 ("[T]he words of the Act of Parliament are positive that no process shall be sued out until the affidavit has been first duly made and filed: and though in ordinary cases a party may wave taking advantage of any trifling irregularity in the mode of proceeding by not objecting in the first instance, the defendants in this case could not wave this objection, because the Court are to take care that an action on a penal statute shall not be commenced in a mode prohibited by that statute.").

considered themselves bound to follow the forms and modes of proceeding provided by the common law of England. In England, common law forms and modes of proceeding, like all unwritten English law, depended "upon immemorial usage" for their support.[124] Following their independence, American states individually adopted the common law of England, subject to their own adaptation of it to local circumstances.[125] In short, neither English courts nor American courts considered themselves free to create new forms of proceeding not provided by the statutes or the common law of their respective jurisdictions.[126]

Although late eighteenth-century English and American courts could not create new forms of proceeding, they did at times apply existing forms of proceeding with enough flexibility to meet the demands of justice. For example, in discussing ejectments, Lord Mansfield wrote that "[t]he great advantage of this fictitious mode [of proceeding] is, that being under the control of the Court, it may be so modelled as to answer in the best manner every end of justice and convenience."[127] The line between courts improperly creating new forms of proceeding and properly molding old ones to meet the demands of justice was not perfectly clear, but it was a line that English courts and treatise writers attempted to maintain.[128]

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[124] 1 Blackstone, supra note 94, at *68.

[125] See Anthony J. Bellia Jr. & Bradford R. Clark, The Federal Common Law of Nations, 109 Colum. L. Rev. 1, 29 (2009) [hereinafter Bellia & Clark, Federal Common Law of Nations] (describing state incorporation and adaptation of the common law).

[126] See, e.g., Case v. Case, 1 Kirby 284, 285 (Conn. 1787) (explaining that a court could not employ a mode of proceeding that was not established by law); Paine v. Ely, 1 N. Chip. 14, 21 (Vt. 1789) ("[T]he mode of proceeding . . . . is pointed out and regulated, not by the common law, but solely by statute; and must be strictly pursued—A different mode cannot be adopted, under pretence of its being more convenient for the debtor, or for the Justices—This would be to assume an arbitrary power not warranted by law."); Miller v. The Lord Proprietary, 1 H. & McH. 543, 548 (Md. 1774) (argument of Attorney General) ("[W]here statutes point out a particular mode of proceeding, such mode of proceeding must be followed.").

[127] Fowler v. Sham-Title, (1762) 97 Eng. Rep. 837 (K.B.) 840; 3 Burr. 1290, 1295–96. For an American state case, see *Rossell v. Inslee*, 6 N.J.L. 475, 476 (1799) ("It is clear that an ejectment is almost entirely a fictitious proceeding, introduced from views of general convenience, which courts have assumed the power of moulding, so as to answer the purposes of justice, and in order to prevent a fiction from working injustice to any one.").

[128] As English treatise-writer John Sheridan explained:

> [The court of King's Bench], like all the other courts of this country, is bound to judge according to the known and fixed laws of the land, that is to say, the common law . . . and the written or statute law; nor can the one or the other be altered, but by express statute: the rules of practice, or mode of proceeding in each court, are indeed,

The forms and modes of proceeding that defined causes of action varied among courts of different jurisdictions. In England, the common law courts, equity courts, and admiralty courts all had different forms and modes of proceeding.[129] In the United States, state forms of proceeding differed in important respects from English forms of proceeding and from state to state.[130] For example, in 1785, the Pennsylvania Court of Common Pleas observed that Pennsylvania had "a positive act of Assembly directing the mode of proceeding, upon mortgages, intirely different from the modes prescribed in *England*."[131] The court was not referring here to what today we would consider mere matters of procedure. Rather, the court was referring to the remedy provided by a common law form of action. Instead of following the English practice, the Pennsylvania statute prescribed a distinct form of action that "confine[d] the remedy of the mortgagee to the recovery of the *principal and interest* due on the mortgage."[132] State forms of action also commonly varied from each other. For example, as Maryland Chief Justice Samuel Chase casually observed shortly before he joined the Supreme Court of the United States, "[t]he mode of proceeding for the recovery of debts, is variant in the several States."[133]

> of course, much under the regulation of the respective courts, yet any material alterations in this respect, or such as may, in any very considerable degree, affect the subject, are generally, and indeed it is to be wished ever may be, made by act of parliament.

John Sheridan, The Present Practice of the Court of King's Bench 17 (London, W. Flexney & J. Walker 1784).

[129] The forms and modes of proceeding had long varied in other courts in England as well, such as ecclesiastical courts. See Judgment of 1675, 89 Eng. Rep. 207 (K.B.) 207; 1 Freeman 286, 286–87 (describing a form of proceeding that obtained in the Ecclesiastical Court that did not obtain as an original matter in the King's Bench).

[130] See 1 Goebel, supra note 22, at 472–73 ("There flourished . . . divergencies from English common law procedures and native inventions in every state peculiar to its jurisprudence.").

[131] Dorrow's Assignee v. Kelly, 1 U.S. (1 Dall.) 142, 144–45 (Pa. Com. Pl. 1785) (emphasis in original).

[132] Id. at 145 (emphasis in original). For another example of a state law that provided a different action for a remedy than English law provided, see *Davidson's Lessee v. Beatty*, 3 H. & McH. 594, 615 (Md. 1797) (opinion of Chase, J.) (describing how Maryland law provided "a special and auxiliary remedy for the recovery of debts in three several cases, and this special remedy is by attachment," and describing the "mode of proceeding" the act prescribed for that remedy).

[133] Campbell v. Morris, 3 H. & McH. 535, 555 (Md. 1797).

B. The First Congress and Federal Judicial Power

To understand the acts of the First Congress establishing and regulating federal courts, it is important to keep in mind the two key points discussed in the preceding Section: First, that the local law of a particular sovereign (as opposed to general law) determined the causes of action that its courts could adjudicate, and, second, that the laws of England and American states differed among themselves in various ways in defining the causes of action available in their respective courts.

When the First Congress met in 1789, a struggle ensued between those who favored more consolidated federal judicial power and those who favored preservation of the existing power of state judiciaries. This struggle was a continuation of debates that occurred both at the Federal Convention and during the ratification debates over the scope of federal judicial power. Opponents of creating inferior federal courts argued that such courts would unduly interfere with state sovereignty[134] and potentially obliterate state courts.[135] They argued that federal courts would be inconvenient fora for litigants, especially defendants haled into distant courts.[136] Opponents also expressed concerns about the novel procedures that federal courts might employ. They were especially concerned that federal courts would fail to draw juries from the locality of the incident or that they would deny jury trial rights altogether.[137] At the time, the right to a jury trial and the method of jury selection varied throughout the United States, and how federal courts would treat these matters was an open question (especially prior to the adoption of the Seventh Amendment).[138] Opponents of a strong national judiciary were also concerned that federal courts, once created, would exercise unfettered equity powers.[139]

In the First Judiciary Act, Congress reached an initial compromise regarding the establishment of inferior federal courts for the United States. It created district and circuit courts, but defined and limited their respec-

[134] See 4 The Documentary History of the Supreme Court of the United States, 1789–1800, supra note 21, at 5, 10–11 (discussing the basis of such opposition).
[135] Id. at 12.
[136] See 1 Goebel, supra note 22, at 472–73 (discussing such arguments).
[137] See 4 The Documentary History of the Supreme Court of the United States, 1789–1800, supra note 21, at 8, 14–15 (discussing such concerns).
[138] See id. at 17 (discussing such variability).
[139] See id. at 12 (discussing such concerns).

tive jurisdictions in significant ways.[140] In light of long-standing concerns about the scope of federal judicial power, the Act also contained important directions regarding the sources of law that federal courts were to apply. For example, in Section 34, the Judiciary Act famously directed federal courts to apply local state law rules of decision absent preemption by the Constitution, laws, and treaties of the United States: "[T]he laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply."[141] Although little evidence survives regarding the drafting of this text,[142] it is believed that "[t]he addition of Section 34 was induced . . . by the need for some positive direction regarding the basic law by which the new courts were to be governed."[143] In addition, Section 16 of the Act prohibited federal courts from entertaining suits in equity when an adequate remedy existed at law.[144] This provision prevented federal courts from extending their equity jurisdiction beyond its conventional limits, which in turn could have deprived litigants of a jury trial.

Amidst these compromises and limitations, it would have been surprising if members of the First Congress had left federal courts free to find or create causes of action on the basis of ambient or general law, as the *Sosa* Court suggested. As explained, if by "ambient law" the *Sosa* Court was referring to general law, then the Court was simply mistaken. English and American courts had never understood general law to supply the causes of action available to litigants. As explained, general law covered subjects of mutual interest to multiple nations, such as the law of state-state relations, the law merchant, and the law maritime.[145] General law did not create causes of action; rather, causes of action were matters of local law.

[140] The First Judiciary Act defined most of the jurisdiction of federal courts in §§ 9–13. Judiciary Act of 1789, ch. 20, §§ 9–13, 1 Stat. 73, 76–81. In §§ 14–17, the Act proceeded to confer certain powers on federal courts. Id. §§ 14–17, 1 Stat. at 81–83.

[141] Id. § 34, 1 Stat. at 92.

[142] See 1 Goebel, supra note 22, at 502 ("Nothing more is known of its genesis than that the text is written out on a chit in Ellsworth's hand and marked for page 15.").

[143] Id.

[144] Congress provided in § 16 "[t]hat suits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate and complete remedy may be had at law." Judiciary Act of 1789 § 16, 1 Stat. at 82.

[145] See supra notes 94–96 and accompanying text.

Even if it had been possible for a court to derive causes of action from principles of general law, it is unlikely that the First Congress would have left federal courts free to undertake such a novel experiment. The Constitution granted federal courts the "judicial Power of the United States" but limited their subject matter jurisdiction to particular kinds of cases and controversies.[146] The Constitution itself did not create federal courts with greater remedial powers than English or state courts enjoyed. Local law, not general law, had long governed the causes of action available in English and American state courts.[147] It is thus not surprising that there is no indication that members of the First Congress entertained the possibility that general law would have supplied causes of action in federal court.

To the contrary, members of Congress appear to have been well aware that the local law of the United States would determine the causes of action available in federal courts, just as local law had long governed the causes of action available in English and state courts. One can readily see, however, why Congress would not have left federal courts free to develop this law on their own. As explained, the local law governing the actions available in a particular court system varied from sovereign to sovereign, and anti-Federalists in Congress had expressed serious concerns about centralized federal judicial power. Accordingly, Congress did not leave federal courts free to develop the local U.S. law governing the forms of proceeding they could adjudicate. Rather, Congress took it upon itself to provide local U.S. law for this purpose by statute. The question before Congress was not whether to leave federal courts free to find causes of action on their own. No one suggested this approach. Rather, the question was whether Congress should try to create uniform forms of proceeding for federal courts (as a matter of local federal law), or instead tie the forms of proceeding available in federal court to local state practice, at least with respect to actions at law. As the next Section will explain, the First Congress chose in the end to require federal courts to borrow the forms of proceeding governing actions at law in the courts of the state where the federal court was located, in order "to quiet the alarums raised regarding the threatened inconvenience of the federal system."[148]

[146] U.S. Const. art. III, § 2, cl. 1.
[147] See supra notes 97–98 and accompanying text.
[148] 1 Goebel, supra note 22, at 473.

C. The First Judiciary Act and the Process Acts

Courts and scholars have largely overlooked the role that the First Judiciary Act and the Process Acts played in defining the causes of action available in early federal courts. Because none of these statutes used the modern phrase "cause of action," it is easy to assume that these Acts related only to what we regard today as procedural matters. Read in context, however, the Acts used legal terms of art that were understood at the time to provide the causes of action available in federal court. Most importantly, in cases at law, Congress required federal courts to adjudicate causes of action recognized under the law of the state in which the federal court sat. Although some members of Congress wanted to create uniform forms of proceeding for use in all federal courts, Congress rejected that approach. Instead, Congress adopted state forms of proceeding for actions at law in federal courts, thus synchronizing the legal causes of action available in federal and state courts located in the same state.

As this Section will explain, a late eighteenth-century reader of early federal statutes, knowledgeable of background legal principles, would have understood Section 14 of the Judiciary Act and the Process Acts of 1789 and 1792 to specify the causes of action that federal courts were authorized to hear. Although their original function has been long overlooked, these Acts operated to define the causes of action that were available to litigants in federal courts for nearly a century. Section 14 of the Judiciary Act was enacted on September 24, 1789, and initially provided federal courts with general authority to adjudicate traditional common law causes of action. In parallel legislation enacted five days later, Congress provided inferior federal courts with more specific and comprehensive instructions in the first Process Act. This Act required federal courts to apply state forms of proceeding in actions at law. Congress reenacted this requirement with certain modifications in the Process Act of 1792, which continued in force until 1872.

The Process Act applied when Congress did not otherwise provide a specific form of proceeding for the enforcement of a claim within the subject matter jurisdiction of the federal courts. Congress always could—and occasionally did—enact a specific cause of action for the enforcement of a specific federal right. For example, in the Patent Act of 1790, Congress gave patent holders a right against infringement and

specified that it was enforceable through an "action on the case."[149] Similarly, in the Copyright Act of 1790, Congress gave copyright holders a right against republication that was enforceable through an "action of debt," and a right against first publication of a manuscript that was enforceable through an "action on the case."[150] Actions of debt and actions on the case were common law forms of proceeding at the time. For most cases within federal court jurisdiction, however—such as diversity cases—Congress had neither created a federal right nor specified a form of proceeding. In such cases, the Process Acts established a background rule that directed federal courts to apply the same forms of proceeding in actions at law as the local state courts would apply.[151] This Section will

[149] Act of Apr. 10, 1790, ch. 7, § 4, 1 Stat. 109, 111 (repealed 1793).

[150] Act of May 31, 1790, ch. 15, §§ 2, 6, 1 Stat. 124, 125–26 (repealed 1802).

[151] It is important to note at the outset that Congress's decision to adopt state forms of proceeding for actions at law, and traditional forms of proceeding in equity and admiralty, did not make the cases adjudicated in federal court using those forms of proceeding "[c]ases . . . arising under" federal law for purposes of Article III. U.S. Const. art. III, § 2, cl. 1. Today, it is generally accepted—as a matter of Article III and statutory "arising under" jurisdiction—that one kind of suit arising under federal law is that in which federal law creates the cause of action. Justice Holmes famously stated this principle in *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916) ("A suit arises under the law that creates the cause of action."). At the time that Congress enacted the First Judiciary Act and the Process Acts, however, this formulation did not hold true in all cases. In 1789, a right of action was a matter of local procedural law. To have a cause of action, the plaintiff would have to employ a form of proceeding that fit the alleged injury to a legal right or title. Bellia, supra note 99, at 784–92. A case arose not under the law that created the form of proceeding, but rather under the law that created the right or title a plaintiff was seeking to enforce through a form of proceeding. In *Osborn v. Bank of the United States*—the seminal Supreme Court case addressing Article III "arising under" jurisdiction—Chief Justice Marshall explained that the judicial power "is capable of acting only when the subject is submitted to it by a party who asserts his rights in *the form prescribed by law*." 22 U.S. (9 Wheat.) 738, 819 (1824) (emphasis added). A case arose under federal law not if federal law provided the form of action, but rather if "the title or right set up by the party, may be defeated by one construction of the constitution or law of the United States, and sustained by the opposite construction." Id. at 822. In other words, a case arose under federal law if a federal question formed "an ingredient of the original cause," but not merely on the ground that federal law provided the form of action. Id. at 823. Because at the time "local" federal law defined the causes of action available in federal courts—as the local law of any sovereign did—every "case" or "controversy" (including, for example, diversity suits) would have arisen under federal law under an anachronistic misapplication of the Holmes test. At the Founding, whether a case arose under federal law for Article III purposes depended on the source of the underlying right or title. Consider, for example, the early federal statute (discussed in the text) that gave copyright holders a right enforceable through an action of debt in federal court. Cases brought under this statute arose under federal law not because the statute provided the form of proceeding (an action in debt), but because the federal law created the underlying right to be enforced through that form of proceeding. Conversely, the mere fact that

describe the Process Acts of 1789 and 1792 and, to place them in context, will recount the more general directive that Congress first provided in Section 14 of the First Judiciary Act.

1. Section 14 of the Judiciary Act of 1789

Section 14 of the Judiciary Act was the first provision Congress enacted that pertained to the causes of action available in federal courts. The Judiciary Act, of course, created inferior federal courts and defined their jurisdiction. It also addressed the original and appellate jurisdiction of the Supreme Court. It thus was natural for Congress to address in some way the causes of action that would be available in federal courts in the exercise of their jurisdiction. Section 14 empowered federal courts to issue all writs "which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law."[152] Although modern lawyers might not read this provision to concern the power of federal courts to adjudicate causes of action, its terms—understood in historical context—encompassed this function.

In Section 14, Congress provided, specifically, that "courts of the United States, shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law."[153] Because contemporaneous statements explaining the meaning of this language do not survive, background legal context provides the best evidence of its meaning. The first part of this provision referred to the bench writs of *scire facias* and *habeas corpus*. Bench writs such as these were commands that courts issued "to inferior officers and courts."[154] But the second part of this provision—authorizing federal courts to issue "all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions"—was broad enough to encompass

Congress, in the Process Acts, generally authorized federal courts to use state forms of action did not mean that every case heard in federal court using those forms of action "arose under" federal law. The relevant question was whether federal law provided the underlying right to be enforced. Thus, a typical diversity case involving debt or trespass did not arise under federal law even though the Process Acts required federal courts to borrow the corresponding state forms of proceeding in such cases. This is because, in such cases, a federal right or title typically did not form an ingredient of the cause of action.

[152] Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 82.

[153] Id. § 14, 1 Stat. at 81–82.

[154] Langbein, Lerner & Smith, supra note 102, at 95.

the original writs through which a plaintiff would pursue a form of action. As explained, an original writ designated a form of proceeding (such as trespass or debt), through which a plaintiff could pursue a remedy for a particular harm. Thus, on its face, Section 14 authorized federal courts to entertain requests for writs that defined civil causes of action.[155] In other words, Section 14 authorized federal courts to issue not only the bench writs of *scire facias* and *habeas corpus*, but also, as Julius Goebel explained, "the traditional mandates which set in motion civil litigation."[156] The original writs at that time encompassed the substantive legal requirements that a plaintiff had to allege and ultimately demonstrate in order to prevail in a lawsuit.[157] The language "agreeable to the principles and usages of law" codified a traditional limit on common law courts—specifically, that courts could not create new forms or modes of proceeding.[158] Accordingly, in Section 14, Congress authorized federal courts to employ only recognized legal causes of action in cases within their jurisdiction.

The writs that initiated common law proceedings defined not only remedies and the right to sue, but also some matters that we would describe today as "procedure."[159] That said, the writs did not encompass all

[155] See supra notes 100–18 and accompanying text.

[156] 1 Goebel, supra note 22, at 509. Courts and scholars have struggled to interpret this language, but Professor Goebel's account seems the most plausible in light of background understandings.

[157] See Bellia, supra note 99, at 784–89; see also Paul D. Halliday & G. Edward White, The Suspension Clause: English Text, Imperial Contexts, and American Implications, 94 Va. L. Rev. 575, 679 (2008) (explaining that at the time § 14 was enacted, "[English and American jurists] believed that a writ—an individual's means of access to a court—was also the equivalent of a substantive legal doctrine").

On March 1, 1824, in *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 3, 7 (1825), Langdon Cheves and John Sergeant, counsel for the plaintiffs, argued that in § 14 "[t]he common law remedies were . . . adopted" by Congress. The question in the case was whether § 14 authorized federal courts to issue post-judgment writs of execution in addition to original writs. Chief Justice Marshall determined for the Court that "the general term 'writs'" included both "original process," or "process anterior to judgment[]," and "process subsequent to the judgment." Id. at 23; see also Bank of the U.S. v. Halstead, 23 U.S. (10 Wheat.) 51, 55 (1825) (stating "[t]hat executions are among the writs hereby authorized to be issued" under § 14 and "cannot admit of doubt").

[158] See, e.g., Case v. Case, 1 Kirby 284, 285 (Conn. 1787) (explaining that courts cannot employ modes of proceeding that are not established by law). As explained infra, some question would arise as to whether "agreeable to the principles and usages of law" referred to traditional common law principles or to state law. See infra notes 184–89 and accompanying text. Whatever the answer to this question, § 14 limited the power of federal courts to create new writs—and thus new causes of action.

[159] See supra notes 100–18 and accompanying text.

matters of judicial practice, such as defaults, costs, contempts, and return dates.[160] Thus, Section 14 did not purport to provide comprehensive rules of practice governing federal courts. Section 17 of the Judiciary Act of 1789 filled this gap by authorizing federal courts to make general rules of practice. Specifically, Section 17 provided that "all the said courts of the United States shall have power . . . to make and establish all necessary rules for the orderly conducting business in the said courts, provided such rules are not repugnant to the laws of the United States."[161]

There are good reasons to think that members of the First Congress did not expect Sections 14 and 17 of the Judiciary Act to establish a permanent framework for federal courts. First, the same congressional committee that drafted the Judiciary Act simultaneously drafted the Process Act of 1789, enacted just five days after the Judiciary Act. Thus, the Process Act of 1789 quickly superseded key aspects of Section 14 with more specific directives. In addition, as explained, the forms of action that original writs designated varied among and between English courts and American state courts. Although the language "agreeable to the principles and usages of law" constrained federal courts in some measure, it arguably left them room to choose among varying "principles and usages of law" in deciding what writs they would employ. Anti-Federalists had expressed strong distrust of federal judicial power, and they were familiar with how courts could use forms and modes of proceeding to thwart or promote certain interests.[162] Had Congress not enacted the more specific directives of the Process Act, the broad language of Section 14 could have empowered federal courts to adopt forms of proceeding that would have advanced the interests of consolidated federal governance against state interests. Section 14 also might have allowed federal courts to expand the scope of their equity jurisdiction. Although Section 16 of the Judiciary Act prohibited federal courts from exercising equity powers when a remedy existed at law,[163] Section 14 left federal courts with room to limit the availability of common law writs and thereby expand the realm of their equity powers. Anti-

[160] For an example of a state law addressing such matters, see An Act Prescribing Forms of Writs in Civil Cases, and Directing the Mode of Proceeding Therein, ch. 59, 1784 Mass. Acts 158.

[161] Judiciary Act of 1789, ch. 20, § 17, 1 Stat. 73, 83.

[162] See supra notes 134–39 and accompanying text.

[163] Judiciary Act of 1789 § 16, 1 Stat. at 82.

Federalist members of Congress had a strong distrust of equity and believed its expansion would dilute jury trial rights.[164]

Perhaps for these reasons, the First Congress did not leave the general terms of Sections 14 and 17 to govern the causes of action available in inferior federal courts.[165] As Professor Goebel pointed out, the Senate committee that drafted the First Judiciary Act likely never had any "intention of leaving matters on such a vague footing."[166] In a letter dated June 16, 1789, Delaware Senator George Read wrote to John Dickinson—his friend and former fellow delegate to the Federal Convention—that "[t]he same committee who reported this bill are preparing another, for prescribing and regulating the process of those respective courts."[167] In other words, members of the First Congress simultaneously drafted the Judiciary Act and the Process Act and enacted them within days of one another—the Judiciary Act on September 24, 1789, and the Process Act five days later.

2. The Process Acts of 1789 and 1792

On September 29, 1789, the President signed into law a statute entitled, an "Act to regulate Processes in the Courts of the United States."[168] This Act came to be known as the Process Act of 1789. The Process Act of 1789 provided more specific direction than the Judiciary Act about the forms of action and modes of proceeding that federal courts were to follow. Three years later, Congress enacted the Process Act of 1792. This statute reenacted key provisions of the first Process Act with some revisions.

According to Professor Goebel, the Process Acts were "doomed to be little regarded by historians, for the subject matter was hardly such to captivate those to whom the larger aspects of institutional development were to be more beguiling."[169] The Process Acts, however, hold large and underappreciated significance for the institutional development of federal courts in the United States. Rather than concerning mere proce-

[164] See supra notes 137–39 and accompanying text.
[165] See 1 Goebel, supra note 22, at 510, 537.
[166] Id. at 510.
[167] Id. (quoting William Thompson Read, Life and Correspondence of George Read, A Signer of the Declaration of Independence 480–81 (Philadelphia, J.B. Lippincott & Co. 1870)).
[168] Act of Sept. 29, 1789, ch. 21, 1 Stat. 93 (repealed 1792).
[169] 1 Goebel, supra note 22, at 509.

dure, the Process Acts actually defined the causes of action that were available in federal court. The Acts adopted state forms of action as causes of action at law in federal courts, and traditional remedies in equity and admiralty as causes of action for cases within those respective jurisdictions. In important ways, the Process Acts were a victory for anti-Federalists against proponents of centralized federal judicial power.[170] The Acts denied federal courts the power to devise a uniform system of federal causes of action that potentially could have undermined state interests. The Acts also prevented the development of two fundamentally different remedial systems in the same state, thereby sparing litigants and lawyers the need to learn a new system.

a. The Process Act of 1789

In setting up the federal judiciary, the First Congress faced an important choice regarding whether to establish uniform forms of proceeding throughout the federal court system. The Senate committee that framed the Judiciary Act of 1789 initially drafted a separate bill that attempted to establish some uniform rules of proceeding for federal courts. The draft bill addressed the form of writs and processes issuing from federal courts, how process would commence in civil actions, rules of service, notice of pleas, bail, default, and execution on judgments.[171] Due at least in part to anti-Federalist opposition to "consolidated government,"[172] however, Congress was unable to agree on a uniform set of procedures for federal courts,[173] and the bill was never enacted. Instead, Congress enacted the Process Act, which adopted state legal forms of action and civil equitable remedies as the actions to be used in federal court.

[170] See id. at 510 ("Considered in its historical setting the controversy may be viewed as an aspect of the sustained offensive conducted by the antifederalists against a 'consolidated government.'" (internal citation omitted)); 4 The Documentary History of the Supreme Court of the United States, 1789–1800, supra note 21, at 108 (discussing how advocates of state interests carried the day in the Process Acts).

[171] 4 The Documentary History of the Supreme Court of the United States, 1789–1800, supra note 21, at 115–18. For detailed descriptions of this bill, see 1 Goebel, supra note 22, at 514–35; 4 The Documentary History of the Supreme Court of the United States, 1789–1800, supra note 21, at 108–10.

[172] 1 Goebel, supra note 22, at 510.

[173] See 4 The Documentary History of the Supreme Court of the United States, 1789–1800, supra note 21, at 112.

As Maeva Marcus has explained, "[T]he entire Process Act of 1789 reflected Congress's inability or unwillingness to agree on uniform rules for the operation of the federal courts."[174] The Process Act of 1789 provided, first, that

> the forms of writs and executions, except their style, and modes of process and rates of fees, except fees to judges, in the circuit and district courts, in suits at common law, shall be the same in each state respectively as are now used or allowed in the supreme courts of the same.[175]

In other words, the Act provided that, in actions at law, a federal circuit or district court was to apply the forms of writs and executions that prevailed in the supreme court of the state in which it sat.[176]

Understood in historical context, this provision served to define the causes of action that federal courts could enforce in actions at law by reference to state law. The form of the writ employed defined a cause of action, as explained in Section II.A.[177] For example, under the Process Act, if a plaintiff wished to recover damages in federal court for bodily injury intentionally inflicted, the plaintiff would seek a writ of trespass, so long as state law allowed such a writ, in the form that state law provided. If a plaintiff sought a writ not recognized under state law, the plaintiff's suit would fail because the district and circuit courts could apply only the same writs that the supreme court of the state in which they sat used or allowed. Rather than adopt a uniform system of writs

[174] Id.; see also 1 Goebel, supra note 22, at 510 ("The surviving materials relating to the history of this act, the revision of 1792 and the supplementary statute of 1793, are not rich, consisting as they do of committee bills, journal entries and exiguous reports of debates, yet it is manifest from these sources that a struggle took place between the legislators who favored creation of a uniform procedure for the new federal courts and those who conceived that in each district state forms and modes of process should prevail."); id. at 539–40 ("If there was truth in the antifederalists' charge that the most ardent federalists were aiming at a 'consolidated' government, the Act for Regulating Processes in its final form was a defeat for such ambitions.").

[175] Act of Sept. 29, 1789, ch. 21, § 2, 1 Stat. 93, 93 (repealed 1792).

[176] The federal court did not have to follow the style associated with such writs, however, because the Process Act made other provisions for styles. The Act provided, regarding style,

> That all writs and processes issuing from a supreme or a circuit court shall bear test of the chief justice of the supreme court, and if from a district court, shall bear test of the judge of such court, and shall be under the seal of the court from whence they issue; and signed by the clerk thereof.

Id. § 1, 1 Stat. at 93.

[177] See supra notes 113–18 and accompanying text.

and modes of process for circuit and district courts, Congress instead tethered federal courts to the forms of writs and modes of process that prevailed in state courts.[178]

For cases of equity and admiralty and maritime jurisdiction, the Process Act of 1789 provided that "the forms and modes of proceedings . . . shall be according to the course of the civil law."[179] Professor Goebel suggested that Congress drafted this provision "in haste."[180] It is not clear whether "civil law" referred generally to that body of law derived from Roman law, or more specifically to English law governing the prerogative courts of chancery and admiralty. (The prerogative courts in England were described as using "civil law," and practitioners in those courts were known as "civilians."[181]) If the former, it may have been unrealistic to expect lawyers and judges schooled in English law to employ it, given their unfamiliarity with this body of law and the prevailing prejudices against it.[182] Whatever Congress meant by "civil law," it does not appear that, for cases in equity, Congress could have simply borrowed state forms of proceeding, as it had done for actions at law. At the time, it was unclear whether all states had fully functioning equity courts.[183] Perhaps unartfully, then, the First Process Act specified a unitary source of the forms and modes of proceeding in cases in equity and admiralty in federal courts—namely, the "civil law." Congress clarified

[178] In *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 27 (1825), Chief Justice Marshall, writing for the Court, described his understanding of the import of the Process Act of 1789. First, he acknowledged that although the Act addresses only the "form" of writs and executions, it "is certainly true" that "form, in this particular . . . has much of substance in it . . . so far as respects the object to be accomplished." Id. He further distinguished "forms of writs and executions" from "modes of process" by describing the latter as having a more "extensive" operation, applying "to every step taken in a cause," not just writs and executions. Id. at 27–28.

[179] Act of Sept. 29, 1789 § 2, 1 Stat. at 93–94.

[180] 1 Goebel, supra note 22, at 534.

[181] Langbein, Lerner & Smith, supra note 102, at 190–98.

[182] 1 Goebel, supra note 22, at 534. Professor Kristin Collins describes this provision as "riddled with ambiguity." Collins, supra note 17, at 271.

[183] See The Federalist No. 83, at 502 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (stating that "[i]n Georgia there are none but common-law courts"). A recent article argues that Hamilton was mistaken and that "Georgia's post-revolutionary courts were given equity power; and such power was exercised by the courts, albeit sparingly." Steven Schaikewitz, Examining Georgia's Equitable Roots: Debunking the Myth that Georgia's Post-Revolutionary Courts Eschewed Equity Jurisdiction, 20 J. S. Legal Hist. 79, 87 (2012). The important point for present purposes is that, whether or not Georgia's courts had equity jurisdiction, the (mis)perception at the time that they did not may have influenced Congress's decision not to borrow state forms of proceeding in equity cases adjudicated in federal court.

this feature of the Process Act when it reenacted the statute in 1792, as explained below.

Before turning to the 1792 Act, however, it is worth briefly examining the ways in which the Process Act of 1789 qualified the more general authorization of Section 14 of the First Judiciary Act. As explained, Section 14 authorized federal courts to issue writs "agreeable to the principles and usages of law."[184] Such "principles and usages of law" in theory could have referred either to traditional English common law or to distinctive state common law. (In time, the Supreme Court came to hold that "the principles and usages of law" in fact referred to both English and state law.[185]) The general language of Section 14, if left to govern inferior federal courts on its own, would have given them an array of law from which to choose. At the time, the form and availability of common law remedies varied in significant ways from state to state, and among American states and England.[186] The Process Act narrowed Section 14's broad terms by limiting federal circuit and district courts to the forms of action that prevailed in the states in which they sat.[187] The Process Act also narrowed the authority of federal courts under Section 17 of the First Judiciary Act. Section 17 conferred broad authority on federal courts "to make and establish all necessary rules for the orderly conducting business in the said courts, provided such rules are not repugnant to the laws of the United States."[188] The Process Act constrained this power by requiring circuit and district courts to follow state modes of process.[189] It is important to note, however, that the Process Act did not render Section 14 obsolete. Section 14 was the primary authority governing the writs available in the Supreme Court of the United States, and it continued to perform this function.[190] Moreover, as explained below, when Congress later amended the Process Act in 1792 to give fed-

[184] Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 82.

[185] See infra note 209 and accompanying text.

[186] See supra notes 129–33 and accompanying text.

[187] In 1825 in *Bank of the United States v. Halstead*, 23 U.S. (10 Wheat.) 51, 57 (1825), the Court observed that Congress enacted the Process Act of 1789 because the "latitude of discretion" provided by § 14 of the First Judiciary Act "was not deemed expedient to be left with the Courts."

[188] Judiciary Act of 1789 § 17, 1 Stat. at 83.

[189] Because the Process Act adopted state modes of process as governing law in federal courts, contrary law applied by federal courts would be "repugnant to the laws of the United States," and thus precluded by § 17 itself. Id.

[190] For an example of how the Supreme Court understood § 14 in this regard, see infra note 228 and accompanying text.

eral courts some authority to alter the forms of proceeding they borrowed from state law, Section 14 continued to provide a limit on how far federal courts could exercise this authority.

b. Developments from 1789–92

After Congress enacted the first Process Act, federal circuit and district courts proceeded to follow the forms of writs and modes of process in use in the supreme court of the state in which they sat in actions at law.[191] "This system," Maeva Marcus has observed, "while undoubtedly confusing for justices of the Supreme Court, must have been popular with the clerks of court and with practitioners, who were spared the necessity of familiarizing themselves with a new set of federal rules."[192] In cases in equity, however, it is unclear how strictly federal courts complied with the Process Act's directive to follow "the course of the civil law."[193] According to Professor Goebel, "[b]ecause the legal profession was hardly prepared to go to school to execute literally the injunction of the first Process Act, existing chancery practice was bound to be treated as substantial compliance."[194] In 1791, the Supreme Court promulgated an order adopting the rules of chancery to "afford[] outlines for the practice" of the Supreme Court in equity cases.[195] It appears that circuit and district courts, however, resorted to local equity practices where they existed.[196] Thus, while the first Process Act remained in effect, lower federal courts generally appear to have followed state forms and modes of proceeding in both actions at law and cases in equity.

Congress quickly realized that the Process Act had its flaws. Amid criticism for tying equity jurisdiction to the civil law and suggestions for some degree of greater uniformity in the forms of executions in federal court,[197]

[191] 4 The Documentary History of the Supreme Court of the United States, 1789–1800, supra note 21, at 113.

[192] Id.

[193] Act of Sept. 29, 1789, ch. 21, § 2, 1 Stat. 93, 93 (repealed 1792).

[194] 1 Goebel, supra note 22, at 580.

[195] Sup. Ct. R. VII, 5 U.S. (1 Cranch) xv, xvi (1804) (issued Aug. 8, 1791).

[196] See 1 Goebel, supra note 22, at 580–85; Collins, supra note 17, at 271.

[197] In his 1790 report on the judiciary, Attorney General Edmund Randolph criticized the Process Act for requiring equity to proceed according to the civil law, and he suggested some change in the forms of executions used in federal courts. Edmund Randolph, Judiciary System, H.R. Rep. No. 1-17, at 21, 24–25 (3d Sess. 1790). In December 1790, President

Congress revised and reenacted the Process Act just three years later in 1792.[198]

c. The Process Act of 1792

Congress provided a more permanent solution to the problem of the forms and modes of proceeding to be used in lower federal courts when it enacted the Process Act of 1792. The 1792 Act continued key provisions of the 1789 Act, but also made some notable changes.

First, the Act provided that "the forms of writs, executions and other process, except their style and the forms and modes of proceeding in suits in those of common law shall be the same as are now used in the said courts respectively in pursuance of [the Process Act of 1789]."[199] In this provision, Congress continued the requirement of the original Process Act that federal courts apply state forms of writs. In the second Process Act, however, Congress replaced the phrase "mode of process" with the phrase "forms and modes of proceeding." It is unclear why Congress made this change, but, whatever the reason, the new language only strengthened the directive that federal courts apply state forms of proceeding—and therefore state causes of action—in cases at law. In the eighteenth century, courts in England and America routinely used the phrases "form of proceeding" and "mode of proceeding" to define not only what we think of today as "procedure,"[200] but also the causes of action that gave plaintiffs a right to a legal remedy.[201] The Process Act of

Washington suggested that Congress might enact "an uniform process of execution on sentences issuing from the Federal Courts." H. Journal, 1st Cong., 1st Sess. 332 (1790).

[198] Prior to the 1792 revision, Congress continued the Process Act in additional interim measures. Act of Feb. 18, 1791, ch. 8, 1 Stat. 191; Act of May 26, 1790, ch. 13, 1 Stat. 123.

[199] Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275, 276 (repealed 1872).

[200] See, e.g., The King v. Almon, (1765) 97 Eng. Rep. 94 (K.B.) 101; Wilm. 243, 259 (describing attachment and trial by jury as different "modes of proceeding").

[201] See e.g., Jefferson v. Bishop of Durham, (1797) 126 Eng. Rep. 804 (C.P.) 813; 1 Bos. & Pul. 105, 122 (Eyre, C.J.) ("As far as can be collected from the text writers of a very early period, and from the forms of proceeding contained in books of very high authority, such as the Register and Fitzherbert's Natura Brevium, it seems that there did not occur in practice, and that there was not in fact any remedy at common law against churchmen committing waste, sufficiently known for them to treat of."); Farr v. Newman, (1792) 100 Eng. Rep. 1209 (K.B.) 1224; 4 T. R. 621, 648 (Kenyon, C.J.) (describing different "form of proceedings" for actions against executors); Hobson v. Todd, (1790) 100 Eng. Rep. 900 (K.B.) 901; 4 T. R. 71, 74 (opinion of Buller, J.) (describing "the old writ of admeasurement of pasture" and explaining that "[b]y that mode of proceeding, if the defendant put more cattle on the common than he ought, the plaintiff was entitled to have a certain quantity admeasured to the defendant; the excess then is the injury in these cases"); Hancock v. Haywood (1789) 100 Eng. Rep. 661 (K.B.) 662; 3 T. R. 433, 434 (argument of counsel, with respect to whether

1792 thus cemented Congress's adoption of state law causes of action as the proper legal actions to be used in federal court. In time, the Supreme Court interpreted this provision to require "static" conformity to state forms and modes of proceeding—in other words, conformity to state forms and modes of proceeding as they existed in 1792 when the Act was adopted, rather than conformity to how they might develop in the future.[202]

Second, the Process Act of 1792 changed the source of law governing cases in equity and admiralty jurisdiction. Under the 1789 Process Act, federal courts were to follow "the civil law" in adjudicating equity and admiralty cases.[203] In an apparent reference to the English court system, the 1792 Process Act provided that the "forms and modes of proceeding" in cases "of equity" and "of admiralty and maritime jurisdiction" were to be "according to the principles, rules and usages which belong to courts of equity and to courts of admiralty respectively, as contradistinguished from courts of common law."[204] Congress thus adopted traditional English forms of proceeding in equity and admiralty as causes of action for federal courts, and abandoned any reference to the civil law.[205]

assignees could bring one action for separate debts, that "[i]n the first place, it is a great objection to the form of an action, that it is perfectly new: no instance of this mode of proceeding has ever occurred"); Mason v. Sainsbury, (1782) 99 Eng. Rep. 538 (K.B.) 539; 3 Dougl. 61, 63 (quoting argument of counsel that "though it is true that a man who has two remedies may pursue either of them, and that it is no defence to say he has another mode of proceeding, yet, where he has once availed himself of one remedy, and recovered, he shall not be allowed to pursue the other"); Rex v. Blooer, (1760) 97 Eng. Rep. 697 (K.B.) 698; 2 Burr. 1043, 1045 ("A mandamus to restore is the true specific remedy where a person is wrongfully dispossessed of any office or function which draws after it temporal rights; in all cases where the established course of law has not provided a specific remedy by another form of proceeding . . . ."); see also Black v. Digges's Ex'r, 1 H. & McH. 153, 155 (Md. 1744) ("That *indebitatus assumpsit* will not lie but where debt will lie. . . . That neither *indebitatus assumpsit* nor debt will lie upon any collateral undertaking, though *assumpsit* will, and the difference between the actions arises from the different form of proceeding.").

[202] Bank of the U.S. v. Halstead, 23 U.S. (10 Wheat.) 51, 59 (1825); Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 49–50 (1825).

[203] See supra notes 179–83 and accompanying text.

[204] Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275, 276 (repealed 1872).

[205] In 1832 in *Bains v. The James and Catherine*, 2 F. Cas. 410 (C.C.D. Pa. 1832) (No. 756), Justice Henry Baldwin, as Circuit Justice, explained that both § 14 of the First Judiciary Act and the Process Act of 1792 excluded federal courts from resorting to the civil law:

> We must then resort to that system of jurisprudence, in which there are courts of common law, as contradistinguished from courts of equity and admiralty; to resort to the civil law for the rules which define the respective jurisdiction of these courts, when congress have excluded them as to the forms and modes of proceeding, would be manifestly opposed to the law.

Id. at 420.

Third, the Process Act of 1792 added a grant of residual authority to federal courts to make "such alterations and additions as the said courts respectively shall in their discretion deem expedient."[206] Relatedly, the Act authorized the Supreme Court to make "such regulations as [it] shall think proper from time to time by rule to prescribe to any circuit or district court concerning the same."[207] These provisions granted federal courts some discretion to alter or amend state forms of proceeding at law and traditional forms of proceedings in equity and admiralty. Over time, however, the Marshall Court made clear that Section 14 of the Judiciary Act cabined the residual authority of federal courts to alter state forms of proceeding under the Process Act of 1792. Under Section 14 of the Judiciary Act, federal courts could only issue writs that were "agreeable to the principles and usages of law."[208] The Supreme Court interpreted this provision to authorize federal courts to issue writs agreeable to traditional common law principles or to developing state common law practice.[209] Accordingly, the Court concluded that federal courts could exercise their residual authority under the Process Act of 1792 to alter or amend legal forms of proceeding only within the bounds of established common law principles or state law. As explained in Section II.A, English courts lacked power to create new forms of proceeding, but they understood themselves to have some flexibility to mold existing forms of proceeding to meet new exigencies. The Court interpreted the Process Act's residual grant of authority to federal courts, in keeping with this tradition, to require adherence to state law or traditional common law principles, not to allow the creation of completely new forms of proceeding.

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[206] Act of May 8, 1792, § 2, 1 Stat. at 276.

[207] Id.

[208] Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 82.

[209] In *United States v. Burr*, 25 F. Cas. 187 (C.C.D. Va. 1807) (No. 14,694), Chief Justice Marshall, as Circuit Justice, "underst[ood] those general principles and those general usages" to be such as are "found not in the legislative acts of any particular state, but in that generally recognised and long established law, which forms the substratum of the laws of every state." Id. at 188. In 1825 in *Bank of the United States v. Halstead*, 23 U.S. (10 Wheat.) 51 (1825), the Court understood "principles and usages of law" to refer both to writs authorized by the common law and to writs unknown to the common law but authorized under state law:

> It was well known to Congress, that there were in use in the State Courts, writs of execution, other than such as were conformable to the usages of the common law. And it is reasonable to conclude, that such were intended to be included under the general description of writs agreeable to the principles and usages of law.

Id. at 56.

Over time, federal courts exercised their limited power to alter or amend state forms of proceeding in two circumstances. Sometimes, federal courts used their residual authority to adopt state forms of proceeding that emerged after 1792.[210] As explained, the Supreme Court interpreted the Process Act of 1792 to require "static" conformity to state law as it existed in 1792.[211] When the application of outdated state forms of proceeding proved inconvenient or unfair, federal courts sometimes exercised their residual authority to employ more current state forms of proceeding. In addition, the Supreme Court used its discretion under the Act to adopt rules of practice for cases within the federal courts' equity jurisdiction in 1822 and 1842.[212]

d. Developments After 1792

The Process Act of 1792 established a framework that federal courts quickly internalized and rarely had occasion to discuss in their opinions. This framework continued in force until 1872, when Congress replaced it with the first Conformity Act. Whereas the Process Act of 1792, as interpreted by the Court, required "static" conformity to state forms of proceeding as they existed in 1792, the Conformity Act adopted a principle of "dynamic" conformity, directing federal courts to apply state le-

[210] The Supreme Court held in *Bank of United States v. Halstead*, 23 U.S. (10 Wheat.) 51, 59–60 (1825), and *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42, 47 (1825), that this was an appropriate use of the discretion conferred by the 1792 Act and not an exercise of unconstitutionally delegated legislative authority.

In addition to the problem of whether to adopt subsequently developed state forms of proceeding, courts also faced the problem of what forms of proceeding to apply in states that adopted aspects of the civil law, not the common law distinction between law and equity, and newly admitted states that had no forms of proceeding in 1792. Eventually, Congress enacted laws to address these problems. In 1834, Congress enacted a special process act for Louisiana, Act of May 26, 1824, ch. 181, § 1, 4 Stat. 62, 62–63, and in 1828 Congress adopted a process for newly admitted states that adopted state forms of proceeding in actions at law and required proceedings in equity to be conducted "according to the principles, rules and usages which belong to courts of equity." The Process Act of 1828, ch. 68, 4 Stat. 278, 278–80.

Moreover, because the Supreme Court would hold that federal law, not state law, determined whether a case was legal or equitable, see Robinson v. Campbell, 16 U.S. (3 Wheat.) 212, 222–23 (1818), federal courts in theory might have to adopt legal forms of proceeding to cover cases that state law deemed equitable but federal law deemed legal.

[211] See supra text accompanying note 202.

[212] Rules of Practice for the Courts of Equity of the U.S., 42 U.S. (1 How.) xli, xli–lxx (1842); Rules of Practice for the Courts of Equity of the U.S., 20 U.S. (7 Wheat.) v, v–xiii (1822).

gal forms of proceeding "existing at the time" the case was heard.[213] In the late nineteenth century and early twentieth century, with the rise of code pleading, the source of the causes of action available in state and federal courts gradually shifted from the realm of "procedure" to the realm of "substance."[214] Even as this shift occurred, however, federal courts continued to apply state law under applicable federal statutes. If states still applied traditional common law forms of action, then federal courts applied them under the Conformity Act. If, on the other hand, states enacted statutes abolishing forms of proceeding and defining causes of action outside the realm of procedure, then federal courts applied the resulting state causes of action as "rules of decision" under Section 34 of the First Judiciary Act.

Of course, during the reign of both the Process Acts and the Conformity Act, much of state law was unwritten law, and, in time, federal courts took advantage of this circumstance to increase their own authority. Under an expanding "*Swift* doctrine," federal courts exercised independent judgment in the nineteenth and early twentieth centuries to determine the content of so-called "general law" applied in federal court. The doctrine earned its name from *Swift v. Tyson*,[215] an 1842 decision in which the Supreme Court exercised independent judgment to determine the content of general commercial law in a diversity case. As we have discussed elsewhere, the Court's approach was largely defensible in 1842 as applied to matters—such as commercial law—that the states themselves considered to be governed by general law.[216] Following the Civil War, however, the Supreme Court expanded the *Swift* doctrine by increasingly treating traditionally local matters—such as torts—as governed by general law.[217] This enabled federal courts to exercise independent judgment as to the content of such law and to disregard unwritten local state law.

Even under the *Swift* doctrine, however, federal courts continued to use state forms of proceeding to adjudicate common law actions within their jurisdiction. The use of general law in such cases did not affect the form of proceeding available under the Process Act or the Conformity Act, but rather went to the validity of the underlying right, title, or privilege at issue in the case. *Swift* itself illustrates this distinction. *Swift* was

[213] Conformity Act of 1872, ch. 255, § 5, 17 Stat. 196, 197 (repealed 1934).
[214] See Bellia, supra note 99, at 792–99 (describing this process).
[215] 41 U.S. (16 Pet.) 1, 18–19 (1842).
[216] Bellia & Clark, General Law in Federal Court, supra note 91, at 687–93.
[217] Id. at 697–701.

a diversity suit in which Swift sued Tyson to recover payment due under a bill of exchange. Tyson originally gave the bill of exchange to two land speculators as payment for a parcel of land they purported to own.[218] The speculators, in turn, gave the bill of exchange to Swift in payment of a preexisting debt.[219] When Swift sought payment from Tyson, Tyson refused on the ground that the speculators had fraudulently induced him to buy land that they did not actually own.[220] Swift argued that Tyson's defense was inapplicable to him because he gave valuable consideration for the instrument (by releasing a preexisting debt), and was thus a bona fide holder against the issuer.

Swift sued Tyson in New York federal court on the basis of diversity of citizenship jurisdiction. Swift brought an action on the bill of exchange. The appropriate action in such a case at law was an action in assumpsit—the same writ or form of proceeding that would have been used if the action had been brought in New York state court.[221] When the case reached the Supreme Court, the Court did not suggest that general law governed the form of action needed to initiate the lawsuit. Rather, the Court applied general law to decide the underlying rights and obligations of the parties. If release of a preexisting debt was valid consideration, then Swift was a bona fide holder, and Tyson's defense would fail. If, on the other hand, release of a preexisting debt was not valid consideration, then Tyson's defense would succeed. In either case, the Process Act—rather than general law—supplied the cause of action needed to initiate the suit. The Court looked to general commercial law not for the cause of action, but to determine the parties' respective underlying rights. As the *Swift* Court put it, "[T]he only real question in the cause is,

[218] *Swift*, 41 U.S. at 14–15.

[219] Id.

[220] Id. at 15.

[221] In the New York state court cases that the *Swift* Court discussed in considering the content of the applicable rule of general commercial law, the underlying actions at law were actions in assumpsit. See, e.g., Bank of Sandusky v. Scoville, 24 Wend. 115, 115 (N.Y. Sup. Ct. 1840) ("This was an action of *assumpsit*."); Bank of Salina v. Babcock, 21 Wend. 499, 499 (N.Y. Sup. Ct. 1839) (same); Ontario Bank v. Worthington, 12 Wend. 593, 593 (N.Y. Sup. Ct. 1834) (same); Rosa v. Brotherson, 10 Wend. 85, 85 (N.Y. Sup. Ct. 1833) (same); Warren v. Lynch, 5 Johns. 239, 239 (N.Y. Sup. Ct. 1810) (same). At the time, federal courts routinely adjudged disputes involving bills of exchange through actions in assumpsit, see, e.g., Evans v. Gee, 36 U.S. (11 Pet.) 80, 81 (1837) (reviewing an "action of assumpsit . . . founded on a bill of exchange"), or, where appropriate under state law, actions of debt, see, e.g., Raborg v. Peyton, 15 U.S. (2 Wheat.) 385, 385 (1817), discussed infra notes 256–60 and accompanying text.

whether, under the circumstances of the present case, such a preexisting debt constitutes a valuable consideration in the sense of the general rule applicable to negotiable instruments."[222] The Court looked to general law to decide this question and ruled in favor of Swift.

Swift was controversial not because it attempted to dictate the forms of proceeding used in diversity cases, but because it allowed federal courts to decide questions of general law in a manner contrary to the conclusions reached by state courts applying the same law. Although we have argued that *Swift* itself was defensible when decided, over time federal courts expanded the *Swift* doctrine into a means of disregarding state law in favor of their own conception of general law.[223] In 1938, in *Erie Railroad Co. v. Tompkins*, the Supreme Court declared the *Swift* doctrine to be unconstitutional, and instructed federal courts to apply the substantive law of the state in which they sat, including the decisions of state courts governing the content of so-called "general law."[224] The important point for present purposes, however, is that during the *Swift* era federal courts continued to use state forms of proceeding pursuant to the Process Act of 1792 and the Conformity Act of 1872.

In 1938, federal courts also finally promulgated their own uniform rules of procedure. In 1934, Congress repealed the Conformity Act when it adopted the Rules Enabling Act. The Rules Enabling Act authorized the Supreme Court to prescribe uniform rules of procedure for federal courts,[225] and the Supreme Court ousted the old forms of action from federal court in 1938 in the Federal Rules of Civil Procedure.[226] Accordingly, 1938 marked a major turning point for the federal court system. Prior to 1938, federal courts employed state forms of proceeding under the Conformity Act, but applied their own conceptions of general law under *Swift*. After 1938, federal courts employed their own uniform procedures under the Rules Enabling Act, but applied the substantive law of the state in which they sat under *Erie*. Although much changed at this time for federal courts, one thing remained the same. Absent contrary federal law, federal courts looked to state law to define the causes of ac-

[222] *Swift*, 41 U.S. at 16.

[223] See Bellia & Clark, General Law in Federal Court, supra note 91, at 697–701.

[224] 304 U.S. 64, 78 (1938).

[225] Rules Enabling Act, Pub. L. No. 73-415, 48 Stat. 1064 (1934) (codified as amended at 28 U.S.C. § 2072 (2012)).

[226] 308 U.S. 645 (1938). Under the Federal Rules of Civil Procedure, there are no particular forms of proceeding for cases at law or in equity; there is simply "one form of action—the civil action." Fed. R. Civ. P. 2.

tion they adjudicated, absent more-specific direction from Congress. Prior to 1938, federal courts borrowed such causes as procedural law under the Process Act and the Conformity Act, or, where states had abandoned the forms of action, applied such causes as rules of decision under Section 34 of the First Judiciary Act (the Rules of Decision Act). After 1938, federal courts unequivocally applied such causes of action as substantive law under *Erie* and the Rules of Decision Act.

III. THE CAUSE OF ACTION IN EARLY FEDERAL COURTS

As discussed, the First Judiciary Act and the Process Acts specified the forms of proceeding—and therefore the causes of action—that the newly-established federal courts could adjudicate. Section 14 of the First Judiciary Act authorized federal courts to issue writs that were agreeable to established principles of law. Days later, however, Congress provided federal courts with more-specific direction. The Process Acts of 1789 and 1792 required federal courts to apply state causes of action and procedures in cases at law, and traditional equitable actions and procedures in cases in equity. Congress gave federal courts residual authority to mold these forms and modes of proceeding, but not to go beyond the requirements of state law or traditional common law practice. Early federal courts followed these statutes for the better part of a century, typically with no need to cite or mention them.

The fact that the Process Acts were relatively uncontroversial when they governed does not diminish their historical importance for understanding the nature of the judicial power exercised by early federal courts. There are several possible reasons why judges and scholars have not discussed the Process Acts today in connection with debates over federal judicial power to recognize new causes of action. First, the Acts used terms of art that we no longer associate with causes of action. Although judges and lawmakers generally do not use the phrase "form of proceeding" to refer to a cause of action today, they did in 1789. Second, early federal judges and lawyers rarely found it necessary to articulate that the Process Acts were the ultimate source of the causes of action in the civil cases they handled. Rather, judges and lawyers simply fell into the habit of using state forms of proceeding—and thus borrowing state causes of action—in federal court cases. Finally, once the Process Acts established the use of state forms of action as the proper background rule in actions at law, there was no real dispute about their application. Accordingly, today's courts and scholars will not find many early federal

court decisions that identify the Process Acts as the source of authority for the causes of action under adjudication.

It would be a mistake, however, to conclude that the federal courts' failure to cite the Process Acts in routine cases suggests that such courts considered themselves free to ignore the Acts' instructions and instead derive causes of action from ambient general common law. Today, by analogy, federal judges rarely recite well-established statutory directives unless they are actually contested—such as the background principles that the Federal Rules of Civil Procedure apply in federal court, that diversity cases require diverse parties and a minimum amount in controversy, or that state law supplies the applicable rules of decision unless preempted by contrary federal law. The First Congress required the newly created lower federal courts to use existing state common law forms of action, at least in part, to facilitate adjudication in federal court by lawyers and judges familiar with state practice. Judges and lawyers in the early republic quickly understood that state forms and modes of proceeding—the forms and modes of proceeding that they had long used in state courts—now also applied in actions at law in federal courts, and they had no reason to discuss this requirement in every case. It was more natural for litigants and judges simply to apply those forms and modes rather than to recite repeatedly Congress's command that they borrow them.[227]

On those rare occasions when early federal courts did address the source of their power to adjudicate a particular cause of action, it was because they had to resolve a dispute over their power to do so. The Supreme Court made clear early on that federal courts could only adjudicate forms of action that Congress had authorized them to hear.[228] The

[227] The same practice prevailed when early federal courts enforced local common law as rules of decision in diversity cases. Section 34 of the First Judiciary Act required application of such law, but federal courts did not consider it necessary to recite that provision in every case. See Bellia & Clark, General Law in Federal Court, supra note 91, at 669–77 (describing early federal courts' application of local state law as rules of decision). That federal courts applied local common law without citing § 34 does not negate the fact that § 34 required this approach. In the same way, that federal courts did not typically recite that the Process Acts required application of state forms of proceeding in actions at law does not negate the existence of that requirement.

[228] For example, in *Ex Parte Bollman*, 8 U.S. (4 Cranch) 75, 93–94 (1807), when Chief Justice Marshall addressed the power of federal courts to issue writs of habeas corpus under § 14, he emphasized that federal courts only could issue writs that Congress authorized them to issue. Although federal courts could resort to the common law for the meaning of a term such as "*habeas corpus*," "the power to award the writ by any of the courts of the United

most revealing cases about the source of causes of action in early federal courts are those in which a dispute arose regarding the source of law defining the cause of action. In some cases, litigants disputed the proper form of proceeding in federal court. In other cases, federal courts had to decide whether they were borrowing state law as a form of proceeding under the Process Acts or applying state law as a rule of decision under Section 34 of the First Judiciary Act. When such disputes arose, federal courts expressed their understanding that under the Process Acts state law, not general common law, defined the applicable causes of action in cases at law. Likewise, federal courts expressed their understanding that the Process Acts, not ambient general common law, required them to apply traditional causes of action in equity and admiralty in the exercise of those respective jurisdictions.

This Part will recount how early federal courts understood the source of their authority to adjudicate causes of action under the Process Acts, both in actions at law and in cases in equity and admiralty. Before doing so, however, it is worthwhile to recount briefly the early federal courts' approach to federal common law crimes. In important respects, the way in which early federal courts approached their power to adjudicate common law crimes contrasts with the way in which they approached civil causes of action.

A. Federal Common Law Crimes

To understand the source of causes of action in civil cases adjudicated by early federal courts, it is useful to examine the source of the cause of action in early federal criminal cases. Unlike Congress's decision to specify the causes of action available in civil cases, Congress specified very few federal crimes in the early republic. The Judiciary Act of 1789 gave federal courts exclusive jurisdiction to hear crimes and offenses "cognizable under the authority of the United States."[229] The Judiciary Act itself, however, established no federal crimes. A year later, Congress adopted the Crimes Act of 1790,[230] which specified only a handful of federal offenses. Some early federal executive officials and federal judg-

States, must be given by written law." Id. That written law included not only § 14, but the Process Acts as well. When disputes arose over the power of federal courts to adjudicate a particular cause of action, courts analyzed their authority under these statutes.

[229] Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76–77 (conferring jurisdiction on district courts); id. § 11, 1 Stat. at 78–79 (conferring jurisdiction on circuit courts).

[230] Crimes Act of 1790, ch. 9, 1 Stat. 112.

es attempted to fill out the federal penal code with federal common law crimes. For two decades following ratification, judges and other public officials debated whether federal courts had authority to adjudicate federal common law crimes—that is, crimes against the United States that Congress had neither created nor authorized.[231] Almost all early Supreme Court Justices initially embraced federal common law crimes while riding circuit. The Court itself, however, did not consider the issue until 1812 when it rejected federal common law crimes in *United States v. Hudson & Goodwin*.[232] Although *Hudson & Goodwin* settled the question moving forward, one might question whether early federal judicial recognition of common law crimes suggests that federal judges likewise would have understood themselves to have the power to recognize common law causes of action in civil cases, even absent the direction Congress provided in the Process Acts. Understood in historical context, however, the nation's experience with federal common law crimes tends to refute—rather than support—this suggestion.

Following the Declaration of Independence, the individual American states took affirmative steps to receive the common law of England as their own law.[233] Accordingly, both before and after the ratification of the Constitution, states prosecuted their citizens for traditional common law crimes such as murder, assault, battery, arson, burglary, trespass, and bribery. The Constitution did not purport to adopt the common law of England for the United States as a whole and Congress never attempted to do so by statute. Nonetheless, some early federal officials assumed that the United States had somehow adopted the common law and that the common law could support certain criminal prosecutions in federal court. For example, in his famous Neutrality Proclamation of 1793, President Washington declared that the United States would remain neutral in the war between Britain and France and gave "instructions to those officers to whom it belongs, to cause prosecutions to be instituted against all persons, who shall . . . violate the law of nations, with respect to the powers at war."[234] This proclamation was tested when Gideon Henfield (an American citizen) assisted the French war effort by serving

[231] For a discussion of the early debate over federal common law crimes, see Bellia & Clark, Federal Common Law of Nations, supra note 125, at 47–55.

[232] 11 U.S. (7 Cranch) 32, 34 (1812).

[233] See supra notes 125–33 and accompanying text.

[234] 32 George Washington, Proclamation of Neutrality: Philadelphia, April 22, 1793, *in* The Writings of George Washington 430, 430–31 (John C. Fitzpatrick ed., 1931).

as the captain of a privateer that sailed out of an American port and captured a British ship.[235] When Henfield brought the ship to Philadelphia, he was arrested and criminally charged with violating neutrality.

Justice Wilson, sitting as a circuit judge, instructed the grand jury that "the common law" had been "received in America," that "the law of nations" to "its full extent is adopted by her," and that "infractions of that law form a part of her code of criminal jurisprudence."[236] The grand jury returned an indictment and the case proceeded to trial. At trial, Henfield's counsel argued that because there was no statute, "the court could take no cognizance of the offense."[237] The circuit court (consisting of Justice Wilson, Justice Iredell, and Judge Peters) rejected this view and instructed the jury accordingly. The jury acquitted Henfield without explanation, and Congress quickly enacted the Neutrality Act to augment the Neutrality Proclamation and make conduct like Henfield's a statutory crime going forward.[238]

Notwithstanding Henfield's acquittal, lower federal courts continued to permit federal common law prosecutions during the 1790s. In 1798, however, Justice Chase became the first Justice to question the legitimacy of federal common law crimes. In *United States v. Worrall*,[239] the government charged the defendant with attempting to bribe a Federal Commissioner of Revenue. Because no federal statute made such conduct a crime, Worrall's counsel argued that the circuit court could not take cognizance of the crime charged in the indictment.[240] His counsel also argued that "[t]he nature of our Federal compact, will not . . . tolerate this doctrine" of federal common law crimes.[241] The United States Attorney responded that the circuit court could punish the offense "upon the principles of common law punishment."[242] Justice Chase rejected this proposition, stating that it is "essential, that Congress should define the offences to be tried, and apportion the punishments to be inflicted."[243]

[235] Henfield's Case, 11 F. Cas. 1099, 1110–13 (C.C.D. Pa. 1793) (No. 6360).
[236] Id. at 1106–07.
[237] Id. at 1119.
[238] Ch. 50, 1 Stat. 381 (1794).
[239] 2 U.S. (2 Dall.) 384 (1798).
[240] Id. at 389.
[241] Id. at 391.
[242] Id. at 392.
[243] Id. at 394. Judge Peters disagreed with Justice Chase, and the court sought to put this case "into such a form, as would admit of obtaining the ultimate decision of the Supreme

Justice Chase's skepticism ultimately prevailed both in the realm of public opinion and in the Supreme Court. Congress passed the Sedition Act in 1798 and a debate erupted over its constitutionality. The Act made it a crime to "write, print, utter or publish . . . any false, scandalous and malicious" statements about Congress, the government, or the President.[244] Republicans argued that the Act exceeded Congress's enumerated powers and violated the Bill of Rights as well. Federalists responded that "the Act presented no 'constitutional difficulty' because the federal courts were already authorized to punish seditious libel as a common-law crime."[245] Republicans, in turn, denied the Federalists' premise "'that the common or unwritten law' . . . makes a part of the law of these States, in their united and national capacity."[246]

The issue became part of Thomas Jefferson's presidential campaign of 1800 with James Madison leading the charge against the Sedition Act and the idea of federal common law crimes. Madison advanced two main constitutional arguments. First, he argued that the incorporation of the common law would be inconsistent with the Constitution's enumeration of limited federal powers. In his view, such incorporation would mean that "the authority of Congress [would be] co-extensive with the objects of the common law"—that is, Congress "would be authorized to legislate in all cases whatsoever."[247] Second, application of the common law would "erect [federal judges] into legislators" by requiring them to pick and choose which parts of the common law are properly applicable to the circumstances of the United States.[248]

These arguments appear to have prevailed in the realm of public debate. Jefferson won the election of 1800, and Congress did not renew the Sedition Act after it expired. The debate over federal common law crimes had all but ended when federal prosecutors charged two Federalist editors, Hudson and Goodwin, with common law seditious libel in

Court, upon the important principle of the discussion." Id. at 396. Worrall's counsel objected, and the court imposed a mitigated sentence notwithstanding the division of opinion on the court. Id.

[244] Ch. 74, § 2, 1 Stat. 596, 596 (1798) (expired 1801).

[245] William R. Casto, The Supreme Court in the Early Republic: The Chief Justiceships of John Jay and Oliver Ellsworth 149 (1995) (quoting Letter from Oliver Ellsworth to Timothy Pickering (Dec. 12, 1798)).

[246] 6 James Madison, Letter from James Madison to Thomas Jefferson (Jan. 18, 1800), *in* The Writings of James Madison 347, 372 (Gaillard Hunt ed., 1906).

[247] Id. at 380.

[248] Id. at 381.

1806. The case of *United States v. Hudson & Goodwin* reached the Supreme Court in 1812, and the Court rejected federal common law crimes. Justice Johnson (President Jefferson's first appointee to the Court) issued a brief opinion on behalf of the Court. He stated the question as "whether the Circuit Courts of the United States can exercise a common law jurisdiction in criminal cases."[249] In apparent reference to the debate surrounding the Sedition Act, Johnson remarked that the question had long been "settled in public opinion."[250] He concluded by proclaiming that before federal courts may exercise jurisdiction in such cases, "[t]he legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence."[251]

Two decades later, the Court reaffirmed that the United States—as a whole—had not adopted the common law. According to the Court:

> It is clear, there can be no common law of the United States. The federal government is composed of twenty-four sovereign and independent states; each of which may have its local usages, customs and common law. There is no principle which pervades the union and has the authority of law, that is not embodied in the constitution or laws of the union. The common law could be made a part of our federal system, only by legislative adoption.[252]

The Court's rejection of a "common law of the United States" negated the central premise of the case for federal common law crimes advanced by Wilson and others.

Notwithstanding the Supreme Court's ultimate rejection of federal common law crimes, one might question whether the initial embrace of federal common law crimes by federal judges in the 1790s demonstrates an understanding that federal courts could exercise common law powers more broadly. If federal courts could recognize and apply federal com-

[249] United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 32 (1812).

[250] Id.

[251] Id. at 34. Although he did not dissent, Justice Story apparently did not agree with the Court's decision. The following year while riding circuit, Justice Story issued an opinion challenging the correctness of *Hudson & Goodwin* and attempting to distinguish it as applied to crimes within the judiciary's admiralty and maritime jurisdiction. See United States v. Coolidge, 25 F. Cas. 619, 621 (C.C.D. Mass. 1813) (No. 14,857). When *Coolidge* eventually reached the Court, it summarily reaffirmed *Hudson & Goodwin*. See United States v. Coolidge, 14 U.S. (1 Wheat.) 415, 416 (1816).

[252] Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 658 (1834).

mon law crimes without congressional authorization, could they also unilaterally recognize and apply common law causes of action in civil cases? There would be several difficulties with making this leap.

First, even though early federal judges assumed without much analysis that they could adjudicate federal common law crimes, the Supreme Court, upon analysis, summarily rejected this practice. Federal judges appointed at the Founding were educated in the English common law system and the state court systems modeled after it. It may have been natural for early federal judges to assume that they—like their English and state counterparts—could recognize and apply common law crimes, especially when Congress had given them a criminal jurisdiction. The question did not arise often, and the political stakes did not escalate until 1798, when Congress enacted the Sedition Act. Once Republicans set forth the federalism and separation of powers arguments against federal common law crimes, Federalist judges had to confront them for the first time. When the Supreme Court ultimately addressed these issues, it rejected federal common law crimes.

Second, and relatedly, the notion that federal courts would have judicial power to adjudicate common law civil actions if they had power to adjudicate common law crimes ultimately rests on the premise that the Constitution somehow adopted the common law for the United States as a whole. Although the Constitution certainly borrowed terms of art from the common law, it contains no provision purporting to adopt that body of law in its entirety. It was Madison's view that such wholesale incorporation would have contradicted the Constitution's limited and enumerated powers. There is evidence that the Founders—like the English—understood the common law to be a complete system for the management of all aspects of society.[253] If federal courts could have applied the common law as part of the judicial power, then Congress, by further implication, would have had power under the Necessary and Proper Clause to legislate with respect to all aspects of such law. Arguments that Congress had such broad powers—notwithstanding its limited and enumerated powers under Article I—would have met strong resistance at the time. It is not surprising, therefore, that the Supreme

[253] See 9 Annals of Cong. 3012 (1799) (statement of Mr. Nicholas) (describing the common law of England as "a complete system for the management of all the affairs of a country").

Court ultimately concluded that "there can be no common law of the United States."[254]

Moreover, arguments that federal courts had authority to recognize federal common law crimes often proceeded not from the premise that federal courts had authority to apply the common law in general (such as the common law of property and contract rights), but rather from the premise that federal court adjudication of common law crimes *in particular* was necessary for the peace and security of the United States. That some judges understood federal courts to have authority to adjudicate common law crimes does not necessarily imply that these judges also understood themselves to have authority to apply other realms of the common law, including civil forms of actions. To the contrary, the absence of analogous debates about the judiciary's power to apply other realms of the common law, such as property (they simply did not apply them), may have more probative value for early understandings of federal judicial power than the specific debate over federal common law crimes.

Indeed, the intense debate over the propriety of federal common law crimes underscores the importance of the Process Acts. By authorizing federal courts to use state forms of proceeding in actions at law, the Process Acts enabled federal courts to avoid any questions regarding the constitutionality of their application of common law forms of action. Even while debate raged over the legitimacy of federal common law crimes, there was no corresponding debate over the legitimacy of the civil forms of action applied by federal courts. No such debate was necessary with respect to civil actions because federal courts had express statutory authority to employ state forms of action. It appears that federal courts quickly internalized the authority conferred by the Process Acts into their general mode of operation. Because litigants rarely contested application of these Acts, courts had little reason to address them in most cases.

B. Actions at Law

It is worth examining in greater detail how the Process Acts worked in practice to supply the cause of action in early federal courts. Pursuant to the Process Acts, federal courts routinely applied state forms of proceeding in actions at law during the first decades following ratification.

[254] *Wheaton*, 33 U.S. at 658.

In most common law actions, federal courts presumed that state forms of proceeding followed the common law of England. States generally had adopted the common law as state law, and state decisions were not widely reported. Accordingly, absent evidence to the contrary, federal courts proceeded on the assumption that states had adopted traditional common law forms and modes of proceeding in actions at law. To the extent that local lawyers selected the applicable form of proceeding under state law, this probably was a fair assumption in most cases. This assumption extended to pleading requirements,[255] evidence,[256] and the availability of forms of proceeding to certain plaintiffs.[257]

The Supreme Court's 1817 decision in *Raborg v. Peyton* is illustrative.[258] In *Raborg*, the Court applied "the well-settled doctrine that [an action in] debt lies in every case where the common law creates a duty

[255] See, e.g., Covington v. Comstock, 39 U.S. (14 Pet.) 43, 44 (1840) (holding that in "an action against the drawer of a note or bill payable at a particular place . . . the place of payment is a material part in the description of the note, and must be set out in the declaration"); Wallace v. McConnell, 38 U.S. (13 Pet.) 136, 149–50 (1839) (holding, on the basis of "a uniform course of decisions for at least thirty years" in American state courts, that in an action on a promissory note or bill of exchange, the plaintiff need not aver a demand of payment, and explaining that "[i]t is of the utmost importance, that all rules relating to commercial law should be stable and uniform"); Pearson v. Bank of the Metropolis, 26 U.S. (1 Pet.) 89, 93 (1828) (determining that plaintiffs had sufficiently alleged the agreement in an action on a promissory note); Sheehy v. Mandeville, 11 U.S. (7 Cranch) 208, 217–18 (1812) (determining that for a plaintiff to receive judgment on a promissory note under the common law, the note that the plaintiff pleads in the declaration must correspond to the note that the plaintiff offers in evidence); Sheehy v. Mandeville, 10 U.S. (6 Cranch) 253, 264 (1810) (determining that "[s]ince . . . the plaintiff has not taken issue on the averment that the note was given and received in discharge of the account, but has demurred to the plea, that fact is admitted").

[256] See, e.g., Downes v. Church, 38 U.S. (13 Pet.) 205, 206 (1839) (determining that plaintiff could recover on the second part of a foreign bill of exchange without producing the first part); Pearson v. Bank of the Metropolis, 26 U.S. (1 Pet.) 89, 92 (1828) (determining "that there was no error in admitting the parol evidence which was offered to sustain the action"); Morgan v. Reintzel, 11 U.S. (7 Cranch) 273, 275–76 (1812) (determining that the plaintiff, in a suit against the maker of a promissory note, was obliged to produce the note upon the trial); Wilson v. Codman's Ex'r, 7 U.S. (3 Cranch) 193, 209 (1805) (holding, in the absence of any cases on point, that "[w]here . . . the averment in the declaration is of a fact *dehors* the written contract, which fact is in itself immaterial . . . the party making the averment, is not bound to prove it"); Levy v. Gadsby, 7 U.S. (3 Cranch) 180, 186 (1805) (addressing whether a defendant can give usury as evidence on the plea of *non assumpsit*).

[257] See, e.g., Harris v. Johnson, 7 U.S. (3 Cranch) 311, 318 (1806) (holding, in reliance on English precedent, that an action could not be "maintained on an original contract for goods sold and delivered, by a person who has received a note as a conditional payment, and has passed away that note").

[258] 15 U.S. (2 Wheat.) 385 (1817).

for the payment of money, and in every case where there is an express contract for the payment of money."[259] On the basis of this doctrine, the Court held "that debt lies upon a bill of exchange by an endorsee of the bill against the acceptor, when it is expressed to be for value received."[260] Although the Court did not recite the Process Act in this case, its application of a traditional common law form of proceeding as presumptive state law was commonplace.

In some cases, the Supreme Court made this presumption explicit. For example, in 1831 in *Doe v. Winn*, the Court addressed whether a state-certified copy of a land grant was admissible evidence in an action of ejectment.[261] As Justice Story explained on behalf of the Court, under common law modes of proceeding, "an exemplification of a public grant under the great seal, is admissible in evidence."[262] The Court applied this common law mode of proceeding on the assumption that it was the law of Georgia:

> The common law is the law of Georgia; and the rules of evidence belonging to it are in force there, unless so far as they have been modified by statute, or controlled by a settled course of judicial decisions and usage. Upon the present question it does not appear that Georgia has ever established any rules at variance with the common law . . . .[263]

Under this approach, federal courts simply assumed that state law adopted common law modes of proceeding, unless the state departed from them by statute or a settled course of judicial decisions.[264] This presump-

[259] Id. at 389.
[260] Id.
[261] 30 U.S. (5 Pet.) 233, 241 (1831).
[262] Id.
[263] Id.
[264] Justice Story's earlier opinion in *Nicholls v. Webb*, 21 U.S. (8 Wheat.) 326 (1823), comports with this analysis. In *Nicholls*, the endorsee of a promissory note brought an action against the endorser. For such actions to proceed under the common law, plaintiffs had the burden to show that they had made a due demand for payment from the maker and given the endorser due notice of non-payment. One question before the Court was whether a protest by a notary, who had died before trial, was in itself evidence of a proper demand. Id. at 331–32. The Court held that the notary's protest was not itself sufficient evidence because "[i]t does not appear that, by the laws of Tennessee, a demand of the payment of promissory notes is required to be made by a notary public, or a protest made for non-payment, or notice given by a notary to the endorsers." Id. at 331. Moreover, "by the general commercial law, it is perfectly clear, that the intervention of a notary is unnecessary in these cases." Id. The Court went on, then, to determine whether the notary's protest was "admissible secondary evi-

tion simplified the application of the Process Acts and sheds light on why the Acts were rarely discussed when litigants did not contest the applicable form of proceeding.

In those relatively rare federal court cases in which litigants disputed the proper form of proceeding in actions at law, federal judges were more explicit about their duty to apply state forms of proceeding. Such disputes arose in two contexts: when litigants disputed the content of state law, and when litigants disputed whether an applicable state law qualified as a "form of proceeding" under the Process Act or as a "rule of decision" under Section 34 of the First Judiciary Act.

Federal courts expressly referred to state law governing forms of proceeding when litigants disputed the requirements of state law, or when state law departed from traditional common law principles. For instance, in 1803 in *Mandeville v. Riddle*, the parties disputed "[w]hether an action of *indebitatus assumpsit* can be maintained by the assignee of a promissory note made in Virginia, against a remote assignor."[265] In an opinion by Chief Justice Marshall, the Supreme Court specifically looked to the common law of Virginia and determined that an assignee could not maintain such an action under such law when there was a lack of privity between the assignee and the remote assignor.[266] The Court also found that no act of the Virginia Assembly conferred a right to sue in such cases.[267] Similarly, in *Breedlove v. Nicolet*, Chief Justice Marshall specifically examined Louisiana law to decide whether a plaintiff could maintain a particular form of proceeding on a promissory note. [268] The

dence . . . to prove due demand and notice." Id. at 332. Justice Story began by observing that "[c]ourts of law are . . . extremely cautious in the introduction of any new doctrines of evidence which trench upon old and established principles." Id. Nonetheless, Justice Story continued, "as the rules of evidence are founded upon general interest and convenience, they must, from time to time, admit of modifications, to adapt them to the actual condition and business of men, or they would work manifest injustice." Id. Justice Story proceeded to conclude, upon consideration of English and state court precedent—and the importance to commerce of the admissibility of such evidence—that the evidence of the deceased notary's protest "was rightly admitted." Id. at 332–37. This analysis is consistent with the Process Act. It appears from Justice Story's analysis that if Tennessee had a settled practice on this question, the Court would have applied Tennessee law. Because Tennessee did not, however, the Court presumed that the common law, which the state had adopted, applied. If this rule of evidence constituted a form or mode of proceeding, the Court had residual authority in any event to settle the question under the Process Act of 1792.

[265] 5 U.S. (1 Cranch) 290, 298 (1803).

[266] Id.

[267] Id.

[268] 32 U.S. (7 Pet.) 413, 429 (1833).

defendants argued that the plaintiffs could not maintain their action because they claimed joint and several liability but failed to sue out process against all of the alleged obligors on the note. In rejecting this argument, Chief Justice Marshall acknowledged that the fact "that the suit is brought against two of three obligors, might be fatal at common law."[269] He explained, however, that "the courts of Louisiana do not proceed according to the rules of the common law. Their code is founded on the civil law, and our inquiries must be confined to its rules."[270] The Court applied state law in many other cases to determine the availability of forms of action.[271] The Court also applied state law to determine additional "procedural" matters, such as pleading requirements,[272] questions of evidence,[273] and statutes of limitations.[274]

Federal courts addressed source of law questions not only when litigants disputed the content of state law, but also when questions arose regarding whether state law qualified as a "form of proceeding" under the Process Acts or as a "rule of decision" under Section 34 of the Judiciary Act.[275] Whether state law applied as a "form of proceeding" or as a "rule of decision" was important because it could lead to the application of different law in certain cases. First, this distinction could determine whether a federal court had to apply state law as it existed in 1792, or as it existed at the time an action arose. Under the Process Act of 1792, federal courts applied state forms of proceeding as they existed when the

[269] Id.

[270] Id.

[271] See, e.g., Kirkman v. Hamilton, 31 U.S. (6 Pet.) 20, 24–25 (1832) (holding that the plaintiff could maintain an action of debt under the laws of North Carolina, which incorporated English law on inland bills of exchange); Bank of the U.S. v. Carneal, 27 U.S. (2 Pet.) 543, 547 (1829) (explaining that "[t]he declaration is for money lent and advanced, and the suit is authorized to be brought in this form jointly against all the parties to the note, by a statute of Ohio") (opinion of Story, J.).

[272] See, e.g., Wilson v. Lenox, 5 U.S. (1 Cranch) 194, 210–11 (1803) (holding under a Virginia statute that the plaintiff was obliged to plead "[t]he charges of protest[, which] constitute an essential part of the debt" claimed).

[273] See, e.g., Sebree v. Dorr, 22 U.S. (9 Wheat.) 558, 560–61 (1824) (explaining that "by the statutes of Kentucky, and the substance of these statutes has been incorporated into the rules of the Circuit Court . . . no person shall be permitted to deny his signature, as maker or as assignor, in a suit against him, founded on instruments of this nature, unless he will make an affidavit denying the execution or assignment.").

[274] See, e.g., Spring v. Ex'rs of Gray, 31 U.S. (6 Pet.) 151, 163–69 (1832) (interpreting and applying Maine statute of limitations); *Kirkman*, 31 U.S. (6 Pet.) at 23–24 (determining that various North Carolina acts did not apply to bar plaintiff's action of debt).

[275] See supra notes 141, 199 and accompanying text.

Act was adopted. In other words, the Process Act required a "static" incorporation of state law as the law defining the forms and modes of proceeding available in federal court.[276] By contrast, under Section 34, federal courts applied state law rules of decision as they existed when the cause of action arose.[277]

Second, whether state law applied as a "form of proceeding" under the Process Act or as a "rule of decision" under Section 34 could determine whether federal courts had authority to alter or amend the state rule in question. Federal courts had no authority to alter or amend rules of decision under Section 34, whereas they had some residual authority under the Process Act of 1792 to alter or amend the forms and modes of proceeding that they borrowed from state law.[278] Thus, in certain cases, federal courts had to decide whether a state law was a form or mode of proceeding (and thus alterable by federal courts) or a rule of decision (and thus unalterable by federal courts).[279]

In both of these situations, the Supreme Court considered whether certain matters qualified as rules of decision (and were thus fixed by state law as of the time an action arose) or forms or modes of proceeding (and were thus subject to federal courts' limited residual authority to update their content as they existed under state law in 1792).[280] For exam-

[276] As the Supreme Court explained it, the Process Acts required static conformity to state law to prevent the states from prospectively changing the forms and modes of proceeding in common law cases in federal courts—and thereby interfering with the sovereign authority of the United States to establish forms and modes of proceeding for its own courts. Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 41, 47–48 (1825).

[277] See Ross v. Deval, 38 U.S. (13 Pet.) 45, 60–61 (1839); infra notes 281–82 and accompanying text.

[278] See supra note 206 and accompanying text. Under the Process Act of 1792, federal courts had residual authority to make "such alterations and additions" to state forms of proceeding "as the said courts respectively shall in their discretion deem expedient, or to such regulations as the supreme court of the United States shall think proper from time to time by rule to prescribe to any circuit or district court concerning the same." Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275, 276 (repealed 1872).

[279] See, e.g., United States v. Mundell, 27 F. Cas. 23, 30 (C.C.D. Va. 1795) (No. 15,834) (holding that a Virginia law governing bail in a civil action by the United States was a rule of decision enforceable under § 34 and thus not alterable by federal courts).

[280] In 1825 in *Bank of the United States v. Halstead*, 23 U.S. (10 Wheat.) 51, 55 (1825), the Court considered "whether the laws of the United States authorize the Courts so to alter the form of the process of execution, which was in use in the Supreme Courts of the several States in the year 1789." The Court, relying on *Wayman*, 23 U.S. (10 Wheat.) at 1, determined that the Rules of Decision Act "has no application to the practice of the Courts." *Halstead*, 23 U.S. (10 Wheat.) at 54. Rather, as *Wayman* had explained, the Process Act of 1792 "enables the several Courts of the Union to make such improvements in its forms and

ple, in *Ross v. Deval*,[281] the Court devoted several paragraphs to explaining why a state act specifying a time for reviving judgments was not a mode of proceeding (subject to the Process Act) but rather a rule of decision (subject to Section 34). The distinction was important because the state adopted the act after the Process Act of 1792, and therefore the act could only apply if it was a rule of decision under Section 34. Again, the Process Act required static conformity with state forms of proceedings

modes of proceeding, as experience may suggest." *Wayman*, 23 U.S. (10 Wheat.) at 41–42. In *Wayman*, the Court concluded that the Rules of Decision Act did not require federal courts to apply state laws governing execution of judgment because rules of decision only governed prejudgment questions. Id. at 26. In other cases, the Court concluded it lacked authority to reject state law on the ground that the state law at issue was a rule of decision under § 34, and thus not a form or mode of proceeding subject to federal court alternation. In 1838 in *M'Neil v. Holbrook*, 37 U.S. (12 Pet.) 84, 84–85 (1838), Holbrook brought an action in the United States Circuit Court for the District of Georgia on promissory notes that others had endorsed over to him. Under an 1810 Georgia act, an endorsement of a promissory note was sufficient evidence that the endorser had transferred the note. The Georgia act did not require proof of the endorser's handwriting. The Supreme Court held that federal courts must apply the Georgia act under the Rules of Decision Act. The Court did "not perceive any sufficient reason for so construing this act of congress as to exclude from its provisions those statutes of the several states which prescribe rules of evidence, in civil cases, in trials at common law." Id. at 89. In this context, the Court considered the rule of evidence to be bound up with the plaintiff's property right under the promissory note:

> Indeed, it would be difficult to make the laws of the state, in relation to the rights of property, the rule of decision in the circuit courts; without associating with them the laws of the same state, prescribing the rules of evidence by which the rights of property must be decided.

Id. Under the Rules of Decision Act, it concluded, the state law of evidence applied in federal court:

> In some cases, the laws of the states require written evidence; in others, it dispenses with it, and permits the party to prove his case by parol testimony: and what rule of evidence could the courts of the United States adopt, to decide a question of property, but the rule which the legislature of the state has prescribed? The object of the law of congress was to make the rules of decisions, in the courts of the United States, the same with those of the states; taking care to preserve the rights of the United States by the exceptions contained in the same section. Justice to the citizens of the several states required this to be done; and the natural import of the words used in the act of congress, includes the laws in relation to evidence, as well as the laws in relation to property.

Id. at 89–90. Similarly, in *Fullerton v. Bank of the United States*, 26 U.S. (1 Pet.) 604 (1828), Justice Johnson had explained that:

> It is not easy to draw the line between the remedy and the right, where the remedy constitutes so important a part of the right; nor is it easy to reduce into practice the exercise of a plenary power over contracts, without the right to declare by what evidence contracts shall be judicially established.

Id. at 614.

[281] 38 U.S. (13 Pet.) 45, 60–61 (1839).

as they existed in 1792, whereas Section 34 required federal courts to apply state law as it existed when the cause of action arose. The Court thus took care to explain that the state statute was "a rule of property; and under the 34th section of the judiciary act, is a rule of decision for the Courts of the United States."[282]

Federal courts would not have undertaken these kinds of inquiries if they had considered themselves free to recognize or create common law causes of action from ambient or general law. Beginning in 1789, federal courts demonstrated their awareness that Congress required them to apply state forms of proceeding in actions at law, and that they were not free to create or apply forms of proceeding from ambient law. Accordingly, when disputes arose over the proper form or mode of proceeding in actions at law, federal courts looked to state law to resolve them. Moreover, on various occasions, federal courts had to decide whether state law qualified as a form of proceeding under the Process Act, or as a rule of decision under Section 34 of the First Judiciary Act. These careful decisions would have been unnecessary if federal courts had power to create their own civil causes of action based on ambient or general law.

C. Cases in Equity and Admiralty

As discussed, the Process Acts directed federal courts to apply state forms of proceeding in actions at law—including actions brought within the federal courts' ATS jurisdiction. Even in cases of equity and of admiralty and maritime jurisdiction, however, the Acts provided federal courts with important direction. As explained, the Process Act of 1789 provided that federal courts were to apply "civil law" forms of proceed-

[282] Id. at 60. In *Ross*, the Court also made clear that § 34 did not apply to rules of proceeding. Id. at 59 (stating that "the thirty-fourth section of the judicial act . . . 'has no application to the practice of the Court'" (quoting *Wayman*, 23 U.S. (10 Wheat.) at 41)). This is not to say that it was easy in all cases to distinguish "rules of decision" from "forms of proceeding." In concept, the forms of proceeding provided the means for a plaintiff to pursue a remedy for a particular kind of rights violation, while rules of decision defined the scope of the underlying right asserted—a line not always easy to draw. See cases cited supra note 280. In most cases, the Court did not have to deal with this distinction because it looked to state law definitions of both rights and remedies under the Process Acts and the Rule of Decision Act, absent a contrary act of Congress. The Court only had to deal with the distinction if there was a dispute over whether a borderline state law applied as it existed when the cause of action arose, or rather in 1792; or when a court had to determine whether it had authority under the Process Act to update a state form of proceeding.

ing in cases in their equity and admiralty jurisdiction.[283] The Process Act of 1792 modified this command by directing federal courts to look to the forms of proceeding used by English courts of equity and admiralty. Specifically, the Act provided that, in cases "of equity" and "of admiralty and maritime jurisdiction," federal courts should apply the "forms and modes of proceeding . . . according to the principles, rules and usages which belong to courts of equity and to courts of admiralty respectively, as contradistinguished from courts of common law."[284] Of necessity, this directive was more general than the directive governing actions at law. All states had common law courts, and all states had adopted the common law (including its forms of proceeding) as their own. By contrast, following the adoption of the Constitution, states no longer had admiralty and maritime courts, and at least one state was thought to lack courts of equity. This meant that Congress could not—as it had for actions at law—simply instruct federal courts to borrow state forms of proceeding in equity and admiralty cases.

By requiring federal courts to apply remedies and procedures generally used by courts of equity and admiralty—and authorizing them to alter or supplement such remedies as they deemed expedient—the Act conferred some discretion on federal courts to tailor such forms of proceeding to the needs of federal courts. No matter how broad this discretion, however, Congress did not give federal courts free reign to derive or create causes of action from ambient general law in cases in equity or admiralty. Rather, Congress directed federal courts to apply traditional causes of action in equity and admiralty, and delegated residual authority to them to alter or amend such actions as they deemed necessary. Accordingly, even with respect to equity and admiralty cases, early acts of Congress and judicial practice do not support the proposition that federal judges had independent power to create their own causes of action on the basis of ambient or general law.

In adjudicating equity cases, "federal courts generally applied a uniform body of . . . principles" respecting equitable remedies and procedures pursuant to the Process Acts.[285] In equity, as in law, the available

[283] Act of Sept. 29, 1789, ch. 21, § 2, 1 Stat. 93, 93–94 (repealed 1792).

[284] Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275, 276 (repealed 1872).

[285] Collins, supra note 17, at 254. There has been some disagreement among scholars about whether federal courts sitting in equity followed state law to determine substantive rights. See id. at 282–83 (describing disagreement among scholars). Compare William Fletcher, The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of

form of proceeding or remedy defined the cause of action, and federal courts attempted to apply uniform remedies on the basis of traditional English practice. For example, in 1832 in *Boyle v. Zacharie*, the Supreme Court explained that "[t]he chancery jurisdiction given by the constitution and laws of the United States, is the same in all the states of the union," and "the remedies in equity are to be administered, not according to the state practice, but according to the practice of courts of equity in the parent country."[286] Similarly, in *Mayer v. Foulkrod*, Justice Bushrod Washington, riding circuit, explained that under the Process Act of 1792, federal courts applied uniform remedies in cases in equity, not state law remedies, as the Process Act directed federal courts to do in cases at law.[287]

When exercising admiralty and maritime jurisdiction, federal courts also applied a uniform set of "forms and modes of proceeding" pursuant to the Process Act of 1792. In 1825, for example, in *Manro v. Almeida*, the Court considered whether a libellant could bring an *in personam* action for a maritime tort within the admiralty jurisdiction of a federal district court.[288] The Court did not appeal to the ambient unwritten law to decide this question. Rather, the Court examined whether Congress had authorized district courts to hear such *in personam* actions within their admiralty jurisdiction. Under the Process Act of 1789, which directed federal courts to use civil law forms and modes of proceeding in cases within their admiralty jurisdiction,[289] district courts could hear such *in personam* actions. The civil law, as the Court observed, clearly allowed them. In 1825, however, the governing law was the Process Act of 1792, which had superseded the prior Act. "The forms and modes of proceeding in causes of admiralty and maritime jurisdiction," the Court explained, "are prescribed to the Courts by the second section of the Pro-

Marine Insurance, 97 Harv. L. Rev. 1513, 1529–30, 30 n.72 (1984) (stating that "as a routine matter, the federal courts sitting in equity followed local state law"), with Ann Woolhandler & Michael G. Collins, The Article III Jury, 87 Va. L. Rev. 587, 619 (2001) (stating that "the substantive law that applied in federal equity proceedings was frequently either federal or general law rather than state law").

[286] 31 U.S. (6 Pet.) 648, 648 (1832).

[287] 16 F. Cas. 1231, 1234–35 (C.C.E.D. Pa. 1823) (No. 9341) (explaining that "as to suits in equity, state laws, in respect to remedies . . . could have no effect whatever on the jurisdiction of the court, the [Permanent Process Act of 1792] having prescribed a rule, by which the line of partition between the law and the equity jurisdiction of those courts is distinctly marked").

[288] 23 U.S. (10 Wheat.) 473, 485–86 (1825).

[289] Id. at 491.

cess Act of 1792."[290] To decide the case, then, the Court had to construe the 1792 Act. "In giving a construction to the act of 1792, it is unavoidable, that we should consider the admiralty practice there alluded to, as the admiralty practice of our own country, as grafted upon the British practice."[291] The Court concluded from its review of admiralty and maritime practice in the United States and from "respectable authority" of "remote origin" that the *in personam* action was agreeable to the "principles, rules, and usages, which belong to Courts of admiralty" under the Process Act of 1792.[292]

In sum, in cases in equity and admiralty jurisdiction, as in cases at law, federal courts determined what causes of action to adjudicate not by reference to ambient law, but by reference to the Process Acts. When disputes arose about whether a particular form of action was cognizable in federal court, federal courts sought answers in the Process Acts.

IV. IMPLICATIONS FOR THE ALIEN TORT STATUTE

Although the Process Acts no longer apply in federal court, the fact that they originally provided the causes of action in federal court has potential implications for the status of federal common law causes of action, both generally and in ATS cases. The Court in *Sosa v. Alvarez-Machain* specifically sought to identify the original source of the cause of action in ATS cases and used its own historical findings to support recognition of a limited number of federal common law causes of action today. In a recent article, we identified two myths commonly associated with the ATS.[293] In this Part, we will identify and discuss a third myth—namely, that the First Congress gave federal courts jurisdiction under the ATS on the assumption that, in exercising this jurisdiction, they would derive causes of action from the general or ambient law of the era. If, as it stated in *Sosa*, the Court seeks to identify and implement the First Congress's understanding of the ATS, it should reconsider its findings regarding the original source of the cause of action in ATS cases.[294]

[290] Id. at 488.

[291] Id. at 489–90.

[292] Id. at 491 (quoting Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275, 276 (repealed 1872)).

[293] See Anthony J. Bellia Jr. & Bradford R. Clark, Two Myths About the Alien Tort Statute, 89 Notre Dame L. Rev. 1609, 1609 (2014) [hereinafter Bellia & Clark, Two Myths].

[294] Even on its own terms, *Sosa* raises difficult questions of translation. As others have noted, the Court interpreted the ATS to have assumed the existence of "the kind of 'general common law' of which Erie disapproved." Hart & Wechsler, supra note 6, at 682. Given this

As explained, the ATS was enacted as part of the Judiciary Act of 1789 and gave federal courts subject matter jurisdiction to hear claims by aliens "for a tort only in violation of the law of nations or a treaty of the United States."[295] Most scholars and judges have assumed that at the time the statute was enacted, the First Congress would have expected federal courts to find or create applicable causes of action on the basis of general common law in the exercise of ATS jurisdiction. This assumption overlooks distinct acts of Congress that actually specified the causes of action that federal courts were to apply in actions at law. Rather than find or create common law causes of action in exercising their jurisdiction, federal courts were to apply state forms of proceeding under the Process Acts. Accordingly, contrary to popular belief, Congress—rather than courts or ambient law—provided the cause of action in ATS cases from the start. This history has potential implications for how judges should understand the ATS today.

This Part will explore some of these implications. First, it will explain how federal statutes, not ambient law, specified what causes of action were available in ATS cases. Second, it will explain the implications of this lost history for current debates over the ATS. Claims that federal common law supplies the cause of action in ATS cases today are anachronistic because they rely on the mistaken historical premise that general common law originally supplied the cause of action in ATS cases. At the same time, claims that the ATS today encompasses causes of action authorized by Congress or state law are largely reconcilable with historical understandings and practice. Upon analysis, the Supreme Court would be on firmer ground going forward were it to recognize that state law, rather than federal common law, defines the cause of action in ATS cases. Not only would this approach be more consistent with the expectations of the First Congress and the historical understanding of the source of causes of action in diversity cases; it would also align more closely with the Court's current restrictive approach to implied rights of action and federal common law. Because of its mistaken historical premises, the Supreme Court's approach to the ATS in *Sosa v. Alvarez-Machain* and *Kiobel v. Royal Dutch Petroleum Co.* has been both too broad (in

(erroneous) premise, the Court also could have interpreted the ATS "as a relic that preserves, in the domain in which it operates, a pre-Erie approach under which federal courts recognize a 'spurious' federal common law applicable only in federal courts." Id. at 682–83.

[295] Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76–77 (codified as amended at 28 U.S.C. § 1350 (2006)).

recognizing federal common law causes of action) and too narrow (in strictly limiting the causes of action available under the ATS).

A. The Process Acts and the ATS

When the First Congress included the ATS in Section 9 of the Judiciary Act of 1789, it did not assume—as *Sosa* suggests—that federal courts would exercise an inherent power in ATS cases to find or create causes of action on the basis of general common law. To the contrary, in Section 14 of the very Judiciary Act that included the ATS, Congress authorized federal courts to issue writs—the traditional means of seeking a judicial remedy—that were "agreeable to the principles and usages of law."[296] Moreover, even as the First Congress enacted the Judiciary Act, its members were drafting more specific legislation to define the forms and modes of proceeding available in inferior federal court cases (including ATS cases).[297] In the Process Act of 1789—enacted just five days after the ATS—Congress required federal courts to apply state forms and modes of proceeding in actions at law, and the traditional forms and modes of proceeding of courts of equity and admiralty in cases within those respective jurisdictions.[298]

Under the Process Acts of 1789 and 1792, a plaintiff could bring an action at law within a federal court's ATS jurisdiction whenever the forms and modes of proceeding of the state in which the federal court sat afforded a remedy for the plaintiff's alleged wrong. The ATS was rarely invoked by early federal courts, but two early libel actions within the courts' admiralty jurisdiction—*Moxon v. The Fanny*[299] and *Bolchos v. Darrel*[300]—did mention the ATS as a possible alternative ground for jurisdiction. Even in this context, the Process Acts—rather than ambient general law—provided the applicable cause of action in federal court. In *Moxon*, British owners of a ship captured by a French vessel in United States waters, libeled the ship, and sought restoration of it in United States district court.[301] In *Bolchos*, a French privateer brought an enemy

[296] Judiciary Act of 1789 § 14, 1 Stat. at 82. See supra notes 153–56 and accompanying text (discussing § 14).

[297] See supra notes 166–67 and accompanying text (explaining that a committee was working on the Process Acts as the First Judiciary Act was being enacted).

[298] See supra notes 168–70 and accompanying text (describing Process Acts).

[299] 17 F. Cas. 942 (D. Pa. 1793) (No. 9,895).

[300] 3 F. Cas. 810 (D. S.C. 1795) (No. 1,607).

[301] *Moxon*, 17 F. Cas. at 943.

Spanish vessel that it had captured on the high seas into port in South Carolina.[302] There was no need in either case for the court to address the source of the cause of action explicitly. As discussed in Part II, the Process Act of 1792 instructed federal courts to apply the "forms and modes of proceeding" in admiralty cases "according to the principles, rules and usages which belong to . . . courts of admiralty."[303] Because libel was so well recognized as an appropriate form of proceeding in prize cases, there was no real need for these courts to discuss it at the time. The *Moxon* and *Bolchos* courts entertained the libel actions not because they found such actions in the "brooding omnipresence" of ambient law. Rather, those courts entertained the libel actions because Congress expressly directed them to do so.

As we explained in Section I.A, Congress originally adopted the ATS in order to give federal courts subject matter jurisdiction over claims by an alien for *any* intentional tort of violence committed by a United States citizen against the alien's person or personal property.[304] The tort itself did not have to be an "international" tort, like piracy or an assault on a foreign ambassador. Rather, under the law of nations at the time, the United States had an obligation to redress any intentional tort of violence committed by one of its citizens against the person or personal property of a friendly alien. If it failed to do so, then the United States itself became responsible for the injury and could face justified retaliation by the alien's nation.[305] The ATS was the means that the First Congress chose to discharge the United States' obligation to redress injuries committed by United States citizens against friendly aliens.[306] The ATS gave federal courts jurisdiction to hear cases of this kind, thus enabling aliens to avoid adjudication in state court where they had suffered real or perceived discrimination during the Confederation era. In ATS cases, state common law provided the underlying rights to bodily integrity and personal property that served as "rules of decision" under Section 34. In addition, state forms of proceeding defined the causes of action that federal courts would employ to redress intentional harms that U.S. citizens

[302] *Bolchos*, 3 F. Cas. at 810.

[303] Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275, 276 (repealed 1872).

[304] See Bellia & Clark, Alien Tort Statute and Law of Nations, supra note 30; see also supra note 31 and accompanying text (explaining the original purposes and meaning of the ATS).

[305] See Bellia & Clark, Alien Tort Statute and Law of Nations, supra note 30, at 466–94.

[306] See id. at 507–39.

inflicted on aliens in violation of those rights. To be clear, the problem with state court adjudication of alien tort claims was not the lack of a state law cause of action. At the time, all states had forms of proceeding—typically trespass or case—to provide redress for tort injuries. Rather, the problem was the biased application of state law by state judges and juries—a problem that threatened to place the United States in violation of the law of nations. The ATS and the Process Acts solved this problem.

In a prototypical ATS case, then, the First Congress would have expected an alien plaintiff to seek redress against an American defendant in federal court for an intentional tort of violence through an ordinary state law writ of trespass. Under the Process Acts, that writ was available to all plaintiffs in federal courts—including aliens—so long as it was an appropriate form of proceeding under the law of the state in which the federal court sat. At the time, a writ of trespass was a standard common law writ in England. Because all of the original thirteen states adopted the common law of England, a writ of trespass was an available form of proceeding in the courts of every state (and thus in every federal court) in 1789. But that does not mean—as *Sosa* assumed—that the First Congress expected federal courts to draw a writ of trespass from the "ambient law of the era."[307] To the contrary, the First Congress specifically instructed federal courts in the Process Act to borrow the appropriate cause of action from state law.

The *Sosa* Court's (mistaken) belief that the First Congress assumed that federal courts would find causes of action in ambient common law caused the Court to interpret the ATS both too broadly and too narrowly. The Court read the ATS too broadly by suggesting that early federal practice provides a basis for federal courts today to recognize causes of action under the ATS regardless of whether Congress or state common law authorizes them. On the other hand, the Court read the ATS too narrowly by insisting that the First Congress would have understood ATS jurisdiction to reach only a small handful of notorious "international" tort actions.[308] As noted, the *Sosa* Court (incorrectly) concluded that ATS jurisdiction originally encompassed only torts corresponding to three criminal offenses against the law of nations that Blackstone high-

[307] *Sosa*, 542 U.S. at 714.

[308] See Bellia & Clark, Alien Tort Statute and Law of Nations, supra note 30, at 540–45; Bellia & Clark, Two Myths, supra note 293, at 1637–40.

lighted—violations of rights of ambassadors, safe conduct violations, and piracy.[309] There is no sound historical basis for this narrow reading. Indeed, this interpretation of the ATS would have largely negated its original function of providing redress to ordinary aliens for intentional torts of violence committed by Americans against their persons or personal property.[310]

The *Sosa* Court's "ambient law" theory of the cause of action in ATS cases not only overlooks the Process Acts, but is anachronistic insofar as it disregards the accepted nature of "procedural" law in 1789. In 1789, local law—not general law—determined the forms and modes of proceeding that were available in a sovereign's courts, and these, in turn, defined the available causes of action.[311] Any suggestion that courts found or created causes of action as a matter of general common law ignores this elementary distinction between general law and local law, well known to lawyers, judges, and Congress at the time. Members of the First Congress debated whether they should adopt a uniform "local" federal law of procedure and remedies for federal courts, or whether they should instruct federal courts to borrow "local" state forms and modes of proceeding.[312] The Process Acts were a victory for those who favored the latter option, at least with regard to actions at law. The Process Acts were also at least a partial victory for those who wished to constrain federal courts' powers in equity. Although the Process Acts did not tie federal courts down to state equity practices, they did require such courts to use the traditional forms and modes of proceeding of courts of equity. The *Sosa* Court's suggestion that the First Congress would have expected federal courts to derive or create causes of action from ambient common law contradicts this history and ignores both the existence and specific directives of the Process Acts.

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[309] *Sosa*, 542 U.S. at 716–17; 4 Blackstone, supra note 94, at *68–71.

[310] Even in the narrow cases that the *Sosa* Court recognized, the Process Acts—rather than ambient law—would have supplied the causes of action. An ambassador who suffered an injury in violation of ambassadorial rights—such as an injury to person or property—could have pursued an action at law under ordinary forms of proceeding, such as trespass. A plaintiff alleging an assault or battery in violation of a safe conduct likewise could have brought an action in federal court using a writ of trespass. Even a plaintiff who invoked the ATS to redress an act of piracy could have used a traditional form of proceeding in admiralty such as libel—a form of proceeding specifically authorized by Congress in the Process Acts.

[311] See supra notes 91–98 and accompanying text (describing the difference between general law and local law, and how forms of proceeding were local law).

[312] See supra notes 145–48 and accompanying text.

B. Implications for ATS Causes of Action Today

The forgotten role of the Process Acts has several potentially important implications for ATS cases today. In *Sosa*, the Supreme Court stated that the First Congress must have assumed that general common law would provide the cause of action in ATS cases. From this (mistaken) premise, the Court suggested that federal courts exercising ATS jurisdiction today may "recognize private claims under federal common law" for a narrow range of international law violations.[313] This suggestion lacks support in historical understandings and practice. As in all cases within federal court jurisdiction, the Process Acts specified the applicable causes of action absent more specific direction from Congress. This is a central point for understanding the early operation of federal courts. Congress itself *authorized* the causes of action that were available in federal courts. Federal courts did not exercise judicial power to divine or create causes of action as a matter of "general common law" or "ambient law." Accordingly, the actual historical practice of early federal courts under the Process Acts provides no support for the Court's current position that federal courts may recognize federal common law causes of action in ATS cases. If valid, this position must find its justification elsewhere.

On the other hand, those who argue that courts exercising ATS jurisdiction today should adjudicate causes of action created by state law or foreign law may find support for their position in federal judicial practice under early acts of Congress.[314] In 1789, lawyers, Congress, and federal courts understood causes of action to be a matter of local "procedural" or "remedial" law. Accordingly, the law of the forum sovereign governed the causes of action that were available in its courts. In early diversity cases (including foreign diversity and ATS cases), the Process Acts instructed federal courts to apply whatever causes of action were available in state forms of proceeding. Over the ensuing century, legislatures and courts came to regard causes of action to be a matter of "substance" rather than "procedure." On this understanding, Congress authorized the introduction of uniform rules of civil procedure in federal courts with the adoption of the Rules Enabling Act in 1934. The Su-

[313] *Sosa*, 542 U.S. at 732.

[314] See, e.g., Roger P. Alford, The Future of Human Rights Litigation After *Kiobel*, 89 Notre Dame L. Rev. 1749, 1751 (2014) (arguing that the most likely avenues of relief in future ATS cases will be causes of action created by state or foreign law).

preme Court promulgated such rules in 1938. Rule 2 provided there is "one form of action to be known as 'civil action.'"[315] This rule not only abolished the distinction between legal and equitable actions, but also abandoned any reliance by federal courts on the distinct forms of action used in different states.

The establishment of uniform rules of procedure for federal courts, however, did not purport to change the substantive law—including, as they were understood by this time, the causes of action—applied in federal courts.[316] Section 34 of the First Judiciary Act (again, known today as the "Rules of Decision Act") directed federal courts to apply the substantive law of the states absent federal law to the contrary. According to the Act: "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."[317] The Supreme Court made clear in *Erie Railroad Co. v. Tompkins* that, under both this provision and the Constitution, "[e]xcept in matters governed by the Constitution or Acts of Congress, the law to be applied in any case is the law of the State."[318] This means that, even today, federal courts continue to apply state law causes of action absent contrary federal law. In addition, under the rule of *Klaxon Co. v. Stentor Electric Manufacturing Co.*, federal courts apply state choice of law rules to determine the application of foreign law, including causes of action created by foreign law.[319]

At present, then, because legislatures and courts consider causes of action to be substantive rather than procedural, federal courts may apply state causes of action—and, under state choice of law rules, foreign causes of action—under the Rules of Decision Act. Interestingly, although the basis of authority has changed, the result in ATS cases today under *Erie* and the Rules of Decision Act would be largely the same as it would have been in 1789 under the Process Act: Federal courts exercising ATS jurisdiction would look to state law to determine the availability of a cause of action in the absence of a federal statute (such as the

[315] See supra note 226.

[316] Indeed, the Rules Enabling Act itself provided that the rules promulgated under the Act "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b) (2012).

[317] Id. § 1652.

[318] 304 U.S. 64, 78 (1938).

[319] 313 U.S. 487, 496–97 (1941).

Torture Victim Protection Act of 1991[320]) expressly granting a specific federal cause of action.

All of this suggests that the Supreme Court—to the extent that it seeks to implement the expectations of the First Congress—should revisit some of the conclusions it reached regarding the ATS in *Sosa* and *Kiobel*. First, if historical meaning matters, the Court should abandon the interrelated ideas that federal common law provides the causes of action available in ATS cases, and that courts should strictly limit the available causes of action by reference to certain eighteenth-century paradigms. There was no such thing as true federal common law in 1789; it is a twentieth century construct.[321] Accordingly, federal courts seeking to implement the original meaning of the ATS would not have exercised a power to create (and limit) the available causes of action as a matter of federal common law. Instead, federal courts would have looked to state law to define the applicable causes of action in the exercise of their ATS jurisdiction (just as they do today in the exercise of their ordinary diversity jurisdiction). Moreover, if the *Sosa* Court had confined the ATS—in accordance with its original meaning—to suits by aliens against U.S. citizens,[322] then it would have had no need to impose strict limits on the kinds of causes of action that federal courts could adjudicate under the ATS.[323] In 1789, *any* intentional tort of violence committed by a U.S. citizen against a friendly alien would have qualified as a tort in violation of the law of nations and would have triggered the United States' obligation under such law to redress the harm. On this view, the ATS would have provided redress to all friendly aliens who were the victims of such torts.

Abandoning *Sosa*'s approach would also be more consistent with the Supreme Court's current restrictive approach to implied rights of action and federal common law because it would relieve federal courts of the difficult and controversial task of crafting—and limiting—federal common law causes of action in ATS cases. In recent decades, the Court has all but halted the recognition of implied federal causes of action by re-

[320] Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 (2012)).

[321] See Bradford R. Clark, The Procedural Safeguards of Federalism, 83 Notre Dame L. Rev. 1681, 1696–97 (2008).

[322] See Bellia & Clark, Alien Tort Statute and Law of Nations, supra note 30, at 529.

[323] The Court would also have no need to confront the difficult question of subject matter jurisdiction that arises when all parties to an ATS suit are aliens—a question the Court has yet to address or resolve. See Bellia & Clark, Two Myths, supra note 293, at 1640–41, 41 n.177.

quiring congressional intent to create them in the underlying statute.[324] Similarly, the Court disfavors the creation of federal common law causes of action because the practice raises both separation of powers and federalism concerns.[325] In the case of the ATS, the Process Act refutes the idea "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."[326] Thus, an implied cause of action would not have been available under the ATS as an original matter, and would be inconsistent with the Supreme Court's current approach to implied causes of action.

Recognition of a federal common law cause of action outside the context of implied federal rights of action, moreover, has been even more difficult and controversial in recent decades. The Supreme Court has almost never recognized a federal common law cause of action beyond the context of the ATS.[327] Even recognition of federal common law defenses has been controversial in recent years.[328] Justice Brennan, dissenting from the Court's recognition of a federal common law defense for federal military contractors, summarized the reasons why the Court has been reluctant to recognize both causes of action and defenses as a matter of federal common law.[329] In his view, the Court has rightly "empha-

[324] See, e.g., Alexander v. Sandoval, 532 U.S. 275, 287–88 (2001).

[325] See infra note 327 and accompanying text; cf. Caleb Nelson, The Legitimacy of (Some) Federal Common Law, 101 Va. L. Rev. 1 (2015) (explaining that some federal common law may be legitimate on topics that lie beyond the reach of state law).

[326] *Sosa*, 542 U.S. at 713; see also id. at 724 (stating that "the ATS is a jurisdictional statute creating no new causes of action").

[327] The most famous example is *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456 (1957), in which the Supreme Court held that a jurisdictional provision of a federal labor law statute authorized federal courts to fashion federal common law to enforce collective bargaining agreements. More recently, however, the Court rejected requests by the FDIC for the creation of federal common law causes of action permitting the FDIC to sue a failed bank's former law firm, see O'Melveny & Myers v. FDIC, 512 U.S. 79, 83 (1994), and the bank's former officers and directors, see Atherton v. FDIC, 519 U.S. 213, 217–18 (1997); see also United States v. Standard Oil Co., 332 U.S. 301, 302, 316–17 (1947) (rejecting the United States' request that the Court recognize a federal common law cause of action permitting the United States to sue a company for the loss of a soldier's services due to the company's negligence).

[328] The Court famously recognized a federal common law defense in favor of the United States in *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366–67 (1943). More recently, a closely divided Court recognized a federal common law defense in favor of military contractors sued under state law for design defects of the products they supply to the United States. See Boyle v. United Techs. Corp., 487 U.S. 500, 504–08 (1988).

[329] *Boyle*, 487 U.S. at 515–32 (Brennan, J., dissenting).

sized that federal common law can displace state law in 'few and restricted' instances," because it is in tension with both federalism and separation of powers.[330] The creation of a new federal contractor defense did not fall within any of these "few and established" enclaves, and thus amounted the exercise of legislative rather than judicial power.[331] As he put it, "I would leave that exercise of legislative power to Congress, where our Constitution places it."[332]

Finally, rejection of federal common law causes of action under the ATS would have obviated the Supreme Court's novel reliance on the presumption against extraterritorial application of U.S. law in *Kiobel*. Because the *Sosa* Court suggested that the cause of action in ATS cases constituted a form of federal common law, the application of such law to the conduct of aliens in the territory of another country raised the same kinds of foreign policy concerns as the extraterritorial application of federal statutes. Accordingly, the Court felt compelled to extend the presumption beyond substantive federal statutes to substantive federal common law causes of action under the ATS. This novel extension of the presumption would have been unnecessary had the Court recognized that the nature of the cause of action in ATS cases was and remains no different from the nature of the cause of action in ordinary diversity cases.

If the Supreme Court had properly interpreted the ATS as a specialized form of diversity jurisdiction—in accordance with its original meaning—the source of the cause of action in ATS cases presumably would have followed the same path as the source of the cause of action in diversity cases. In the early decades of the republic, federal courts exercising both forms of jurisdiction would have applied state causes of action under the Process Acts. In light of *Erie*, the Rules of Decision Act, and the adoption of the federal rules of civil procedure, federal courts eventually came to apply state causes of action in diversity cases as substantive state law.[333] Had the Supreme Court interpreted the ATS as a form of foreign diversity jurisdiction, aliens injured by U.S. citizens today would have the option of invoking either ATS jurisdiction (with no amount-in-controversy requirement) or foreign diversity jurisdiction

[330] Id. at 518 (quoting Wheeldin v. Wheeler, 373 U.S. 647, 651 (1963)).

[331] But see Clark, supra note 2, at 1368–75 (suggesting that *Boyle* might be justified as an instance of constitutional preemption of state law).

[332] *Boyle*, 487 U.S. at 516 (Brennan, J., dissenting).

[333] See Bradford R. Clark, *Erie*'s Constitutional Source, 95 Cal. L. Rev. 1289 (2007).

(with an amount-in-controversy requirement), as they saw fit. This understanding would allow aliens to sue Americans for any intentional torts to their person or personal property, whether they occurred within the United States or in other countries (using the well-established common law doctrine of transient torts).[334] Finally, this understanding would relieve federal courts of the difficult and controversial task of recognizing (and limiting) federal common law causes of action in ATS cases.

CONCLUSION

In recent debates regarding the meaning of the ATS, courts and scholars have suggested that early federal courts found or created causes of action on the basis of general common law. The Supreme Court endorsed this idea in *Sosa*. Early federal courts, however, neither found causes of action in ambient common law nor exercised any power to create common law causes of action. In the Process Acts, early Congresses directed federal courts to apply the same causes of action that local state courts applied in cases at law, and to apply traditional causes of action in equity and admiralty cases. Congress thereby adopted "local" federal forms and modes of proceeding defining the causes of action that were available in federal courts. Congress did not leave federal courts free to find or create them on their own.

Recognizing the original source of the cause of action in early federal courts has important implications for how the ATS should operate today—especially given that the Supreme Court has self-consciously sought to implement its original meaning. The Court has suggested that today federal courts may create a limited number of federal common law causes of action for cases within ATS jurisdiction because early federal courts would have applied causes of action found in ambient common law. The premise of this claim lacks support in—and is actually contradicted by—the historical record. The same Congress that enacted the ATS required federal courts to adopt state causes of action in cases within that jurisdiction. If the Court still seeks to implement the expectations of the First Congress and remain faithful to historical practice in future cases, the Court should abandon the erroneous assumptions it made in *Sosa* and take seriously claims that state law and foreign law (under relevant choice-of-law rules) now define the applicable causes of action in ATS cases. This approach would not only better fulfill the Court's desire

[334] See Bellia & Clark, Two Myths, supra note 293, at 1636.

to apply the original meaning of the statute; it also would better align with the evolution of the source of the cause of action in diversity cases and with the Court's current approach to implied rights of action and federal common law.

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