FEDERAL JURISDICTION OVER U.S. CITIZENS' CLAIMS FOR VIOLATIONS OF THE LAW OF NATIONS IN LIGHT OF *Sosa*

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I. INTRODUCTION

Do U.S. citizens have the same rights to bring civil claims for violations of the law of nations in United States' federal courts as a matter of federal common law [1] under the general federal question jurisdiction statute as non-citizens do under the Alien Tort Statute [2] (ATS)? The ATS, enacted in 1789, allows aliens, but not U.S. citizens,[3] to bring private tort[4] claims for violations of the law of nations, or customary international law,[5] in U.S. federal courts as a matter of federal common law; in other words, aliens may bring the private claims without any statutory authorization.[6]

The U.S. Supreme Court indicated skepticism about whether the general federal question jurisdictional statute, enacted in 1875,[7] provides similar jurisdiction in its 2004 landmark ATS case, *Sosa v. Alvarez-Machain*.[8] In *Sosa*, the Court found that although the ATS is a jurisdictional statute only, and thus does not create a cause of action, federal courts can adjudicate certain

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[1] Federal common law refers to common law developed by the federal courts. As discussed later in this Article, *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) stated that *general* federal common law no longer exists, although certain limited enclaves of federal common law do currently exist, including in the area of the law of nations.

[2] 28 U.S.C. § 1350 (2000). The Alien Tort Statute reads, "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." The ATS is also sometimes referred to as the Alien Tort Claims Act, or ATCA. The ATS was enacted as Section 9 of the Judiciary Act of 1789, ch. 20, 1 Stat. 73 (1789). The Act is commonly referred to as the First Judiciary Act.

[3] Given the clear language of the statue which states only aliens can bring such claims under the ATS, this is true even if the U.S. citizen wanting to bring the claim was an alien at the time the violation took place, but later became a citizen. 28 U.S.C. § 1350 (2000). Moreover, no case has held that a U.S. citizen who was formerly an alien has standing to bring a suit under the ATS.

[4] In the eighteenth century, the word "tort" typically referred to a wrong or injury in general, lacking the separation between civil torts and crimes that we see now in domestic law in the United States. *See* OXFORD ENGLISH DICTIONARY (J.A. Simpson & E.S.C. Weiner eds., 2d ed. 1989).

[5] The "law of nations" is generally equated with customary international law. Flores v. S. Peru Copper Corp., 414 F.3d 233, 237 n.2 (2d Cir. 2003); The Estrella, 17 U.S. 298, 307–08 (1819) (referring to non-treaty based law of nations as the "the customary . . . law of nations").

[6] *See, e.g.*, Sosa v. Alvarez-Machain, 542 U.S. 692 (2004). Of course, the courts must still have *personal* jurisdiction over any defendant. Burnham v. Super. Ct. of Cal., 495 U.S. 604 (1990).

[7] The statute reads: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331 (2000).

[8] 542 U.S. at 731 n.19.

private claims in violation of the law of nations under the ATS as part of their common law power.[9] This is so, the Court found, because the ATS was "enacted on the congressional understanding that courts would exercise jurisdiction by entertaining some common law claims derived from the law of nations,"[10] and that such claims "would have been recognized within the common law" at the time the statute was enacted in 1789.[11] The Court stated, however, "[W]e know of no reason to think that federal-question jurisdiction was extended subject to any comparable congressional assumption."[12] Yet the question was not briefed and remains unexplored.[13] Moreover, no scholar has yet taken the challenge to explore the Court's assumption.

This Article demonstrates that the Court's assumption was likely erroneous, at least with regard to claims for violations of the law of nations that have the

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[9] *Id.* at 714, 724–25.

[10] *Id.* at 731 n.19.

[11] *Id.* at 714, 720–21.

[12] *Id.* at 731 n.19. In addition, Professor William Casto, a well-respected scholar that the Supreme Court cited often in *Sosa*, suggested in a recent article that federal courts' jurisdiction over common law claims for violation of the law of nations has not received implicit authorization by congressional action, although he acknowledges that passage of the Torture Victim Protection Act in 1991, ch. 646, 62 Stat. 934 (1948) (codified as amended at 28 U.S.C. § 1350 (2000)) demonstrates implicit congressional approval for treating American and alien plaintiffs the same for purposes of creating remedies for certain violations of the law of nations. William R. Casto, *The New Federal Common Law of Tort Remedies for Violations of International Law*, 37 RUTGERS L.J. 635, 666–67 (2006).

[13] Prior to *Sosa*, most lower federal courts faced with the question of whether § 1331 provides federal courts with jurisdiction to hear such claims have avoided deciding the issue because the plaintiffs in the cases were almost always aliens, and thus § 1350 was available to them. *See, e.g.*, Kadic v. Karadzic, 70 F.3d 232, 246 (2d Cir. 1995); Filartiga v. Pena-Irala, 630 F.2d 876, 887 n.22 (2d Cir. 1980); *In re* S. African Apartheid Litig., 346 F. Supp. 2d 538, 554 (S.D.N.Y. 2004); Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 319 (S.D.N.Y. 2003); Burger-Fischer v. Degussa AG, 65 F. Supp. 2d 248, 273 (D.N.J. 1999); Xuncax v. Gramajo, 886 F. Supp. 162, 193–96 (D. Mass. 1995). Several courts found that such jurisdiction exists under § 1331 or suggest that it likely exists. *See Filartiga*, 630 F.2d at 888, n.22; Bodner v. Banque Paribas, 114 F. Supp. 2d 117, 127 (E.D.N.Y. 2000); Abebe-Jiri v. Negewo, No. 1:90-CV-2010-GET, 1993 WL 814304, at *3–4 (N.D. Ga. Aug. 20, 1993), *aff'd*, 72 F.3d 844 (11th Cir. 1996); Martinez-Baca v. Suarez-Mason, No. C-87-2057 SC, 1988 U.S. Dist. LEXIS 19470, at *4–5 (N.D. Cal. Apr. 22, 1988); Forti v. Suarez-Mason, 672 F. Supp. 1531, 1538, 1543–44 (N.D. Cal. 1987). Two courts expressed their reservations about whether § 1331 provides jurisdiction; however, both rested their reservations on the assumption that federal common law does not recognize private causes of action under the law of nations, an assumption no longer valid after *Sosa*. *See* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 779 n.4 (D.C. Cir. 1984) (Edwards, J. concurring); *Xuncax*, 886 F. Supp. at 193–94.

potential to impact foreign affairs. It concludes that general federal question jurisdiction was in fact likely "enacted on the congressional understanding that [federal] courts would exercise jurisdiction by entertaining some common law claims derived from the law of nations"[14] where such could impact foreign affairs.[15]

Under what circumstances such violations could "impact foreign affairs" is, like the term itself, somewhat ambiguous and not subject to easy categorization, especially in our ever-changing and increasingly interconnected world. As discussed within this Article, "affecting foreign relations" historically often meant creating cause for war, affecting diplomatic relations, or affecting the nation's relationships with foreign powers. The term "affecting foreign relations" or affairs, for purposes of § 1331 jurisdiction in today's world, would be defined the same. However, the types of claims that might affect the nation's relationship with foreign powers or diplomatic relations are likely to be somewhat broader, given our increasingly globalized world. For example, the wholly domestic use of torture or extrajudicial killing arguably affects foreign affairs today, even if it might not have two hundred years ago. In addition, circumstances that might not have been common two hundred years ago, such as a domestic corporation's involvement in human rights abuses surrounding mineral extractions abroad, would likely fit within the phrase "affecting foreign relations." It is also arguable that a violation of any law found to be customary international law could "affect foreign

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Since *Sosa*, the only circuit court to rule on this question found that § 1331 does provide such jurisdiction. Igartua-De La Rosa v. United States, 417 F.3d 145, 178 (1st Cir. 2005). However, in *Rasul v. Rumsfeld*, 414 F. Supp. 2d 26, 38 (D.C.C. 2006), *aff'd sub nom. Rasul v. Myers*, 512 F.3d 644 (D.C. Cir. 2008), the district court found that § 1331 did not provide jurisdiction because it did not confer a cause of action. Interestingly, the court did not cite the Supreme Court's decision in *Sosa*, but another pre-*Sosa* district court case, *Schneider v. Kissinger*, 310 F. Supp. 2d 251, 267 (D.D.C. 2004), which also found that § 1331 did not provide a cause of action. The court provided no analysis of the question.

[14] *Sosa*, 542 U.S. at 731 n.19.

[15] One could be tempted to make an argument that because the Court previously concluded in *Illinois v. City of Milwaukee*, 406 U.S. 91, 100 (1972), that "laws" within the meaning of § 1331 embraced claims founded on federal common law, and because it is now accepted that federal common law recognizes the law of nations, *Sosa*, 542 U.S. at 724–25, claims for violations of the law of nations fall within § 1331's jurisdiction. However, a review of *Sosa*, along with an understanding of the Court's holdings regarding authorization of claims discussed earlier, directs the inquiry to whether a claim under federal common law actually exists. This depends on Congress' authorization of such claims, which in turn depends on whether Congress assumed such private claims would exist and enacted federal question jurisdiction on such an understanding.

relations." However, it is important to realize that the concept is fluid and one that a court will likely find itself having to adjudicate in determining whether federal jurisdiction under § 1331 exists.

Part II of this Article discusses the Court's analysis in *Sosa*, as well as the question it points scholars and practitioners to address in determining whether the enactment of federal question jurisdiction authorized federal courts to recognize private claims for violations of the law of nations: whether Congress understood that such would be the case.

In addressing this question, Part III examines (1) the congressional history of federal question jurisdiction, and in particular, Congress' desire that federal jurisdiction be expanded to the degree allowed by Article III of the Constitution; (2) Congress' likely view in 1875 that our country's Founders understood that the "law of the United States" included the law of nations, at least where such claims could implicate foreign affairs; (3) Congress' view of its own history, which would have indicated that from the birth of our country's judiciary, Congress had consistently strived to ensure that federal courts would have jurisdiction, albeit not always exclusively, over causes of action that could implicate foreign relations; (4) the developing federal common law of the time; and (5) the philosophy of the chief architect of federal question jurisdiction, Senator Matthew Carpenter,[16] which would likely have led him to ensure that federal courts have jurisdiction over claims involving the law of nations, but only where such claims could impact foreign affairs. Part III concludes that in 1875, Congress likely believed that claims for violations of the law of nations where such could affect foreign affairs—and likely only where such was the case—fell within Article III's provisions, and thus intended federal question jurisdiction to include claims for violations of the law of nations where such claims could affect foreign affairs.

Part IV demonstrates that in enacting federal question jurisdiction, Congress understood that federal courts would recognize private claims for violations of the law of nations as part of their federal common law power. As Part IV discusses, this was because throughout the 1800s, including the era in

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[16] Senator Matthew Hale Carpenter of Wisconsin sponsored and managed the Act of March 3, 1875, ch. 137, 18 Stat. 470, which established federal question jurisdiction, and was its likely author. *See* Romero v. Int'l Terminal Operating Co., 358 U.S. 354, 366 n.22 (1959) (citing Jon B. Cassoday, *Matthew Hale Carpenter*, 7 REPORTS OF THE WIS. STATE BAR ASS'N 155, 186 (1906)), *superseded by statute as stated in* Miles v. Apex Marine Corp., 498 U.S. 19, 32 (1990). Senator Carpenter's first name is sometimes spelled Mathew, rather than Matthew, in historical and even modern documents. At the time, he went more often by Matt, as in Senator Matt Carpenter. Cassoday, *supra*, at 156.

which federal jurisdiction was enacted, both federal and state courts routinely exercised their common law powers to recognize private claims, including claims for violations of the law of nations.

Part V argues that the decision in *Erie Railroad Co. v. Tompkins*,[17] wherein the U.S. Supreme Court held that there no longer existed any *general* federal common law, did not preclude federal courts from recognizing private claims for violations of the law of nations, at least where such claims impact foreign affairs, because such claims remain an enclave of federal common law that survived *Erie*. In fact, as the Supreme Court stated in *Sosa*, *no development* in the last two centuries has precluded federal courts from recognizing a claim under the law of nations as an element of common law.[18]

Finally, Part V addresses the implications of federal courts having jurisdiction over, and recognizing private claims for, violations of the law of nations where such claims could impact foreign affairs.[19] The first implication is that recognizing these claims will rectify the unfairness that currently exists with non-citizens having more rights than citizens in federal courts, an outcome Congress most certainly did not intend. The second implication is that providing federal jurisdiction over these claims will ensure greater consistency in cases that might affect foreign affairs, as well as greater consistency in the application of the political question and act of state doctrines.[20]

I. BACKGROUND AND THE QUESTION PRESENTED

A. Sosa v. Alvarez-Machain *and the Court's Analysis Regarding Authorization of Private Claims as a Matter of Common Law*

In *Sosa*, the U.S. Supreme Court was presented with the question of whether the ATS created a cause of action or whether it was a jurisdictional

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[17] 304 U.S. 64 (1938).

[18] *Sosa*, 542 U.S. at 724–25.

[19] If the Supreme Court ultimately decides that 28 U.S.C. § 1331 does not provide jurisdiction for private claims for violation of the law of nations, then the law of nations is a body of federal common law, or simply a body of law, that federal courts could and should apply in alienage cases—cases in which one party is an alien and the other a U.S. citizen.

[20] The political question doctrine is a jurisdictional doctrine based on a violation of the constitutional separation of powers of government, wherein a court finds that the issue sought to be adjudicated should be deferred to the legislative or executive branch of government. Baker v. Carr, 369 U.S. 186, 210–11 (1962). For act of state doctrine, see *infra* note 31.

statute only. After finding that the statute was jurisdictional only,[21] the Court addressed the question of whether an alien could bring a private claim under the ATS as a matter of federal common law, or whether such claims could only be brought under the ATS pursuant to a congressional statute authorizing such claims.[22] After an in-depth historical analysis, the Court concluded that in enacting the ATS, Congress authorized federal courts to recognize certain private claims[23] derived from the law of nations as a matter of common law because such claims would have been recognized within the common law at the time the ATS was enacted in 1789.[24] Moreover, the Court found that "no development" since that time had "categorically precluded federal courts from recognizing a claim under the law of nations as an element of common law."[25]

In addition, the Court found its holding consistent with the division of responsibilities between federal and state courts set forth in the landmark 1938 case *Erie Railroad Co. v. Tompkins*.[26] In *Erie*, the Court held that there was no general federal common law, and that in cases where it had jurisdiction due to diversity of citizenship,[27] the federal courts should apply state common law.[28] The Court recognized in *Sosa* that although *general* federal common law may no longer exist after *Erie*, the law of nations continues to be one of the "limited enclaves in which federal courts may derive some substantive law in a common law way," given that "[f]or two centuries we have affirmed that the domestic law of the United States recognizes the law of nations."[29] The Supreme Court has also stated that "international disputes implicating . . . our relations with foreign nations" is an area of law that continues to exist as an

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

[22] *Id.*

[23] The Court held that any claim brought today for violation of the law of nations under the ATS must "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th century paradigms" recognized at the time. *Id.* at 725. This is arguably the same standard employed by many federal courts prior to *Sosa*: the requirement that any international norm such claims rest upon be specific, universal, and obligatory. In fact, the *Sosa* Court noted its test is consistent with those of prior courts, citing them with approval. *Id.* at 732.

[24] *Id.* at 714, 724, 731 n.19.

[25] *Id.* at 724–25.

[26] 304 U.S. 64 (1938).

[27] The relevant code provision that provides for jurisdiction based on diversity of citizenship is 28 U.S.C. § 1332 (2000).

[28] *Erie*, 304 U.S. at 78. The Court held that state law should be applied in cases where the Court has jurisdiction due to diversity except in matters governed by the United States Constitution or by acts of Congress. *Id.*

[29] *Sosa*, 542 U.S. at 729.

enclave of federal common law.[30] In fact, after *Erie*, the Court recognized it still had authority under federal common law to apply the law of nations and to develop a common law rule of decision—the act of state doctrine—because such was so important to foreign relations.[31]

However, in *Sosa*, the Court further stated, "[o]ur position does not . . . imply that every grant of jurisdiction to a federal court carries with it an opportunity to develop common law (so that the grant of federal-question jurisdiction would be equally as good for our purposes as § 1350)."[32] The Court explained that the ATS was "enacted on the congressional understanding that courts would exercise jurisdiction by entertaining some common law claims derived from the law of nations; and we know of no reason to think that federal-question jurisdiction was extended subject to any comparable congressional assumption."[33] Moreover, the Court questioned whether finding "a more expansive common law power related to"§ 1331 would be consistent with *Erie*.[34]

The Court did not analyze these questions in any detail, however, and by no means dismissed the possibility that § 1331 might provide jurisdiction for certain private claims in violation of the law of nations. Rather, the Court's analysis suggests that such common law claims could exist under § 1331 if Congress authorized them.[35] This reasoning is consistent with the 1972

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[30] Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 641 (1981), *cited with approval in Sosa*, 542 U.S. at 730.

[31] *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 426–28 (1964). The act of state doctrine dictates that "[e]very sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory." *Id.* at 416 (quoting Underhill v. Hernandez, 168 U.S. 250, 252 (1897)).

[32] *Sosa*, 542 U.S. at 731 n.19.

[33] *Id.*

[34] *Id.*

[35] *See id.* at 728–31. There seems to be agreement, for the most part, that congressional authorization is necessary for a federal court to recognize or create a remedy for the violation. *See* Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 853–56 (1997); Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law After* Erie, 66 FORDHAM L. REV. 393, 435–36 (1997). The issue is whether the authorization needs to be explicit, see for example, Bradley & Goldsmith, *supra*, at 856–57, or whether it can be implicit through congressional understanding and the Constitution's division of responsibilities—in this case, providing that the federal government has power over matters concerning international affairs. Stephens, *supra*, at 436–48.

Supreme Court case of *Illinois v. City of Milwaukee*,[36] where the Court held that federal question jurisdiction "will support claims founded upon federal common law," because federal common law is now considered law of the United States.[37]

This authorization of claims, the *Sosa* Court suggests, in turn depends on whether Congress understood such claims would exist when it enacted federal question jurisdiction.[38]

1. The Sosa *Analysis Is Consistent with Prior Case Law*

The analysis employed by the Court and the test it suggests for determining whether § 1331 provides jurisdiction to federal courts to recognize violations of the law of nations—whether Congress understood such would be the case and thus implicitly authorized such claims—is consistent with the prior holdings of the Supreme Court recognizing private causes of action.[39] In addition, there have been occasions when the Court has recognized causes of action where the Court found that Congress *assumed* such remedies were available,[40] or where the Court found an implied action existed because such private claims had been allowed previously.[41] Although these occasions involved congressional assumptions when enacting *statutes*, there is no reason the same analysis should not apply to common law claims. In fact, the analysis should be more applicable to claims arising from the common law because with private claims presumed to arise from statutes, Congress had the

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[36] Illinois v. City of Milwaukee, 406 U.S. 91, 100 (1972) (concluding "laws" within the meaning of § 1331 embraced claims founded on federal common law (citing Romero v. Int'l Terminal Operating Co., 358 U.S. 354, 393) (Breman, J., dissenting and concurring)). In the case, Illinois filed a lawsuit against four cities alleging that they were polluting Lake Michigan and creating a public nuisance; Illinois asked the lower courts to abate the nuisance. *Id.* at 93.

[37] *Id.* at 100.

[38] *See, e.g.*, *Sosa*, 542 U.S. 692 *passim*.

[39] *See, e.g.*, Karahalois v. Nat'l Fed'n of Fed. Employees, 489 U.S. 527, 536 (1989); Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 15–16 (1979); Touche Ross & Co. v. Redington, 442 U.S. 560, 568 (1979); J.I. Case Co. v. Borak, 377 U.S. 426 (1964); Cannon v. Univ. of Chicago, 441 U.S. 677, 688 (1979); *see also* ERWIN CHEMERINSKY, FEDERAL JURISDICTION 377–83 (3d ed. 1999).

[40] *See, e.g.*, Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 380 (1982).

[41] Herman & MacLean v. Huddleston, 459 U.S. 375, 380 (1983). *See also* CHEMERINSKY, *supra* note 39, at 383.

opportunity when it drafted the statute to create a cause of action, but did not do so. With federal common law, Congress had no similar opportunity.

B. The Question: When Congress Enacted Federal Question Jurisdiction, Did It Understand that Federal Courts Would Have Jurisdiction over, and Use Their Common Law Power to Recognize Private Claims for, Violations of the Law of Nations?

Given the *Sosa* analysis, the appropriate question is whether § 1331 "was enacted on the congressional understanding that courts would exercise jurisdiction by entertaining some common law claims derived from the law of nations."[42] In other words, did Congress understand when it enacted federal question jurisdiction in 1875 that federal courts would recognize private claims for violations of the law of nations as a matter of common law, thus implicitly authorizing the federal courts to do so?

This question, in turn, contains two separate but interrelated questions. First, did Congress intend that federal question jurisdiction would include claims involving the law of nations? Second, did Congress understand that federal courts would exercise this jurisdiction by recognizing private claims for violations of the law of nations as a matter of common law, i.e., without specific statutory authority?

This Article answers both questions affirmatively. It concludes that when Congress enacted federal question jurisdiction in 1875, it likely intended that claims involving violations of the law of nations—at least those which had the potential to affect foreign relations—would be within the jurisdiction of the federal courts. Additionally, Congress likely understood that federal courts would exercise their common law power to recognize private claims for violations of the law of nations which could affect foreign relations.

The Article bases its final conclusion on the following conclusions discussed in detail within the Article. First, the historical record strongly suggests that Congress, in 1875, intended that federal question jurisdiction be as broad as the Founders meant to permit under Article III. The historical record also suggests that Congress, in 1875, believed that the Founders viewed the law of nations as both the law of the states but also as law of the United States, especially where claims involving the law of nations could impact foreign affairs. Second, it appears that from the birth of our country's judiciary, Congress sought to ensure that federal courts had jurisdiction over

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[42] *Sosa*, 542 U.S. at 731 n.19.

any claims that might impact foreign relations. Third, this understanding is consistent with the trend that emerged in the latter part of the 1800s, when federal courts asserted common law power over claims affecting uniquely federal interests, thereby invoking an emerging body of federal common law.[43] Fourth, and perhaps most importantly, just as Congress understood in 1789, when it enacted the ATS, that federal courts would recognize private claims for certain violations of the law of nations as a matter of common law—i.e., without the need for a statute authorizing the claim—Congress likely had a similar understanding in 1875 when it enacted general federal jurisdiction. In fact, as part of their common law power, both federal and state courts regularly recognized private causes of action, including claims for violations of the law of nations.[44]

III. IN ENACTING FEDERAL QUESTION JURISDICTION IN 1875, CONGRESS LIKELY INTENDED FEDERAL COURTS TO HAVE JURISDICTION OVER, AND TO USE THEIR COMMON LAW POWER TO RECOGNIZE PRIVATE CLAIMS FOR, VIOLATIONS OF THE LAW OF NATIONS, BUT ONLY WHERE SUCH CLAIMS COULD IMPACT FOREIGN AFFAIRS

A. General History of Federal Question Jurisdiction

Although Article III of the Constitution authorized Congress to broadly confer jurisdiction upon federal courts for claims "arising under" the laws or Constitution of the Unites States,[45] Congress refrained from doing so for nearly one hundred years.[46] However, in 1875, Congress granted federal

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[43] *See* Stephens, *supra* note 35, at 416–25 (discussing multiple cases in which the Court used common law to adjudicate issues dealing with federal interests).

[44] *Id.* at 416–17.

[45] U.S. CONST. art. III, § 2.

[46] During this time the federal courts had very limited jurisdiction, but such limited jurisdiction, as discussed in more detail below, included the types of cases that Congress believed could impact foreign affairs. It should be noted, however, in 1801, general federal question jurisdiction did exist for one year. Congress had created federal question jurisdiction for the inferior courts in the "Midnight Judges Act," which substantially tracked the language from Article III of the Constitution: "[T]he said circuit courts respectively shall have cognizance of . . . all cases in law or equity, arising under the constitution and laws of the United States, and treaties made, or which shall be made, under their authority." Act of Feb. 13, 1801, ch. 4, § 11, 2 Stat. 89, 92, *repealed by* Act of Mar. 8, 1802, ch. 8, § 1, 2 Stat. 132. This Act, however, was repealed one year later. Donald L. Doernberg, *There's No Reason For It; It's Just Our Policy: Why the Well Pleaded Complaint Rule Sabotages the Purpose of Federal Question*

question jurisdiction (where the amount in controversy exceeded five hundred dollars) to the inferior federal courts with the Judiciary Act of March 3, 1875.[47]

The original text of the statute provided for original jurisdiction "of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the Constitution or laws of the United States . . . ."[48] There have been slight changes in the language over the years,[49] and in 1980, Congress removed the "amount in controversy" requirement, which at that time was ten thousand dollars.[50] The general federal question jurisdiction statute, 28 U.S.C. § 1331, now reads, "The district courts shall have jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."[51]

Unfortunately, there is little legislative history for the general federal question jurisdiction provision of the 1875 Act, particularly history explaining its purpose and the types of actions Congress expected to be incorporated within the term "arising under."[52] Just as surprising, there was no mention of this expansive broadening of federal jurisdiction in the legal literature of the time.[53] Neither is it mentioned in the book about the life of the bill's floor manager and likely author, Senator Matthew Carpenter.[54]

Notwithstanding this dearth of information, some scholars opine that the Act most likely reflected the new wave of federalism and widespread expansion of federal judicial power that occurred after the Civil War[55] or "the

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Jurisdiction, 38 HASTINGS L.J. 597, 601 (1987).

[47] Act of Mar. 3, 1875, ch. 137, 18 Stat. 470.

[48] *Id.* § 1.

[49] Doernberg, *supra* note 46, at 606.

[50] Act of Dec. 1, 1980, Pub. L. No. 96-486, 94 Stat. 2369 (1980) (codified as amended at 28 U.S.C. § 1331 (2000)). *See also* 28 U.S.C. § 1331 (note 1980 amendments).

[51] 28 U.S.C. § 1331 (2000).

[52] Doernberg, *supra* note 46, at 603. *See also* Stewart Jay, *Origins of Federal Common Law: Part Two*, 133 U. PA. L. REV. 1231, 1315 (1985) (noting that "the Court has treated the 'arising under' " clause "as a charge to develop a federal common law of judicial jurisdiction"); CHEMERINSKY, *supra* note 39, at 265 (noting that the legislative history of § 1331 is "skimpy").

[53] In fact, an exhaustive review of the legal and periodical literature of the time found no references to what is now seen as revolutionary. Felix Frankfurter, in his famous 1925 article, *The Business of the Supreme Court of the United States — A Study in the Federal Judicial System*, 39 HARV. L. REV. 35, 44 n.34 (1925–1926) similarly notes that no legal periodicals of the time discussed this new federal jurisdictional power.

[54] *See generally* FRANK ABIAL FLOWER, LIFE OF MATTHEW HALE CARPENTER (3d ed., Madison, David Atwood & Company 1884).

[55] James H. Chadbourn & A. Leo Levin, *Original Jurisdiction of Federal Questions*, 90 U. PA. L. REV. 639, 645 (1942) (quoting Frankfurter, *supra* note 53, at 44, n.34). *See also* HOWARD

culmination of a movement . . . to strengthen the Federal Government against the states."[56] Another scholar suggests that the broad jurisdictional grant was a reflection of the philosophy of the reconstruction period—the nation's desire to have a growing economy, the significance of interstate commerce, and the economic benefits of a uniform system of justice.[57]

Some scholars, however, suggest that the federal question jurisdiction provision of the Act was a "sneak" piece of legislation, noting that the Act "was originally introduced in the House of Representatives in the form of a bill to amend the removal statute."[58] The Act was passed with little debate and sent to the Senate.[59] However, once in committee, it underwent a "metamorphosis," and another bill was substituted.[60] That bill saw minimal debate and was passed by the Senate on the day it was introduced.[61] After the House rejected the Senate amendments, however, the bill went into conference again.[62] On March 3, the same day Congress was dealing with appropriations matters and urgent last minute business, both the House and Senate approved the revised bill without discussion.[63] On the same day, the Presidential signature was "hurriedly affixed."[64] The original title of the bill was "regulating the removal of causes from the State courts,"[65] but was changed after its passage to "An Act to determine the jurisdiction of circuit courts of the United States, and to regulate the removal of causes from State courts, and for other purposes."[66]

The theory of federal question jurisdiction being a "sneak" piece of legislation, however, contradicts the other scholars' views, referenced above,

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FINK & MARK TUSHNET, FEDERAL JURISDICTION: POLICY AND PRACTICE 7 (2d ed. 1984). Although it may seem that federal question jurisdiction made the other grants of jurisdiction seem superfluous given its breadth, it is important to recognize that until 1980, § 1331 contained an amount in controversy requirement; thus, other specific grants of jurisdiction were still very important until 1980.

[56] Frankfurter, *supra* note 53, at 44 n.34 (describing the comment of one anonymous writer at the time).

[57] *See, e.g.*, STANLEY I. KUTLER, JUDICIAL POWER AND RECONSTRUCTION POLITICS 143–60 (1968).

[58] Chadbourn & Levin, *supra* note 55, at 642–43.

[59] *Id.* at 643.

[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] Act of Mar. 3, 1875, ch. 137, 18 Stat. 470 (1875).

that the expansion of federal judicial power was quite intentional. It also seems to contradict the very vocal arguments set forth in the Congressional Record by the bill's floor manager and drafter, Senator Carpenter, that the Act should provide the federal courts with the entire jurisdiction allowed under Article III, which had historically been viewed quite broadly.[67] In fact, it is difficult to believe that those concerned about state power would have simply missed this very important—even radical—provision or stayed quiet about it, given its importance. It is more likely that given the Civil War and the strong trend toward federalism, it was just simply not controversial. In fact, it seems that during this time, Congress supported any legislation that gave more power to the federal government and to the federal courts, not withstanding concerns about states' rights vocalized by certain members of congress. This can be seen, for example, with the passage of Civil Rights Act of 1875, which passed on the same day as federal question jurisdiction.[68]

In any event, although the legislative history of the Act is minimal, a review of the congressional record and a legal text published around the time reveals that Congress likely intended to broaden federal jurisdiction to the broad degree allowed by Article III of the Constitution. In fact, the congressional record indicates that Senator Carpenter took an unequivocal public position on the Senate floor that general federal question jurisdiction should be as expansive as allowed under Article III,[69] and the Senate probably understood that such was the intent of the bill.

B. Congress Intended Federal Question Jurisdiction to Confer Jurisdiction on Federal Courts as Expansive as that Allowed under Article III

A strong argument can be made that the author of the bill providing for general federal question jurisdiction, Senator Carpenter, intended such jurisdiction to be as broad as Article III allowed, and that Congress understood this would be the case. First, the original language of the bill, set forth above, substantially tracked the constitutional language of Article III of the Constitution.[70] Second, as others have noted,[71] Senator Carpenter declared his

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[67] *See, e.g.*, Osborn v. Bank of the U.S., 22 U.S. (9 Wheat.) 738, 822 (1824); Verlinden B.V. v. Cent. Bank of Nig., 461 U.S. 480, 492 (1983).

[68] *See* Act of Mar. 1, 1875, ch. 114, § 3, 18 Stat. 335, 336 (1875).

[69] *See infra* notes 72–78 and accompanying text.

[70] *Compare* Act of Mar. 3, 1875, ch. 137, 18 Stat. 470, *with* U.S. CONST. art. I, § 2.

[71] *See, e.g.*, Jay, *supra* note 52, at 1314; CHEMERINSKY, *supra* note 39, at 265; Doernberg, *supra* note 46, at 603; Kenneth C. Randall, *Federal Questions and the Human Rights*

intent regarding its breadth by stating, "The [Judiciary] [A]ct of 1789 did not confer the whole [judicial] power which the Constitution conferred . . . . This bill does. . . . This bill gives precisely the power which the Constitution confers—nothing more, nothing less."[72]

Moreover, an in-depth review of the congressional record reveals with even more clarity than scholars have heretofore suggested, that the Act was intended to confer jurisdiction equal to that provided for in the Constitution. Senator Carpenter's above statement was not the only indication of his intent. The record contains much more to indicate how strongly he felt and how clearly he believed that federal jurisdiction should be broadened to the extent allowed under Article III. For example, Senator Carpenter stated, "Th[e] present bill is intended to confer a jurisdiction just as it is conferred in the Constitution, without that limitation."[73] Moreover, it seems he believed that the Constitution *actually required*—not just allowed—Congress to ensure federal jurisdiction to the degree set forth in Article III.[74] He felt that Congress had actually contravened the Constitution in 1789 when it passed the First Judiciary Act by not doing what he believed it was required to do.[75] He argued that it was Congress' duty in 1875, just as it had been in 1789, to vest all of the judicial power of the Union in the federal court to the full extent provided by the Constitution.[76]

Senator Carpenter, notwithstanding his view that the First Congress did not do what it was required to do, noted that the passage of the First Judiciary Act may have made sense in 1789, but it did not in 1875. "Everything has changed," he noted; the Union had grown from thirteen states to thirty-seven, commerce streamed "up and down the Atlantic," and people were traveling all over the country because they could return quickly and efficiently.[77] He continued:

> [T]he time has now arrived it seems to me when Congress ought to do what the Supreme Court said more than forty years ago it was its duty to do, vest the power which the Constitution confers in some court of original jurisdiction. Our circuit court is the

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Paradigm, 73 MINN. L. REV. 349, 365 n.78 (1988).

[72] 2 CONG. REC. 4986–87 (1874).

[73] *Id.* at 4986.

[74] *See id.* at 4984–86.

[75] *Id.*

[76] *Id.* at 4986.

[77] *Id.* at 4986–87.

> only one of original jurisdiction in civil cases, and there it properly belongs.[78]

Senator Carpenter was a well-regarded lawyer of his time and was recognized as one of the leading constitutionalists in the nation after having argued several significant constitutional cases before the Supreme Court. He argued his first case before the U.S. Supreme Court in 1862.[79] In 1868, he acquired nationwide recognition in *Ex Parte McCardle*,[80] where he demonstrated his knowledge of complex jurisdictional issues, and he was eventually acknowledged to be the leading legal advocate for reconstruction policies.[81] His other well-known cases include his representation of the state of Louisiana in the famous *Slaughter-House Cases*[82] in 1872, where the Supreme Court adopted his argument that the Fourteenth Amendment's privileges and immunities clause did not restrict the police powers of the state to centralize all slaughterhouses within the city of New Orleans in order to prevent dumping of remains in waterways.

In addition to being a well-respected constitutional lawyer, Senator Carpenter was also a powerful figure in the Senate, having been elected president *pro tempore* on December 11, 1873, holding the position for the remainder of his two years as a Senator.[83]

Moreover, many other members of the Senate Judiciary Committee, the Committee out of which the bill arose, were lawyers, law professors, and judges. The Supreme Court has described the members of the Senate Judiciary Committee during the drafting and enactment of the Act of March 3, 1875 as follows:

> Among Senator Carpenter's collaborators on the Senate Judiciary Committee were men with outstanding professional experience as lawyers, professors of law and judges: George G. Wright of

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[78] *Id.* at 4987.

[79] Wisconsin Historical Society, Dictionary of Wisconsin History, Carpenter, Matthew Hale, http://www.wisconsinhistory.org/dictionary/index.asp?action=view&term_id=2138&keyword=Carpenter (last visited Oct. 14, 2008).

[80] 74 U.S. 506 (1868). Senator Carpenter argued that Congress had the power to remove the Supreme Court's appellate jurisdiction over certain habeas corpus cases.

[81] Wisconsin Historical Society, *supra* note 79. *See generally* FLOWER, *supra* note 54.

[82] Butchers' Benevolent Ass'n of New Orleans v. Crescent City Live-Stock Landing & Slaughter-House Co. (*Slaughter-House Cases*), 83 U.S. 36 (1872).

[83] FLOWER, *supra* note 54, at 445 n.1.

> Iowa (a professor of law and a member of his State's Supreme Court), Allen G. Thurman (Chief Justice of the Ohio Supreme Court), John W. Stevenson (a professor of law, codifier of the law of Kentucky, President of the American Bar Association), and Frederic T. Frelinghuysen (eminent practitioner, Attorney General of New Jersey, subsequently Secretary of State). After leaving the Senate the bill went to conference and was reported out on the floor of the House by Luke Poland of Vermont, an esteemed Chief Justice of the Vermont Supreme Court.[84]

Finally, all of the senators who spoke either for or against the bill (and as mentioned previously, the section on general federal question jurisdiction was not a portion of the bill that was spoken out against) studied law and were members of their respective state bars.[85]

Given the above, Senator Carpenter and other members of the Senate Judiciary Committee, as well as many members of the Senate, almost certainly understood that Article III had been previously interpreted quite broadly by the Supreme Court[86] and that the jurisdiction being proposed was intended to be as equally broad.[87]

1. Scholars, Practitioners, and the Supreme Court of the Era Also Viewed the Act as Providing Jurisdiction Equally as Broad as Article III

The only identified contemporary article on federal jurisdiction still in existence, an article from the *Central Law Journal* in 1875, concludes that Congress intentionally gave federal courts the entire jurisdiction conferred by

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[84] Romero v. Int'l Terminal Operating Co., 358 U.S. 354, 366 n.22.

[85] *See* 2 CONG. REC. 4987 (1874) (listing members of the Senate who discussed the bill and supported it as George F. Edmunds, (R - VT), Oliver H.P.T. Morton (R – Indiana), Rosco Conkling (R – New York), and those who discussed the bill and did not support it on grounds unrelated to the enactment of general federal question jurisdiction as Thomas F. Bayard (D - Delaware), John S. Hager (D - California), Augustus S. Merrimon (D - North Carolina), Eli M. Saulsbury (D - Delaware), John P. Stockton (D - New Jersey), Bainbridge Wadleigh (R - New Hampshire)). For the professions and state bar membership of each of the men, see Biographical Directory of the United States Congress 1774–Present, http://bioguide.congress.gov/biosearch/biosearch.asp.

[86] *See supra* note 67 and accompanying text.

[87] Given the trend of the era to place as much power as possible with the federal government, the lack of debate concerning the expansion of federal jurisdiction most likely reflected the simple fact that the issue was not controversial.

the Constitution to protect against states thwarting Congress' reconstruction efforts after the Civil War.[88] A leading practitioner in the late 1800s also noted that the federal question jurisdiction statute conferred federal jurisdiction to the degree allowed in the Constitution.[89]

In fact, although it involved the removal provision of the March 3, 1875 Act rather than the federal question provision, the Supreme Court, in the 1880 case *New Orleans, Mobile & Texas Railroad Co. v. Mississippi*,[90] equated the term "arising under" for purposes of Article III and the Act of March 3, 1875 as the same.[91]

The Supreme Court has since interpreted § 1331 more narrowly,[92] but a strong argument can be made that Congress in 1875 intended federal question jurisdiction to be as equally broad as Article III.[93]

C. Congress in 1875 Likely Believed that Article III Allowed Jurisdiction over Claims for Violations of the Law of Nations Where Such Claims Could Impact Foreign Affairs

Given that Congress likely intended to give jurisdiction to the federal courts to the entire extent allowed under Article III, the next question becomes

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[88] A.I., *Our Federal Judiciary*, 2 CENT. L.J. 551, 553 (1875), *described in* Doernberg, *supra* note 46, at 603 n.27.

[89] HOWARD M. CARTER, THE JURISDICTION OF FEDERAL COURTS, AS LIMITED BY CITIZENSHIP AND RESIDENCE OF THE PARTIES 145–46 (WM. S. Hein Publishing 1983) (1899) (noting that with the Act of March 3, 1875, "for the first time the jurisdiction of these courts was extended . . . to the limits of the constitutional grant." (citing a lower federal court case of the era, *Van Patten v. Chicago M. & St. Paul R.R. Co.*, 74 F. 981, 984 (C.C.N.D. Iowa 1896))). It is also important to note that Felix Frankfurter, who later became a member of the Supreme Court, stated in 1925 that, "In the Act of March 3, 1875, Congress gave the federal courts the whole sweep of power which had lain dormant in the Constitution since 1789." Frankfurter, *supra* note 53, at 44.

[90] 102 U.S. 135 (1880).

[91] *Id.* at 136 ("The only inquiry therefore . . . is . . . whether the present suit, looking to its nature and object as disclosed by the record, is, in the sense of the Constitution, or within the meaning of the act of 1875, one 'arising under the Constitution or laws of the United States.' ").

[92] *See, e.g.*, Verlinden B.V. v. Cent. Bank of Nig., 461 U.S. 480, 495 (1983); Powell v. McCormack, 395 U.S. 486, 515–16 (1969). *See also* Doernberg, *supra* note 46, at 608.

[93] Given the scholarship which suggests that the Judiciary Act of 1875 was meant to give federal courts as broad of jurisdiction as the Constitution, many scholars believe the Court has erred in its narrow interpretation. *See* CHEMERINSKY, *supra* note 39, at 265. On the other hand, supporters of the Court's narrow interpretation of § 1331 recognize that it would be virtually impossible for the Court to interpret § 1331's "arising under" language as broadly as it interprets Article III's, or almost *any* case could be brought in federal court. *Id.*

whether Congress in 1875 believed that Article III allowed for federal jurisdiction over claims for violations of the law of nations. Given that little legislative or other history exists regarding federal question jurisdiction, it appears this is not a question that can be answered with any degree of certainty. But it can be answered with a degree of likelihood, and this Article concludes that for all the reasons set forth below, Congress likely believed that Article III allowed for such jurisdiction, but only when claims for violations of the law of nations had the potential to affect foreign affairs.

Before the enactment of federal question jurisdiction in 1875, no federal court had decided whether "law of the United States" included the law of nations for purposes of either federal appellate jurisdiction or Article III.[94] In 1871, the Supreme Court had directly considered the question, which was extensively argued before the Court, in the context of federal appellate jurisdiction in the case of *Caperton v. Bowyer*.[95] However, it ultimately refrained from deciding the issue.[96] Although the case is discussed in more detail below, it is worth mentioning here that it is hard to believe that Senator Carpenter, given his background as a leading constitutional lawyer, as well as the backgrounds of others serving on the Senate Judiciary Committee, were not aware of *Caperton* and the issue it presented and left unresolved.

1. Congress Likely Believed that the Founders Viewed the Law of Nations as Law of the United States, Even as They Viewed It Also as Law of the Several States, Especially Where Such Impacted Foreign Affairs

At the time of the founding of the Constitution and the enactment of the First Judiciary Act, the law of nations, like general common law, was not categorized as uniquely federal law or state law but was seen as a general body of law that belonged to the states separately,[97] as well as to the United States

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[94] Obviously, there was no occasion to decide whether the law of nations was "law of the United States" for purposes of federal jurisdiction because no statute had yet given federal courts jurisdiction to hear cases arising under the laws of the United States.

[95] 81 U.S. 216 (1871). In the case, the Supreme Court was asked to decide, *inter alia*, whether international law—the law of war in particular—raised a federal question for purposes of the Supreme Court's appellate jurisdiction.

[96] The Court chose not to decide the issues, finding instead that the basis for jurisdiction was not adequately raised or presented below, and thus it did not have the ability to decide the matter, stating, "it is plain law that questions not presented in the court of last resort do not give jurisdiction in a case like the one before the court." *Id.* at 236.

[97] *See* 5 Op. Att'y Gen. 691, 692 (1802) ("The law of nations is considered as a part of the municipal law of each State.").

as a whole.[98] As the Court in *Sosa* confirmed, the domestic law of the United States "recognized" the law of nations in 1789 because it was seen as a type of common law that transcended each individual state, as well as being obligatory within each state.[99] Thus, it was seen as a body of law that bound the federal government, even as it bound each individual state. As discussed in Part IV, both federal and state courts routinely applied the law of nations when appropriate. As further discussed in Part III.*D*, and Part IV, this conception continued throughout most of 1800s.

Nonetheless, the law of nations was commonly referred to in the late 1700s and early 1800s as "law of the United States."[100] This was likely because questions involving the law of nations during that period typically arose in cases over which only the federal courts had jurisdiction (or, with regard to common law crimes, areas they believed they had jurisdiction over), such as in admiralty, prize, attacks on diplomats, and like cases. Thus, the fact that the law of nations was "law of the United States" for purposes of Article III was likely a given, even though it was also likely seen as general public law belonging to both the federal and state governments.[101]

In addition, one can make a very strong argument that Congress viewed the law of nations as "law of the United States" for purposes of Article III, as Professor William Dodge has done.[102] Professor Dodge cites numerous documents and several of the federalist papers indicating that such is the case.[103] Additionally, he notes the difference in language between Article III and Article VI's Supremacy Clause, noting that the latter refers to "This Constitution, and Laws of the United States which shall be made in Pursuance

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[98] Stephens, *supra* note 35, at 410, 430–31; Jay, *supra* note 52, at 1266, 1270. *See also* Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587, 595 (2002). In fact, a recognizable federal common law did not start emerging until the late nineteenth century. Stephens, *supra* note 35, at 410, 430–31.

[99] Sosa v. Alvarez-Machain, 542 U.S. 692, 725 (2004).

[100] A series of Attorney General opinions throughout the 1800s—1822, 1855, and 1865—demonstrate that the executive branch understood the law of nations was part of the law of the United States and could be applied in federal courts. 1 Op. Att'y Gen. 566, 570 (1822); 7 Op. Att'y Gen. 495, 503 (1855); 11 Op. Att'y Gen. 297, 299 (1865).

[101] Another scholar, Professor Stewart Jay, suggests that although the common law might not have been viewed as the law of the United States during that era, the Founders nonetheless viewed the law of nations as already binding and an unwritten part of the Constitution. In any event, the Founders intended to ensure that all controversies affecting the interests of the United States were within Article III's purview. Jay, *supra* note 52, at 1261–68.

[102] William S. Dodge, *The Constitutionality of the Alien Tort Statute: Some Observations on Text and Context*, 42 VA. J. INT'L L. 687, 705–08 (2002).

[103] *Id.*

thereof," whereas the former only discusses "laws of the United States" without reference to "pursuance thereof."[104] He argues this distinction was intentional and that it suggests that there must be a category of laws that are not made "in pursuance" of the Constitution and yet are "laws of the United States."[105] The most obvious candidate, he suggests, is the law of nations.[106]

a. The Early History of Federal Criminal Common Law Also Demonstrates that the Law of Nations Was Seen Primarily as Law of the United States

Early federal prosecutions of federal common law crimes also demonstrate that the Founders viewed the law of nations as part of the common law of the United States and exclusive to the federal judiciary. Moreover, as one leading scholar notes, the Founders and early jurists believed that "all of the common law pertinent to the enforcement of the law of nations naturally attached to the federal government upon its creation."[107]

Reflecting this, shortly after the establishment of the federal judiciary, the federal government began prosecuting citizens for violations of the law of nations as part of the common law of the United States, for crimes such as piracy and crimes on the high seas, breaches of neutrality and attacks on diplomats.[108] In these cases, the judges routinely stated that the law of nations was part of the law of the United States,[109] and their asserting jurisdiction over such common law crimes[110] indicate that they further viewed crimes in violation of the law of nations as uniquely federal rather than state crimes. In response to growing criticism that the idea of federal common law might provide Congress with unlimited power to legislate in whatever areas it

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[104] *Id.* at 704–05.

[105] *Id.* at 705.

[106] *Id.*

[107] WILLIAM R. CASTO, THE SUPREME COURT IN THE EARLY REPUBLIC: THE CHIEF JUSTICESHIPS OF JOHN JAY AND OLIVER ELLSWORTH 160 (Herbert A. Johnson ed., 1995).

[108] *See id.* at 136–38. See for example *Henfield's Case*, 11 F. Cas. 1099 (C.C.D. Pa. 1793), involving a privateer, who after bringing a French prize into Philadelphia, was arrested and prosecuted for violating American neutrality in wars between the European powers.

[109] *See, e.g., Henfield's Case*, 11 F. Cas. at 1117; CASTO, *supra* note 107, at 131; *cf. Henfield's Case*, 11 F. Cas. at 1105 n.2.

[110] *See, e.g., Henfield's Case*, 11 F. Cas. at 1117 (stating that because the law of nations is part of the common law of the United States, Henfield and other like him are subject to common law prosecution in federal court).

chose,[111] Chief Justice Ellsworth sought to preserve federal criminal common law in particular areas, including for acts contravening the law of nations.[112] Ellsworth's views are particularly important, as he was on the committee that drafted Article III, was the chief architect of the First Judiciary Act, and drafted the ATS.[113] He, and others, saw the law of nations as an important part of non-statutory federal law.

The doctrine of federal common law crimes came to an end in 1812 when the Supreme Court held that federal courts lacked authority to punish non-statutory common law crimes.[114] However, even some of those who became opponents of the idea of the general doctrine of federal common law crimes believed that violations of the law of nations could be prosecuted in federal courts.[115] The importance of this should not be understated, as it was in the area of prosecutions for violations of the law of nations where the doctrine was least controversial and had its broadest support.[116]

2. In Addition, Congress' View of Its Own History of Legislation Would Have Indicated that from the Birth of Our Country's Judiciary, Congress Has Strived to Ensure that Federal Courts Have Jurisdiction over Claims that Could Impact Foreign Affairs

In considering whether Congress in 1875 would have intended claims for violation of the law of nations to fall within Article III, it is important to consider what Congress' view of its own history regarding claims for violations of the law of nations would have been. A review of that history demonstrates that from the birth of our country's judiciary, Congress has consistently strived to ensure that federal courts have jurisdiction over causes of action involving the law of nations that could implicate foreign relations. That would have been the 1875 Congress' view as well.

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[111] CASTO, *supra* note 107, at 149–50.

[112] *See id.* at 151–52 (citing Oliver Ellsworth, Charge to the South Carolina Grand Jury (May 7, 1799)).

[113] *Id.* at 14, 27–53.

[114] United States v. Hudson & Goodwin, 11 U.S. 32, 34 (1812); CHEMERINSKY, *supra* note 39, at 350.

[115] CASTO, *supra* note 107, at 135. For example, *Henfield's Case* was not very controversial because it involved the potential impact on foreign relations. *Id.* at 160.

[116] *Id.* at 160.

The starting point is the Constitutional Convention of 1787, when the founding generation was contemplating both the constitutional and initial statutory scope of a federal judiciary.

a. Article III of the Constitution: Congress Ensured that Questions Involving Foreign Affairs Could Be Heard by the Federal Judiciary

The drafting of the Constitution was, as one might expect, subject to controversy regarding the role of the federal government, including the federal judiciary. At the Constitutional Convention in the summer of 1787, one of the most significant issues with respect to the judiciary was "the extent of the national courts' constitutional authority to adjudicate cases," or in other words, jurisdiction.[117]

Some opposed a strong central government and thus opposed a strong federal judiciary.[118] Others wanted a strong central government and a strong federal judiciary, which they believed would not only offset tendencies toward "balkanization" of the states, but would guarantee that national interests would be protected and advanced.[119]

One of the major points of disagreement at the Constitutional Convention was whether inferior federal courts should exist and what their jurisdictional scope should be.[120] Some thought it was unnecessary and undesirable to have lower federal courts, arguing that as long as state courts were subject to review by the Supreme Court, the interests of the national government would be protected.[121] Others, however, distrusted the ability and willingness of the state courts to uphold federal law, especially where there might be conflicting state and federal interests.[122] They did not believe that simply having the Supreme Court review certain state court decisions would be adequate because they felt the number of such appeals would exceed the Court's limited capacity to hear and decide such cases.[123]

A compromise resulted in Article III mandating the existence of the Supreme Court and defining the outer limits of federal judicial power through

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[117] *Id.* at 5.
[118] *See* FINK & TUSHNET, *supra* note 55, at 5.
[119] *Id.*
[120] CHEMERINSKY, *supra* note 39, at 2–3.
[121] *Id.* at 3.
[122] *Id.* at 2–3.
[123] *Id.* at 3.

its subject matter jurisdiction.[124] Congress was left with and later exercised the ability to create inferior courts and to confer the scope of federal jurisdiction by statute.[125] As part of the compromise, the drafters also agreed to refrain from conferring the full extent of jurisdiction allowed under Article III in the First Judiciary Act.[126]

i. The Competing Drafts of Article III All Anticipated that Federal Courts Would Have Jurisdiction over Claims Impacting Foreign Affairs

In outlining the constitutional limits on jurisdiction to be set forth in Article III, the drafters considered a variety of arrangements that would preserve local initiative and power, as well as protect national interests.[127]

However, given the political and legal landscape at the end of the eighteenth century, all of the Founding Fathers wanted to ensure that foreign affairs and national security issues were placed within the powers of the federal government.[128] Thus, each of the plans regarding the judiciary, although different in other significant ways, evidenced a firm consensus that there should be federal jurisdiction over cases involving foreign affairs, such as admiralty, including prize cases,[129] and cases involving aliens.[130]

At least three precipitating situations likely led to the Founders' strong belief that matters involving violations of international law that could affect foreign affairs should be vested with the federal judiciary. First, there was the "Marbois affair" which involved an assault on a French diplomat by French adventurer De Longchamps on the streets of Philadelphia in 1783.[131] The international community was "outraged" and demanded that the Continental Congress take action, but Congress lacked the authority to do anything under the Articles of Confederation.[132] Although he was successfully prosecuted by

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[124] CASTO, *supra* note 107, at 25–26.

[125] *Id.*

[126] *See id.* at 12–15, 27–31. *See also infra* notes 153–62 and accompanying text.

[127] FINK & TUSHNET, *supra* note 55, at 3.

[128] CASTO, *supra* note 107, at 6; Jay, *supra* note 52, at 1267–68, 1275.

[129] CASTO, *supra* note 107, at 7. Prize cases involved a court's condemnation of property seized from commercial enemy vessels during time of war and the court's decision about whether such seizure was lawful. It was an important area of international law in the eighteenth century that was seen as implicating national security concerns. *Id.*

[130] *Id.*

[131] *Id.*

[132] *Id.* at 8. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 716 (2004).

the state of Pennsylvania,[133] the event demonstrated the Continental Congress' inability to remedy violations of the law of nations.

In fact, in 1781, the Continental Congress had called upon states to pass legislation addressing the vindication of rights under the law of nations because it felt "hamstrung" by its inability to " 'cause infractions of treaties, or of the law of nations to be punished.' "[134] After the Marbois incident, Congress called again for states to enact legislation addressing international law violations, and this concern over the inadequate vindication of the law of nations continued through the time of the Constitutional Convention.[135]

The second event was the arrest of the Dutch Ambassador's coachman in 1787,[136] about which the Ambassador protested.[137] During the Convention, members of Congress were informed about the Marbois affair and the Dutch Ambassador's protest.[138] Secretary of Foreign Affairs John Jay explained to Congress that " 'the federal government does not appear . . . to be vested with any judicial Powers competent to the Cognizance and Judgment of such Cases.' "[139] As discussed below, "[t]he Framers responded by vesting the Supreme Court with original jurisdiction over 'all Cases affecting Ambassadors, other public ministers and Consuls.' "[140]

The third situation likely leading to federal jurisdiction over foreign affairs involved enforcement of the Treaty of Paris that ended the Revolutionary War.[141] The Treaty permitted British creditors to collect on pre-Revolutionary War debts incurred by the then-colonists, a process the states had intentionally made difficult during the war.[142] After the war, many American debtors continued to refuse to pay their debts, and many legislatures and courts in several states overtly cooperated with this refusal and ignored the Treaty.[143]

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[133] Respublica v. De Longchamps, 1 U.S. 111 (Pa. Ct. of Oyer & Terminer 1784).

[134] *Sosa*, 542 U.S. at 716 (quoting JAMES MADISON, JOURNAL OF THE CONSTITUTIONAL CONVENTION 60 (E.H. Scott ed., Chicago, Albert, Scott & Co. 1893)).

[135] *Id.* at 717 (citing RECORDS OF THE FEDERAL CONVENTION OF 1787, at 25 (M. Farrand ed., 1911)).

[136] CASTO, *supra* note 107, at 43; *Sosa*, 542 U.S. at 717.

[137] *Sosa*, 542 U.S. at 717 (citing William R. Casto, *The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 494 n.152 (1986)).

[138] *Id.*

[139] *Id.*

[140] *Id.* (citing U.S. CONST. art. III, § 2).

[141] CASTO, *supra* note 107, at 8.

[142] *Id.*

[143] *Id.*

This had national security consequences, however, because under the Treaty, the British had agreed to evacuate their military posts, and insisted that the failure of the United States to comply with this aspect of the Treaty would result in continued British occupation of the posts.[144]

After the Convention passed a resolution which stated that, " 'the jurisdiction of the national Judiciary shall extend to cases arising under laws passed by the general Legislature, and *to such other questions as involve the National peace and harmony*,' "[145] a five-person committee worked out compromises and drafted the details.[146]

ii. The Resulting Language of Article III

In Article III of the U.S. Constitution, the drafters created the federal judiciary and defined the outer constitutional limits on its powers. Section One reads, "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[147] Section Two provides that federal judicial power shall extend to nine different categories:

> [T]o all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizen of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and—between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.[148]

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[144] *Id.* at 9. The compromise ultimately allowed state courts to hear claims under five hundred dollars, which was the majority of such claims. *See infra* note 157 and accompanying text.

[145] CASTO, *supra* note 107, at 14 (emphasis added).

[146] *Id.*

[147] U.S. CONST. art. III, § 1.

[148] *Id.* § 2, cl. 2.

The compromise resulted in the Supreme Court having original jurisdiction over cases affecting diplomats and appellate jurisdiction over each of the nine areas enumerated.[149] It also provided for the possibility of future creation of inferior federal courts with jurisdiction over "claims arising under the Constitution, Laws, or Treaties of the United States" and for specific types of actions that could impact foreign affairs, such as admiralty and claims between aliens and citizens.[150]

Of course, these were the outer Constitutional limits; Congress still had to authorize the jurisdiction through statutes. The resulting First Judiciary Act, although providing for limited jurisdiction of the federal courts as agreed to in the compromise,[151] ensured the federal judiciary would have jurisdiction over every type of case likely thought of at the time that might impact foreign relations.[152]

b. The First Judiciary Act of 1789 Provided Jurisdiction over Those Claims that Could Affect Foreign Affairs

Shortly after the Constitution was enacted, Congress passed the First Judiciary Act, which in addition to setting forth the jurisdiction of the Supreme Court, created federal circuit and district courts and outlined their jurisdiction.[153] In drafting the Judiciary Act, the committee took into consideration the same concerns regarding federal judicial power that the Constitutional Convention faced, as well as the ensuing compromise.[154] Thus, there was no attempt to provide jurisdiction as broad as Article III of the

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[149] *Id.*

[150] *Id.* art. III, § 1 & § 2, cl. 2. It is unclear why the Founders decided to limit Article III to claims only between citizens and aliens, rather than any claims between two aliens, especially given that *De Longchamps* involved two aliens. Interestingly, three of the original four plans extended jurisdiction to all cases involving aliens. CASTO, *supra* note 107, at 7. The fourth plan limited jurisdiction to maritime claims involving aliens and to cases involving treaties or the law of nations. *Id.* In the First Judiciary Act discussed below, Congress provided for federal jurisdiction for all claims over five hundred dollars involving aliens, which courts later declared unconstitutional between two aliens, as such jurisdiction was outside Article III. This suggests one of two things: either Congress simply made a mistake with regard to Article III and meant for the Article to include all cases involving aliens, or Congress made a mistake with regard to the First Judiciary Act, meaning to limit alienage cases to those between an alien and a citizen. *See* Bradley, *supra* note 98, at 590–91.

[151] *See supra* note 126 and accompanying text.

[152] *See* Jay, *supra* note 52, at 1275, 1275 n.222.

[153] Judiciary Act of 1789, 1 Stat. 73 (1789); *see also* FINK & TUSHNET, *supra* note 55, at 6.

[154] CASTO, *supra* note 107, at 27.

Constitution allowed. Yet, even though the initial jurisdictional grant was narrow, Congress felt it was critical to provide federal jurisdiction in discrete areas of federal concern,[155] most of which were areas that could impact foreign relations. For example, it reinforced the Supreme Court's original jurisdiction over suits involving diplomats.[156] With regard to the inferior courts, Congress also created alienage jurisdiction for claims over five hundred dollars,[157] provided exclusive jurisdiction of all civil cases of admiralty and maritime,[158] and provided jurisdiction for aliens bringing tort claims in violation of the law of nations.[159]

In addition, the Act also gave the Supreme Court appellate jurisdiction[160] over the decisions rendered by states' highest courts so long as they involved the validity of a federal statute, treaty, or the construction of any clause of the Constitution, statute, or treaty which affected any federal right, privilege, or exemption claimed by any party.[161] It also gave the Supreme Court jurisdiction to hear appeals where a plaintiff argued that a state statute was "repugnant to the constitution, treaties or laws of the United States," and the state's highest

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[155] *Id.*

[156] Judiciary Act of 1789 § 13.

[157] *Id.* § 11. The Act also allowed the removal of cases from state to federal court against an alien defendant for claims in excess of five hundred dollars. *Id.* § 12. The five hundred dollars requirement for claims involving aliens was, like nearly everything else, the result of a compromise, which on this occasion involved the problem of British debt collections under the Treaty of Paris. *See* discussion *supra* p. 81. By limiting jurisdiction over cases involving aliens to claims in excess of five hundred dollars, a large majority of such litigation would be forced to occur in state courts, which were much more sympathetic to the Americans. *See* CASTO, *supra* note 107, at 8–9. Finally, as discussed above, this alienage provision did not comport with Article III's alienage provision, which required that one party be an alien and one party be a citizen. As further discussed below, this section of the First Judiciary Act was shortly thereafter found to be unconstitutional as outside of Article III. It has never been determined how and why Congress created this apparent inconsistency, but it does seem that Congress intended that all cases which could impact foreign affairs or implicate the law of nations in ways that could impact foreign affairs be within federal jurisdiction.

[158] Judiciary Act of 1789 § 9. For a variety of reasons, admiralty jurisdiction in particular was an area for which there was little controversy because of the need for federal courts to have jurisdiction over prize cases, given that much of prize existed during times of naval war. CASTO, *supra* note 107, at 39–40.

[159] Judiciary Act of 1789 § 9.

[160] Federal appellate jurisdiction under Article III was quite broad and was likely interpreted at the time to allow the Court to review and reverse state courts' interpretation of common law. CASTO, *supra* note 107, at 36.

[161] Judiciary Act of 1789 § 25.

court found it was not.[162] It is important to note that this section of the Act uses the terms "statute" and "laws of the United States" separately, and treats "law of the United States" distinct from the Constitution, indicating that the drafters believed the "laws of the United States" included more than simply statutes and the Constitution. This suggests that Congress might have thought of common law and the law of nations as constituting non-statutory "law" of the United States.

c. The Alien Tort Statute

As mentioned above, the First Judiciary Act provided federal courts with jurisdiction, concurrent with states,[163] over cases where an alien sues for a tort[164] in violation of the law of nations or a treaty of the United States.[165] There is no record from which to ascertain with absolute certainty why such jurisdiction was given; in fact, there is no record of any debate on this section at all.[166] However, there does seem to be enough information to suggest it was likely due to similar concerns regarding international law and foreign relations expressed in Article III and in the provision of alienage jurisdiction. The founders found it critical to ensure that the federal courts have jurisdiction over aliens' claims for torts in violation of the law of nations—torts that most likely at the time included piracy, attacks on diplomats, and safe passage—[167]because they were the type of violations that potentially "threaten[ed] serious consequences in international affairs . . . ."[168]

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[162] *Id.*

[163] That the jurisdiction is concurrent with the states likely reflects the fact that the law of nations could also be applied by the states, and in fact was, as described below in Part III. However, giving federal courts jurisdiction allows an alien to file his case in federal court, where he might believe he will get a more fair trial.

[164] The Act limits the claims to torts only (as opposed to commercial claims arising from a violation of the law of nations or a treaty) due to the compromise involving the Treaty of Paris and alienage jurisdiction. *See supra* note 157.

[165] Judiciary Act of 1789 § 9 ("[T]he district courts . . . shall also 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 in violation of the law of nations or a treaty of the United States."). There have been slight changes in the language over the years. *Compare id., with* 28 U.S.C. 1350 (2000).

[166] Sosa v. Alvarez-Machain, 542 U.S. 692, 718 (2004).

[167] *See id.* at 714–15.

[168] *Id.* at 715.

As with the Constitutional Convention, the drafters of the First Judiciary Act continued to have incidents like the Marbois affair and the arrest of the Dutch Ambassador's coachman in mind, as well as the need for Congress to ensure compliance with the law of nations, given the states' failures to do so.[169] The drafters also likely had in mind the problem that American citizens continued to mount private military expeditions against Spanish territories in Florida and to commit torts "against aliens who, under U.S. treaties, were entitled to the free exercise of religion and to safe passage through the country."[170]

Regardless of the exact reasons for the provision, there was a national consensus that the federal courts should be open to any alien who had suffered tortious injuries in violation of international law, and that the national interest was so obvious that Congress used broad, open-ended language to vest the federal courts with complete power over these cases.[171]

i. Enactment and Continued Existence of the Alien Tort Statute Confirmed that Claims Implicating the Law of Nations Where Such Impacted Foreign Affairs Was Likely Viewed as "Law of the United States" and thus Within Article III

The passage of the ATS is also important to consider in ascertaining whether Congress, in 1875, believed the Founders understood the "law of nations" as the "law of the United States." To be sure, there is a debate among scholars about whether the First Congress viewed the ATS as constitutional under Article III, due to the law of nations being viewed as law of the United States, or whether it was constitutional due to Article III's alienage provision.

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[169] CASTO, *supra* note 107, at 43–44; *see Sosa*, 542 U.S. at 716–18 (citing Kenneth C. Randall, *Federal Jurisdiction over International Law Claims: Inquiries into the Alien Tort Statute*, 18 N.Y.U. J. INT'L L. & POL. 1, 15–21 (1985)).

[170] CASTO, *supra* note 107, at 43–44.

[171] *Id.* From the First Judiciary Act's passage in 1789 until 1980, jurisdiction had been upheld under the ATS in only two cases, one in 1795 and the other in 1961. *See* Bolchos v. Darrel, 3 F. Cas. 810 (D.S.C. 1795); Adra v. Clift, 195 F. Supp. 857 (D. Md. 1961). In fact, the ATS was, for the most part, dormant for many years until the Center for Constitutional Rights brought an action on behalf of a Paraguayan doctor and his daughter against a former military leader who tortured their son and brother to death, after it was discovered that former military leader resided in New York. In the case, *Filartiga v. Pena-Irala*, the Second Circuit found that the ATS provided subject matter jurisdiction over claims for torts in violation of the law of nations, even where the tort occurred abroad and was perpetrated by an actor from the alien's own government. 630 F.2d 876, 880 (2d Cir. 1980).

Professor Curtis Bradley has strongly argued that Congress believed the ATS was constitutional due to Article III's alienage provision.[172] He argues that Congress either mistakenly believed that Article III's alienage provision extended to any suit involving aliens, even where both parties were aliens, or intended to limit suits to where the defendant was a U.S. citizen.[173] Although he cites evidence to support both possibilities, he gives the edge to the latter.[174]

However, as discussed earlier, others, such as Professor Dodge, who examined the constitutionality of the ATS in particular,[175] make strong arguments that Article III's "laws of the United States" includes the law of nations based on their own in-depth historical reviews.[176]

In addition, it seems likely that the Founders did not assume the ATS was constitutional under Article III due to the Article's alienage jurisdiction, which allows for jurisdiction only when the case is between an alien and a citizen, because the drafters did not specify that only citizens could be defendants; they allowed for the possibility that either a citizen or a non-citizen could be a defendant.[177] Moreover, and perhaps even more convincingly, it seems the Founders assumed that the ATS would involve claims of a non-citizen against another non-citizen for acts that occurred in the United States given that *De Longchamps* was an impetus for the ATS, a case in which both the plaintiff and defendant were non-citizens.

Perhaps more importantly, between 1800 and 1810, the Supreme Court repeatedly found that Article III's alienage provision only provided for jurisdiction over claims between an alien and a citizen, and not between two aliens.[178] Yet, even after these cases, Congress never acted to repeal the ATS as beyond Article III. In addition, no Court has since declared the ATS unconstitutional. Thus, Congress in 1875 was on notice that the ATS was constitutional under Article III, not due to alienage provisions, but because claims involving the law of nations arise under the laws of the United States.

Finally, it is worth noting, the court in the seminal ATS case, *Filartiga v. Pena-Irala*, found the ATS to be constitutional based on the "laws of the

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[172] *See* Bradley, *supra* note 98, at 591, 619–37.

[173] *Id.* at 591.

[174] *Id.*

[175] Dodge, *supra* note 102.

[176] *Id.* at 689, 701–11.

[177] *Id.* at 691–92.

[178] *See, e.g.*, Mossman v. Higginson, 4 U.S. (4 Dall.) 12, 13–14 (1800); Montalet v. Murray, 8 U.S. (4 Cranch) 46, 47 (1807); Hodgson v. Bowerbank, 9 U.S. (5 Cranch) 303, 304 (1809).

United States" provision of Article III,[179] a holding the Supreme Court let stand in *Sosa*.[180] In *Sosa*, where defendants included Mexican citizens, the Court did not address the basis for the ATS' constitutionality under Article III, but cited *Filartiga* approvingly.[181] Moreover, the Court stated, "For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations."[182] These facts indicate that the Supreme Court most likely agrees not only with the predominate current view that the ATS is constitutional because the law of nations is part of the "laws of the United States," but believes that the Founders ascribed to this view as well.

d. The Growth of Habeas Jurisdiction Also Reflected the Desire to Ensure that Cases Which Could Affect Foreign Affairs Be Heard in Federal Courts

Congress' expansion of jurisdiction in the area of habeas corpus in the mid-1800s also demonstrates Congress' continued desire to ensure that jurisdiction over claims which could affect foreign relations be vested in the federal judiciary. For example, Congress passed the Habeas Corpus Act of 1842, extending the benefit of habeas corpus to aliens imprisoned by a state for acts done under the authority of a foreign nation.[183] Congress passed the Act in response to a diplomatic impasse between the British and American governments after the federal government noted it was unsure whether it had the authority to demand that New York courts release Alexander McLeod, a British citizen who was charged with murder during the burning of the Caroline in 1837.[184] The Senator who introduced the bill noted that the object was to allow a foreigner prosecuted for an offense under the authority of the law of nations to be brought before a federal court, noting that such should "be brought up on that issue before the only competent judicial power to decide upon matters involved in foreign relations or the law of nations."[185]

Thus, Congress in 1875, with an eye toward history, would have understood that prior congresses had historically, and repeatedly, ensured that any type of

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[179] Filartiga v. Pena-Irala, 630 F.2d 876, 886 (2d Cir. 1980).

[180] Sosa v. Alvarez-Machin, 542 U.S. 692 (2004).

[181] *Id.* at 725, 731–32.

[182] *Id.* at 729.

[183] Habeas Corpus Act of 1842, ch. 257, 5 Stat. 539 (1856).

[184] William Wiecek, *The Great Writ and Reconstruction: The Habeas Corpus Act of 1867*, 36 J. S. HIST. 530, 535 (1970).

[185] Cunningham v. Neagle, 135 U.S. 1, 71 (1890).

claim, including claims for violations of the law of nations, that could impact foreign affairs could be heard by federal courts.

D. An Emerging Federal Common Law During the Era Also Indicates that Congress Likely Understood and Intended that Federal Courts Would Have Jurisdiction over, and the Ability to Recognize Private Claims for, Violations of the Law of Nations Where Such Could Impact Foreign Affairs

Another development in the mid- to late-1800s weighs toward finding that Congress likely intended federal question jurisdiction to be broad enough to cover claims for violations of the law of nations when the claims might impact foreign affairs. This development is the emergence of what is now termed "federal common law" in areas unique to the federal government.

In contrast to the relatively short life of federal criminal common law, the federal courts continued to develop and implement common law in civil cases, even supplanting state law.[186] This was exemplified by the Supreme Court in the 1842 case of *Swift v. Tyson*,[187] where the Supreme Court held that in diversity cases, federal courts should apply "general principles and doctrines" where there was no state statutory or constitutional provision addressing the claim, thereby supplanting state common law.[188] In so finding, the Court held that the Rules of Decision Act,[189] which mandated that state law should apply unless the Constitution, a treaty, or an act of Congress otherwise require, did not apply to claims involving contracts and commercial transactions.[190] The Court noted that "the true interpretation and effect" of the law in these cases should not be found in decisions of local courts, but in the "general principles and doctrines of commercial jurisprudence" as articulated by federal courts.[191] In effect, the Court ruled that the Rules of Decision Act, which declared that state law should apply in the absence of a federal constitutional provision, a treaty, or statute, did not apply to state common law.[192] Although not

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[186] CASTO, *supra* note 107, at 162.

[187] 41 U.S. (16 Pet.) 1 (1842).

[188] *Id.* at 12.

[189] The Act reads: "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." 28 U.S.C. § 1652 (2000).

[190] *Swift*, 41 U.S. (16 Pet.) at 12.

[191] *Id.*

[192] *Id.*

necessarily recognized as such at the time, *Swift* was the beginning of an emerging federal common law.[193]

To be sure, there was criticism of *Swift* throughout the late 1800s and early 1900s.[194] The criticism focused not only on the differing legal rules applied in federal courts when there was diversity and in state courts when there was not,[195] but also on the "jurisprudential underpinnings of *Swift*—that there [were] objectively true principles of law" that courts simply discovered and applied, i.e., natural law.[196]

These criticisms of *Swift*, occurring simultaneously with the emergence of federal common law in certain areas, also reflected the tension between the rights of state courts to develop and apply their own common law in matters of local concern, and the recognition that certain types of common law questions—those affecting the nation as a whole—should be decided by federal courts.[197]

What is now thought of as federal common law continued in the latter half of the 1800s and into the early twentieth century, expanding into areas of contracts, agency, insurance, and torts.[198] As scholars have noted, the motivation behind the recognition and development of this type of federal common law was largely economic, with a desire to create uniform national law to help facilitate commercial transactions.[199]

Admiralty was another area in which federal courts continued their development of common law in cases over which they otherwise already had jurisdiction. The continued development of common law in this area, in particular with regard to collisions on the high seas, included many judicial opinions during the latter half of the 1800s.[200]

In 1874, just one year before the enactment of federal question jurisdiction, the Supreme Court continued to rule that federal common law was appropriate in the field of admiralty, as otherwise "the rules and limits of maritime law

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[193] *See generally* CHEMERINSKY, *supra* note 39, at 310.

[194] *Id.*

[195] *Id.*

[196] *Id.*

[197] Stephens, *supra* note 35, at 430–31.

[198] CASTO, *supra* note 107, at 162; Jay, *supra* note 52, at 1266–70, 1274; CHEMERINSKY, *supra* note 39, at 309. However, in certain local matters, state decisions controlled. CHEMERINSKY, *supra* note 39, at 309.

[199] CHEMERINSKY, *supra* note 39, at 301–08.

[200] *See, e.g.*, *In re* The Plymouth, 70 U.S. (3 Wall.) 20 (1865); *In re* The Belgenland, 114 U.S. 355 (1885); *In re* The Lamington, 87 F. 752 (D.C.N.Y. 1898).

under the disposal and regulation of several States . . . would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states."[201]

Although it did not apply the law of nations specifically, one important case regarding the developing federal common law in the area of international law was the 1984 federal district court case, *Murray v. Chicago & Northwestern Railway Co.*[202] In *Murray*, which concerned an action to recover damages for freight transportation rates, the court held that federal courts are empowered to develop common law principles governing "matters of national control."[203] As an example, the court pointed in particular to international law, stating, "The subject-matter of dealing with other nations is conferred exclusively upon the national government, and of necessity all questions arising under the law of nations . . . are committed to the national government."[204]

The court further reasoned that the Constitution divided responsibility for various areas between national and state governments, with the national government responsible for "subjects affecting the country or people at large."[205] Where there was exclusive federal control, the court noted that federal courts should apply common law in the absence of congressional directives.[206] *Murray* was later cited with approval by the Supreme Court in 1901.[207]

Such developments were consistent with the emerging common law in other areas of uniquely federal interest, demonstrating that where the law of nations could impact foreign relations, such was likely seen as "federal law" or "law of the United States," by both jurists and lawyers of the era, as well as by members of Congress.

The expansion of federal common law continued until the Supreme Court's 1938 decision in *Erie Railroad Co. v. Tompkins*,[208] which held that there was no longer general federal common law and that state law should be applied in each case, except in matters governed by the federal Constitution or

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[201] *The Lottawanna*, 88 U.S. (1 Wall.) 558, 575 (1874).

[202] 62 F. 24 (C.C. Iowa 1894).

[203] *Id.* at 31–33, 42.

[204] *Id.* at 32.

[205] *Id.* at 28–29.

[206] *Id.* at 32.

[207] W. Union Tel. Co. v. Call Publ'g Co., 181 U.S. 92 (1901) (holding that the Court had jurisdiction over claims involving pricing, applying emerging federal common law to the case).

[208] 304 U.S. 64 (1938).

acts of Congress.[209] However, as discussed below, *Erie* left open the possibility that certain enclaves of federal common law would survive, and it has been accepted that international law is one such area ever since.

1. The Differing Views Expressed in the 1871 Case Caperton v. Bowyer *Reflect an Emerging Consensus that Where the Law of Nations Impacted Foreign Affairs, Such Was Likely Considered Federal Common Law*

As mentioned above, in the 1871 case of *Caperton v. Bowyer*, the Supreme Court was asked to decide, whether international law—the law of war in particular—raised a federal question for purposes of the Supreme Court's appellate jurisdiction;[210] in particular, the issue was whether a belligerent rights defense was a question of "law of the United States."[211] Although the Court refrained from deciding the issue, the parties' discussion provides insight into the various views expressed at the time.

In *Caperton*, a Virginia man, Bowyer, was thrown into prison by a provost-marshal of the Confederate forces named Caperton for allegedly giving information to the United States. Bowyer brought a tort suit in a Virginia court.[212] The defendant raised various defenses, including that he was protected by belligerent rights under the laws of war.[213] The plaintiff prevailed at trial, and Virginia's highest court affirmed.[214] The defendant filed an appeal to the Supreme Court under its appellate jurisdiction, and the plaintiff objected.[215] Among other arguments, the defendant argued that his belligerent rights defense provided a basis for appellate jurisdiction because "international law is a law of the United States, of the *nation*, and not of the several States."[216] The defendant relied primarily on the federal executive and legislative branches' response to a New York state case from 1841, *People v. McLeod*, where the United States's position was that it had appellate

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[209] *Id.* at 78.

[210] 81 U.S. 216 (1871); *see also* Judiciary Act of 1789 § 25, 1 Stat. 73 (providing appellate jurisdiction where there was "drawn in question the validity of a treaty or statute of, or an authority exercised under any State, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favour of such their validity").

[211] Caperton v. Bowyer, 81 U.S. 216, 225 (1871).

[212] *Id.* at 216.

[213] *Id.* at 219–21.

[214] *Id.* at 222–23.

[215] *Id.* at 225–27.

[216] *Id.* at 225.

jurisdiction over the case, even though it allowed New York to maintain jurisdiction.[217] The defendant also cited the *National Intelligencer* and a speech by a United States Senator—both indicating that the Supreme Court could have taken appellate jurisdiction over the case—[218]as well as letters between the Senator and the Secretary of State.[219] Because the basis for appellate jurisdiction in *McLeod* would have been international law, the defendant in *Caperton* argued that international law should be the basis of jurisdiction in his case.[220] The defendant continued, "This indeed must be the law, or the General Government is at the mercy, on a question of foreign relations, of the action of a State, or of its courts."[221] The same could be said about the Civil War, the defendant argued, as defendants would be at the whim or prejudice of any State court.[222]

The plaintiff argued that even if the case involved questions of international law, this could not give the Court jurisdiction because, although both the federal and state courts "recognize the law of nations as binding upon them," the law of nations is not "embodied in any provision of the Constitution, nor in any treaty, act of Congress, or any authority, or commission derived from the United States."[223] Thus, the plaintiff argued, there was no basis for federal appellate jurisdiction.[224] The plaintiff, however, conceded that an argument might exist that the Supreme Court should be the court of last resort in cases that could affect foreign relations—an area the federal government is responsible for—but stated that such an argument was not applicable to the situation at hand.[225]

The seeming concession aside, the different views expressed in *Caperton* likely reflected the emerging resistance to the newly developing federal common law of the era and the tension that existed between wanting to ensure that the federal courts had jurisdiction over areas of law with which the nation

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[217] 1 Hill 377 (N.Y. Sup. Ct. 1841). In this case, New York tried an officer of Great Britain, McLeod, for events arising out of the burning of the Caroline, even though Great Britain had recognized the act was performed pursuant to orders. *Id.* at 380–82. Although the United States allowed New York to maintain jurisdiction, the Attorney General argued at trial that the United States had appellate jurisdiction over the case. *Id.* at 387–91.

[218] *Caperton*, 81 U.S. at 225–26.

[219] *Id.* at 226.

[220] *Id.* at 225–26.

[221] *Id.* at 226.

[222] *Id.*

[223] *Id.* at 228.

[224] *Id.*

[225] *Id.* at 228–29.

truly needed to speak with one voice, and those areas for which there was little reason to impinge upon the state court's sovereignty.

As mentioned above, early in the country's history, the law of nations was most likely seen as "law of the United States" in most contexts—even if it was also seen as law of the several states. Given the contexts in which the law of nations was typically applied, state courts rarely had opportunities to apply the law of nations. This changed during and after the Civil War, when state courts began applying the law of nations domestically.[226] Such cases typically arose when plaintiffs brought cases against defendants—mostly officers, but sometimes citizens following the orders of officers—for assault, kidnapping, destruction of property, unlawful takings, and the like.[227] These cases were typically based on state common law torts, with the state courts applying the law of nations, and the law of war in particular, to defense claims, such as belligerent rights. Even though state courts applied the law of nations, it would likely have been viewed as infringing on state court's sovereignty to allow such otherwise wholly domestic cases to be tried in federal courts.

At the same time, this era also began to see the first real development of a separate federal common law,[228] which seemed to lead some jurists and lawyers to react against federal courts asserting their power to hear and decide these cases. Some began to doubt that the law of nations was federal law in all contexts, as epitomized in the plaintiff's argument in *Caperton*.[229] Yet, many understood that in certain areas of national concern recognizing the law of nations as federal law was appropriate.[230] In fact, these differing views can be reconciled by understanding that, consistent with the emerging federal common law of the era, the emerging consensus was that only where the law of nations impacted foreign affairs was it likely considered federal law. The Supreme Court later insinuated as much in two cases which followed a few years after the enactment of federal question jurisdiction, discussed in more detail below.[231]

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[226] *See* cases cited *infra* Part IV.*A.2*.

[227] *Id.*

[228] *See* Stephens, *supra* note 35, at 410–11, 417, 431.

[229] *See Caperton*, 81 U.S. at 227–29.

[230] *See, e.g., id.* at 228–29.

[231] *See infra* notes 269–76 and accompanying text.

E. Senator Carpenter Likely Believed that Federal Courts Should Have Authority over Claims Involving the Law of Nations, but Only Where Such Would Have Foreign Affairs Implications

It is important to understand that Senator Carpenter likely intended claims that could affect the nation as whole to be heard in federal courts. However, as discussed below, he likely did not intend the federal courts to usurp jurisdiction from state courts in those cases that have no implication on foreign affairs. Similarly, he most likely believed that cases involving the law of nations were within Article III, and thus within the federal question statute, where the matter impacted foreign relations but not where it was of local concern.

For example, a speech against the Civil Rights Bill that Senator Carpenter delivered on February 27, 1875, just days before the passage of the Judiciary Act of 1875, suggests that he did not desire federal usurpation of state jurisdiction.[232] In the speech, Senator Carpenter indicated that although he was an opponent of slavery and a staunch supporter of the rights of black Americans, he felt the Civil Rights Bill was unconstitutional.[233] Although he believed the Bill was constitutional as it pertained to those federal rights, privileges, and immunities held by black citizens, he felt the bill should not purport to regulate conduct occurring wholly within the states, i.e., conduct not affecting interstate commerce or impacting privileges and immunities of U.S. citizens.[234] For example, he did not think it was constitutional to regulate who could serve on state juries or to regulate places of accommodation within a state.[235] However, he also indicated that, to the extent commerce or activity occurred between states, or transcended a state, restrictions on discrimination might be constitutional.[236] He explained that when a black American was engaged in commerce between several states, it might be within Congress's power to ensure that he was not discriminated against in public accommodations.[237] Setting aside the practical difficulties this might engender,

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[232] *Civil Rights Discussed*, N.Y. TIMES, Feb. 28, 1875, *available at* http://query.nytimes.com/mem/archive-free/pdf?_r=1&res=9907EEDF113FE73ABC4051DFB466838E669FDE&oref=slogin.

[233] *Id.*

[234] *Id.*

[235] *Id.*

[236] *Id.*

[237] *Id.*

his point that such regulation might be permissible indicates his belief that Congress could provide for federal jurisdiction over such situations.

Similarly, in 1880, Senator Carpenter spoke out against the consolidation of power in the federal government through the creation of federal departments in those areas where the Constitution did not seem to grant such power.[238] In his speech, Carpenter criticized the creation of the Department of Agriculture and spoke out against efforts to create a Department of Agriculture, Mines and Mining, and Manufactures, as encroachments upon the power of the states.[239] He stated that only those powers conferred on the federal government either expressly or by reasonable implication should stand.[240] However, he recognized the federal province of foreign affairs, noting that such was an area expressly committed to the federal government and pointing to the State Department as an appropriate department of the federal government.[241] Thus, his comments, when read as a whole, reflect a belief that the federal judiciary should have jurisdiction in those cases implicating, involving, or impacting foreign affairs.[242]

Given Senator Carpenter's comments in these matters, it seems unlikely that he would have intended his amendment to provide federal courts with jurisdiction over torts or claims for injuries that occurred wholly within a state, even if those torts were for violations of the law of nations. His comments, however, suggest that he would have supported jurisdiction to cover those claims "transcending" state boundaries and affecting federal interests, such as claims for violations of the law of nations that could affect foreign relations, and likely that he so intended federal jurisdiction to cover such claims. In fact, this is confirmed by what was occurring in the federal courts during the years leading up to 1875. Not only was there a growing expansion of federal jurisdiction by Congress, there was emerging common law within the federal courts when they had jurisdiction, as discussed earlier.[243]

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[238] *The Proof of the Unconstitutionality of the Fitz John Porter Bill*, N.Y. TIMES, Mar. 7, 1880, *available at* http://query.nytimes.com/mem/archive-free/pdf?res=9405E4DA173FEE3ABC4F53DFB566838B699FDE.

[239] *Id.*

[240] *Id.*

[241] *Id.*

[242] *Cf. id.*

[243] *See supra* Part III.D.

F. Cases Following the Enactment Found that the Law of Nations Would Not Provide for Federal Appellate Jurisdiction, but None of Those Cases Involved Potential Impact on Foreign Affairs

Although the Supreme Court, given its analysis in *Sosa*, will likely give more weight to congressional intent, reviewing case law from shortly after the creation of the Judiciary Act provides additional insight into whether "law of nations" was considered to be "laws of the United States."

The first case after the jurisdictional enactment to grapple with the issue of whether a claim involving the law of nations presented a federal question—again in the context of appellate jurisdiction—was the 1875 Supreme Court case of *New York Life Insurance Co. v. Hendren*.[244] The Court found the claim did not present a federal question.[245] However, the case was not one that could affect foreign affairs; it was a wholly domestic matter.[246] In addition, a strong dissent reflects the differing views first set forth in *Caperton*,[247] as well as the tensions of the time regarding jurisdiction and the emerging federal common law, especially in the area of the foreign relations.[248]

In *Hendren*, the Court reviewed whether the law of nations arose under the laws of the United States, not for federal question jurisdiction, but for the appellate jurisdiction.[249] The case involved the effect of the Civil War upon insurance contracts.[250] In the case, a New York life insurance company had issued a life insurance policy to a woman on behalf of her husband, both of whom resided in Virginia.[251] The insurance company argued that it was exempted from the obligations of the insurance contract due to the war between the insured's government (the Confederacy) and the government of the insurance company.[252]

The Court held that to the degree the question rested on the general law of nations, no federal question was presented, unless it was contended that the general rules had been "modified or suspended" by the laws of the United

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[244] 92 U.S. 286 (1875).

[245] *Id.* at 286–87.

[246] *Id.*

[247] Caperton v. Bowyer, 81 U.S. 216 (1871).

[248] *Hendren*, 92 U.S. at 287–88.

[249] *See id.* at 286–87.

[250] *Id.* at 286.

[251] The plaintiff had brought suit in Virginia and had received a judgment in her favor. *Id.* at 286.

[252] *Id.* at 287.

States.[253] The Court treated the question as one of general public law, suggesting that the law of war was a type of general common law available to and applicable in all courts, but not a federal question.[254]

The opinion drew a vigorous dissent by Justice Bradley, epitomizing the strong disagreement at the time about whether application of the law of nations presented a federal question, especially where such application fell within the ambit of war or relations with the enemy.[255] Bradley wrote:

> When a citizen of the United States claims exemption from the ordinary obligations of a contract by reason of the existence of a war between his government and that of the other parties to it, the claim is made under the laws of the United States by which trade and intercourse with the enemy are forbidden.[256]

He further stated that "international law has the force of law in our courts, because it is adopted and used by the United States."[257] He continued:

> [T]he laws which the citizens of the United States are to obey in regard to intercourse with a nation or people with which they are at war are laws of the United States. . . . [Whether these laws] be the unwritten international law . . . or the express regulations of the government[,] . . . in both cases it is the law of the United States for the time being, whether written or unwritten.[258]

Thus, Justice Bradley would have found appellate jurisdiction based on the federal government's authority to declare and wage war. Critically, he noted the importance of ensuring uniformity and the final word by the national government on these types of matters.[259]

The majority in *Hendren* distinguished the case from one decided earlier in the same term, *Matthews v. McStea*.[260] In *Matthews*, the Court was presented with the question of whether a proclamation by President Lincoln

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[253] *Id.* at 286–87.
[254] *Id.* at 287.
[255] *See id.* at 287–88 (Bradley, J., dissenting).
[256] *Id.*
[257] *Id.*
[258] *Id.* at 288 (Bradley, J., dissenting).
[259] *Id.*
[260] *Id.* at 287.

altered the normal principle of the law of war that commerce between citizens or powers at war is suspended upon the declaration of war.[261] The defendant in the case, Matthews, was sued by McStea on a bill of exchange, Matthews having been a partner in the firm that accepted the bill.[262] Matthews argued that the partnership was dissolved before the bill of exchange was accepted due to President Lincoln's April 19, 1861 declaration of a blockade.[263] The *Matthews* Court found that the proclamation and other activity did alter the general rule of war, and that the partnership was valid.[264] The *Hendren* Court noted that in *Matthews*, it was the President's proclamation altering the rules of war that presented a federal question, and that nothing of that kind existed in the case before it.[265]

However, that legal distinction is not completely convincing. In *Matthews*, the Court looked to the laws of war to determine when commerce should be suspended in times of war, and when exceptions should be made.[266] The Court was not considering whether the proclamation was valid, but simply the effect it had on the general principle of the law of nations at issue. In other words, the Court looked to the law of nations to determine the general principle but also looked to the body of law to determine applicable exceptions to the general principle. In particular, the Court focused on when the exception that allows trading with the enemy may be authorized by the sovereign.[267] Thus, in both *Hendren* and *Matthews* the Court looked to the same body of law—the law of war—to determine whether commerce was suspended during the Civil War.

One scholar, Professor Beth Stephens, has suggested that the *Hendren* decision might best be understood as part of the Court's "effort to avoid [a] flood of cases challenging contracts formed during the Confederacy."[268] Moreover, as a practical matter, both cases involved two U.S. citizens as parties for conduct that occurred wholly within the United States. Had either claim potentially affected foreign affairs, or involved a foreign party (even if the claim was for less than five hundred dollars and thus not under alienage jurisdiction), given that the claim raised questions concerning the law of war,

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[261] Matthews v. McStea, 91 U.S. 7, 9 (1875).
[262] *Id.* at 8.
[263] *Id.* at 9–10.
[264] *Id.* at 12–13.
[265] *Hendren*, 92 U.S. at 287.
[266] *Matthews*, 91 U.S. at 10–12.
[267] *Id.* at 10.
[268] Stephens, *supra* note 35, at 428.

it is highly questionable whether the *Hendren* majority would have reached the same result.

In fact, in the 1881 case of *Dugger v. Bocock*,[269] the Supreme Court again refused to assert appellate jurisdiction and found no federal question where, in applying the laws of war, a land conveyance paid for with confederacy currency was legitimate.[270] However, the Court indicated that it might have found jurisdiction if there were allegations that the payments were intended to aid the rebellion.[271] This suggests that if questions concerning the laws of war impacted relationships between two sovereigns at war, then federal jurisdiction might attach.

Another case supporting an argument that the Court likely viewed, or was coming to view, federal question jurisdiction as granting jurisdiction in cases affecting international relations and foreign affairs, is the Court's 1879 decision in *Tennessee v. Davis*.[272] *Davis* involved removal of a state murder charge against a federal revenue officer who killed a citizen of Tennessee in the discharge of his duties claiming self-defense.[273] The Court granted removal, finding it was appropriate both under the federal removal statute—which was part of the Jurisdiction and Removal Act of 1875—and the Constitution.[274] The Court noted that "arising under" the Constitution included those cases that might affect the ability of the federal government to perform its Constitutional functions or that would affect the ability of federal officials to engage in their duties.[275] If such was not the case, the Court reasoned, the federal government could not function in areas provided for in the Constitution.[276] This case indicates that the Court may have been sympathetic to a case that could impact foreign relations, an area the Constitution reserved for the federal government.[277]

Somewhat similar to *Caperton*, these cases reflect the post-*Swift* struggle between deciding which cases belonged in state courts for the development of state common law and which cases implicated emerging federal common law

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[269] 104 U.S. 596 (1881).
[270] *Id.* at 603.
[271] *Id.*
[272] 100 U.S. 257 (1879).
[273] *Id.* at 259.
[274] *Id.* at 263–66.
[275] *Id.*
[276] *Id.* at 266.
[277] U.S. CONST. arts. I, II & III.

and thus belonged in federal courts.[278] This struggle was further complicated by the fact that it occurred during an era that had not yet made a distinction between federal and state common law.[279] It also reflects what was "settling in" as a legal and judicial consensus: cases which were domestic in nature, even if they involved the law of war or the law of nations, belonged in state courts, but cases which could affect foreign relations or sovereigns' relationships with each other belonged in federal courts as a part of emerging federal common law.

What should be determinative for the Supreme Court in assessing whether the law of nations is "law of the United States" for purposes of § 1331 is Congress's understanding when it enacted federal court jurisdiction in 1875. When viewed against a backdrop of the emerging trends of the era, these cases and the *Hendren* dissent support the theory that what Congress likely intended was that when the law of nations affected foreign relations, it was federal law, albeit unwritten, for purposes of federal question jurisdiction. But when it did not, the law of nations was not federal law, and thus such claims involving the law of nations did not provide for federal jurisdiction under the "law of the United States."

It seems important to acknowledge here that what "Congress intended" or "Congress understood" is a complicated question, for many obvious reasons. However, it is the test that the Court in *Sosa* has directed us to address. As mentioned previously, it cannot be known with any degree of certainty that Congress intended or understood that federal question jurisdiction would include claims for violations of the law of nations, but it does seem more likely than not that Congress would have understood or intended such jurisdiction where the claims could affect foreign affairs, given all that was transpiring at the time, and the issues addressed in *Caperton*. Members of the Judiciary Committee and many members of Congress likely would have been aware of the case and the issues the legal and judicial community were struggling with. Granted, considering the near silence on the Senate floor when discussing federal question jurisdiction and the legal experience of many of the Senators, one could argue that members of Congress did not completely comprehend the potential extent of federal question jurisdiction with respect to claims involving the law of nations. It is true that no legislator can predict the future and exactly what type of claims may be brought under either jurisdictional or substantive statutes. However, this Article concludes that considering the

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[278] *See* Stephens, *supra* note 35, at 430–31.

[279] *See id.*

weight of evidence and what was occurring at the time, Congress did likely intend that claims involving the law of nations that had the potential to impact foreign affairs were considered claims involving the law of the United States for purposes of federal jurisdiction.

IV. CONGRESS IN 1875 ALSO UNDERSTOOD THAT FEDERAL COURTS WOULD RECOGNIZE PRIVATE CLAIMS FOR VIOLATION OF THE LAW OF NATIONS AS A MATTER OF COMMON LAW, THEREBY AUTHORIZING THEM TO DO SO

The next question that the Supreme Court directs us to address—and in many ways is the heart of the matter—is whether Congress would have understood, and thus authorized, federal courts to recognize private claims for violations of the law of nations as part of the jurisdictional grant.

As the Supreme Court noted in *Sosa*, "torts in violation of the law of nations would have been recognized within the common law" in the late 1700s,[280] and the Founders understood that federal courts, as part of their common law power, would recognize private causes of action for these torts once they had jurisdiction to do so.[281] Importantly, this continued to be the case throughout the 1800s.

A. Both Federal and State Courts Recognized Private Claims for Violations of the Law of Nations As a Matter of Common Law Throughout the 1800s

In the years leading up to the enactment of federal question jurisdiction, federal and state courts routinely recognized private tort and property claims for violations involving the law of nations absent statutory authority to do so when they otherwise had jurisdiction over the case. Thus, assuming that Congress intended, when it enacted federal question jurisdiction, to provide federal courts with jurisdiction over cases involving violations of the law of

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[280] Sosa v. Alvarez-Machain, 542 U.S. 692, 714 (2004).

[281] *Id.* at 720–21 (discussing Bolchos v. Darrel, 3 F. Cas. 810 (D.S.C. 1795); Moxon v. The Fanny, 17 F. Cas. 942 (D. Pa. 1793) (No. 9895); and the famous 1795 opinion of Attorney General William Bradford, in which he stated that a federal court could hear a private civil suit for violations of the law of nations arising out of the French plunder of a British slave colony in which Americans had taken part). The Court noted that the Attorney General's probable basis for finding jurisdiction to hear the claim was the ATS. *See id.* During the era, the law of nations was also applied to torts in the area of prize. *See, e.g.*, Talbot v. Janson, 3 U.S. (3 Dall.) 133, 156–57 (1795).

nations, Congress also understood that with the jurisdictional grant, federal courts would recognize private causes of action as part of their common law power.

1. Federal Courts

Federal courts applied the law of nations in a variety of cases in the latter half of the 1800s when they otherwise had jurisdiction over a case.[282] In many of these cases, federal courts recognized private claims for violations of the law of nations as part of their common law power both before and after 1875.

At the outset, it is important to note that federal courts had recognized private claims for violations of the law of nations in the late 1700s,[283] and in 1875, those cases were still good law. The *Sosa* Court cited two of these cases to support its reasoning that Congress assumed private claims alleging violations of the law of nations could be brought as part of the common law.[284]

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[282] *See, e.g.*, Thorington v. Smith, 75 U.S. (8 Wall.) 1, 7–12 (1868) (applying the law of war, which is described as fitting within general principles of law, in holding that a contract for the payment of money in Confederate currency was valid because the contract at issue was used in the regular course of business and the currency "was imposed on the community by irresistible force"); Hanauer v. Woodruff, 82 U.S. (15 Wall.) 439, 449 (1872) (applying principles of what the Court called "public law"—although referring to the law of war—in finding that a bond issued by the State of Arkansas used to fund the insurgency could not be consideration as a matter of public policy); United States v. One Thousand Five Hundred Bales of Cotton, 27 F. Cas. 325 (W.D. Tenn. 1872) (No. 15958) (applying the law of war regarding whether the proceeds from the sale of cotton used to aid the rebellion should be forfeited); Williams v. Bruffy, 96 U.S. 176, 185–90 (1877) (applying the law of war extensively in holding that the Confederacy's sequestering of a Pennsylvania citizen's debts as an alien enemy was void under the Constitution); Dainese v. United States, 15 Ct. Cl. 64 (1879) (applying the law of nations to determine that a consul had judicial responsibilities, and thus was entitled to additional pay); Willamette Iron-Bridge Co. v. Hatch, 125 U.S. 1, 15 (1888) (citing Penn v. Wheeling & Belmont Bridge Co, 54 U.S. 518 (1851) as an example of where such occurred) (noting that a federal court can apply international, state, or federal law in deciding issues under nuisance law); United States v. Wong Kim Ark, 169 U.S. 649, 655–94 (1898) (applying international law to settle a question of immigration).

[283] *See Bolchos*, 3 F. Cas. 810 (citing the ATS as a basis for jurisdiction in a suit for damages brought by a French privateer against the mortgagee of a British slave ship); *Talbot*, 3 U.S. at 156 (finding that Talbot, a French citizen, who had assisted Ballard, a U.S. citizen, in unlawfully capturing a Dutch ship had acted in contravention of the law of nations and was liable for the value of the captured assets); *Moxon*, 17 F. Cas. at 942 (stating that the ATS did not confer jurisdiction in a case where a French privateer seized a British ship in U.S. waters because the case could not be called one for a "tort only," suggesting that had it been for a "tort only," the ATS would have provided jurisdiction).

[284] *Sosa*, 542 U.S. at 720.

The *Sosa* Court also cited the famous 1795 opinion of Attorney General William Bradford, which stated that a federal court could hear private civil claims for violations of the law of nations.[285]

A review of cases during the mid- to late-1800s demonstrates that during this time, just as it had been in 1789, private claims for violations of common law generally, and law of nations specifically, could be brought without statutory authorization.

a. Prize Cases

The most common type of federal cases where private claims for violations of the laws of nations were recognized as a matter of common law was in the area of prize,[286] over which the courts had jurisdiction in admiralty. In these cases, the question was typically whether the capture of a ship, and thus the prize, was lawful. These cases involved essentially private claims for damages brought by those who owned or operated the captured vessels. There was no statute that allowed for such private claims, but the claims were recognized as part of the federal court's common law. Such cases include the 1855 case of *Jecker, Torre & Co. v. Montgomery*, where the Supreme Court entertained a private common law claim.[287] In addition, the Court in that case not only confirmed that the law of nations is part of the domestic law of the United States, but used its common law power to derive a rule from the law of nations that states that trading with an enemy subjects the property to confiscation, even if it is captured in a neutral port.[288] Such cases also include the *Prize Cases*,[289] when in 1862 the Supreme Court entertained four common law private claims in which the plaintiffs alleged that their ships' capture and seizure as prize was unlawful. The Court extensively applied the law of nations in determining that the blockade ordered by President Lincoln during the Civil War was lawful, finding that the law of war applied to the nation's Civil War, just as it would between two sovereign countries.[290]

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[285] *Id.* at 721 (citing 1 Op. Att'y Gen. 57 (1795)).

[286] Cases involving prize were routinely brought before the federal courts during the 1800s. In addition to the cases discussed in this Part, see also *The Rapid*, 12 U.S. (8 Cranch) 155 (1814) and *The Joseph*, 10 U.S. (6 Cranch) 451 (1814).

[287] 59 U.S. (18 How.) 110, 112 (1855).

[288] *Id.* at 113.

[289] 67 U.S. 635 (2 Black) (1862).

[290] *Id.* at 666–72.

Perhaps among the most famous prize cases in which the Supreme Court recognized a private common law claim for injuries under the law of nations, and stated that the law of nations is part of the law of the United States, is *The Paquete Habana*.[291] In that case, the Supreme Court not only confirmed that "[i]nternational law is part of our law," but held that private fishing vessels owned and operated by Spaniards, who were not armed and were unaware of the blockade issued pursuant to the Spanish War, were exempted from capture as prize under international law.[292]

b. Cases Involving Acts or Orders by Military Officers

Other cases in which federal courts recognized, as a matter of common law, private claims for both torts and property damages when they otherwise had jurisdiction arose in cases against military officers, as well as civilians who were obeying the orders of military officers, during times of armed conflict. Although the claims themselves were for municipal torts, the defenses relied on the laws of war, making the claims arguably claims for violations of the laws of war.

For example, in the 1851 seminal case of *Mitchell v. Harmony*,[293] a U.S. citizen who traded, with permission of the United States in an area of Mexico controlled by the United States, brought a claim for the common law torts of trespass and conversion in federal court.[294] The claim was against a U.S. Army officer who seized and converted to his own use the plaintiff's horses, mules, wagons, goods, chattels, and merchandise during the U.S.-Mexican War.[295] The defendant argued that the plaintiff had "design" to engage in trade with the enemy, and the defendant was thus entitled to seize the property under the laws of war.[296] The Court disagreed, applying international law and discussing the principles of the law of nations in detail to find the officer only had the right to seize the property to prevent it from falling into enemy hands or to fulfill some necessity—neither circumstance existed in the case.[297] In rejecting the

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[291] 175 U.S. 677 (1899).

[292] *Id.* at 700. Although the dissent criticized the application of the law of nations as a rule of decision in the case without authorization, it did not criticize the recognition of private claims without specific authorization. *Id.* at 715 (Fuller, C.J. dissenting).

[293] 54 U.S. (13 How.) 115 (1851).

[294] *Id.* at 137. The Court had jurisdiction due to diversity of citizenship. *Id.*

[295] *Id.* at 115–16.

[296] *Id.* at 118.

[297] *Id.* at 133–35.

defendant's argument, the Court allowed the private claim to go forward on common law basis.[298]

The dissent of *Straughan v. United States*, an 1866 court of claims case, also demonstrates that once a court had jurisdiction, it would entertain private claims for torts in violation of the law of nations.[299] In *Straughan*, the wife of a seaman whose ship was attacked by the British brought suit for "pay and emoluments" under a federal statute imposing such payments when men of United States' vessels were "taken by an enemy."[300] The British alleged that there were deserters on board, took her husband, and held him for five years.[301] The majority found that any act of hostility was an act of war; thus the British ship was "an enemy," allowing recovery under the statute.[302] In so finding, the court applied the law of nations, namely the rule that a country is responsible for the acts of its commissioned officer.[303] In finding that the British soldier who ordered the capture was acting on behalf of the British government, it found his action was an act of war; thus there could be no private tort.[304] However, had the soldier not been acting on behalf of the British government, the implication is that there could have been a private tort. In fact, the dissent found there was no war and thus no "enemy" for purposes of proceeding under the federal statute.[305] Rather, the dissent argued that the law of nations applied, stating that the plaintiff could and should have filed a private claim for full compensation "secured to him by the law of nations," and that the United States would be bound to enforce any such judgment.[306] Even the Attorney General at the time issued an advisory opinion that the attack was not an act of war and thus not covered by the statute, but instead was an "individual . . . and private wrong."[307]

Another case in which the Supreme Court applied the law of nations and recognized a private common law claim involving acts of the military is the 1878 case of *Ford v. Surget*,[308] which arose out of the United States Civil

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[298] *Id.* at 136–37.

[299] 2 Ct. Cl. 603 (1866) (Loring, J., dissenting).

[300] Straughn v. United States, 1 Ct. Cl. 324, 1865 WL 1994 (1865) (majority opinion).

[301] *Id.* at *1.

[302] *Id.* at *4.

[303] *Id.* at *5.

[304] *Id.* The majority left open the possibility of a private wrong if the British soldier was acting outside of his authority.

[305] 2 Ct. Cl. 603, *1 (1866) (Loring, J., dissenting), *available at* 1866 WL 74.

[306] *Id.*

[307] 5 Op. Att'y Gen. 185, 185–86 (1849).

[308] 97 U.S. 594 (1878). The case was appealed from Mississippi, with the Court having

War. *Ford* was a common law action for trespass against the defendant, a civilian who, on orders from the Confederate Army, trespassed on the plaintiff's property and burned cotton that he believed was about to be taken and used by the Union Army.[309] The defendant was acting on orders from a provost-marshal, who in turn was acting on legislation passed by the Confederate Congress in 1862.[310] The legislation stated that it was the duty of all military commanders in their service to destroy all cotton whenever, in their judgment, it would likely soon fall into the hands of the United States.[311] The Supreme Court, applying the laws of war to the case, affirmed judgment for the defendant, finding that although he was a civilian, he was protected from liability by the laws of war because officers in the Confederate Army were acting lawfully under the rules of war.[312] Their actions were lawful because the plaintiff was voluntarily residing within lines of insurrection.[313] Nevertheless, the Court entertained the common law action, and it seems the Court would have otherwise allowed it to go forward.

Another case involving the law of nations in the context of a tort claim arising out of the Civil War was the 1879 case of *Dow v. Johnson*,[314] where the Court found that an officer of the U.S. Army could not be sued in Louisiana state court in a civil lawsuit for injuries the plaintiff sustained when the officer illegally entered and took the plaintiff's property.[315] The Court looked to the laws of war to find that the "doctrine of non-liability to the tribunals of the invaded country for acts of warfare" was applicable to the case.[316] The Court found that the laws of war applied, but that the officer was responsible to his "own government"—the United States, as opposed to the Confederacy—and only to that government's tribunals, suggesting that the plaintiff could have brought the private common law claim in a U.S. federal court.[317]

In his dissent, Justice Clifford agreed that in time of war officers and soldiers were not amenable to civil tribunals for any act done in the

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appellate jurisdiction because the plaintiff claimed that the statute the defendant was relying on for his defense violated the plaintiff's rights, privileges, and immunities under the Constitution. *Id.* at 597.

[309] *Id.* at 594–97.

[310] *Id.*

[311] *Id.* at 602.

[312] *Id.* at 605–06.

[313] *Id.*

[314] 100 U.S. 158 (1879).

[315] *Id.* at 166–69.

[316] *Id.* at 169.

[317] *Id.* at 166–69.

performance of their duties; however, "if the injurious act done to person or property was wholly outside of the duty of the actor, and was wilfully [sic] and wantonly inflicted," the officer would have to answer to civil tribunals, ostensibly for a private common law claim.[318] The dissent cited the 1849 case of *Luther v. Borden*,[319] wherein the Supreme Court ruled that during a period when martial law was imposed in Rhode Island after an insurgent uprising to overthrow the government, an officer could be civilly accountable for acts willfully done to an individual if the officer used more force than militarily necessary.[320] No specific authorization for a private claim was cited; rather, such appears to have been a matter of common law.

A review of these cases demonstrates that federal courts recognized private claims, including claims for violations of the law of nations, without the need for any specific authorization during the era Congress enacted federal question jurisdiction. The court assumed that once it had subject matter jurisdiction, it could use its common law power to recognize a private civil claim.

2. State Courts

During this era, state courts also recognized private common law tort and property damage claims when applying the law of war, a subset of the law of nations.[321] Such decisions primarily addressed whether individuals who were part of either the Union or Confederate forces could be held civilly liable for actions arising out of their conduct during and immediately after the Civil War. Even though the plaintiffs did not categorize these claims as "violations of the laws of war," but as regular state common law tort claims, the courts' analyses of whether the laws of war allowed the tort claim or was an acceptable defense suggests that they were, in a sense, treated as private common law tort claims "in violation of the laws of war."

In most of the cases, state courts allowed private common law tort and property claims to go forward after rejecting defendants' claims of belligerent rights under the law of war. The cases include the 1866 Tennessee case of

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[318] *Id.* at 170 (Clifford, J., dissenting).

[319] *Id.* (citing Luther v. Borden, 48 U.S. (7 How.) 1 (1849)).

[320] *Luther*, 48 U.S. at 45–46.

[321] There are also examples of state courts applying the law of war in criminal cases. For example, in the 1866 case of *Riggs v. State*, 43 Tenn. (3 Cold.) 85 (1866), the Supreme Court of Tennessee found that a soldier following lawful orders could not be charged with murder, but that if the order was unlawful and a man of ordinary sense would know it was illegal, he could be charged with murder, even if he was following an order of a superior.

Cochran v. Tucker,[322] where the plaintiff, a former soldier in the U.S. Army was kidnapped, assaulted, and unlawfully imprisoned by the defendants. The former soldier filed a tort action, and the court found that belligerent rights did not allow attacks against citizens who were not currently combatants in the war.[323] Two other cases were the 1867 and 1870 cases of *Hedges v. Price*[324] and *Caperton v. Martin*,[325] respectively, where the Supreme Court of West Virginia rejected belligerent rights defenses for injuries to innocent plaintiffs, allowing private common law claims to go forward. A fourth case, decided in 1869, *Johnson v. Cox*, rejected belligerent rights, found that neither the laws of war nor the laws of nations "sanction indiscriminate plunder," and allowed the claim to go forward.[326]

In addition, the Kentucky Supreme Court, in the 1869 case of *Ferguson v. Loar*, allowed a private common law claim to go forward after applying the law of nations to find that Confederate soldiers did not have the right to seize and confiscate private property of an enemy found in Confederacy territory, except in cases of emergency.[327] Finally, in *Bryan v. Walker*,[328] and *Koonce v. Davis*,[329] the North Carolina Supreme Court in 1870 and 1875, respectively, allowed common law private claims to proceed after applying the laws of war to find that the defendants who had trespassed and committed theft during the Civil War were not covered by the state's Amnesty Act[330] because the takings did not occur pursuant to any lawful authority or state law, and did not occur out of necessity.

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[322] 43 Tenn. (3 Cold.) 186 (1866).

[323] *Id.*

[324] 2 W. Va. 192 (1867). Although *Hedges* concerned trespass of property and taking goods, the court's language was broad enough to include any wrong or injury. *Id.*

[325] 4 W. Va. 138 (1870).

[326] 3 Ky. Op. 599 (1869) (citing other Kentucky cases as well as Mitchell v. Harmony, 54 U.S. 115 (1851)).

[327] 68 Ky. 689 (1869) (relying on, *inter alia*, *Mitchell*, 54 U.S. 115).

[328] 64 N.C. 141 (1870).

[329] 72 N.C. 218 (1875).

[330] Between 1861 and 1865, parties had rights of actions in North Carolina against individuals who committed torts against them even if the acts were in discharge of their duties during war. *See, e.g.*, Franklin v. Vannoy, 66 N.C. 145 (1872). However, that changed with the passage of the Amnesty Act in 1866, which provided that no person who had served in the U.S. government or with the Confederate States could be liable civilly for any homicide, felony, or misdemeanor done in discharge of his duties. *Id.* at 149. The Act was held constitutional in *Franklin*. *Id.* at 151–53. In that case, the court recognized that had it not been for the Amnesty Act, every person who had been involved with arresting "recusant" conscripts and sending them to the front lines during the war were potentially both criminally and civilly liable for false imprisonment, assault and battery, and other injuries. *Id.* at 148.

These state cases demonstrate that when tort claims were filed and the law of nations was applied, states also routinely allowed private common law tort claims to go forward, without the need for any statutory authorization.

V. *ERIE RAILROAD CO. V. TOMPKINS* DID NOT CHANGE THE FACT THAT THE LAW OF NATIONS, WHERE SUCH COULD IMPACT FOREIGN AFFAIRS, CONTINUES TO BE A BODY OF COMMON LAW THAT CAN BE DERIVED BY FEDERAL COURTS. IN FACT, THE LAW OF NATIONS HAS SINCE BECOME SEEN AS FEDERAL COMMON LAW IN THOSE CASES AFFECTING FOREIGN AFFAIRS

As discussed above, the Supreme Court overturned *Swift v. Tyson* in the famous 1938 case of *Erie Railroad Co. v. Tompkins*.[331] In *Erie*, the Court held that there was no "federal general common law" and that in diversity cases, state common law should apply.[332] Also as discussed above in Part I, the Court in *Sosa* stated that with regard to the ATS, "our holding today is consistent with the division of responsibilities between federal and state courts after *Erie*," but stated that "a more expansive common law power related to 28 U.S.C. § 1331 might not be."[333]

However, the conclusion contained within this Article—that 28 U.S.C. § 1331's jurisdictional grant allows federal courts to recognize private claims in violation of the law of nations when such suits could implicate foreign relations in some way—is not suggesting a more expansive common law power that would be inconsistent with *Erie*. In fact, the Article's conclusion is consistent with *Erie* and its holding.

Erie concerned a diversity case and the lower federal court's substitution of its own common law in an area traditionally governed by state law.[334] The Court held that Congress has no power to declare substantive rules of common law applicable in a state, be they commercial law or part of the law of torts, and that "no clause in the Constitution purports to confer such a power upon the federal courts" to develop state common law in areas not uniquely within federal concern.[335] Moreover, the Court found that in diversity cases, *Swift*

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[331] 304 U.S. 64 (1938). The case involved a Pennsylvania citizen suing a New York railroad company after he was injured by an open door on a rail car while walking next to railroad tracks. *Id.* at 69.

[332] *Id.* at 78.

[333] Sosa v. Alvarez-Machain, 542 U.S. 692, 731 n.19 (2004).

[334] *See Erie*, 304 U.S. at 70–71.

[335] *Id.* at 78.

encouraged forum shopping and was unjust because the outcome depended on the citizenship of the parties, leading to inconsistent results.[336] The Court also relied on an earlier handwritten draft of the First Judiciary Act, which indicated that the drafters of the Federal Rules Decision Act had intended to ensure that, in diversity cases, "in all matters except those in which some federal law is controlling," state law, including state common law, was to be followed.[337] The Court in *Erie* simply wanted to ensure that in diversity cases, federal courts respect state judicial sovereignty. Thus, it would stand to reason that in certain areas of law which are of primary federal concern, the problems at issue in *Erie* would not exist.

Moreover, on the same day the Court issued *Erie*, it issued another decision written by the same author, Justice Brandeis, where the Court stated that the question of "whether the water of an interstate stream must be apportioned between the two States is a question of 'federal common law,' "[338] thereby recognizing that *Erie* notwithstanding, federal common law continues to exist in certain important areas.

After *Erie*, scholars began arguing that certain "enclaves" of federal common law still existed, and that one of them was the "law of nations."[339] The Supreme Court has created federal common law in this area, even post-*Erie*, because of the uniquely federal interest in foreign affairs, noting that the application of state law would frustrate the need for uniform law in this uniquely federal area.[340] For example, in *Banco Nacional de Cuba v. Sabbatino*, the Court applied the act of state doctrine as a matter of federal common law in relation to claims involving the law of nations, dismissing a

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[336] *Id.* at 72–74.

[337] *Id.* at 72–73.

[338] Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 110 (1938).

[339] See, for example, Stephens, *supra* note 35, for a lengthy argument and discussion regarding why *Erie*'s rejection of the general common law in federal courts did not include areas properly governed by federal law or those with a unique federal interest, including international law. However, in his article, *Sorting Out the Debate Over Customary International Law*, 42 VA. J. INT'L L. 365 (Winter 2002), Ernest A. Young rejects the idea that the law of nations is federal common law. *Id.* at 372. He argues that the law of nations has always been viewed as general common law and should continue to be treated as general common law. *Id.* at 467, 502–03. He further argues that whether it is applied in any given situation should be decided under a "choice of law" analysis. *Id.* at 470. Moreover, he allows for the possibility that in some areas of specific federal concern, such as foreign policy in particular, questions regarding the law of nations should constitute a "federal question," although he advocates a narrow approach in this regard. *Id.* at 502–06.

[340] *See, e.g.*, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 425–26 (1964).

claim against Cuba by an American commodity broker for title to sugar.[341] In so doing, the Court noted that "[p]rinciples formulated by federal judicial law have been thought by this Court to be necessary to protect uniquely federal interests."[342]

The U.S. Supreme Court in *Sosa* agreed. The Court recognized that *Erie* allowed "limited enclaves" in which federal courts may derive some substantive federal common law, and one such enclave was the law of nations.[343] The Court further noted that Congress has not taken any action to limit this common law power.[344]

A. No Development Has Precluded Courts from Recognizing a Claim Under the Law of Nations as an Element of Common Law

In addition, the Court concluded that *"no development* in the [last] two centuries . . . has . . . precluded federal courts from recognizing a claim under the law of nations as an element of common law."[345] Especially important, the Court considered whether *Erie*'s denial of "the existence of any federal 'general' common law" foreclosed tort claims based on federal common law's incorporation of the law of nations, and found that it did not.[346]

VI. IMPLICATIONS

The implications of finding that § 1331 provides jurisdiction for federal courts to recognize private claims in violation of the law of nations where such could impact foreign relations are twofold. First, recognizing that private claims for violations of the law of nations can be brought under § 1331 would result in citizens possessing the same rights non-citizens have under the ATS.[347] As it stands now, non-citizens have more rights and remedies for

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[341] *Id.*

[342] *Id.* at 426.

[343] Sosa v. Alvarez-Machain, 542 U.S. 692, 729 (2004). *See also id.* at 730 n.18 (noting that *Sabbatino* "further endorsed the reasoning of a noted commentator who had argued that *Erie* should not preclude the continued application of international law in federal courts"). *See also* Casto, *supra* note 12, at 641 ("[T]hat there is little doubt that international law is incorporated into United States domestic law as a form of federal common law.").

[344] *Sosa*, 542 U.S. at 731.

[345] *Id.* at 724–25 (emphasis added).

[346] *Id.* at 726.

[347] The ATS limits claims to torts. 28 U.S.C. § 1350 (2000). The conclusion of this Article is that claims should not be limited to torts, but should include those private claims for violation of

international wrongs in U.S. courts than do U.S. citizens. This is true even if both citizens and non-citizens would be affected by the same event, such as genocide, war crime, or cruel, inhuman, and degrading treatment—an outcome that is unjust.[348] Although in 1789 Congress wanted to ensure that aliens had a remedy for torts and that they could bring claims in federal court where they might be afforded more fair hearings, it was the desire to protect foreign relations that was the primary concern. In fact, in an 1893 case, *In re Hohorst*,[349] the Supreme Court refused to interpret a statute as allowing a civil action to be brought against a defendant only if he was an inhabitant of the district, noting that doing so "would leave the courts of the United States open to aliens against citizens, and close them to citizens against aliens."[350] The Court found that such a construction could not have been what Congress intended.[351]

Secondly, allowing federal jurisdiction over claims for violation of the law of nations where such could impact foreign affairs ensures greater consistency in cases that could affect foreign affairs. In addition, many cases that might affect foreign affairs raise issues that run head-on into the political question and act of state doctrines, doctrines that federal courts have more experience analyzing and deciding. Moreover, federal courts are more likely to be sensitive to foreign policy considerations of the federal government and may be more apt to listen to the State Department when they choose to intervene in such cases than state courts.

VII. CONCLUSION

This Article concludes that general federal question jurisdiction, now found at 28 U.S.C. § 1331, provides jurisdiction for federal courts to recognize

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the law of nations derived from common law—likely to include both torts and property damage.

[348] Although the federal courts would likely have jurisdiction over any claim involving both a citizen and a non-citizen under alienage jurisdiction, the court has a choice of law to apply. This Article advocates that the courts should choose the law of nations to apply to claims for violations of human rights, but there is no guarantee that such would be the case. Allowing claims to be brought under 28 U.S.C. § 1331 for violation of the law of nations would ensure that such law is equally applied to these claims. Where the defendant is a U.S. citizen or corporation, the federal courts would not necessarily have jurisdiction over claims. Thus, with the expansion of U.S. corporate activity abroad and increasing scrutiny over U.S. corporations' role in human rights abuses, it is even more important from a fairness point of view that U.S. citizens are allowed to bring claims for violations of the law of nations.

[349] 150 U.S. 653 (1893).

[350] *Id.* at 660.

[351] *Id.* at 659–60.

private claims for violations of the law of nations when such claims could impact foreign relations. This conclusion is based on the fact that when Congress enacted federal question jurisdiction, it understood not only that the law of nations was "law of the United States" where such could impact foreign relations, but that federal courts would recognize private claims in violation of the law of nations as a matter of common law. This understanding implicitly authorized federal courts to recognize these private claims.

Circumstances under which such violations could impact foreign relations are not subject to easy categorization, given increasing globalization and changing world dynamics. The Court in *Sosa* did not limit ATS claims to the three violations it identified the Founders likely had in mind based on the fluid nature of developing conceptions of customary international law.[352] Similarly, the circumstances in which the law of nations is viewed to affect foreign relations should also remain fluid. For example, a domestic question of whether the death penalty violates customary international law might not arise under § 1331 today given that the practice's effect on international relations remains unclear. However, world dynamics are forever changing, and there is the possibility such a question might affect international relations in the future, just as one could argue that the practice of torture—even torture wholly within the United States—arguably affects U.S. international relations today.

Finding that federal courts have the jurisdiction to recognize private claims for violations of the law of nations as part of their common law power would result in citizens having the same rights as non-citizens to bring such claims in federal courts, and would also ensure greater consistency in cases that could affect foreign affairs. Thus, in conclusion, federal courts should recognize private claims for violations of the law of nations[353] under general federal question jurisdiction.[354]

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[352] Sosa v. Alvarez-Machain, 542 U.S. 692, 725 (2004).

[353] For a general discussion as to why allowing such claims to go forward will not result in a "parade of horribles," see Casto, *supra* note 12, at 659–61, 663–66 (discussing the requirements of exhaustion, duplicative remedies, immunization of federal actors overseas, and limitations due to the Federal Tort Claims Act).

[354] The further implication of this Article is that even if the Supreme Court ultimately finds that § 1331 does not provide for such jurisdiction, where there is otherwise diversity jurisdiction, a court could apply the law of nations as general common law of the various states in question, finding that such practice allows the court the ability to recognize private causes of action. Similarly, in a case involving alienage jurisdiction, where one party is a citizen and one an alien, a court could apply the law of nations under a choice of law analysis and similarly recognize a private claim. *See, e.g.*, Young, *supra* note 339, at 470.