Law As Integrity and the Alien Tort Statute

Michael S. Cecil[1]

The Alien Tort Statute (ATS) is approaching a pivotal crossroads. For the first time in its 40-year "modern line," the Supreme Court has signaled the prospect of shutting the door to ATS claims for good. This death knell stems from the muddied evolution of ATS jurisprudence and the failure to resolve its fundamental debates. At its root, this debate concerns two "Core Controversies": (1) whether the ATS is strictly jurisdictional, requiring a separate statute to establish a cause of action, or whether federal courts can use their common law power to recognize causes of action under the ATS itself; and (2) whether the ATS facilitates a form of "universal jurisdiction," meaning claims between foreign citizens, or whether it is limited to "sovereign-specific" claims between a foreign citizen and U.S. citizens. Both controversies stem from a contradictory premise set by the Supreme Court in 2004, where it held that the ATS is strictly jurisdictional yet includes three "historical torts" within its meaning and the prospect of recognizing new law of nations torts so long as they were "specific, universal, and obligatory" and comparable to their 18th Century paradigms.

In an effort to defend the role of the ATS in the federal system, this Article presents a jurisprudential approach to resolve these long-standing debates. "Law as integrity" is a non-positivist theory which argues the ATS consists of rules, standards, and principles. Critically, the foundational principle—ensuring that federal courts are available to foreign citizens who suffer international law violations for which other nations may expect the United States to provide a forum for redress—provides the key to understanding the limits and latitudes of the ATS from its original passage in 1789 up until present day.

Viewing the ATS through the lens of law as integrity resolves the two Core Controversies. First, federal courts can use their common law power to recognize new causes of action under the "tort . . . in violation of the law of nations" standard. This distinguishes the "Law of Nations" as a set of duties and responsibilities between states from the "law of nations standard" within the text of the ATS itself. Second, the ATS is limited to claims between an "alien" and a U.S. citizen (person or entity), satisfying the

1. Assistant Professor of Law, Gonzaga University School of Law. Much of my thanks goes to a wide array of legal scholars spanning the federal courts, human rights, legislation, legal history, and international law communities, all of whom devoted considerable time and energy to evaluating this all-too-important statute. This Article is largely a response to a deep well of excellent work done before me. Although my interest in the ATS predates this, my inspiration for this Article came while attending oral arguments in *Jesner v. Arab Bank, PLC* at the Supreme Court. Heartfelt thanks must be given to all of my colleagues in the Research Seminar for Future Academics at NYU School of Law and Florencia Marotta-Wurgler, whose insightful comments to prior drafts and during oral presentation sharpened many of my early ideas on the Article. Additional thanks goes to several of my colleagues at Gonzaga University School of Law, whose comments and encouragement throughout the writing process laid the groundwork for later drafts and ideas. I am grateful for excellent research assistance from Lewis Beck and Grace Harkins. All errors are my own.

strictures of "alienage jurisdiction" under Article III of the U.S. Constitution. In developing ATS jurisprudence, federal courts must fulfill their "dual role" of (1) looking to sources of customary international law to determine whether a "tort . . . in violation of the law of nations" has ripened into a justiciable cause of action; and (2) fashioning rules of decision in secondary doctrines such as "aiding and abetting" liability. This Article offers a jurisprudential analysis to the meaning and scope of the ATS, affirming its capacity to embrace modern precepts of customary international law while remaining faithful to its original text and objectives.

Introduction

> "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."[2]

The Alien Tort Statute (ATS) is the embattled centerpiece of transnational human rights litigation in the United States. Few areas of law have the potential to touch upon issues as diverse as a U.S. technology corporation's alleged aiding and abetting of human rights violations against religious minorities in China,[3] a U.S. military contractor's alleged facilitation of torture and war crimes at Abu Ghraib prison,[4] and a U.S. fruit corporation's alleged facilitation of death squads in Colombia.[5]

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2. 28 U.S.C. § 1350.

3. On January 31, 2025, Cisco Systems, Inc. filed a Petition for Writ of Certiorari with the Supreme Court of the United States. *See* Doe I v. Cisco Systems, Inc., 73 F.4th 700, 717 (9th Cir. 2023), petition for cert. filed, No. 24-856 (Docketed Feb. 11, 2025) (15-16909). In its petition, Cisco included the following questions relevant to this Article: (1) Whether the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, allows a judicially-implied private right of action for aiding and abetting; (2) Whether, if ATS aiding-and-abetting claims are cognizable, mere knowledge rather than purpose suffices to show the requisite mens rea. *See id.*

4. *See* Al Shimari v. CACI Premier Tech., Inc., 263 F. Supp. 3d 594 (E.D. Va. 2017) (holding that claims for torture, cruel, inhuman and degrading treatment, and war crimes can be brought under Alien Tort Statute against private actors). *But see* Al Shimari v. CACI Premier Tech., Inc. (Order of July 3, 2024, scheduling a jury trial following the declaration of mistrial set for Oct. 28, 2024); *c.f. Abu Ghraib Verdict: Iraqi Torture Survivors Win Landmark Case as Jury Holds Private Contractor CACI Liable*, Ctr. for Const. Rts. (Nov. 15, 2024), https://ccrjustice.org/home/press-center/press-releases/abu-ghraib-verdict-iraqi-torture-survivors-win-landmark-case-jury [https://perma.cc/LHY6-THF6]. On Nov. 12, 2024, a jury in the United States District Court for the Eastern District of Virginia found CACI Premier Technology, Inc. liable to three plaintiffs under the ATS. *Id.* Each plaintiff was awarded $3 million in compensatory damages and $11 million in punitive damages. *Id.* The contractor's total damage liability was assessed at $42 million. *Id. But see* Al Shimari v. CACI Premier Tech., Inc., 1:08-cv-00827-LMB-JFA (E.D. Va. 2025) (Notice of Appeal to the U.S. Court of Appeals for the Fourth Circuit).

5. *Colombian victims win historic verdict over Chiquita: Jury finds banana company liable for financing death squads*, EarthRights Int'l (June 10, 2024), https://earthrights.org/media_release/colombian-victims-win-historic-verdict-over-chiquita-jury-finds-banana-company-liable-for-financing-death-squads/ [https://perma.cc/CD2B-Z5A5]. In a landmark ruling in the fight for human rights, the jury found banana giant Chiquita Brands International liable for financing the United Self-Defense Forces of Colombia (AUC), a brutal paramilitary death squad. *Id.* Although claims were brought under the ATS, liability against Chiquita was ultimately based on a wrongful death theory. *Id. But see* Cardona v. Chiquita Brands Int'l, Inc., 760 F.3d 1185 (11th Cir. 2014) (reversing the orders denying the motions to dismiss claims under the Alien Tort Statute and Torture Victims Protection Act and remanding the case for dismissal).

Yet ATS jurisprudence faces the imminent risk of being foreclosed for good.

Many factors can explain this precarious state of affairs, but two unsettled "Core Controversies" stand above the rest. First, is the ATS strictly jurisdictional, requiring a separate statute to create a cause of action, or can federal courts recognize common law causes of action under the ATS itself? Second, does the ATS facilitate a form of "universal jurisdiction," meaning claims between foreign citizens, or is it limited to "sovereign-specific" claims between a foreign citizen and U.S. citizens? These two Core Controversies have provoked considerable and longstanding disagreement, with one author declaring the cause of action debate "simply frivolous,"[6] a second deeming *universal jurisdiction* more consistent with the original reading,[7] and a third recognizing the ATS as a "self-executing, fail-safe" measure permitting aliens to sue U.S. citizens for intentional torts in federal court.[8] These competing views are emblematic of a larger debate over how best to understand the role of the ATS in the federal system.

Despite the underlying disagreement, transnational human rights litigation arising under the ATS has persisted. This "modern line" of ATS jurisprudence dates back to 1980 with the Second Circuit's watershed decision in *Filártiga v. Peña-Irala*, the first case in which a federal court recognized a common law cause of action under the ATS itself.[9] For the Supreme Court, this debate harkens back to its seminal 2004 decision in *Sosa v. Alvarez-Machain*, the case from which the current ATS doctrine originates.[10] The *Sosa* Court entrenched the two Core Controversies by issuing a contradictory holding. First, it declared the ATS to be a "jurisdictional statute creating no new causes of action,"[11] basing its conclusion on the fact the ATS was written in jurisdictional language and originally enacted as part of the Judiciary Act of 1789.[12] Yet the Court then hedged, holding that the ATS was not meant to be "stillborn" or a "jurisdictional convenience to be placed on a shelf" until a future Congress authorized specific causes of action.[13] Thus, under the "ambient law" of the era, the *Sosa* Court further held that the First Congress would have understood a "modest number of international law violations" to have been actionable under the ATS.[14] In one fell swoop, a fundamental contradiction was set: the ATS is strictly jurisdictional while also enabling a narrow set of causes of action in the form of judicially developed federal common law.[15] In the twenty years after *Sosa* the Supreme Court has yet to reconcile this contradictory guidance.

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6. William R. Casto, *The Federal Courts' Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations*, 18 Conn. L. Rev. 467, 480 (1986).

7. William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the 'Originalists'*, 19 Hastings Int'l & Compar. L. Rev. 221, 223 (1996).

8. Anthony J. Bellia Jr. & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. Chi. L. Rev. 445, 454 (2011).

9. Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980).

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

11. *Id.* at 694.

12. *Id.*

13. *Id.* at 719.

14. *Id.* at 724.

15. *Id.*

Few areas of law take such diametrically opposing views when it comes to a statute's central functions.[16] Yet this is commonplace for the ATS in a post-*Sosa* world. In fact, most ATS cases play out in a two-tiered manner: the first-tier addressing the "merits" of the case at hand and the second-tier addressing a "non-merits" debate about the meaning and scope of the ATS itself. This results in a common cycle: an opinion and holding is rendered that relies upon a secondary doctrine, *dicta* stokes the flame of uncertainty about the two Core Controversies, and lower federal courts issue conflicting rulings in their respective districts and circuits.

The Supreme Court's 2021 ruling in *Nestlé USA, Inc. v. Doe*, its fourth and most recent ATS decision, illustrates this point.[17] There, the *Nestlé* Court relied on the "presumption against extraterritoriality" to find that six Malian individuals who were allegedly trafficked into the Ivory Coast to harvest and produce cocoa could not assert ATS claims for aiding and abetting child slavery against two of the largest cocoa producers in the world.[18] Justice Thomas, writing for the majority, found that the ATS did not establish a clear indication that it applies extraterritorially, and because the conduct alleged amounted to no more than "general corporate activity-like decision making," there was no evidence from which an ATS claim could proceed.[19] This opinion was emblematic of a first-tier "merits" determination, in which the *Nestlé* Court utilized a canon of statutory interpretation to resolve the specific case before it.

But true to form, the second-tier "non-merits" debate took place within the majority, concurring, and dissenting opinions. On one account, the majority seemed willing to overrule *Sosa* altogether. As Justice Thomas wrote, "even without reexamining *Sosa*, our existing precedents prohibit us from creating a cause of action."[20] In his concurring opinion, Justice Gorsuch took a firmer line. "[T]he time has come," he wrote, "to jettison the misguided notion that courts have discretion to create new causes of action under the ATS . . . ."[21] As Justice Gorsuch explained, "[p]erhaps this language was originally understood to furnish federal courts with authority to entertain a limited number of specific and existing intentional tort claims that, if left unremedied, could give rise to reprisals or war. . . . But nothing in the statute's terse terms obviously authorizes federal courts to invent new causes of action on their own."[22]

In dissent, Justice Sotomayor firmly disagreed. While she acknowledged that respondents had failed to allege a domestic application of the ATS, she

16. For example, in *Loper Bright Enterprises v. Raimondo*, 603 U.S. __ (2024), the Supreme Court held that the Administrative Procedure Act (APA) requires courts to exercise their independent judgment in deciding whether an agency has acted within its statutory authority, preventing courts from deferring to an agency interpretation simply because a statute is ambiguous. *Id.* Despite the enormous consequences of shifting the balance between administrative agencies and federal courts, there is no dispute over how the APA works. Contrast this with the ATS where the two Core Controversies lack resolution over forty years since *Filártiga*.

17. Nestlé USA, Inc. v. Doe, 593 U.S. 628 (2021).

18. *Id.* at 634.

19. *Id.*

20. *Id.* at 635.

21. *Id.* at 640 (Gorsuch, J., concurring).

22. *Id.* at 643 (Gorsuch, J., concurring).

would not overrule the *Sosa* doctrine for federal common law. "The First Congress," she wrote, "enacted the ATS to ensure that federal courts are available to foreign citizens who suffer international law violations for which other nations may expect the United States to provide a forum for redress."[23] As she explained, the ATS was "enacted on the understanding that [federal] common law would provide a cause of action for [a] modest number of international law violations."[24] In challenging Justice Thomas's view that federal courts should refuse to recognize a cause of action under the ATS, Justice Sotomayor responded that this view was "unmoored from both history and precedent."[25] Because the First Congress did not pass "the ATS only to leave it lying fallow indefinitely," she wrote, "the statute 'is best read as having been enacted on the understanding that the common law would provide a cause of action' for widely recognized torts in violation of the law of nations."[26]

In a separate dissenting opinion, Justice Alito signaled the fraught position in which current ATS jurisprudence finds itself.[27] In addressing the "merits" debate, Justice Alito wrote that "if a particular claim may be brought under the ATS against a natural person who is a United States citizen, a similar claim may be brought against a domestic corporation."[28] However, in likening the outcome in *Nestlé* to an unconstitutional "advisory opinion," Justice Alito signaled that a reckoning with the ATS may be imminent. "A decision begins to take on the flavor of an advisory opinion," he wrote, "when it is necessary to make so many important assumptions in order to reach the question that is actually resolved."[29]

Over forty years have passed since the Second Circuit's ruling in *Filártiga*, yet the two Core Controversies are no closer to being settled. Instead, the *Nestlé* decision provided the clearest indication of the Supreme Court's willingness to cut its losses, avoid resolving these issues, and close the door to ATS claims forevermore. But this pivot to a form of constitutional and statutory avoidance—where a lack of analytical clarity combined with prudential difficulty results in the affirmative negation of ATS jurisprudence altogether—cannot suffice in today's interconnected world. With the fate of transnational human rights litigation in U.S. courts hanging in the balance, the central question must be asked: Is there a "correct" or "best" way to set the ATS on a new course of clarity?

This Article answers in the affirmative, advancing a jurisprudential theory to resolve the two Core Controversies. The "law as integrity" theory is a non-positivist approach to understanding the ATS.[30] Its central premise states that

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23. *Id.* at 646 (Sotomayor, J., concurring).
24. *Id.* (Sotomayor, J., concurring) (quoting *Kiobel*, 569 U.S. at 115 (quoting *Sosa*, 542 U.S. at 724)).
25. *Id.* at 649 (Sotomayor, J., concurring).
26. *Id.* at 650 (Sotomayor, J., concurring) (quoting *Sosa*, 542 U.S. at 719).
27. *Id.* at 657 (Alito, J., dissenting).
28. *Id.* (Alito, J., dissenting).
29. *Id.* at 658 (Alito, J., dissenting).
30. The "law as integrity" theory of the ATS falls under the general rubric of "non-positivist" theories of law, notably that of Ronald Dworkin, who in his later work argued that "integrity" is the outcome of the proper balance of fit and moral value. *See* RONALD DWORKIN, LAW'S EMPIRE 12–18 (Harv. Univ. Press

the ATS consists of rules, standards, and principles, which work cohesively to establish the statute's limits and latitudes. "Rules" are incontrovertible if/then commands that exist in the statute's text.[31] "Standards" are terms of art placed within the text that require evaluative judgment from sources outside the immediate text.[32] "Principles" are the underlying value propositions that inform the statute's history and objectives.[33] By disaggregating the rules, standards, and principles into a cohesive framework, law as integrity supplies the analytical clarity and interpretive consistency that reconciles the original intent and evolution of ATS jurisprudence from its 18th Century origins up unto contemporary legal thought.

In resolving the two Core Controversies through the lens of law as integrity, this Article argues that federal courts *can* use their common law power to recognize causes of action pursuant to the "tort . . . in violation of the law of nations" standard, limited to claims between "aliens" (foreign nationals) and U.S. citizens (persons and entities). This reconciles the objectives of the First Congress and the strictures of "alienage jurisdiction" under Article III of the U.S. Constitution, which extends the judicial power to controversies "between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."[34] Put simply, law as integrity confirms that the ATS is *both* a jurisdictional grant and the textual source for a cause of action.[35] In advancing ATS jurisprudence going forward, federal courts must discharge the "dual role" of *outwardly* examining sources of "customary international law" (i.e., the modern analog to the Law of Nations) to determine whether a new cause of action exists under the "tort . . . in violation of the law of nations" standard, and *inwardly* fashioning a limited body of common law to create uniform rules of decision with respect to secondary doctrines such as "aiding and abetting" liability, the presumption against extraterritoriality, and damages remedies. Law as integrity enables federal courts to meet their institutional responsibilities in shaping a limited area of federal common law that meets the objectives of the First Congress while addressing modern controversies in the Law of Nations.

With the above in mind, this Article proceeds along the following lines. Section One provides a critical re-examination of the "modern line" of ATS

1986). *See also* Cass R. Sunstein, *Rules and Rulelessness* 27, 4–5 (Coase-Sandor Inst. for L. & Econ., Working Paper No. 27, 1994) ("The key characteristic of rules is that they specify outcomes before particular cases arise. Rules are defined by the ex ante character of law.").

31. Ronald Dworkin, Taking Rights Seriously 14, 24 (1977); *see also* Sunstein, *supra* note 30, at 4–6.

32. *See* Kathleen M. Sullivan, *The Supreme Court 1991 Term Forward: The Justices of Rules and Standards*, 106 Harv. L. Rev. 22, 58–59 (1992–1993) ("A legal directive is 'standard'-like when it tends to collapse decision making back into the direct application of the background principle or policy to a fact situation. . . . Standards allow the decision maker to take into account all relevant factors or the totality of the circumstances."); *see also* Sunstein, *supra* note 30, at 8–9 (for rules).

33. *See* Sunstein, *supra* note 30, at 9–11 (for rules).

34. U.S. Const. art. III, § 2.

35. The jurisdiction-substance relationship of the ATS should be analogized to the Supreme Court's interpretation of § 301 of the Taft-Hartley Act in *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 456 (1957) (holding that a grant of jurisdiction to the federal courts concerning labor disputes also supplied the capacity for federal courts to create new forms of substantive law).

jurisprudence to explain how the two Core Controversies arose. Section Two expands on the "law as integrity" theory by disaggregating and evaluating the rules, standards, and principles of the ATS. Section Three evaluates the first Core Controversy, namely whether the ATS is strictly jurisdictional or enables courts to fashion a limited realm of federal common law. As explained above, this section argues that federal courts can create causes of action under the "tort . . . in violation of the law of nations" standard. Section Four analyzes the second Core Controversy, namely whether the ATS facilitates a form of "universal jurisdiction" or is limited to "sovereign-specific" causes of action. Critically, the "tort . . . in violation of the law of nations" standard is analytically distinct from the Law of Nations as a general set of rules and principles governing comity among nation-states.[36] Lastly, Section Five explains federal courts' "dual role" in developing ATS jurisprudence going forward.

I. Analysis of the "Modern Line" of ATS Jurisprudence

There are six major decisions in the "modern line" of ATS jurisprudence.[37] While it is unnecessary to outline the complete procedural history of each case, this Section will instead focus on four factors necessary to advance the discussion: the category of parties involved, the claims asserted, the court's holding, and any outstanding issues left unattended.

But beyond these factors, analyzing the modern line is relevant for two other reasons. For one, throughout the nation's history the ATS was hardly, if ever, invoked.[38] For nearly 200 years it lay dormant, collecting dust in the

36. The proper noun, "Law of Nations," generally refers to the body of rules and norms governing interactions among nation states. In a historical lens, this refers to *jus gentium*, defined as the general set of legal norms and principles that apply universally to all nations, prompting justice and order in international relations, *see, e.g.*, Hugo Grotius, On the Law of War and Peace 37 (Stephen C. Neff trans., Cambridge U. Press 2012). In a modern lens, "Law of Nations" means "customary international law," understood as a set of legal rules established by the consistent actions of nation-states, *see, e.g.*, Section 102 of the Restatement (Third) of Foreign Relations § 102 (defining customary international law as "a general and consistent practice of states followed by them from a sense of legal obligation"). By contrast, the lower-case phrase "law of nations" refers to the textual "standard" placed within the ATS as articulated by the "law as integrity" theory. This is discussed in Section IV, *infra*, noting the distinction between the "Law of Nations" as interpreted in the *The Paquete Habana*, 175 U.S. 677 (1900) versus the "law of nations" textual standard as interpreted in *United States v. Smith*, 18 U.S. 153 (1820).

37. Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980); Tel-Oren v. Libyan Arab Republic, 726 F.2d 775 (D.C. Cir. 1984); *Sosa*, 542 U.S.; Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013); Jesner v. Arab Bank, PLC, 584 U.S. 408 (2018); *Nestlé*, 593 U.S. 628 (2021).

38. Prior to the modern line, the Alien Tort Statute had been rarely invoked. *See generally* Bolchos v. Darrel, 3 F. Cas. 810 (D.S.C. 1795) (No. 1607) (granting jurisdiction in a case involving a French captain attempting to recover a cargo of slaves he had captured along with a Spanish prize vessel); Adra v. Clift, 195 F. Supp. 857 (D. Md. 1961) (granting jurisdiction in a case involving the use of forged passports in an international child custody dispute). *See also* Bellia Jr. & Clark, *supra* note 8, at 457 ("In hindsight, it may not be surprising that aliens rarely, if ever, invoked ATS jurisdiction throughout most of US history. There is evidence that, over time, state court discrimination against aliens dissipated, many loyalists assimilated into the US population, and state courts became convenient venues for tort litigation. In practice, the ATS remained a little-used—but symbolically important—backstop, authorizing redress of law of nations violations whenever state courts, federal criminal prosecutions, or extradition proceedings failed to provide it.").

annals of legislative attics.[39] As a result, there is limited case law from which to draw insight. Today, competing interpretations of the ATS more often than not turn on ideological and doctrinal preferences rather than anything bordering clear understanding. While Section Two will address early cases in an effort to ascertain difficulties faced in the pre-modern period, understanding the modern line helps sharpen our understanding of how current doctrine evolved to where it is today.

A second reason is to gain insight into how the two Core Controversies came about. Consider a generalized trajectory of an ATS case before reaching the Supreme Court. A complaint with particularized facts is filed in federal district court and an Article III judge issues their ruling. The facts from that case become crystallized in the record, limiting any appeals to the "legal question" at hand. By the time the case reaches the Supreme Court (a rare feat in itself), briefs have been filed and legal questions have been narrowed. The Court then addresses these arguments in oral proceedings. Although it can (and often does) use its institutional position to invalidate legal doctrine beyond the immediate case before it,[40] the practical politicking of the Supreme Court often relegates majority holdings and opinions to what can garner a majority of votes.[41] This has resulted in the two-tiered debate, where the merits of the case before it are decided, yet the foundational questions are left unaddressed. Put simply, there has never been a case before the Supreme Court that asks the direct question: How does the ATS work?[42] As a result, ATS doctrine has developed within the narrow contours of each case.

Filártiga*'s Great Dilemma and the Road to* Sosa

Discussion of the modern line begins in 1980 when the U.S. Court of Appeals for the Second Circuit issued its seminal ruling in *Filártiga v. Peña-Irala*.[43] There, two Paraguayan citizens who had sought political asylum in the United States (Dolly and Dr. Joel Filártiga) brought an action against the former

39. Taveras v. Taveraz, 477 F.3d 767, 771 (6th Cir. 2007) ("During the first 191 years of its existence, the ATS lay effectively dormant. In fact, during the nearly two centuries after the statute's promulgation, jurisdiction was maintained under the ATS in only two cases.").

40. For example, in its now infamous *Citizens United* decision, the Supreme Court expressly overruled *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990). The Court did this by independently requesting supplemental briefs addressing whether it should overrule *Austin v. Michigan Chamber of Commerce*, indicating its willingness to go beyond the as-applied challenge before it in *Citizens United*. *See* William N. Eskridge Jr. et al., Cases and Materials on Legislation and Regulation: Statutes and the Creation of Public Policy 224 (6th ed. 2020).

41. See Forrest Maltzman et al., Crafting Law On The Supreme Court: The Collegial Game 8 (Cambridge Univ. Press 2000) ("Because outcomes on the Supreme Court depend on forging a majority coalition that for most cases must consist of at least five justices, there is good reason to expect that final Court opinions will be the product of a collaborative process, what we call the collegial game.").

42. Justice Kennedy addressed this conundrum in *Kiobel*. There, he wrote that it is the "proper disposition" for the majority to "leave open a number of significant questions regarding the reach and interpretation" of the ATS that will require elaboration in the future. *Kiobel*, 469 U.S. at 125. Effectively, Justice Kennedy is arguing that the Court should think through the statute in its entirety before making fundamental decisions on what it means or how it applies.

43. *Filártiga*, 630 F.2d.

Inspector General of Police of Paraguay (also a citizen of Paraguay), who was living in New York after the fact, alleging that he kidnapped, tortured, and killed Plaintiffs' relative in retaliation for their family's support of a political opposition party.[44] Plaintiffs invoked jurisdiction under, among other provisions, the ATS (28 U.S.C. § 1350). The Eastern District of New York (E.D.N.Y.) dismissed the action for want of jurisdiction, on the ground that violations of the law of nations "do not occur when the aggrieved parties are nationals of the acting state."[45] In dismissing the case, the district court relied on what it deemed binding precedent suggesting the ATS did not encompass claims involving a country's treatment of its own citizens.[46]

Yet the Second Circuit reversed and remanded, concluding that the prior precedent was "clearly out of tune with the current usage and practice of international law."[47] Instead, the Second Circuit held that "deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, *regardless of the nationality of the parties*," and that 28 U.S.C. § 1350 gave jurisdiction over an action asserting such a tort committed in violation of the law of nations (emphasis added).[48] The Second Circuit found that the alleged acts constituted, by the "general assent of civilized nation[s]," a "clear and unambiguous" violation of the law of nations.[49] Judge Kaufman wrote that federal courts applying the ATS "must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today."[50] Lastly, the Second Circuit suggested that violations of the law of nations "arise under . . . the Laws of the United States" for purposes of Article III, analogizing the ATS to a prior decision of the Supreme Court which found federal common law to "arise under the . . . laws . . . of the United States" under the Federal Question Jurisdiction statute.[51] In doing so, the Second Circuit asserted that the law of nations has "always been part of the federal common law."[52]

The significance of *Filártiga* cannot be overstated. Its impact was unprecedented. A leading scholar hailed *Filártiga* as the "*Brown v. Board of Education* of human rights," which "inaugurated the era of transnational public law

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44. *Id.* at 878.

45. Filártiga v. Peña-Irala, 577 F. Supp. 860, 861 (E.D.N.Y. 1984) (quoting Dreyfus v. von Finck, 534 F.2d 24, 31 (2d Cir. 1976)).

46. *Id.* (citing IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975) ("While every civilized nation doubtless has this as a part of its legal system, a violation of the law of nations arises only when there has been 'a violation by one or more individuals of those standards, rules or customs (a) affecting the relationship between states or between an individual and a foreign state, and (b) used by those states for their common good and/or in dealings inter se."); Dreyfus v. von Finck, 534 F.2d 24, 31 (2d Cir. 1976) (finding no international law violation where "aggrieved parties are nationals of the acting state. . . .").

47. *Filártiga*, 630 F.2d at 884.

48. *Id.* at 878.

49. *Id.* at 884.

50. *Id.* at 881.

51. *Id*. at 886 (citing Illinois v. Milwaukee, 406 U.S. 91, 98–100 (1972) (holding that claims based on federal common law "aris[e] under the . . . laws . . . of the United States" for purposes of statutory federal question jurisdiction).

52. *Id.* at 885–86.

litigation in which we now live."[53] Another wrote that since *Filártiga*, "the ATS has garnered worldwide attention and has become the main engine for transnational human rights litigation in the United States."[54] By recognizing torture as a cause of action under the ATS and enabling a suit between non-U.S. citizens to proceed in federal court, *Filártiga* represented a break from historical practice, establishing federal courts' power to create common law causes of action in the arena of foreign affairs, domains traditionally left to the political branches.[55]

But for all of its many insights, the *Filártiga* episode raised inescapable questions. First, was reference to the "arising under" provision of Article III the proper constitutional basis for ATS claims?[56] Second, what was the precise relationship between international law and federal common law?[57] Third, could ATS claims proceed in federal court when the events giving rise to the action occurred abroad and/or were unconnected to the United States?[58] One scholar echoed the uncertainty of *Filártiga* three decades later, writing that "what struck many commentators . . . was that it involved events with seemingly no relation to U.S. actors or territory."[59] Although Peña-Irala was living in New York on an expired visa at the time the complaint was filed, which supplied personal jurisdiction, the ATS claims had no relation to any U.S. government actor or agency, U.S. citizen, or U.S. entity.[60] The question of subject-matter jurisdiction became difficult to square. These questions are just as prevalent today as they were to the Second Circuit in 1980.

The Second Circuit gave nominal attention to the first question, writing that "enactment of the Alien Tort Statute . . . was authorized by Article III of the Constitution dealing with jurisdiction of federal courts."[61] However, it did not

53. Harold Hongju Koh, *Transnational Public Law Litigation*, 100 Yale L.J. 2347, 2366 (1991).

54. Ingrid Wuerth, *The Supreme Court and the Alien Tort Statute: Kiobel v. Royal Dutch Petroleum Co.*, 107 Am. J. Int'l L. 601, 601 (2013).

55. Richard L. Herz, *The Liberalizing Effects of Tort: How Corporate Complicity Liability Under the Alien Tort Statute Advances Constructive Engagement*, 21 Harv. Hum. Rts. J. 207, 225 (2008) ("[W]here the political branches have made the broad determination that constructive engagement is the most effective policy for encouraging democratic reform and respect for human rights in a particular nation, ATS complicity liability serves a vital role; it ensures on a case-by-case basis that individual corporations are held accountable on a case-by-case basis if they subvert that policy by aiding and abetting human rights abuses.").

56. *See, e.g.*, Donald Francis Donovan & Anthea Roberts, *The Emerging Recognition of Universal Civil Jurisdiction*, 100 Am. J. Int'l. L. 142, 146–48 (2006) (defending the role of the ATS as a form of universal civil jurisdiction).

57. On remand, the E.D.N.Y granted default judgment against Peña-Irala, who took no further part in the action. *See* Filártiga v. Peña-Irala, 577 F. Supp. 860, 861–62 (E.D.N.Y. 1984). Notably, the E.D.N.Y. held that it should "determine the substantive principles to be applied by looking to international law, which, as the Court of Appeals stated, 'became a part of the common law of the United States upon the adoption of the Constitution." *Id.* at 863. The early allusion to federal courts' dual role is discussed in Section Five.

58. Balintulo v. Daimler AG, 727 F.3d 174, 179 (2d Cir. 2013) (describing the ATS as "a statute, passed in 1789, that was rediscovered and revitalized by the courts in recent decades to permit aliens to sue for alleged serious violations of human rights occurring abroad").

59. Stephen J. Schnably, *The Transformation of Human Rights Litigation: the Alien Tort Statute, the Anti-Terrorism Act, and JASTA*, 24 U. Miami Int'l & Compar. L. Rev. 285, 290 (2017).

60. *Filartiga*, 630 F.2d at 879.

61. *Id.* at 886.

specify under which clause the ATS fell.[62] It cited two cases relying on Federal Question Jurisdiction under 28 U.S.C. § 1331(a), but it never directly affirmed a similar basis for the ATS, 28 U.S.C. § 1350.[63] While this strongly suggests the Second Circuit implied "arising under" jurisdiction from Article III § 2,[64] it left matters unclear, writing that "the law of nations forms an integral part of the common law, and a review of the history surrounding the adoption of the Constitution demonstrates that it became a part of the common law of the United States upon the adoption of the Constitution."[65]

To the second question, the Second Circuit failed to expressly clarify whether any distinction existed between the Law of Nations as a general concept versus the law of nations language within the ATS itself.[66] The implications of this oversight are enormous. For on one account, *Filártiga* opened the door to a *civil* form of "universal jurisdiction," a principle of international law that recognizes certain crimes as so serious that the duty to prosecute them transcends all borders.[67] Overnight, the Second Circuit enabled "*jus cogens*" or "peremptory norms" to be litigated under the ATS.[68] Despite this lack of clarity, the statute suddenly took on an expansive character, operating as a vehicle for adjudicating civil claims between non-U.S. citizens that were specific and universal enough to merit justiciability.

By implication, it could be argued that the Second Circuit in *Filártiga* addressed the third question by allowing a controversy to proceed pursuant to

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62. *Id.* at 885–86.

63. *Id.* (citing Illinois v. City of Milwaukee, 406 U.S. 91, 99–100 (1972), *superseded by statute*, *as recognized in* American Elec. Power Co., 564 U.S. 410 (2011), and Ivy Broadcasting Co., Inc. v. American Tel. & Tel. Co., 391 F.2d 486, 492 (2d Cir. 1968)).

64. U.S. Const. art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority. . . .").

65. *Filártiga*, 630 F.2d at 886.

66. The Second Circuit referenced the notorious *The Paquete Habana*, 175 U.S., for the well-known axiom, "United States courts are 'bound by the law of nations, which is a part of the law of the land.'" *Id.* at 887. It also cited *United States v. Smith*, 18 U.S. 153, 158–60 (1820) to counteract the argument that the Congress needed to expressly define the law of nations in order for it to be actionable. *Id.* Section IV addresses the distinction between *The Paquete Habana* and *United States v. Smith* with respect to two distinct layers of the Law of Nations.

67. *Basic Facts on Universal Jurisdiction,* Human Rts. Watch, (October 19, 2009) https://www.hrw.org/news/2009/10/19/basic-facts-universal-jurisdiction [https://perma.cc/7VLA-NJ6X] ("Universal jurisdiction is the ability of the domestic judicial systems of a state to investigate and prosecute certain crimes, even if they were not committed on its territory, by one of its nationals, or against one of its nationals (i.e., a crime beyond other bases of jurisdiction, such as territoriality or active/passive personality)."); *see also* Ernest A. Young, *Universal Jurisdiction, The Alien Tort Statute, And Transnational Public-Law Litigation After* Kiobel, 64 Duke L.J. 1023, 1026 (2015) ("The *Filártiga* line of cases employed the ATS as a form of civil-side universal jurisdiction, offering recourse against serious violators of international law despite the absence, in many if not most cases, of any significant connection between the parties or events in issue and the United States.").

68. United Nations, Chapter V, Peremptory norms of general international law (jus cogens) (norms accepted and recognized by the international community of States from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character). U.N. Int'l Law Comm'n, Peremptory Norms of General Int'l Law (Jus Cogens), Ch. V, in Rep. on the Work of Its Seventy-First Session, U.N. Doc. A/74/10 (2019), https://legal.un.org/ilc/reports/2019/english/chp5.pdf [https://perma.cc/824S-Z8GX].

"universal jurisdiction" between two citizens of Paraguay, while failing to make clear what constitutional source generated this implied grant of jurisdiction. With the Supreme Court denying certiorari, these issues lingered unresolved.

Tel-Oren *and the Cause of Action*

While the first Core Controversy lingered in the background, the makings for the second took to the fore. Could a cause of action be invoked under the ATS at all, or was separate legislation necessary to create an express cause of action?

This second "Core Controversy" was directly addressed four years after *Filártiga*, in a case before the D.C. Circuit. In *Tel-Oren v. Libyan Arab Republic*, plaintiffs, Israeli citizens who were survivors and representatives of persons killed in an armed terrorist attack on a civilian bus in Israel, brought an action in district court against the Libyan Arab Republic, the Palestinian Liberation Organization (PLO), and other institutions who allegedly orchestrated the attack.[69] Plaintiffs claimed that defendants were responsible for multiple tortious acts in violation of the law of nations, treaties of the United States, and criminal laws of the United States, as well as the common law.[70] Similar to *Filártiga*, *Tel-Oren* was a suit between non-U.S. citizens concerning activities that occurred outside of U.S. territory. The district court dismissed the action for lack of subject-matter jurisdiction and as barred by the applicable statute of limitations.[71] Plaintiffs appealed on two of the claimed jurisdictional bases—federal question jurisdiction and the ATS—in addition to the statute of limitations issue.[72]

In a per curiam opinion the D.C. Circuit unanimously affirmed the district court's dismissal for lack of subject-matter jurisdiction and as barred by the statute of limitations.[73] While the facts are worth reviewing in full, this Article will focus on the two concurring opinions of Judge Edwards and Judge Bork. Unknown to them at the time, both opinions would come to shape the analytical framework of the current ATS debate.

At the outset, Judge Edwards made his position clear. "This case deals with an area of the law that cries out for clarification by the Supreme Court."[74] But on his own account, Judge Edwards found the "legal principles" in *Filártiga* to be "more faithful to the pertinent statutory language and to existing precedent."[75] These principles were the evolutionary nature of the law of nations; the relevance of customs and usages of civilized nations as a source of identifying the substantive law of nations; the limitations that international law placed on

69. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984).

70. *Id.* at 775. Plaintiffs sought jurisdiction under federal question jurisdiction (28 U.S.C. § 1331); diversity jurisdiction (28 U.S.C. § 1332); the Alien Tort Statute (28 U.S.C. § 1350); and the Foreign Sovereign Immunities Act (28 U.S.C. § 1330).

71. Tel-Oren v. Libyan Arab Republic, 517 F. Supp. 542 (D.D.C. 1981).

72. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 775 (D.C. Cir. 1984).

73. *Id.*

74. *Id.* (Edwards, J., concurring)

75. *Id.* at 775 (Edwards, J., concurring).

a state's power to torture persons held in custody; and the idea that the ATS "opens the federal courts for adjudication of the rights already recognized by international law."[76] Judge Edwards declined to "extend *Filártiga*'s construction of section 1350" to encompass the case before the D.C. Circuit—drawing a factual distinction between liability against states and persons acting under color of state law (i.e., the situation in *Filártiga*'s) versus against non-state actors, such as the PLO (the context in *Tel-Oren*).[77] Yet he endorsed the Second Circuit's position that the ATS did not require plaintiffs to point to a "specific right to sue under the law of nations" in order to establish jurisdiction, but required only a "showing that the defendant's actions violated the substantive law of nations."[78] Put simply, Judge Edwards asserted that although the law of nations never required specific articulation of an actionable right, it provided the substance from which the United States could determine how best to facilitate these particular violations.[79]

In support of his argument, Judge Edwards cited a well-known 1907 legal opinion of the U.S. Attorney General, who, with respect to remedies available to Mexican citizens harmed by the actions of an American irrigation company along the Rio Grande River, pointed out that "section 1350 provides *both a forum and a right of action*" (emphasis added).[80]

By sharp contrast, Judge Bork concluded that the ATS is a purely jurisdictional statute that does not create a cause of action.[81] Guided "chiefly by separation of powers principles," namely the Political Question Doctrine[82] over the arena of foreign affairs, Judge Bork wrote that "we should not, in an area such as this, infer a cause of action not explicitly given."[83] As Judge Bork wrote, "neither the law of nations nor any of the relevant treaties provides a cause of

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76. *Id.* at 777 (Edwards, J., concurring).

77. *Id.* at 776–77 (Edwards, J., concurring).

78. *Id.* at 777 (Edwards, J., concurring).

79. *Id.* at 778 (Edwards, J., concurring) ("The law of nations thus permits countries to meet their international duties as they will.") (citing L. Henkin R. Pugh, O. Schacter & H. Smith, International Law 116 (1980); *cf.* 1 C. Hyde, International Law 729 n.5 (2d rev. ed. 1945)).

80. 26 Op. Att'y Gen. 250, 252–53 (1907) ("As to indemnity for injuries which may have been caused to citizens of Mexico, I am of opinion that existing statutes provide a right of action and a forum. Section 563, Revised Statutes, clause 16, gives to district courts of the United States jurisdiction 'of all suits brought by any alien for a tort only in violation of the law of nations or of a treaty of the United States.' . . . I repeat that the statutes thus provide a forum and a right of action. I can not, of course, undertake to say whether or not a suit under either of the foregoing statutes would be successful. That would depend upon whether the diversion of the water was an injury to substantial rights of citizens of Mexico under the principles of international law or by treaty, and could only be determined by judicial decision.").

81. *Tel-Oren*, 726 F.2d at 801 (Bork, J., concurring) ("[I]t is essential that there be an explicit grant of a cause of action before a private plaintiff be allowed to enforce principles of international law in a federal tribunal.").

82. The idea being that issues touching upon "foreign affairs" should be exclusively decided by the Executive and Legislative branches. *See* Erwin Chemerinsky, Federal Jurisdiction, 164 (8th ed. Aspen 2020). Political Question Doctrine refers to subject matter that the Court deems inappropriate for judicial review. Under PQD, federal courts should "not rule on certain allegations of unconstitutional government conduct even though all of the jurisdictional and other justiciability requirements [Standing, Ripeness, Mootness] are met." Thus, constitutional interpretation in these areas should be left to the "politically accountable branches" of government.

83. *Tel-Oren*, 726 F.2d at 798 (Bork, J., concurring).

action that appellants may assert in courts of the United States."[84] For Judge Bork, it was essential "that there be an explicit grant of a cause of action before a private plaintiff be allowed to enforce principles of international law in a federal tribunal."[85] Notably, Judge Bork introduced the Blackstone "historical torts" into the ATS lexicon, three Law of Nations offenses identified in William Blackstone's leading 18th Century treatise, *Commentaries on the Laws of England*, that was in circulation at the time the First Congress enacted the original alien tort clause of Section 9 of the Judiciary Act of 1789. In declining to acknowledge the possible evolutionary nature of international law, Judge Bork limited ATS claims to those three substantive offenses recognized by Blackstone—violation of safe conducts, infringement of the rights of ambassadors, and piracy.[86] Like Judge Edwards, Judge Bork agreed that "the meaning and application of section 1350 will have to await clarification elsewhere."[87]

For better or worse, these two concurring opinions have formed the argumentative bookends relevant to contemporary ATS debate. For Judge Edwards, a cause of action could be recognized under the ATS, supplied by substantive sources of customary international law that evolve over time. For Judge Bork, the ATS required an explicit textual grant before any cause of action could be involved. As Judge Bork argued, if any causes of action existed under the ATS, they must be limited to the three Blackstone torts acknowledged at the time the original ATS was passed. Neither *Filártiga* nor *Tel-Oren* were granted certiorari by the Supreme Court, leaving the state of ATS jurisprudence and the resolution of the two Core Controversies in grave doubt.

*The "*Sosa*" Doctrine and the Beginning of Two "Core Controversies"*

The twenty-year period after *Filártiga* and *Tel-Oren* was one of transformation and uncertainty.[88] The questions of universal jurisdiction and the common law cause of action left lower courts without firm ground to stand on. New causes of action were brought under the ATS, and new doctrines filled lacunas. Calls for Supreme Court intervention continued to mount. The high court finally took up the task.

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84. *Id.* (Bork, J., concurring).
85. *Id.* at 801 (Bork, J., concurring).
86. *Id.* at 798–801 (Bork, J., concurring).
87. *Id.* at 823 (Bork, J., concurring).
88. *See, e.g.*, Amerada Hess Shipping Corp. v. Argentine Republic, 488 U.S. 428 (1989) (Alien Tort Statute does not grant jurisdiction over foreign sovereigns independently of the FSIA); *In re* Estate of Ferdinand Marcos, Human Rights Litigation, 25 F.3d 1467, 1474–75 (9th Cir. 1994) ("[A]ctionable violations of international law must be of a norm that is specific, universal, and obligatory."); Hamid v. Price Waterhouse, 51 F.3d 1411 (9th Cir. 1995) (fraud, breach of fiduciary duty, and fund misappropriation are not valid claims under the ATS for establishing jurisdiction or a cause of action); Kadic v. Karadžić, 70 F.3d 232 (2d Cir. 1995) (to establish jurisdiction under the ATS, a complaint must allege violations of universal international law, regardless of whether the acts are committed by state actors or private individuals); Beanal v. Freeport-McMoran, Inc., 197 F.3d 161 (5th Cir. 1999) (alleged mining activities constituting environmental torts or abuses, are not universally accepted violations of international law and therefore the ATS jurisdiction is inapplicable until such universal concern arises); Flores v. S. Peru Copper Corp., 414 F.3d 233 (2d Cir. 2003) (a right to health and life, and intranational pollution are too vague to be considered violations of customary international law and do not support ATS jurisdiction).

In 2004 the Supreme Court issued its seminal decision in *Sosa v. Alvarez-Machain*, a case from which the two Core Controversies took on their current doctrinal character.[89] The case grew out of an episode between agents of the Drug Enforcement Agency (DEA), who approved using petitioner Sosa and other Mexican nationals to abduct respondent Alvarez-Machain, a Mexican national, from Mexico to stand trial in the U.S. for a DEA agent's torture and murder.[90] After Alvarez-Machain was acquitted, he sued the U.S. for false arrest under the Federal Tort Claims Act (FTCA)[91] and sued Sosa directly for violations of the law of nations under the ATS.[92] The district court dismissed the FTCA claim but awarded Alvarez-Machain summary judgment and damages as to the ATS claim. On appeal, the Ninth Circuit overruled the district court's FTCA decision, finding that the DEA could not authorize a citizen's arrest of Alvarez-Machain in Mexico and was therefore liable.[93] As to the ATS claim, the Ninth Circuit affirmed the lower court's conclusion, upholding the ruling against Sosa.

The Supreme Court granted certiorari and two questions were asked: (1) Does the ATS permit private individuals to bring suit against foreign citizens for crimes committed in other countries in violation of the law of nations or treaties of the United States?; and (2) May an individual bring suit under the Federal Tort Claims Act for a false arrest that was planned in the United States but carried out in a foreign country? While the *Sosa* opinion brings many themes full circle, its lasting reputation is its ability to confound. The *Sosa* Court followed the two-tiered merits versus non-merits debate all the way through.

Turning to the ATS claim, Justice Souter, writing for the majority in a 6-3 decision, found that Alvarez-Machain's single illegal detention, of less than one day, and subsequent transfer to lawful authorities in the U.S. for prompt arraignment, "violated no norm of customary international law so well defined" as to support creation of cause of action under the ATS.[94] Thus, the first-tier merits debate was decided.

But true to fashion, the most important non-merits discussion in the history of the ATS took shape. To start, Justice Souter's majority opinion aligned with Judge Bork's concurring opinion in *Tel-Oren*, declaring the ATS to be a "jurisdictional statute creating no new causes of action."[95] The Court found it "implausible" that the ATS was intended for anything beyond a jurisdictional

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

90. *Id.* at 692.

91. The FTCA waives sovereign immunity in suits "for . . . personal injury . . . caused by the negligent or wrongful act or omission of any [Government] employee while acting within the scope of his office or employment." 28 U.S.C. § 1346(b)(1).

92. *Sosa*, 542 U.S. at 692.

93. Alvarez-Machain v. United States, 331 F.3d 604 (9th Cir. 2003).

94. *Sosa*, 542 U.S. at 692.

95. *Id.* at 724 ("In sum, although the ATS is a jurisdictional statute creating no new causes of action, the reasonable inference from the historical materials is that the statute was intended to have practical effect the moment it became law. The jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time.").

grant, let alone an authority for the creation of a new cause of action for torts in violation of international law."[96] The Court reasoned that the ATS being written in jurisdictional language, and originally enacted as Section 9 of the Judiciary Act of 1789, confirmed its "strictly jurisdictional nature."[97] The Court relied on a well-known article from Professor Casto, which deemed any "contrary suggestion" that the ATS created a statutory cause of action as "simply frivolous."[98]

Normally this would close the matter altogether. But surprisingly the Court hedged, laying the groundwork for the two Core Controversies we know today. As Justice Souter put it, "holding the ATS jurisdictional raises a new question, this one about the interaction between the ATS *at the time of its enactment* and the ambient law of the era" (emphasis added).[99] In other words, the Court elected to examine the history of the ATS when it was originally passed and the status of the law of nations during that same period. The Court cited the position of professors of federal jurisdiction and legal history, who submitted an *amicus curiae* arguing that federal courts could entertain claims once the jurisdictional grant was on the books, because torts in violation of the law of nations would have been recognized within the common law of the time.[100] As Justice Souter wrote, "we think history and practice give the edge to this latter position."[101]

But what was this "ambient" law of the era to which the *Sosa* Court referred? This involved at least three distinct threads of the law of nations as it related to 18th Century United States.

In the first thread, the Court affirmed that the United States, upon declaring its independence, was "bound to receive the law of nations."[102] "In the early years of the republic," Justice Souter wrote, the law of nations "comprised two principal elements . . . the first covering the 'general norms governing the behavior of national states with each other'[103] or 'that code of public instruction which defines the rights and prescribes the duties of nations, in their intercourse with each other.'"[104] In other words, the first thread comprised the general norms of the Law of Nations. The second thread was a body of "judge-made law regulating the conduct of individuals situated outside domestic boundaries" with an international character such as "mercantile questions . . .

96. *Id.* at 711.

97. *Id.* at 711–13. The Court referenced Congressman Fisher Ames for the proposition that someone who voted on the First Judiciary Act clearly understood the difference between jurisdiction and cause of action. ("As Fisher Ames put it, 'there is a substantial difference between the jurisdiction of the courts and the rules of decision.'" 1 Annals of Cong. 807 (Gales ed. 1834)).

98. Casto, *supra* note 6, at 479–80 (1986); *cf.* William S. Dodge, *The Constitutionality of the Alien Tort Statute: Some Observations on Text and Context*, 42 VA. J. INT'L L. 687, 689 (2002).

99. *Sosa*, 542 U.S. at 714.

100. Brief for Vikram Amar et al. as Amici Curiae Supporting Respondents, Sosa v. Alvarez-Machain, 542 U.S. 692 (2004), 2004 WL 419425 at 27–28.

101. *Sosa*, 542 U.S. at 714.

102. *Id.*

103. *Id.* (citing E. de Vattel, Law of Nations, Preliminaries § 3 (J. Chitty et al. transl. and ed. 1883) (law of nations as "the science which teaches the rights subsisting between nations or states, and the obligations correspondent to those rights")). *See* discussion of Vattel in the ATS context *infra* Section V.

104. *Id.*

disputes relating to prizes, shipwreck, to hostages, and ransom bills."[105] From these ideas, the Court noted, came the Supreme Court's 1900 holding in *The Paquete Habana*, which ruled directly on the "status of coast fishing vessels in wartime" growing from "ancient usage among civilized nations . . . gradually ripening into a rule of international law. . . ."[106]

In the third thread, the Court referred to a "sphere in which these rules binding individuals for the benefit of other individuals overlapped with the norms of state relationships," pointing to "three specific offenses against the law of nations addressed by the criminal law of England" as referenced by Blackstone in his 18th Century treatise, *Commentaries on the Laws of England*: violation of safe conducts, infringement of the rights of ambassadors, and piracy.[107] As Justice Souter wrote, "it was this narrow set of violations of the law of nations, admitting of a judicial remedy and at the same time threatening serious consequences in international affairs, that was *probably* on minds of the men who drafted the ATS with its reference to tort" (emphasis added).[108] To these "hybrid international norms," the Court referenced James Madison's Journal of the Constitutional Convention, which expressed worry that the newly independent United States would be hamstrung by its inability to "cause infractions of treaties, or of the law of nations to be punished."[109] The Court referenced, as an historical example of the Continental Congress's inability to deal with this class of cases, the so-called "Marbois incident" in May 1784, where a French adventurer, De Longchamps, verbally and physically assaulted the Secretary of the French Legion in Philadelphia.[110] According to the *Sosa* Court, the Framers responded to the controversies of the Marbois incident by vesting the Supreme Court with original jurisdiction over "all Cases affecting Ambassadors, other public ministers and Consuls."[111]

Therefore, based upon this historical analysis of the "ambient law of the era," the *Sosa* Court reached its fundamental paradox. As Justice Souter wrote, "although the ATS is a jurisdictional statute creating no new causes of action, the reasonable inference from the historical materials is that the statute was intended to have practical effect the moment it became law."[112] Thus, this jurisdictional grant is "best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time."[113]

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105. *Id.* at 715. The Court is referring here to the "law merchant," which "emerged from the customary practices of international traders and admiralty" that required its own transnational regulation.

106. *Id.* (quoting *The Paquete Habana*, 175 U.S. at 686).

107. *Id.* (citing Blackstone, Commentaries 4).

108. *Id.*

109. *Id.* at 716 (citing J. Madison, Journal of the Constitutional Convention 60 (E. Scott ed. 1893)).

110. *Id.* (citing Respublica v. De Longchamps, 1 Dall. 111, 1 L.Ed. 59 (O.T. Phila.1784)). De Longchamps was ultimately prosecuted for a criminal violation of the law of nations in state court. Discussion of the Marbois Affair takes place *infra* Section Two.

111. *Id.* at 717 (citing U.S. Const. art. III, § 2).

112. *Id.* at 724.

113. *Id.*

The *Sosa* Court went on to say that "the First Congress understood that the district courts would recognize private causes of action for certain torts in violation of the law of nations."[114] Lastly, the Court concluded that "no development in the two centuries from the enactment of § 1350 to the birth of the modern line of cases beginning with *Filártiga* . . . has categorically precluded federal courts from recognizing a claim under the law of nations as an element of common law."[115]

Thus, the Supreme Court entrenched the first of two Core Controversies: the ATS is strictly jurisdictional while also enabling a "narrow set" of causes of action in the form of judicially developed federal common law.[116] While noting that "the judicial power should be exercised on the understanding that the door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today,"[117] the Court emphasized that in the post-*Erie*[118] era there exist "limited enclaves" in which federal courts may derive some substantive law in a common law way."[119] Justice Souter concluded for the Court: "We think it would be unreasonable to assume that the First Congress would have expected federal courts to lose all capacity to recognize enforceable international norms simply because the common law might lose some metaphysical cachet on the road to modern realism."[120]

From all of this, the Court established the "*Sosa* test" from which new ATS claims could be asserted. First, federal courts must determine whether the ATS claim is based on violations of an international law norm that is "specific, universal, and obligatory."[121] If step one is satisfied, federal courts must then determine whether allowing the case to proceed is an "appropriate"

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114. *Id.*

115. *Id.* at 724–25.

116. *Id.* at 721–25.

117. *Id.* at 729.

118. In *Erie Railroad Co. v. Tompkins* (1938), the Supreme Court held that federal courts sitting in diversity jurisdiction must apply state substantive law instead of federal "general" common law. Erie Railroad Co. v. Tompkins, 304 U.S. 64, 80 (1938). This decision arose from a personal injury claim where Tompkins, a resident of Pennsylvania, was injured by a train car owned by Erie Railroad. The central legal controversy was whether federal courts should apply Pennsylvania common law, which held that a railroad has a duty to maintain its tracks safely, or federal "general" common law, which did not impose the same duty. *Id.* at 69. The Court infamously proclaimed there was no federal "general" common law, therefore requiring the federal court to apply Pennsylvania common law concerning the duty of care. *Id.* at 78. *Erie* emphasized the centrality of state law in the U.S. federal system and recalibrated the near 100-year period of *Swift v. Tyson* (1842), in which federal courts developed "general" common law principles in areas as vast as commercial law, tort, and property. Swift v. Tyson, 41 U.S. 1, 13 (1842). For purposes of this Article, *Erie* represents the beginning of the fissure between "federal general common law" (disallowed) versus "federal common law" (allowed in particular circumstances). *See also* Southern P. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes. J., dissenting) (emphasizing that the common law was not a "brooding omnipresence," meaning a derivative of "natural law" principles, and that judges were not independent mouthpieces of an infinite force).

119. *Sosa*, 542 U.S. at 729 (citing Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 641 (1981) ("Recognizing that 'international disputes implicating . . . our relations with foreign nations' are one of the 'narrow areas' in which 'federal common law' continues to exist.")).

120. *Id.* at 730.

121. *Id.* at 732 (quoting *In re* Estate of Marcos Human Rights Litigation, 25 F.3d 1467, 1475 (9th Cir. 1994)).

exercise of judicial discretion.[122] Any federal common law cause of action subject to jurisdiction under the ATS must not be defined with "less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted."[123] Any determination of whether a norm is sufficiently definite to support a cause of action, Justice Souter wrote, "should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in federal courts."[124]

With that, several of the unresolved questions of *Filártiga* and *Tel-Oren* were recast into the fundamental paradox of *Sosa*. On the one hand, the ATS is strictly jurisdictional in nature while instilling within its purpose a narrow set of causes of action as a form of judicially developed common law.[125] On the other hand, the Law of Nations torts recognized in the ATS must be limited to those the First Congress in 1789 would likely have recognized, but also includes violations of the present-day Law of Nations that can be analogized to those three historic torts. From the cycle of the two-tiered debate a new jurisprudential edifice was constructed, one from which uncertainty would prove the rule rather than the exception.

The Reaction to Sosa: Kiobel, Jesner, *and* Nestlé

The post-*Sosa* world entered uncharted territory. The contradictory guidance in *Sosa* gave federal courts justifiable reticence in rendering new decisions. Yet new questions of corporate liability, aiding and abetting, and procedural doctrines like "exhaustion" came to the fore.[126] How would federal courts interpret the new *Sosa* test and what sources of international law supplied the basis for a cause of action? Would secondary doctrines require recognition under international law before finding their way into federal court? The question of universal jurisdiction, despite a subtle nod from Justice

122. *Id.* at 738.

123. *Id.* at 732.

124. *Id.* at 732–33.

125. *Federal Common Law*, Black's Law Dictionary (12, 2024). ("The body of decisional law derived from federal courts when adjudicating federal questions and other matters of federal concern, such as disputes between the states and foreign relations, but excluding all cases governed by state law.").

126. Taveras v. Taveraz, 477 F.3d 767 (6th Cir. 2007) (to establish ATS jurisdiction, the claim must involve a clearly defined and widely accepted law of nations violation, not a tangential connection); Khulumani v. Barclay Nat. Bank Ltd., 504 F.3d 254 (2d Cir. 2007) (a defendant may be held liable under the ATS for aiding and abetting when the defendant (1) provides practical assistance which has a substantial effect on the perpetration of the crime, and (2) does so with the purpose of facilitating the commission of that crime); Sarei v. Rio Tinto, PLC, 550 F.3d 822 (9th Cir. 2008) (in ATS cases where the domestic nexus is weak, courts should consider questions of exhaustion when the claims do not involve matters of universal concern); Romero v. Drummond Co., 552 F.3d 1303 (11th Cir. 2008) (the ATS contains no express exception for corporations, and the statute grants jurisdiction over complaints of torture against corporate defendants); Abdullahi v. Pfizer, Inc., 562 F.3d 163 (2d Cir. 2009) (the prohibition on nonconsensual medical experimentation on human beings is a universally accepted norm adequately alleged under the ATS for jurisdiction); Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244 (2d Cir. 2009) (the mens rea standard for aiding and abetting liability in ATS actions is purpose rather than knowledge since purpose is universally accepted; the evidentiary standard is proof of substantial assistance in the unlawful conduct).

Breyer's concurring opinion in *Sosa*, remained largely unsettled.[127] The two-tiered cycle marched on.

The Supreme Court added two additional wrinkles in its next ATS decision. In *Kiobel v. Royal Dutch Petroleum*, a group of Nigerian nationals residing in the U.S. filed suit against Dutch, British, and Nigerian oil companies for allegedly "aiding and abetting" human rights abuses committed by the Nigerian police and military in Nigeria.[128] Unlike the DEA's alleged involvement in *Sosa*, *Kiobel* concerned non-U.S. citizens bringing suit in federal court against non-U.S. multinational corporations (MNCs) for allegedly coordinating with local Nigerian government authorities to commit human rights abuses.

The district court dismissed several of petitioners' claims, but on interlocutory appeal, the Second Circuit dismissed the entire complaint, reasoning that the ATS did not provide jurisdiction against corporations.[129] In granting certiorari, the Supreme Court framed the first question as whether corporations were immune from ATS liability for violations of the law of nations. It then ordered supplemental briefing on whether and under what circumstances courts may recognize a cause of action under the ATS for violations of the law of nations occurring within the territory of a sovereign other than the United States.

Chief Justice Roberts issued a unanimous opinion affirming the Second Circuit's judgment. The Court began by repeating *Sosa*'s fundamental paradox: "the ATS is a jurisdictional statute that creates no causes of action," yet permits federal courts to "recognize private claims [for a modest number of international law violations] under federal common law."[130] But unlike *Sosa*, the Court instead relied on the "presumption against extraterritoriality," a canon of statutory interpretation, to hold that the ATS does not reach conduct that occurred *entirely* in the territory of a foreign nation (emphasis added).[131] The Court defended its position, reasoning that nothing in the text, history, or purpose of the ATS suggested that the First Congress intended the ATS to have extraterritorial reach.[132] While the Court suggested the presumption might be displaced in future ATS cases if the claims "touch[ed] and concern[ed] the United States,"[133] it failed to explain how a claim might satisfy this test. According to Chief Justice Roberts, any claims alleged to "touch and concern" the territory of the United States must do so with "sufficient force" to displace the presumption against extraterritorial application.[134] While an explanation

127. *Sosa*, 542 U.S. at 761 (2004) (Breyer, J., concurring in part and concurring in judgment) ("Since enforcement of an international norm by one nation's courts implies that other nations' courts may do the same, I would ask whether the exercise of jurisdiction under the ATS is consistent with those notions of comity that lead each nation to respect the sovereign rights of other nations by limiting the reach of its laws and their enforcement.").

128. Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 114 (2013).

129. *Id.* at 108.

130. *Id.* (quoting *Sosa*, 542 U.S. at 692, 732).

131. *Id.* at 115 (citing Morrison v. National Australia Bank, 561 U.S. 247 (2010) (this canon provides that "[w]hen a statute gives no clear indication of an extraterritorial application, it has none" . . . and reflects the "presumption that United States law governs domestically but does not rule the world")).

132. *Id.* at 118.

133. *Id.* at 124–25.

134. *Id.* at 125.

of "sufficient force" was left for another day, the Court agreed that mere corporate presence in the U.S. was insufficient. "If Congress were to determine otherwise," Chief Justice Roberts wrote, "a statute more specific than the ATS would be required."[135] Because it relied on the presumption against extraterritoriality, the *Kiobel* Court never directly addressed whether corporations were immune from tort liability for violations of the law of nations.

In a concurring opinion, Justice Breyer offered a different reasoning.[136] For Justice Breyer, the presumption against extraterritoriality should not apply because the ATS was always intended to create a cause of action for at least one act—piracy—which occurs outside the territorial jurisdiction of the United States.[137] "The majority," he wrote, "cannot wish this piracy example away by emphasizing that piracy takes place on the high seas."[138] Justice Breyer further challenged the majority's flimsy distinction between piracy at sea and similar cases on land, writing that "applying the U.S. law to pirates" does typically involve applying our law to acts taking place within the jurisdiction of another sovereign.[139] Rather than relying on the presumption, Justice Breyer argued the Court should have limited ATS jurisdiction to cases involving one of the following factors: (1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant's conduct substantially and adversely affects an important national interest, which includes a distinct interest in preventing the U.S. from becoming a safe harbor for a torturer or other common enemy of mankind.[140] Justice Breyer reiterated the "historical torts" outlined in *Sosa* and the commitment to fashioning a cause of action for a "modest number" of claims "based on the present-day law of nations," which "rest on a norm of international character accepted by the civilized world and defined with specificity comparable to the features" of those three "18th-century paradigms."[141]

Justice Breyer's opinion strikes an important nuance. On the one hand, he recognized that certain law of nations torts may implicate actions that occur extraterritorially.[142] Thus, the presumption should not operate as a blanket restriction. Moreover, all three of Justice Breyer's categories potentially

135. *Id.* at 124–25.

136. *Id.* at 127 (Breyer, J., concurring).

137. *Id.* at 128–131 (Breyer, J., concurring). Indeed, in the early 19th century Chief Justice Marshall described piracy as an "offenc[e] against the nation under whose flag the vessel sails, and within whose particular jurisdiction all on board the vessel are." United States v. Palmer, 16 U.S. (3 Wheat.) 610, 632 (1818). *See* United States v. Furlong, 18 U.S. (5 Wheat.) 184, 197 (1820) (holding that a crime committed "within the jurisdiction" of a foreign state and a crime committed "in the vessel of another nation" are "the same thing"). *See Kiobel*, 569 U.S. 108, 131 ("Thus the Court's reasoning, as applied to the narrow class of cases that Sosa described, fails to provide significant support for the use of any presumption against extraterritoriality; rather, it suggests the contrary.").

138. *Id.* at 130 (Breyer, J., concurring).

139. *Id.*

140. *Id.* at 133 (Breyer, J., concurring).

141. *Id.* at 128 (Breyer, J., concurring).

142. Justice Breyer referenced the Restatement (Third) of Foreign Relations Law, which states that a nation may apply its law "not only (1) to "conduct" that "takes place [or to persons or things] within its territory" but also (2) to the "activities, interests, status, or relations of its nationals outside as well as within its territory," (3) to "conduct outside its territory that has or is intended to have substantial effect

meriting ATS jurisdiction related in some shape or form to the United States. Whether territorially, the class of defendant, or the implication of national interests, each category struck a "sovereign-specific" rationale. The question of universal jurisdiction versus sovereign-specific jurisdiction (i.e., the second Core Controversy) is directly implicated in Justice Breyer's line of reasoning. For example, if the alleged human rights violations took place abroad, and a U.S. multinational corporation (MNC) effectively sanctioned the activities by approving corporate decisions leading to the abuses or failing to ensure human rights standards were met through its own supervisory negligence, could the ATS be invoked?[143] The corporate element added greater confusion, as MNCs could establish operations across the world, setting up shop in jurisdictions in a deliberate effort to fall beyond the statute's reach.

Thus, the *Kiobel* Court buttressed the ambiguities of *Sosa* by not only failing to answer the degree of U.S. corporate involvement necessary to warrant ATS liability, but also by blanketing a canon of statutory interpretation to significantly limit its geographic reach. Justice Alito echoed this uncertainty, writing that he would have further explained how litigants can satisfy the "touch and concern" requirement.[144] For Justice Alito, only when the conduct that constitutes a violation of the Law of Nations occurred domestically will the claim "touch and concern" the United States with sufficient force to displace the presumption against extraterritoriality.[145] Which conduct met this nonbinding dicta, and the substantive rationale for this limiting construction, was left unanswered. The open questions of ATS corporate liability continued after *Kiobel* with no seeming end in sight.[146]

Five years later, the Supreme Court clarified one element of ATS corporate liability. In *Jesner v. Arab Bank, PLC* claims were brought by approximately 6,000 foreign nationals (or their families or estate representatives) who were

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within its territory," and (4) to certain foreign "conduct outside its territory . . . that is directed against the security of the state or against a limited class of other state interests."

143. The relationship between U.S. corporations and human rights abuses is discussed *infra* Section V.

144. *Kiobel*, 569 U.S. at 125 (Alito, J., concurring).

145. *Id.* at 126 (Alito, J., concurring).

146. *See, e.g.*, Al Shimari v. CACI Premier Tech., Inc., 758 F.3d 516 (4th Cir. 2014) (the allegations against the U.S. corporation "touch and concern" the territory of the United States with sufficient force to displace the presumption against extraterritorial application of the ATS); Mastafa v. Chevron Corp., 770 F.3d 170 (2d Cir. 2014) (noting that the complaint asserts that (1) the defendants' conduct touches and concerns the United States, overcoming the presumption against extraterritoriality, and (2) this conduct, upon preliminary examination, constitutes a violation of the law of nations or aiding and abetting such a violation); In re Arab Bank, PLC Alien Tort Statute Litig., 808 F.3d 144 (2d Cir. 2015) (noting that the complaint does not assert a claim that touches and concerns the United States to support ATS jurisdiction or rebut the presumption of extraterritoriality since all conduct occurred in Somalia); Licci by Licci v. Lebanese Canadian Bank, SAL, 834 F.3d 201 (2d Cir. 2016) (allegations adequately plead acts of genocide and crimes against humanity violating the law of nations, allegations adequately touch and concern the territory of the United States to displace the presumption of extraterritoriality, but the ATS immunizes corporations from liability in this circuit); Adhikari v. Kellogg Brown & Root, Inc., 845 F.3d 184 (5th Cir. 2017) (arguing that allegations involve impermissible extraterritorial application of the ATS and are barred); Jara v. Nunez, 878 F.3d 1268 (11th Cir. 2018) (arguing that allegations fail to allege any relevant conduct that occurred on American soil to subject the claim to ATS jurisdiction).

injured, killed, or captured by terrorist groups in Israel, the West Bank, and Gaza between 1995 and 2005.[147] The plaintiffs alleged the Arab Bank—one of the largest financial institutions in the Middle East—"aided and abetted" four terrorist organizations allegedly responsible for the attacks.[148] The plaintiffs argued that Arab Bank maintained accounts for the terrorist groups knowing they would be used for terrorist actions, and that it used its New York branch to clear dollar-denominated transactions that benefited terrorists through the Clearing House Interbank Payments System (CHIPS) and to launder money for a Texas-based charity allegedly affiliated with the group Hamas.[149]

The Second Circuit dismissed the ATS claim on the ground that the statute does not permit any form of corporate liability.[150] But the Supreme Court qualified the Second Circuit's decision, holding that "foreign corporations" were not subject to liability under the ATS.[151] Justice Kennedy, writing for a 5-4 majority, left open the possibility that U.S. corporations could face claims under the ATS, yet the opinion clarified little about the relationship between domestic corporations and their subsidiaries, affiliates, or partners abroad. For the *Jesner* Court, ATS claims against foreign corporations often impact the United States' foreign relations, necessitating their lack of justiciability.[152] In a concurring opinion, Justice Gorsuch added a few more wrinkles.[153] First, he claimed that Separation of Powers principles dictate that federal courts should never recognize new causes of action under the ATS.[154] Second, Justice Gorsuch addressed the second Core Controversy directly, writing that a reexamination of the history of the ATS shows that it was intended to apply *only* to claims against U.S. defendants, regardless of whether they are corporations or natural persons (emphasis added).[155] Suddenly the conclusion of alien-alien claims embraced in *Filártiga* appeared ripe for attack.[156] ATS issues, new and old, came to the fore in demand of answers.[157]

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147. Jesner v. Arab Bank, 138 S. Ct. 1386 (2018).

148. *Id.* at 1388.

149. *Id.*

150. *In re* Arab Bank, 808 F.3d 144, 158 (2d Cir 2015).

151. *Jesner*, 138 S. Ct. at 1407 ("[T]he Court holds that foreign corporations may not be defendants in suits brought under the ATS.").

152. *Id.* at 1406–07. Discussion of federal courts role in foreign affairs is discussed *infra* Section II.

153. *Id.* at 1412–19 (Gorsuch, J., concurring in part and concurring in the judgment).

154. *Id.*

155. *Id.*

156. *See Filártiga*, 630 F.2d at 890.

157. *See* Brill v. Chevron Corp., 804 F. App'x 630 (9th Cir. 2020) (holding that the allegation fails to allege the requisite mens rea and actus rea for aiding and abetting liability under the ATS); Nahl v. Jaoude, 968 F.3d 173 (2d Cir. 2020) (holding that, based on prudential concerns, declining to create a civil remedy under the ATS for those who suffered a purely financial injury by the mismanagement of a corporation by a corporate officer who engages in criminal activities); Al-Tamimi v. Adelson, 916 F.3d 1 (D.C. Cir. 2019) (arguing that ATS claims can be justiciable even when they touch on politically sensitive issues, provided that the specific questions at hand are legal rather than political in nature); Alvarez v. Johns Hopkins Univ., 373 F. Supp. 3d 639 (D. Md. 2019) (allowing domestic corporate liability would further the purposes of the ATS, by affording a remedy in U.S. courts to foreign nationals for violations of international law by a domestic corporation); Doe v. Exxon Mobil Corp., 391 F. Supp. 3d 76 (D.D.C. 2019) (allowing a domestic corporate liability case to proceed under the ATS that has already provoked

This brings us to the latest case in the modern line of ATS jurisprudence. In 2021 the Supreme Court issued its ruling in *Nestlé USA, Inc. v. Doe*.[158] Respondents were six individuals from Mali who alleged they were trafficked, kidnapped, and forced to work on cocoa farms in the Ivory Coast under grueling conditions.[159] Together they filed a class-action lawsuit against large manufacturers, purchasers, processors, and retail sellers of cocoa beans, including petitioner Nestlé USA (and Cargill Inc., petitioner in a consolidated case).[160] They alleged a common law cause of action in the form of "aiding and abetting forced labor" as a tort in violation of the Law of Nations.[161]

Although Nestlé USA and Cargill did not operate the Ivory Coast farms themselves, they provided technical resources, such as training, tools, and financial assistance in exchange for the exclusive right to purchase cocoa.[162] Plaintiffs alleged that Nestlé USA and Cargill exercised "economic leverage" over the farms and their labor practices, and continued to purchase cocoa even after they "knew or should have known" that the farms exploited children for slave labor.[163] They further alleged that employees from the companies' U.S. headquarters "regularly inspect[ed] operations in the Ivory Coast and report[ed] back" to offices in the United States.[164] With *Nestlé*, the unresolved questions of U.S. corporate liability in *Jesner* came full circle. But instead of confronting the foundational questions of the ATS, the Court hedged once more, deciding the first-tier claim under the same "presumption against extraterritoriality" outlined in *Kiobel*.[165] Justice Thomas, writing for the 8-1 majority, concluded that the allegations did not draw a "sufficient connection" between the alleged forced labor and U.S.-based conduct to sustain ATS jurisdiction.[166] Although Nestlé USA and Cargill made or approved "every major operational decision" from the United States, the Court described this decision-making as too "common" or "generic" a corporate function to sufficiently connect the claim to the U.S.[167]

Staying true to the muddied evolution of ATS jurisprudence, Justice Thomas replaced the still unsubstantiated "touch and concern" test from *Kiobel* with a new "focus" test, which said that the conduct relevant to the statute's focus must occur in the United States in order for liability to exist.[168] But like the majority in *Kiobel*, the Court again failed to specify what conduct should

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diplomatic strife is contrary to the fundamental purpose of the statute when international law does not already extend liability to corporations and caution is required to allow the political branches to grant authority over domestic corporate liability).

158. *Nestlé*, 593 U.S.

159. *Id.* at 630.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. Doe v. Nestlé, 906 F.3d 1120, 1123 (9th Cir. 2018) ("Indeed, the gravamen of the complaint is that defendants depended on—and orchestrated—a slave-based supply chain.").

165. *Nestlé*, 593 U.S. at 633.

166. *Id.* at 629.

167. *Id.*

168. *Id.*

be the "focus" of the statute. While Nestlé USA and Cargill argued that the ATS must focus on the "act" that directly caused the injury (i.e., the alleged child trafficking and forced labor in West Africa), the six Malian individuals argued that the focus is the act that violates international law (i.e., the acts of aiding and abetting forced labor through corporate support from U.S offices). In the end, the Court failed to resolve this discrepancy, writing that even if it accepted the plaintiffs' legal interpretation, their ATS claims were still improperly extraterritorial because "[n]early all the conduct that they say aided and abetted forced labor . . . occurred in Ivory Coast."[169]

Several conclusions can be drawn in analyzing the modern line of ATS jurisprudence. First, *Filártiga* undeniably paved the way for the two Core Controversies we know today. In allowing a case between foreign citizens, under a claim of deliberate torture perpetrated under color of official authority to proceed absent a separate statute providing a cause of action, the Second Circuit provoked some of most foundational questions about the role of federal courts and the Law of Nations in the U.S. legal system. Should the ATS open federal courts to entertain torts in violation of customary international law, or is it all wishful thinking, as Justice Scalia argued in *Sosa*—a "20th-century invention of internationalist law professors and human rights advocates" seeking U.S. fora to provide expansive notions of global justice?[170]

Second, *Sosa* pushed ATS jurisprudence into uncharted territory. The *Sosa* Court created the fundamental paradox that has resulted in federal courts either refusing or avoiding decisions in ATS cases. The *Sosa* Court placed the statute on a collision course with itself by holding the ATS to be strictly jurisdictional, while including three "historical torts" and the possibility of modern law of nations violations within its meaning, a tension the current Supreme Court appears inclined to take up in the near future.[171]

Third, *Kiobel* merged the "presumption against extraterritoriality" into the ATS, while ignoring the reality that law of nations violations may reach territory outside the United States, as Justice Breyer's concurring opinion affirmed.[172] The *Kiobel* Court set the groundwork for a central question to modern jurisprudence, namely what involvement, if any, was required within an alleged ATS violation to trigger secondary liability. Fourth, *Jesner* categorically closed the door to foreign corporations' liability under the ATS, while largely ignoring the implications for universal jurisdiction set out in *Filartiga*.[173] The implication is that the ATS is limited to U.S. citizens, as Justice Goruch's concurring opinion suggests, but the *Jesner* Court took a one-foot-in-one-foot-out approach to the question.

Lastly, analysis of the modern line reveals the sheer range of positions that exist in the ATS context. While pinpointing precise views from scholars and

169. *Id.*
170. *Sosa*, 542 U.S. at 750 (Scalia, J., concurring).
171. *Nestlé*, 593 U.S. at 639 (Thomas, J.) ("[N]obody here has expressly asked us to revisit *Sosa*.").
172. *Supra* notes 131–137.
173. *Supra* notes 49–63.

judges is unlikely, there exists a general spectrum of jurisprudential outlooks. At one end is an "open position" which claims the ATS supplies universal jurisdiction (alien-alien claims), enables a cause of action absent a separate statute, allows claims against persons and entities, and demands federal courts' turn to international law for all primary and secondary issues. At the other end is a "closed position," which claims the ATS is strictly jurisdictional, an extension of "alienage jurisdiction," never supplies grounds for a cause of action absent a separate statute, is limited to cases against U.S. individuals, and provides federal courts with a narrow power within the strictures granted by Congress. These analytical gulfs are vast. Yet the truth of these positions may simply reflect the reality of competing values in the bewildering art of statutory interpretation. Contrasting impulses, rooted in notions of combating injustice, adhering to textual strictures, vindicating original intent, and the nature of statutes as an evolutive enterprise may better explain how the two Core Controversies came to be. The question becomes whether a theory can best reconcile these issues in a manner best aligned with the nature of statutes.

II. Law As Integrity: Rules, Standards, and Principles of the ATS

Having explained the origins and development of the two Core Controversies, this Section sets the basis for a normative theory from which the Alien Tort Statute (ATS) can best be understood. The "law as integrity" theory[174] roots its methodological approach in a specific premise about the nature of the ATS. It aims to reconcile the original purpose of the statute, its textual and non-textual components, and the nature of the statute's evolution over time. Law as integrity bears resemblance to a non-positivist theory of law, focusing on the significance of legal principles in understanding the ATS.

Foundationally, law as integrity is rooted in the following premise: statutes consist of rules, standards, and principles. This Section proceeds by disaggregating the rules, standards, and principles of the ATS into a coherent framework, explaining how each norm functions in relation to one another. This lays the groundwork for Sections Three and Four, which address the two Core Controversies through the lens of law as integrity. Law as integrity reconciles the limitations and latitudes of competing theories of statutory interpretation. It does not rely on the misguided pursuit of "objective intent," instead working to grasp the underlying objectives of the ATS at the time it was signed into law. Rather than inferring selective conclusions from text, law as integrity accepts that interpretation requires a turn to extrinsic sources and demands investigation to the principles guiding the statute's foundational objectives.

To consider one example, proponents of textualism and purposivism,[175] two predominant theories of statutory interpretation, generally share the goal of adhering to Congress's intended meaning, while disagreeing about how best to

174. Hereinafter "law as integrity."

175. John F. Manning, *What Divides Textualists from Purposivists?*, 106 Colum. L. Rev. 70, 75 (2006).

achieve that goal.[176] Both seek to construct a version of ascertaining "objective intent,"[177] yet both invariably fall short in serving as an explanatory theory of the ATS. Textualism is unable to account for the breadth of factual circumstances that may come before a court, inflexibly neglecting the law's underlying principles and issues the law is intended to address, while purposivism often provides interpretive cover to deviate from good faith evaluations of text by cloaking its reasoning in unrelated policy arguments. When reconciling textualism and purposivism with the fact that the ATS legislative history[178] is largely incomplete or unknown, this makes it difficult (if not impossible) to establish anything bordering a definitive, complete historical meaning.[179] We do know it was passed by the First Congress as part of the original Judiciary Act of 1789, and we do have critical fragments of historical context to draw from,[180] but we lack anything bordering a complete understanding.[181] Even were a complete understanding to exist, the nature of the ATS would still require a concrete grasp of how federal courts determine if and when a new context falls within the statute's scope. Absent this clarity, interpretive vacuums will inevitably be filled. As a result, competing interpretations will turn on one's political and doctrinal preferences rather than anything bordering clear understanding.

Consider further the elusive objectives of the textualist approach. Generally, the predominant focus of textualism is on the words of a statute, emphasizing the text over any unstated purpose.[182] Textualists argue that courts should "read the words of that statutory text as any ordinary Member of Congress

176. *See generally* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts (2012) (arguing against using the word "intent" even if it refers solely to the intent "to be derived solely from the words of the text" because it inevitably causes readers to think of subjective intent").

177. Caleb Nelson, *What is Textualism?*, 91 Va. L. Rev. 347, 348 (2005) (arguing that both theories use evidence of "the subjective intent of the enacting legislature" to "construct their sense of objective meaning"); *but see also* Brian Bix, Jurisprudence: Theory and Context (Sixth Edition), Chapter Fourteen, Statutory Interpretation, 162 ("[L]egislation usually involves an expectation that the rule promulgated will be used as guidance for the indefinite future by persons not known to the legislators–a purpose or set of expectations far different from what one finds most of the time in individual conversations.").

178. Separately, the textualist approach to statutory interpretation raises questions of whether "legislative history" should play any role in the toolkit of statutory interpretation. This author's view is that legislative history, whether explicitly acknowledged or not, invariably plays a role in any approach to interpretation. The text of a statue supplies fundamental strictures in which to understand the law, yet the inevitable gaps in bridging text and new factual contexts demands evaluating sources outside the literal words. The lack of clarity ATS textual analysis and the lack of any complete legislative history requires evaluating the underlying principles of the statute itself.

179. Dodge, *supra* note 7, at 222 ("The statute's historical origins are murky . . . Because the Clause lacks a 'legislative history,' however, it is difficult to establish definitively what Ellsworth and the First Congress meant to accomplish with the provision.").

180. Anne-Marie Burley (now Anne-Marie Slaughter), *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 Am. J. Int'l L. 461, 461–493 (1989) (discussing the early history of the Alien Tort Statute).

181. Although explanations are persuasively offered. *See, e.g.*, Bellia Jr. & Clark, *supra* note 8, at 446 ("The original meaning of the statute appears relatively clear in historical context: the ATS limited federal court jurisdiction to suits by aliens against United States citizens but broadly encompassed any intentional tort to an alien's person or personal property.").

182. George H. Taylor, *Structural Textualism*, 75 B.U. L. Rev. 321, 327 (1995). *See also* King v. Burwell, 135 S. Ct. 2480, 2489 (2015) ("If the statutory language is plain, we must enforce it according to its terms.").

would have read them."[183] In this pursuit, textualists search for the meaning that a "reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*"—"the body of law."[184] Textualism only concerns itself with statutory purpose to the extent that it is evident from the text, in order to avoid any demonstration of a turn to subjective intent.[185]

But while the text of the ATS operates as a necessary guidepost from which we can understand its meaning, it simply cannot resolve the two Core Controversies. As Justice Frankfurter once wrote, the problem of determining statutory meaning is inherent in "the very nature of words."[186] Consider the fact that the "Law of Nations" today utilizes the modern phrase "customary international law," which creates questions of where one term ends and another one begins.[187] Further, the current iteration of the ATS (1948) endured the abolition of "federal general common law" in *Erie* into positivist "federal common law" that Justice Scalia brought to attention in *Sosa*.[188] Yet there is something bordering judicial imagination in the line of thinking from which the *Sosa* Court deemed pre-*Erie* common law to be "found or discovered" as opposed to its modern positivist approach of being "made or created."[189] Even within

183. Chisom v. Roemer, 501 U.S. 380, 405 (1991) (Scalia, J., dissenting).

184. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION, 17 (1997); *see also id.* at 22 ("It is simply not compatible with democratic theory that laws mean whatever they ought to mean, and that unelected judges decide what that is.").

185. SCALIA & GARNER, *supra* note 176, at 30 (arguing against the word "intent" even if it refers solely to the intent "to be derived solely from the words of the text" because it "inevitably causes readers to think of subjective intent").

186. Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 528 (1947).

187. Edwin D. Dickinson, *The Law of Nations as Part of the National Law of the United States*, 101 U. PA. L. REV. 26, 26 (1952) ("It is an ancient and a salutary feature of the Anglo-American legal tradition that the Law of Nations is part of the law of the land and is to be ascertained and administered, like any other, in the appropriate case."). *See* Michelle M. Kundmueller, *Application of Customary International Law in U.S. Courts: Custom, Convention, or Pseudo-Legislation?*, 28 J. LEGIS. 359, 359 (2002) (prior to the acceptance of the term "customary international law," U.S. courts used the term "law of nations") (citing *The Paquete Habana*, 175 U.S. at 708 ("This review of the precedents and authorities on the subject appears to us abundantly to demonstrate that at the present day, by the general consent of the civilized nations of the world, and independently of any express treaty or other public act, it is an established rule of international law, founded on considerations of humanity to a poor and industrious order of men, and of the mutual convenience of belligerent states, that coast fishing vessels, with their implements and supplies, cargoes and crews, unarmed and honestly pursuing their peaceful calling of catching and bringing in fresh fish, are exempt from capture as prize of war . . . . This rule of international law is one which prize courts administering the law of nations are bound to take judicial notice of, and to give effect to, in the absence of any treaty or other public act of their own government in relation to the matter.")).

188. *Sosa*, 542 U.S. at 739–746 (Scalia, J., concurring). Justice Scalia states the original Law of Nations fell under the rubric of "general common law" which he argues was "not federal" law under the Supremacy Clause. *Id.* at 740. Next he breaks federal "common law" into two periods: the first being the period of *Swift v. Tyson* to *Erie Railroad*, where the Supreme Court declared "there is no federal general common law"; and second, the birth of a new and different federal "common law" pronounced by the courts, carved out in a "few and restricted" areas where a "federal rule of decision is necessary to protected uniquely federal interests" and those in which Congress has given the courts the power to develop substantive law." *Id.* at 741. For Justice Scalia, the lapse between "pre-Erie" general common law and "post-Erie" federal common law is "rooted in a positivist mindset utterly foreign to the American common-law tradition of the late 18th century." *Id.* at 745.

189. *Id.* at 725 ("Now, however, in most cases where a court is asked to state or formulate a common law principle in a new context, there is a general understanding that the law is not so much found or discovered as it is either made or created.").

the Judiciary Act of 1789 the ATS found itself in a realm of obscurity. Tucked between a lengthy passage establishing the system of U.S. federal courts and U.S. circuit courts lies the original Alien Tort Clause, contextless and isolated.[190] This uncertainty once led Judge Henry Friendly to refer to this "old but little used section" as "a kind of legal Lohengrin" that "no one seems to know whence it came."[191]

Put simply, the text of the ATS performs necessary but insufficient work. While text provides essential commands reflecting choices made by the legislative branch pursuant to legitimate enactment procedures, it cannot fully reflect the substantive legitimacy of a statute as an expression of broader societal objectives. On a similar account, Professor Eskridge explains this relationship as one between "formalism" (prioritizing the text as an outgrowth of legitimate legislative procedures) and "majoritarianism" (emphasizing the legitimacy of a statute as reflecting evolving social values).[192] While Eskridge affirms the legitimacy of text, his criticism focuses on the idea that formalism cannot capture the democratic and substantive legitimacy of a statute.[193] In other words, while text must be given its due weight in any form of statutory interpretation, the more pressing question becomes how to fill in answers to questions the text simply cannot provide. These interstitial matters of statutory understanding demand greater scrutiny. For every choice of text placed within the ATS, the focus must inevitably turn to what is left out. The muddied forty-year ATS modern line reflects this ongoing dynamic. For example, the fact the word "alien" is used on the plaintiff's side says little of *who* can be named as a defendant. This produces conflicting results that require evaluating the societal objectives of the ATS itself. Justice Gorsuch in *Jesner* asserted this very point, while Justice Sotomayor committed to the contrasting position in the very same case.[194] There are simply too many gaps that the text cannot fill.

On a separate account, consider purposivism and its tendency to abandon textual strictures in the pursuit of preferred policy outcomes. This pursuit of policy preference represents a shortcoming of purposivism, proportionate to the critique of textualism and its overreliance on text. On one account, purposivism operates with the assumption "that legislation is a purposive act, and therefore judges should construe statutes to execute that legislative purpose."[195] This reflects the notion that statutory interpretation must focus on the intent

190. Judiciary Act, ch. 20, § 9, 1 Stat. 73, 77 (1789) ("And 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 only in violation of the law of nations or a treaty of the United States.").

191. IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975).

192. *See generally* William N. Eskridge Jr., Dynamic Statutory Interpretation 38 (1994).

193. *Id*. Eskridge emphasizes how text, while essential to statutory interpretation, fails to consider the way in which statutes evolve over time in response to relevant political, social, and cultural developments.

194. *Supra* note 148 for Justice Gorsuch and *infra* notes 328–329 for Justice Sotomayor.

195. *See generally* Robert A. Katzmann, Judging Statutes 6 (2014). Academics sometimes distinguish between "purpose" and "intent," most frequently using "purpose" to mean the objective intent that is the goal of new purposivism, and "intent" to mean the legislature's actual intent, which was the goal of the old "intentionalism." Katzmann's purpose-based approach to statutory interpretation reflects his commitment to contextual and purposive evaluation over the rigidities of formalism or textualism.

and purpose that legislators sought to achieve when passing a law, as opposed to focusing solely on text or literal meaning.[196] As Hart and Sacks asserted, interpreting statutes according to their purpose requires a heightened focus on the legislative process, where judges attempt to look into the specific problem Congress was trying to solve in creating the specific law, asking how the statute, if at all, accomplishes that goal.[197] When there are statutory ambiguities, "purposivists" argue that courts should first ask "what problem Congress was trying to solve," and then ask "whether the suggested interpretation fits into that purpose."[198] In practice, this takes place by exploring legislative history to pinpoint the fundamental objective of the statute, and then determining which interpretation is most consistent with that purpose or goal. When text is unclear, purposivists generally argue that it should be interpreted "in a way that is faithful to Congress's purposes."[199]

There are at least three key criticisms of purposivism to consider. First, purpose is often unable to be discerned, as statutes are often the byproduct of legislators seeking re-election and thus skewing the actual point of the law. In other words, this challenges the idea there is a "single purpose" underlying the statute. On this account, complex congressional processes, in which often internally contradictory and unreliable guidance predominate, cannot serve as the source from which we can understand what the legislation means or is intended to accomplish.[200]

Second, purposivism often falls victim to being a cloak for a particular advocates' policy preferences. Legislation is not a blank state from which any interpretation of principles can be permitted. Purposivism can overlook the fact that legislation has an original context of creation and an outer limit. Policy arguments are of course valid prudential reasons for why a new context should be included within the meaning of a particular piece of legislation, but any policy argument must be rooted in the principles that existed in the original legislation. Purposivism's sleight of hand is that it may, although it need not always, tie its arguments to the purposes or principles of original legislation.[201]

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196. *Id*. at 6.

197. *See generally* Henry M. Hart, Jr. & Albert M. Sacks, The Legal Process: Basic Problems In The Making And Application Of Law 1148 (1994). Hart and Sacks argued that laws are enacted to address particular social issues, and that judges should interpret statutes in a way that furthers the legislative purpose behind them.

198. Freeman v. Quicken Loans, Inc., 566 U.S. 624, 632 (2012) (noting that a particular interpretation would undermine the purpose of a statute by imposing liability on "the very class for whose benefit [a particular statute] was enacted," . . . "provid[ing] strong indication that something in [that] interpretation is amiss").

199. Katzmann, *supra* note 195, at 31.

200. Scalia & Garner, *supra* note 176 at 20–21, 376–78. *But see, e.g.*, Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2122 (2016) ("[C]ourts should seek the best reading of the statute by interpreting the words of the statute, taking account of the context of the whole statute, and applying the agreed-upon semantic canons. Once they have discerned the best reading of the text in that way, they can depart from that baseline if required to do so by any relevant substantive canons—for example, the absurdity doctrine.").

201. *See, e.g.*, Jara v. Nunez, 878 F.3d 1268 (11th Cir. 2018) (holding that, relying on purpose, the claim was properly dismissed because a federal court cannot exercise jurisdiction under the ATS when the relevant conduct took place outside the United States).

Lastly, some critics argue that the theory of purposivism is too easily manipulable, allowing the purposivist to ignore the text and "achieve what he believes to be the provision's purpose."[202] This is like the second critique, although it takes on a different character. The key to overcoming this is by meticulously working to identify the fundamental principle(s) underlying the legislation at the time of creation, and then determining what the connection is to how those principles may evolve over time. Put simply, the purpose of a piece of legislation does in fact exist at the creation. Even if the legislative history can make this enterprise murky at best, the very practice of identifying and articulating principles pushes toward a common understanding.

Law as integrity attempts to answer the normative question: how *should* the ATS be understood? It relies fundamentally on the role of rules and standards in relation to legal principles, not only to understand the statute's limitations, but also to provide advancing clarity in how new contexts may or may not be included within its meaning and scope.

Rules and Standards in the Text of the Alien Tort Statute

The text of the ATS represents the analytical starting point from which law as integrity begins. Critically, within the text there exist both "rules" and "standards."[203] While a full exploration of the literature on the nature of "rules" is beyond the scope of this Article, the focus largely draws upon Ronald Dworkin's explanation of rules as definite, all-or-nothing statements.[204] In referencing Dworkin's terminology, Scott Shapiro writes that "when a valid rule applies in a given case, it is *conclusive* or, as a lawyer would say, 'dispositive.' Because valid rules are conclusive reasons for action, they cannot conflict. If two rules conflict, then one of them cannot be a valid rule."[205] In other words, rules are certain, incontrovertible, and incapable of contradiction with other rules.

For purposes of law as integrity, the key point for "rules" is that they follow a logical if/then structure. While the rules in the ATS do not explicitly deploy this structure, they can be recast as such to emphasize their conclusive, dispositive commands. Each rule is rigid and fixed, not subject to an alternative meaning, and consistent within the overall scheme of the statute. Understood through this lens, there are four "rules" of the ATS:

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202. Scalia & Garner, *supra* note 176, at 18.

203. Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 529 (1947) ("The intrinsic difficulties of language and the emergence after enactment of situations not anticipated by the most gifted legislative imagination, reveal doubts and ambiguities in statutes that compel judicial construction.").

204. Dworkin, *supra* note 31, at 14. Dworkin writes that rules are all or nothing "standards" rather than "statements." *Id.* This Article firmly takes the position that "rules" are all or nothing "statements." *Id.* While the terms "standards" and "statements" are largely synonymous in Dworkinian terminology, this Article distinguishes "rules" in Dworkinian terminology from "standards" as terms of art within a rule.

205. Scott J. Shapiro, *The Hart-Dworkin Debate: A Short Guide for the Perplexed*, 9 (March 5, 2007).

Rules

1. If an ATS claim is brought, then it must be brought in *district courts* because district courts have *original jurisdiction* over ATS claims.
2. If an ATS claim is brought, then it must be brought by an *alien*.
3. If an ATS claim is brought, then it must be brought as a *civil action*.
4. If an ATS claim is brought, then it must be brought as a *tort only, committed in violation of the law of nations or a treaty of the United States*.

Rule #1. "District courts" are the only fora from which ATS claims have "original jurisdiction."[206] This is confirmed from the ATS statutory history. From the original Alien Tort Clause included as part of Section 9 of the Judiciary Act of 1789 up until the current iteration of the ATS passed in 1948, the "district courts" language has remained intact.[207] This "district courts" language unequivocally refers to *federal* district courts.[208] The original 1789 language stated that "district courts shall also have cognizance, concurrent with the courts of the several States, or the circuit courts. . . ." Courts of the several States referred to each state's respective courts, whereas the "circuit courts" were 3-judge panels comprised of two justices of the Supreme Court and a local U.S. district court judge, serving as trial courts for most federal criminal cases, suits between citizens of different states, civil suits initiated by the United States, while also exercising appellate jurisdiction over admiralty cases and other civil suits originating in U.S. district courts.[209] Notably the 1873 revision of the ATS removed the reference to concurrent jurisdiction "with the courts of the several States."[210] Therefore, as the ATS reads in its

206. *Original Jurisdiction*, Cornell L. Sch., Legal Info. Inst., https://www.law.cornell.edu/wex/original_jurisdiction, [https://perma.cc/LAF6-RRZU] ("A court's authority to hear and decide a case for the first time before any appellate review occurs. Trial courts typically have original jurisdiction over the types of cases that they hear, but some federal and state trial courts also hear appeals in specific instances.") (last visited Aug. 5, 2024).

207. Judiciary Act, 1 Stat. at 77 (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 only in violation of the law of nations or a treaty of the United States"); 1948 (current version): Act of June 25, 1948 (62 Stat. 869, 934 (1948)) (codified in 28 U.S.C. § 1350). The phrase "civil action" was substituted for the term "suits" to comport with the Federal Rules of Civil Procedure. See H.R. Rep. No. 308, 80-308, at 124 (1947). The phrase "[a]n alien" was substituted for "any alien[,]" and the word "committed" was inserted prior to "in violation of the law of nations."

208. *The U.S. Circuit Courts and the Federal Judiciary*, Fed. Jud. Ctr., https://www.fjc.gov/history/courts/u.s.-district-courts-and-federal-judiciary, [https://perma.cc/6PCB-UBG5] (in its plan for the federal judiciary, the Congress in 1789 divided the nation into thirteen judicial districts that served as the basic organizational units of the federal courts) (last visited Aug. 5, 2024).

209. *Id.*

210. Revised Statute tit. 13, ch. 3, § 563, para. 16 (1873) ("The district courts shall have jurisdiction as follows: . . . Of all suits brought by an alien for a tort 'only' in violation of the law of nations, or of a treaty of the United States.").

current textual form, state courts do not, and will never, have original jurisdiction over ATS claims. This rule remains fixed, regardless of context.[211]

Rule #2. Only an "alien" may bring an ATS claim.[212] This has been reiterated by several Appellate Courts.[213] By implication, U.S. citizens and nationals cannot bring an ATS claim. Yet as referenced earlier, this rule provides a necessary but insufficient component. For all that *is* included within the text, questions arise as to what *is not* included. For one, the text does not supply any basis for understanding *who* can be named as a defendant. Can an "alien" bring a suit against another "alien" under the ATS, as in *Filártiga*, or is the category of defendant limited in any shape or form? Irrespective of interpretive view, the text of the ATS simply cannot provide a definitive answer to this question.

Rule #3. A "civil action" is the only claim that can be brought under the ATS.[214] By implication, criminal liability is fundamentally precluded under the ATS.

Rule #4. A "tort only, committed in violation of the law of nations or a treaty of the United States" is the only claim that can be brought under the ATS. This last rule generates the greatest disagreement. As shown in the evolution of the two Core Controversies, the question of whether a cause of action can be brought under the ATS itself remains an open debate. Yet the "rules" framework of law as integrity provides a necessary structure from which an answer can be scrutinized. Regardless of whether a cause of action can be established under the ATS or if it requires a separate statute, there is no dispute that "if" a claim is brought under the ATS, then that claim "must" be for a "tort only, committed in violation of the law of nations or a treaty of the United States." For example, a separate statute defining a "contract" or "property" claim as a cause of action can never be brought under the ATS. This would flatly contradict common sense and the all-or-nothing commands of rules as defined by Dworkin. At the very least, this rule provides a rigid, irreducible limitation. Regardless of whether a separate statute supplies the cause of action, any "tort" must be one "committed in violation of the Law of Nations or a Treaty of the United States." The word "tort" is qualified by the two phrases that follow, namely the "law of nations" or "treaty of the United States." Much like

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211. This reading is disputed. *Cf.* Casto, *supra* note 6, at 468 n.4 ("The deletion of the reference to the state courts' concurrent jurisdiction should not be read as making the district courts' jurisdiction exclusive, because the plan of the Revised Statutes was to enact a single section consolidating all instances of exclusive federal jurisdiction.").

212. An "alien" is defined in federal law to be "any person not a citizen or national of the United States." 8 U.S.C. § 1101(a)(3). The term "alien" is largely anachronistic, but the history of that term lies beyond the scope of this Article.

213. Yousuf v. Samantar, 552 F.3d 371, 375 n.1 (4th Cir. 2009) ("To the extent that any of the claims under the ATS are being asserted by plaintiffs who are American citizens, federal subject-matter jurisdiction may be lacking."); Serra v. Lappin, 600 F.3d 1191, 1198 (9th Cir. 2010) ("The ATS admits no cause of action by non-aliens.").

214. *Civil Action*, Cornell L. Legal Info. Inst., https://www.law.cornell.edu/wex/civil_action, [https://perma.cc/75RP-6FJQ] ("A civil action is a noncriminal lawsuit that begins with a complaint and usually involves private parties. The plaintiff is the party filing the complaint, and the defendant is the party defending against the complaint's allegations.") (last visited Aug 5, 2024).

Rule #2, the text cannot furnish a complete answer. What is a "tort only, committed in violation of the law of nations or a treaty of the United States"? How can one begin to answer this question? Invariably one must look beyond the rigidity of rules to supply an answer.

Despite these open questions, the four rules of the ATS establish fixed, context-neutral boundaries from which all interpretations cannot deviate. These are definite commands that neither conflict with one another nor generate competing interpretations. Regardless of time period or context, no claim could legitimately argue that a criminal case or contract dispute be brought under the ATS. Similarly, a U.S. plaintiff could never assert jurisdiction under the ATS. These four rules establish the necessary foundations from which law as integrity proceeds.

In contrast to rules, "standards" are *non-definite* uses of language that exist as "terms of art" or broader "capturing words or phrases" that require interpretation. Generally, standards are the use of any legal norm that involves a value judgment.[215] For purposes of law as integrity, standards are necessarily included *within* the framework of a rule, and, like rules, are constrained or enabled by the selection of text. In other words, standards are terms of art embedded within the definitive commands of a rule's text. Rules, in their all-or-nothing commands, are not subject to interpretation. While standards do not mirror the same incontestable nature as rules, they always establish an interpretive dimension from which new contexts are included or excluded within its meaning.

In applying the same analytical framework as "rules" (if/then propositions), two standards of the ATS can be discerned:

Standards

1. "tort . . . in violation of the law of nations."
2. "tort . . . in violation of . . . a treaty of the United States."

Notice the distinction between rules and standards. Rule #4 specifies that "if" a claim is brought, then it must be brought as a "tort . . . committed in violation of the law of nations or a treaty of the United States." By contrast, both standards operate within the framework of the rule. This specific choice of text and these specific phrases are terms of art, having particular meanings within the ATS domain. These standards fundamentally require investigation beyond the rigidity of rules. No decision maker could look at the plain text of

215. *See* Kathleen M. Sullivan, *The Supreme Court 1991 Term Forward: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 58–59 (1992–1993) ("A legal directive is "standard"-like when it tends to collapse decision making back into the direct application of the background principle or policy to a fact situation. . . . Standards allow the decision maker to take into account all relevant factors or the totality of the circumstances."); *see also* Russell B. Korobkin, *Behavioral Analysis and Legal Form: Rules vs Standards Revisited*, 79 OR. L. REV. 23, 23 (2000) ("A law requiring drivers to drive "no faster than is reasonable" is a standard. To determine whether the driver has or has not violated the law, an adjudicator must investigate the range of relevant driving conditions and apply the background principle of reasonableness to the situation.").

the ATS and answer the question of whether a particular claim violates a "tort . . . in violation of the law of nations." This is different from rules, as a decision maker could easily utilize the text to answer the question of whether a "criminal action" can be brought under the ATS. While Rule #4 specifies what type of claim can be brought, Standard #1 and Standard #2 specify the term of art to be identified in order for an ATS claim to be invoked.

Standard #1. The "tort . . . in violation of the law of nations" term of art is a standard because it establishes a non-definite basis from which a decision maker must look beyond the text in order to make a determinative judgment. The question, "what is a tort . . . in violation of the law of nations?" cannot be answered by looking at the text. The very use of a "standard" in a statute means the interpreter must invariably turn to sources outside of the text to interpret and apply its meaning. The phrase "law of nations" cannot be understood without understanding what this means, how it is formed, and how it applies.

But recall the premise referenced earlier, that a standard can never be conclusively defined yet has an interpretive dimension from which new contexts are included or excluded within its meaning. Any decision maker must, in its institutional capacity, turn to some source, some norm or value, in rendering its judgment. It would first read the text and note the rule that "if an ATS claim is brought, then it must be brought as a tort . . . in violation of the law of nations. . . ." Next, it would examine the standard within the rule ("tort . . . in violation of the law of nations"). Lastly, it would turn its focus to sources outside of the standard to supply understanding. Implicit within this set of analytical steps are two key insights: first, the law of nations can be articulated and defined with some degree of clarity; and second, the law of nations has *some* outer perimeter, an interpretive dimension a decision maker can reasonably identify. While this interpretive dimension can and will likely change over time, as new contexts confront the standards of the ATS, this process of evaluation remains constant.

Standard #2. For purposes of this Article, the "tort . . . in violation of a treaty of the United States" standard does not warrant much discussion, as this process would be fairly straightforward. If the Executive, following her Article II, section 2 powers "to make Treaties," enters into treaty with a foreign state or multiple states,[216] two-thirds of the Senate approves the treaty (putting aside the question of self-executing versus non-self-executing treaties[217]), and the text of the treaty includes an actionable "tort" in its language, then the ATS would provide federal courts with original jurisdiction over that claim. There is a question whether a treaty would include a tort as a rule (i.e., a specific, intentional tort) or as a standard (i.e., the treaty establishes some

216. U.S. CONST. art. II, § 2 (the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur").

217. A self-executing treaty is a treaty that becomes judicially enforceable upon ratification, as opposed to a non-self-executing treaty, which becomes judicially enforceable through the implementation of legislation. *See, e.g.*, Medellin v. Texas, 552 US 491, 505 (2008).

non-determinative term of art such as "forced labor"), but the point is that, so long as the Constitutional guidelines for the entering and approval of treaties is met, then the standard has been met.

The use of "standards" in the ATS is a legislative choice, one that a plain reading of text cannot satisfy absent interpretive value judgments.[218] As Eskridge writes, "a simple, plain meaning approach to statutory interpretation seems unlikely to yield the determinacy needed for a foundational theory of statutory interpretation."[219] Interpretation, by its very nature, comprises normatively forward-looking, inferential processes, in which the actor trying to understand the meaning of a standard examines sources outside the text in order to address a new circumstance. This conception is consistent with the framers' intentions, noting that they believed "in the productivity of evolving interpretation to meet new circumstances."[220]

The "rules" and "standards" of the ATS provide the textual foundations from which the ATS can be understood. From its original language in the Judiciary Act of 1789, its modifications in 1873[221] and 1911[222], and up until its latest iteration passed in 1948[223], the text of the ATS has undoubtedly played the central role. Disaggregating the text into rules and standards provides a necessary step to best understand the ATS. But for the many contexts the rules and standards resolve, just as many questions are raised that the text cannot answer. Neither of the two Core Controversies can be settled by relying solely on rules and standards. For that, law as integrity demands that we turn to principles.

Principles Underlying the Alien Tort Statute

Law as integrity asserts the fundamental role of "principles" in understanding the ATS. The identification and articulation of principles represents the missing link to understand its meaning and scope. The longstanding inclination to overlook or ignore the normative role of principles contributes significantly to the grave state of uncertainty in resolving the two Core Controversies. Law as integrity affirms the role of principles that "must be taken into account by judges and lawyers who make decisions of legal obligation."[224] But what are principles and how do they apply to the ATS?

In his well-known essay, *The Model of Rules I*, Ronald Dworkin contrasted "policies" from "principles."[225] For Dworkin, a policy is a "kind of standard that sets out a goal to be reached, generally an improvement in some economic,

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218. *See* George H. Taylor, *Structural Textualism*, 75 B.U. L. Rev. 321, 327 (1995). *See also* King v. Burwell, 135 S. Ct. 2480, 2489 (2015) ("If the statutory language is plain, we must enforce it according to its terms.").

219. Eskridge, Jr., *supra* note 192, at 41.

220. *Id.* at 117.

221. *Supra* note 190.

222. Act of March 3, 1911, 36 State. 1087, 1093 (1911) (providing district courts with jurisdiction over "all suits brought by any alien for a tort only, in violation of the laws of nations or of a treaty of the United States").

223. *Supra* note 207.

224. Dworkin, *supra* note 204, at 29.

225. *Id.* at 22.

political, or social feature of the community. . . ."[226] By contrast, a principle is a "standard that is to be observed, not because it will advance or secure an economic, political or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality."[227] As a simple contrast, Dworkin writes that the notion that "automobile accidents are to be decreased" represents a policy, whereas the notion that "no man may profit by his own wrong" represents a principle.[228] "All that is meant," Dworkin writes, "when we say that a particular principle is a principle of law, is that the principle is one in which officials must take into account . . . as a consideration inclining in one direction or another."[229]

Rules, standards, and principles operate cohesively, although their normative function is vastly different. As Dworkin writes, "principles have a dimension that rules do not—the dimension of weight of importance."[230] Unlike rules, principles can intersect, and therefore the person tasked with resolving a conflict between principles must take into account the relative weight of each.[231] This cannot be, of course, an exact measurement, and the judgment that a particular principle is more important than another is often a controversial one. Nevertheless, it is an integral part of the concept of a principle that it has this dimension of weight, that it makes sense to ask "how important or weighty it is."[232] In hard cases, Dworkin asserts that "principles play an essential part in arguments supporting judgments about particular legal rights and obligations."[233]

For law as integrity, principles in the ATS are articulated value propositions rooted in some form of justice, fairness, or morality that explain the underlying meaning of a statute in an effort to define specific rights and obligations. ATS principles have the weight of importance in determining its role in the federal scheme and operate cohesively with its rules and standards. Principles do not contradict rules, but instead supply normative insight into answering how the ATS should be understood. This Section argues principles can be identified by examining the underlying objectives of the ATS at the time of its creation. In other words, one can construe a principle "as stating a social goal."[234] That social goal *is*, fundamentally, the social goal when the ATS was first passed.

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226. *Id.*

227. *Id.* (the example Dworkin uses comes from the classic New York case from 1889, *Riggs v. Palmer*, in which the principle, "no man may profit by his own wrong" was expounded). Although Dworkin uses the word "standard" in his definition of "policy" and "principle," this Article identifies "standards" as a distinct unit of interpretation within statutory text. Dworkin's use of the word "standard" can better be described as a "norm" both in his application to policies and principles. In that sense, Dworkin's "standard" and this Author's use of "standards" within law as integrity are not necessarily at odds with one another, although they take on distinctly separate meanings.

228. *Id.* at 22–28. Of course, Dworkin notes that the idea that "no man may profit from his own wrong" does not mean "the law never permits a man to profit from wrongs he commits." Dworkin notes the doctrine of adverse possession from Property Law as one example.

229. *Id.* at 26.

230. *Id.*

231. *Id.*

232. *Id.* at 27.

233. *Id.* at 28.

234. *Id.* at 22–23.

Principles do not operate as an endless constellation of value propositions that can be created whole cloth. While Dworkin argues that certain principles need not necessarily exist prior to a case being decided, the court can still cite to principles as its justification for adopting and applying a new rule to a particular circumstance.[235] In other words, the origin of principles lies not in a particular decision of some legislature or court, "but in a sense of appropriateness developed in the profession and public over time."[236] We argue for a particular principle by grappling with a whole set of shifting, developing and interacting standards (themselves principles rather than rules) about institutional responsibility, statutory interpretation, the persuasive force of various sorts of precedent, the relation of all these to contemporary moral practices, and hosts of other such standards."[237]

With that in mind, the task of identifying the core principle(s) of the ATS requires examining the fundamental value propositions that explain the statute's motivations and underlying norms. In performing this investigation, there is a rich body of literature on the history and motivations of the ATS from which principles can be discerned.[238]

In a canonical article, Professors Anthony Bellia Jr. and Bradford Clark focus on the centrality of the law of nations at the time the Judiciary Act of 1789 was passed. On the Bellia Jr. and Clark account, several "principles" motivate the passage of the ATS in 1789. Three can be identified: the U.S. had duties and responsibilities under the law of nations for certain actions committed by its citizens or subjects against other nations or their citizens; the U.S. must provide fora for civil remedies to ensure the nation will not be held responsible for its citizens or subjects violations of the law of nations; and if the U.S. failed to redress violations of the law of nations committed by its citizens or subjects it risks giving the other nation just cause for war. This analysis provides a resolution to Rule #4, answering the question of what a "tort . . . in violation of the law of nations or treaty of the United States" means. As Bellia Jr. and Clark write, "the ATS was enacted against a well-known background understanding of when the law of nations shields nations responsible for the torts of their citizens. Private citizens were said to violate the law of nations if they engaged in certain acts that breached the peace of nations by triggering an obligation on the part of their nation to provide redress or face reprisals."[239]

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235. *Id.* at 28. Dworkin states that, if one was challenged to back up the claim that some principle is a principle of law, we would mention "any prior cases in which that principle was cited, or figured in the argument," but also "any statute that seemed to exemplify that principle (even better if the principle was cited in the preamble of the statute, or in the committee reports or other legislative documents that accompanied it)."

236. *Id.* at 40.

237. *Id.*

238. *See, e.g.*, Bellia Jr. & Clark, *supra* note 8; Burley, *supra* note 180; Casto, *supra* note 6; William S. Dodge, *The Constitutionality of the Alien Tort Statute: Some Observations on Text and Context*, 42 VA. J. INT'L L. 687, 689 (2002). It should be noted that neither author referenced here necessarily adopts a "principle" approach to statutory interpretation. Yet each Article cited provides invaluable insight into the key investigations necessary for a law as integrity approach to the ATS.

239. Bellia Jr. and Clark, *supra* note 8, at 470.

On a related account, Professor William Dodge argues the ATS was designed to ensure that those who violated the law of nations could be held liable not just criminally but civilly as well.[240] For Dodge, the Continental Congress became concerned with "how to redress individual violations of the law of nations as early as 1781,"[241] where, in lacking formal statutory power, it passed a resolution urging state legislatures "to provide expeditious, exemplary, and adequate punishment" for a number of specific offenses "against the law of nations."[242] Turning to John Jay in *The Federalist* No. 3[243] and James Madison at the Constitutional Convention,[244] Dodge argued that "the original intent of the Alien Tort Clause was to provide the broad civil remedy for violations of the law of nations that the Continental Congress had sought since 1781."[245] Professor Casto confirms this sentiment, writing that the Continental Congress "grappled with the problem of providing judicial remedies for violations by individuals of the law of nations," specifically the concern that "the national government—such as it was—could not credibly disavow the misconduct of private individuals if 'regular and adequate punishment shall not have been provided against the transgressor.'"[246] This coincided with the Marbois Affair and the Van Berckel controversy,[247] two pre-constitutional era episodes concerning foreign ambassadors' inability to seek redress for civil tort claims that took place on U.S. soil.[248] The Continental Congress's inability to provide

240. Dodge, *supra* note 7, at 224.

241. *Id.* at 226. (citing 21 Journals of the Continental Congress 1774–1789, at 1136–1137 (Library of Congress, 1912)).

242. *Id.* at 257 ("That it be farther recommended [to the states] to authorise suits to be instituted for damages by the party injured, and for compensation to the United States for damage sustained by them from an injury done to a foreign power by a citizen.").

243. *Id.* at 235. Jay's essay expressed the Founding Generation's desire for a uniform interpretation of the law of nations and discussed the importance of law of nations adjudications to be held in federal forums where there could be uniformity.

244. *Id.* (as Madison wrote, "we well know, sir, that foreigners cannot get justice done them in these [state] courts, and this has prevented many wealthy gentlemen from trading or residing among us").

245. *Id.* at 237.

246. Casto, *supra* note 6, at 490.

247. *Id.* at 491–494. The Marbois Affair (May 17, 1784) concerned the assault of Mr. Marbois, the Secretary of the French legation, by the Chevalier de Longchamps, a French adventurer in the streets of Philadelphia. After de Longchamp was arrested and released on bail, he sent anonymous letters to Marbois and threatened assassination if the prosecution was not discontinued. *Id.* at 491. Despite international outrage over this event, the Continental Congress was powerless to deal with this, only offering a reward for apprehending de Longchamps so he could be delivered to the relevant state authorities. *Id.* at 492. As Casto writes, "the Marbois Affair was a national sensation that attracted the concern of virtually every public figure in America," *id.*, noting that "the real foreign affairs problem was the possibility that the United States might fail to provide an appropriate sanction or remedy." *Id.* at 493. The Van Berckel issue took place in New York City, where a constable entered the house of the Dutch Ambassador Van Berckel and arrested one of his house servants. As Casto writes, "[t]his affront outraged the Ambassador, and he immediately protested to Jay, who was Secretary of the United States Department of Foreign Affairs." *Id.* at 494. But as in the Marbois Affair, the national government was powerless to act.

248. This Article argues that the ATS is best understood as a constitutional outgrowth "alienage jurisdiction" under Article III of the U.S. Constitution. The implication, therefore, is that had the Marbois Affair been adjudicated under law as integrity, the court should have dismissed the case for a lack of subject-matter jurisdiction as the "controversy" was between two "aliens," i.e., non-U.S. citizens. By contrast, the Van Berckel Controversy could have been adjudicated properly under law as integrity because it was a controversy between an "alien" plaintiff and a U.S. citizen defendant. Law as integrity

redress during these two events motivated the passage of the ATS. Like Bellia Jr. and Clark, Dodge roots the underlying motivations of the original Alien Tort Clause in the United States' duties and responsibilities under the law of nations.[249]

On a final account, Burley, through the lens of history and tradition, argues that the Framers' understanding (of the ATS) was of a more general obligation to help redress certain violations of international law as such, regardless of where they may have occurred or the identity of the victim.[250] Based on that premise, Burley asserts that "the Alien Tort Statute was a straightforward response to what the Framers' understood to be their duty under the law of nations."[251] On this expansive view, Burley concludes that the ATS is a "badge of honor" that "contribute[s] . . . to the moral and political standing of the United States as a champion of international law."[252]

While the historical objectives are vast, on balance, the fundamental motivation underlying the passage of the ATS is the responsibility of the United States in meeting its duties and responsibilities under the Law of Nations. Therefore, the following principle, as articulated by Justice Sotomayor in *Nestlé*, holds the greatest weight in articulating the core value proposition of the ATS.

Principle(s)

1. "The First Congress enacted the ATS to ensure federal courts are available to foreign citizens who suffer international law violations for which other nations may expect the United States to provide a forum for redress."[253]

This principle reflects the foundational objective of the ATS at the time of its original passing. It communicates the goals of a new Republic seeking to instantiate itself within the international arena and provide federal mechanisms in pursuit of its obligations under the Law of Nations. These responsibilities were not simply to provide fora in which law of nations grievances could be redressed, but to ensure that its own persons and entities could be held accountable as well. Importantly, this principle emphasizes that foreign nations would expect the United States to provide federal avenues for international law violations inflicted on its members by members of the United States. In

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principally addresses the issue of subject-matter jurisdiction. The fact that both controversies took place on American soil only matters insofar as establishing personal jurisdiction, i.e., whether the court in question was properly authorized to make a binding judgment in the particular lawsuit based on its location in relation to the U.S. citizen party.

249. Dodge, *supra* note 7, at 230. (In commenting on the Marbois Affair and Van Berckel controversy, Dodge wrote: "There is no record of any civil action being filed against de Longchamps or against the constable in the Van Berckel case. Nevertheless, each had committed what would have been recognized as a tort and, in so doing, each had violated the law of nations.").

250. Burley, *supra* note 180, at 464.

251. *Id.*

252. *Id.* at 493.

253. *Nestlé*, 593 U.S. at 636 (Sotomayor J., concurring); *see also* Golove & Hulsebosch, *infra* note 365.

essence, Justice Sotomayor's principle encapsulates Dworkin's idea of "appealing to an amalgam of practice and other principles in which the implications of legislative and judicial history figure along with appeals to community practices and understandings."[254] This principle provides normative guidance as to what the statute's fundamental meaning is, and importantly, what legal rights and duties flow from that in harmony with the preceding rules and standards.

This Section has asserted law as integrity as a normative theory of the ATS. This theory focuses on the relationship between the rules, standards, and principles of the ATS. As this Section has tried to show, the rules and standards, while essential to defining the textual limitations of the ATS, simply cannot resolve the two Core Controversies on their own. Principles, as underlying value propositions expressing the normative objectives of the ATS at the time of its original passing, provide this missing link.

III. Strict Jurisdiction and the Cause of Action

This Section analyzes the first Core Controversy through the lens of law as integrity. To understand the federal courts' role in shaping ATS jurisprudence, it must first be understood what that role is. For if the ATS is strictly jurisdictional, then the onus falls on Congress to establish new causes of action in order to meet the demands of subject-matter jurisdiction. However, if the ATS is more than a jurisdictional vehicle, the next pursuit becomes understanding the breadth of federal courts' common law power in the ATS context.

Law as integrity provides an analytical framework in which to resolve this question. Building on the principles of the ATS, the unique federal interests concerning international relations, and the history and evolution of federal courts in developing common law, this Section argues that federal courts can recognize causes of action under the ATS. The fact that the First Congress expected federal courts to hear these types of claims strongly suggests that the "modest common law" view (explained below) is the most appropriate way in which to view the development of ATS jurisprudence. On this view the ATS is both a jurisdictional grant and a textual source for identifying new causes of action.

Strict Jurisdictional, Limited Common Law, Modest Common Law

There are three positions comprising the first Core Controversy: (1) the "strict jurisdictional" view, which says the ATS is only jurisdictional in nature, requiring separate legislation to provide a substantive cause of action; (2) the "limited common law" view, which says that federal courts can exercise common law power limited to three "historical torts" that violated the Law of Nations in 1789; and (3) the "modest common law" view, which says that federal courts can exercise their common law power to recognize new Law of Nations torts beyond the three historical torts.

254. Dworkin, *supra* note 31.

The confusion from these three views is exacerbated in that each has been heralded as persuasive.[255] Yet these views cannot be reconciled into some middle ground, for their underlying assumptions are at odds with one another. For example, despite the fundamental paradox outlined in *Sosa*, the strict jurisdictional and limited common law views cannot coexist, for the former says that the ATS requires a separate cause of action whereas the latter argues the ATS includes common law causes of action. Moreover, while the limited common law view and the modest common law view do not directly contradict one another, both compete for interpretive legitimacy. The limited common law view maintains that federal courts do have an implicit common law power under the ATS, but that power is constrained by the three historical torts outlined by Blackstone. The modest common law view not only accepts that federal courts have a common law power to recognize causes of action under the ATS, but also that this power extends beyond those three "historical torts" to include new interpretations that are "specific, universal, and obligatory" as explained in *Sosa*.[256]

In an effort to resolve the first Core Controversy, each view is taken in turn.

Strict Jurisdictional View

To begin exploring the strict jurisdictional view, a threshold question must be posed: what would incontrovertibly determine that the ATS is strictly jurisdictional? For example, if the statute included a rule of clear statement to the effect of "this statute is only jurisdictional and only meant to be interpreted as jurisdictional, requiring a separate cause of action" then this would end our inquiry altogether.[257] But putting the obvious case aside, and insofar as no clause like this exists in the ATS, the analysis must turn elsewhere. Should the absence of explicit language concerning the first Core Controversy suggest its interpretation be left to whatever viewpoint can generate judicial consensus? And if so, are we content to leave the understanding to whatever meaning can garner a majority of votes? Surely a commitment to rule of law principles and the pursuit of clarity, namely the idea that the objective understanding

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255. *See Tel-Oren*, 726 F.2d at 801 (Bork, J., concurring) (defending the "strict jurisdictional" view); *Sosa*, 542 U.S. at 724 (articulating the grounds for the "limited common law" view); *Nestlé*, 593 U.S. at 646 (Sotomayor, J., concurring) (articulating the grounds for the "modest common law" view).

256. *Sosa*, 542 U.S. at 732 (quoting *In re Estate of Marcos Human Rights Litigation*, 25 F.3d 1467, 1475 (9th Cir. 1994)).

257. Although, we see numerous examples where the strict text of a statute is contravened by an underlying purpose. *See, e.g.*, *Riggs v. Palmer*, 115 N.Y. 506 (1889) (reasoning that the legislature couldn't have intended a murderer to inherit from their victim, and so emphasizing legislative intent and the underlying common law maxim against profiting from wrongdoing is appropriate to overrule or deviate from the statute's strict text); *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978) (reasoning that Congress intended to prioritize endangered species' survival under the plain meaning of the Endangered Species Act, leading the Court to halt a nearly completed dam project despite significant and continual Congressional appropriations); *Train v. Colorado Pub. Int. Rsch. Grp., Inc.*, 426 U.S. 1, (1976) (reasoning that the legislative history of the Federal Water Pollution Control Act showed Congress intended the Atomic Energy Commission, not the EPA, to regulate radioactive materials, emphasizing that legislative history provides crucial context and clarification to avoid inconsistent results, even when the strict text seems explicit).

of a statute should take precedence over politically motivated interpretation, would find this answer insufficient.[258] Fair administration of justice demands ascertaining an impartial and unprejudiced understanding of the law, while accepting the reality that new factual contexts invariably demand judicial interpretation.

To be clear, there is no dispute that Congress can create new causes of action under its Article I power "to define and punish . . . Offences against the Law of Nations."[259] The question is whether federal courts can recognize common law causes of action *in parallel* to Congress's power.

Recall the "original jurisdiction" clause within the ATS (Rule #1).[260] There is little dispute that only federal district courts shall have original jurisdiction over ATS claims. Its rule is absolute, bound by the commands of the text.[261] At a separate level, the rules governing the Supreme Court's "original jurisdiction" find their commands in the Constitution, specifically the language separating cases distinguishing appellate from original jurisdiction in Article III.[262] But for federal district courts the concept of "original jurisdiction" is exclusively rooted in statute, specifically the Judiciary Act of 1789.[263] In passing this law, Congress established "inferior" courts comprising the federal court system, which included granting federal courts original jurisdiction over a set of limited matters that it alone could define.[264] Regardless of one's interpretive outlook, jurisdiction and powers granted at the federal court level can only be granted by Congress.[265] Therefore any determination requires an exercise in statutory interpretation.

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258. Lon L. Fuller, The Morality of Law 63 (1964) ("The desideratum of clarity represents one of the most essential ingredients of legality. . . . Yet it is obvious that obscure and incoherent legislation can make legality unattainable by anyone, without an unauthorized revision which itself impairs legality.").

259. U.S. Const. art. I, § 8, cl. 10.

260. *See supra* pt. II(A).

261. *See supra* Rule #1 from Section II that places this command within the if/then logical structure.

262. U.S. Const. art. III, § 2, cl. 2 ("In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction . . . ."); *see also* The Federalist No. 81 (Alexander Hamilton) ("The Supreme Court is to be invested with original jurisdiction, only "in cases affecting ambassadors, other public ministers, and consuls, and those in which A STATE shall be a party.").

263. The Judiciary Act of 1789 (ch. 20, 1 Stat. 73). This act is considered one of the "organic laws" of the United States, *see* Fallon, *infra* note 303, at 76–77.

264. Nowhere in the U.S. Constitution is "original jurisdiction" outlined for "inferior Courts." The only reference to "original jurisdiction" in the Constitution is its grant of original jurisdiction to the Supreme Court (Article III, § 2, cl. 2: "In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction."). By contrast, Article III, § 1 gives Congress the power to "ordain and establish" such inferior Courts as it "may from time to time ordain and establish." The point being that the power of original jurisdiction for "inferior" federal courts derives exclusively from congressional act and not the U.S. Constitution itself. This gives Congress the power to define the jurisdiction of lower federal courts, *see generally* Sheldon v. Sill, 49 U.S. 441 (1850) (because lower federal courts owe their authority to Congress rather than the Constitution, Congress has the authority to shape the extent of their jurisdiction. It may do so even in a way that limits the grant of authority under Article III).

265. The Federalist No. 81 (Alexander Hamilton) ("We have seen that the original jurisdiction of the Supreme Court would be confined to two classes of causes, and those of a nature rarely to occur. In

Proponents of the "strict jurisdictional" view typically proceed along textual and historical lines. For example, Professor Casto wrote that "section 1350 clearly does not create a statutory cause of action."[266] In support of this position Casto referenced a statement from Congressman Fisher Ames, who delivered a speech in the House of Representatives defending the district courts' jurisdiction in the then-proposed Judiciary Act of 1789.[267] In the speech Ames noted the "substantial difference between the jurisdiction of the courts and the rules of decision."[268] The inference here is that Congress knew how to draw distinctions between jurisdictional statutes and statutes creating substantive causes of action. As Casto writes, "[w]hen the first Congress desired to create statutory civil actions, entirely different language was used."[269]

But Professor Dodge challenged the very idea that the ATS requires an express cause of action.[270] Dodge argued that requiring an express cause is "patently antihistorical,"[271] writing that "the very notion of an express cause of action did not appear until 1848—nearly sixty years after Congress passed the Alien Tort Clause."[272] The Supreme Court confirmed this in 1979.[273] In effect, Dodge asserted that the ATS does not need an express cause of action in its text because that very concept did not exist when the statute was passed. But does the fact that the term "cause of action" did not exist provide conclusive proof that the ATS includes causes of action? Dodge's account, although persuasive, does not strike at the heart of this problem. It does, however, provide important context that shuts the door on arguments that rely strictly on explicit congressional grant. Any argument relying on the lack of an express "cause of action" must grapple with Dodge's historical fact.

On a competing account, Professor Curtis Bradley argues that the ATS is purely jurisdictional, meaning that alien tort suits do not "arise under" the statute itself for purposes of Article III, the law of nations is not part of the "Laws of the United States" referred to in Article III, and that the First

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all other cases of federal cognizance, the original jurisdiction would appertain to the inferior tribunals; and the Supreme Court would have nothing more than an appellate jurisdiction, 'with such EXCEPTIONS and under such REGULATIONS as the Congress shall make.'").

266. Casto, *supra* note 6, at 479.

267. *Id*.

268. *Id*. at 479, n.60.

269. *Id*. at 479. In footnote 62, Professor Casto supports his position by citing two 18th Century statutes with clear textual commands granting a cause of action. *Id.* at 429 n.62. The first, "An Act to Promote the Progress of Useful Arts," passed in 1790, was a patent protection statute requiring infringers to forfeit and pay damages to the patentee "which may be recovered in an action on the case founded on this act," and "An Act for the Government and Regulation of Seamen in the Merchants Service, also passed in 1790, which requires seamen who abandon their service to be held "liable to pay [the master] all damages . . . recovered with costs, in any court . . . having jurisdiction of the recovery of debts." *Id*.

270. Dodge, *supra* note 7, at 224 (an "express cause of action" meaning that the text of the statute provides an explicit grant of authority for private parties to bring suit if they are a victim of a breach of the statute).

271. *Id*. at 237–240.

272. *Id.* at 237.

273. Davis v. Passman, 442 U.S. 228, 237 (1979) (the "cause of action" became a legal term of art only in 1848 when the New York Code of Procedure abolished the distinction between law and equity "and simply required a plaintiff to include in his complaint 'a statement of the facts constituting the cause of action'").

Congress intended the Alien Tort Statute as an implementation of alienage jurisdiction that would reach only suits against U.S. citizens.[274] By contrast, Bradley argues that the Judiciary Act of 1789 "was designed to regulate the structure and jurisdiction of the federal courts, not rights to relief" and that the original alien tort provision in Section 9 "made no reference to damages or any other remedies."[275]

Professor Dodge aligned with Bradley's contention, writing that he "agree[s] with Bradley that the First Congress thought the Alien Tort Statute was purely jurisdictional."[276] Yet Dodge qualifies this statement, arguing that Bradley's discussion masks two important points: first, for the First Congress, "it would not have occurred to them that such a cause of action was necessary . . . [t]he requirement of a cause of action did not enter American law until 1848" and it "assumed that torts in violation of the law of nations would be cognizable at common law, just as any other tort would be." Second, "Congress could have enacted such a law if it so desired."[277]

With such fervently competing accounts, a broader question must be asked: is there any historical evidence to suggest that federal courts were expected to provide a cause of action absent a separate statute? The 1794 incident in which an American citizen led a French privateer fleet in a mission to plunder the British colony of Sierra Leone proves illustrative.[278] After plundering the colony for two weeks, the British ambassador protested to the government of the United States about the American citizen who led and other American citizens who joined in the attack.[279] "Fortunately," Professor D'Amato writes, "the Founding Fathers had foreseen this very dilemma a half-dozen years earlier when they enacted the Alien Tort Statute."[280] In reply to the inquiry from the British Ambassador, then-Attorney General William Bradford produced a legal opinion invoking the ATS, writing:

> "[T]here can be no doubt [the Sierra Leone Company] or individuals . . . injured by these acts of hostility have a remedy by a *civil* suit in the courts of the United States; jurisdiction being expressly given to these courts in all cases where an alien sues for a tort only, in

274. Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 Va. J. Int'l L. 587, 619 (2002) ("There is substantial evidence suggesting that the First Congress believed that at least the law of nations portion of the Alien Tort Statute was an implementation of Article III alienage jurisdiction–that is, jurisdiction over "Controversies between . . . the Citizens [of a state], and . . . Citizens or Subjects [of a foreign state].")

275. *Id.* at 593.

276. Dodge, *supra* note 238, at 689.

277. *Id*. at 690 (citing Davis v. Passman, 442 U.S. 228, 237 (1979)).

278. *See* William R. Casto, *The Federal Courts' Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations*, 18 Conn. L. Rev. 467, 502, n.198 (1986). As Casto notes, documentation of the Sierra Leone episode comes from Christopher. Fyfe, A History Of Sierra Leone 59–61 (1962).

279. Anthony D'Amato, *The Alien Tort Statute and the Founding of the Constitution*, Am. J. Itl'l L. 62, 66 (1988). Professor D'Amato described the conundrum for the United States: "If the United States attempted to pay reparations to Great Britain, France surely would have been angered and might have been provoked into military hostilities against the United States. On the other hand, if the United States failed to do anything, Great Britain would have regarded the failure as a denial of justice." *Id.*

280. *Id*.

> violation of the law of nations, or a treaty of the United States; . . . such a suit may be maintained by evidence taken at a distance, on a commission issued for that purpose."[281]

The Sierra Leone incident provides the first evidence of the ATS providing grounds for jurisdiction and a tort absent a separate statute.

Limited Common Law View

The "limited common law" view took shape in *Sosa*.[282] This view states that the ATS is jurisdictional in nature, but includes three "historical torts" within its purpose: "violation of safe conducts, infringement of the rights of ambassadors, and piracy."[283] The *Sosa* Court entrenched the fundamental paradox giving rise to this view, namely that the ATS is jurisdictional but also includes three historical torts in violation of the Law of Nations understood by the First Congress. At its best, *Sosa* is a great example of jurisprudence absent theoretical foundation. At its worst, *Sosa* represents the scattered realities of judicial decision making, as the Court slashed through a confused jungle of text, intent, historical meaning, purpose, and the need to find five controlling votes to expound a workable solution.

Though referenced earlier, the key passage from *Sosa* is worth quoting in full:

> "In sum, although the ATS is a jurisdictional statute creating no new causes of action, the reasonable inference from the historical materials is that the statute was intended to have practical effect the moment it became law. The jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time."[284]

The error of the "limited common law" view is the logic underlying the Court's reasoning. Put simply, a statute cannot be "strictly jurisdictional" in one moment, and in the next moment include a narrow range of common law torts in violation of the Law of Nations. Moreover, limiting this common law power to a short list of "historical torts" is arbitrary absent affirmative language creating these distinct limitations. This hedging between positions represents an inconsistency even the most fluid of theorists would reject. Consider the following syllogism:

> *Major Premise*: Strictly jurisdictional statutes do not include causes of action
> *Minor Premise*: The ATS includes common law causes of action
> *Conclusion*: The ATS is not a strictly jurisdictional statute

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281. 1 Op. Att'y Gen. 57, 59 (1795).
282. Although Judge Bork was the first to mention the three Blackstone "historical torts" as the possible limitation. *See supra* note 72.
283. *Sosa*, 542 U.S. at 724.
284. *Id.*

Despite its simple logic, this conflicting premise continues to the present day. Recall that Justice Gorsuch advanced a similar idea in *Nestlé*, arguing that the ATS "nowhere deputizes the judiciary to create *new* causes of action (emphasis added),"[285] adding that "the statute confers jurisdiction on federal courts to adjudicate tort claims by aliens for violations of the law of nations."[286] Yet Justice Gorsuch hedged in the very next sentence, writing that "perhaps this language [of the ATS] was originally understood to furnish federal courts with authority to entertain a limited number of specific and existing international tort claims that, if left unremedied, could give rise to reprisals of war."[287] Within a short section of his opinion, Justice Gorsuch discarded the historical fact that federal courts were in all likelihood expected to entertain a limited category of law of nations torts.

The *Sosa* Court's fundamental paradox began this confusion, when it reasoned that an otherwise strictly jurisdictional statute was also not meant to be "stillborn"—meaning a "jurisdictional convenience to be placed on a shelf" until a future Congress took action. This muddied, middle ground view again contravenes the legal logic underlying judicial decision making. It is as if the Court is saying, "well, until you [Congress] pass legislation giving this strictly jurisdictional statute life, we will go ahead and infer that some torts are included." But as the flawed syllogism shows, the ATS must be one or the other. Legal logic refutes the basis that the ATS is only jurisdictional yet includes a specific number of torts recognized in 1789. It either serves strictly as a jurisdictional statute or establishes jurisdiction and creates a standard for Law of Nations torts.

History supports rejection of this flawed view. In a persuasive account, Dodge argued that limiting torts to those that violated the law of nations in 1789 is "out of tune with the Founding Generation's views."[288] As he noted, "not only did the members of the First Congress understand that the Law of Nations had evolved, they expected that evolution to continue—indeed, they specifically provided for it."[289] Dodge's view more closely aligns with the principles of the ATS and the First Congress's historical understanding, namely that circumstances evolve with the passage of time, that meanings of words in one generation take a different shape in another, and that the granting of power, absent affirmative language to the contrary, does not close the door on future interpretation of that power given.

Another peculiar element of the "limited common law" view's reasoning is the reliance on Blackstone's *Commentaries on the Laws of England* to establish and constrain the Law of Nations torts.[290] The standard phraseology finding

285. The use of the word "new" causes of action implied that the "old" causes of action, the three "historical torts" mentioned earlier, may lay intact. I am unaware of any statute that reconciles a strict jurisdictional posture while preserving some limited class of causes of action.

286. *Nestlé*, 593 U.S. at 643 (Gorsuch, J., concurring).

287. *Id.* (citing Bellia Jr. & Clark, *supra* note 8).

288. Dodge, *supra* note 7, at 238.

289. *Id.*

290. *See generally* 4 William Blackstone, Commentaries On The Laws Of England 68 (1769).

these "historical torts ('violation of safe conducts, infringement of the rights of ambassadors, and piracy') to be conclusive is that they were '*probably* on [the] minds of the men who drafted the ATS (emphasis added).'"[291] Essentially, the Court in *Sosa* argued that because those three torts were "probably" on the minds of the drafters of the ATS, they should in fact control when determining what particular Law of Nations torts are actionable under federal common law.

There are several assumptions in the *Sosa* Court's line of reasoning. First, it narrowly selects Blackstone's *Commentaries* as definitive when there were other scholars and understandings of the Law of Nations at the time, principally Emmerich De Vattel[292] and Hugo Grotius.[293] Moreover, as Bellia Jr. and Clark noted, the *Sosa* Court was "too restrictive in suggesting that the ATS originally encompassed only torts corresponding to a narrow class of law of nations violations that English law criminalized—violation of safe conducts, infringement of the rights of ambassadors, and piracy."[294] Though the language of the text or the legislative history may suggest Congress intended to "freeze" a body of common law at the time of enactment, the common law is widely understood to be an evolving and developing body of law.[295] In sum, the "limited common law" must be irreversibly rejected.

Modest Common Law View

Lastly, the "modest common law" view is the idea that federal courts can not only utilize their power of common law to recognize torts in violation of the Law of Nations but extend that recognition beyond the three "historical torts" identified by Blackstone and outlined by the Supreme Court in *Sosa*.[296]

This view is largely articulated by Justice Sotomayor in her concurring opinion in *Nestlé*.[297] Justice Sotomayor's opinion aligns closely with the

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291. *Sosa*, 542 U.S. at 715 (citing 4 William Blackstone, Commentaries On The Laws Of England 68 (1769) ("It was this narrow set of violations of the law of nations, admitting of a judicial remedy and at the same time threatening serious consequences in international affairs, that was probably on minds of the men who drafted the ATS with its reference to tort.").

292. *See generally* Emmerich De Vattel, The Law of Nations or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns 1 (Joseph Chitty ed.) (1844) (describing the Law of Nations as "[t]he science which teaches the rights subsisting between nations or states, and the obligations correspondent to those rights").

293. *See generally* Hugo Grotius, The Law of War and Peace (Francis W. Kelsey trans., 1925) (describing jus gentium as the law established by natural reason for all men, distinct from jus civile, which is peculiar to a specific state or people).

294. Bellia Jr. & Clark, *supra* note 8, at 465.

295. Edward Levi, An Introduction to Legal Reasoning 8–27, 27–57 (1948) (discussing the development of common law rules and the evolution of statutory interpretation).

296. *See, e.g.*, the recognition of aiding and abetting liability under the ATS in Doe I v. Cisco Systems, Inc. 73 F.4th 700, 716 (9th Cir. 2023) ("Our Circuit has acknowledged several times the availability of aiding and abetting liability under the ATS."). *See Nestlé I*, 766 F.3d at 1023; Sarei v. Rio Tinto, 671 F.3d 736, 749, 765 (9th Cir. 2011) (en banc), vacated, Rio Tinto PLC v. Sarei, 569 U.S. 945 (2013). We now revisit the question and conclude again, in agreement with every circuit to have considered the issue, that aiding and abetting liability is a norm of customary international law with sufficient definition and universality to establish liability under the ATS. Because recognizing aiding and abetting liability does not raise separation-of-powers or foreign policy concerns under *Sosa* step two, we further decide, such liability is cognizable for the purposes of the ATS.

297. *Nestlé*, 593 U.S. at 646 (Sotomayor, J., concurring in part and concurring in the judgment).

foundational principle of law as integrity. First, she argued the principle that "the First Congress enacted the ATS to ensure that federal courts are available to foreign citizens who suffer international law violations for which other nations may expect the United States to provide a forum for redress."[298] Next, Justice Sotomayor challenged the "limited common law view," accepting the notion that the law of nations evolves over time, and in the process disagreed with Justice Thomas's view in limiting the reach to the three historical torts.[299] This approach, Justice Sotomayor argued, contravenes the Court's holding in *Sosa* and the text and history of the ATS. As she wrote:

> The statute was "enacted on the understanding that federal common law would provide a cause of action for a modest number of international law violations . . . the statute is best read as having been enacted on the understanding that the common law would provide a cause of action for widely recognized torts in violation of the law of nations."[300]

Justice Sotomayor's view aligns closely with Dodge's argument that the federal common law power was expected to be actionable within the ATS itself. Justice Sotomayor makes clear that "from the moment the ATS became law, the First Congress expected federal courts to identify actionable torts under international law and to provide injured plaintiffs with a forum to seek redress."[301] For Justice Sotomayor, to engage in ATS-related litigation, federal courts must interpret international law and "identify those norms that are so specific, universal, and obligatory that they give rise to a 'tort' for which Congress expects federal courts to entertain 'causes'"—or in modern terms, "civil actions"—for redress.[302] Justice Sotomayor's concurring opinion recognizes the reality that common law torts would evolve over time, emphasizing that the ATS does not, and never will, list the torts that fall within its purview.

In considering the "modest common law" view, two further underlying assumptions must be examined: first, the scope of Article III courts' common law power in a modern legal context; and second, the "tort . . . in violation of the law of nations" as a manageable standard for courts to apply.

Federal courts can indisputably exercise their common law power. Generally, federal common law is defined as "federal rules of decision whose content cannot be traced directly by traditional methods of interpretation to federal statutory or constitutional commands."[303] In effect, federal common law is

298. *Id.* at 649–50. ("Congress' 'principal objective' in establishing federal jurisdiction over such torts 'was to avoid foreign entanglements by ensuring that availability of a federal forum where the failure to provide one might cause another nation to hold the United States responsible for an injury to a foreign citizen.'").

299. *Id.*

300. *Id.* at 646–650. (Sotomayor, J., concurring).

301. *Id.* at 650.

302. *Id.* at 651.

303. Richard H. Fallon et al., Hart and Wechsler's the Federal Courts and the Federal System 635 (7th ed. 2015).

judicial lawmaking.[304] On one account, Thomas Merrill asserts that federal common law is distinguishable from an implied cause of action, as the latter requires a specific congressional intent to create such an action[305] whereas the former does not.[306] Moreover, he argues that "federal common law is not qualitatively different from textual interpretation, but rather is an extension of it, with 'interpretation' understood in a broader sense than the search for the specific intentions of the [drafters]."[307] As a result, federal common law "refers to legal rules (substantive or procedural) that (1) are propounded by courts, that is, are not found on the face of an authoritative federal text, and (2) have the status of federal law."[308]

The Supreme Court has previously ruled that it is within the power of Congress to delegate lawmaking power to the federal courts.[309] It has also recognized that federal common law has traditionally governed four enclaves: "(1) cases affecting the rights and obligations of the United States, (2) interstate controversies, (3) international relations, and (4) admiralty."[310] Further, in *Sabbatino*, the Supreme Court held that federal courts can exercise common law power if the "problems" posed by the case were "uniquely federal in nature."[311] The question is whether "torts . . . in violation of the Law of Nations" fall within either of the four enclaves, and are these of a uniquely federal nature?

ATS claims affect the rights and obligations of the United States, under a view of the Law of Nations as a norm in which states are responsible for the actions of their members. This view of the Law of Nations also implicates "interstate controversies," as the ATS often deals with transnational claims from an "alien," and concerns "international relations," as ATS suits often overlap with U.S. foreign policy prerogatives. Put simply, the ATS overlaps with

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304. *See generally* Thomas W. Merrill, *The Common Law Powers of the Federal Courts*, 52 U. CHI. L. REV. 1 (1985).

305. Transamerica Mortgage Advisors v. Lewis, 444 U.S. 11, 15–16 (1979) ("The question whether a statute creates a cause of action, either expressly or by implication, is basically a matter of statutory construction. While some opinions of the Court have placed considerable emphasis upon the desirability of implying private rights of action in order to provide remedies thought to effectuate the purposes of a given statute, what must ultimately be determined is whether Congress intended to create the private remedy asserted, as our recent decisions have made clear.") (citing Touche Ross & Co. v. Redington, 442 U.S. 560, 568 (1979)).

306. Merrill, *supra* note 304, at 24–26.

307. *Id.* at 5.

308. *Id.* at 7.

309. *See generally* Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957). This case dealt with Section 301(a) of the Labor Management Relations Act, which provides federal district court jurisdiction over "[s]uits for violation of contracts between an employer and a labor organization . . . in an industry affecting commerce . . . ." *Id.* at 449. The Supreme Court relied on legislative history to hold that this provision was not merely a grant of jurisdiction but that it also "authorize[d] federal courts to fashion a body of federal law for the enforcement of these collective bargaining agreements . . . ." *Id.* at 451.

310. Jay Tidmarsh & Brian Murray, *A Theory of Federal Common Law*, 100 NW. U. L. REV. 585, 594 (2006) ((1) cases affecting the rights and obligations of the United States, (2) interstate controversies, (3) international relations, and (4) admiralty).

311. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 4024 (1964) (the Court analogized this use of federal common law to other "enclaves of federal judge-made law which bind the States" that "have been thought by this Court to be necessary to protect uniquely federal interests") (citing Clearfield Trust v. United States, 318 U.S. 363, 366)).

several distinct enclaves within the Supreme Court's federal common law jurisprudence. In *Texas Industries*, for example, the Supreme Court recognized "the need and authority in some limited areas to formulate what has come to be known as 'federal common law.'"[312] This has generally turned on express or implied delegated lawmaking from Congress to the federal courts. Express delegated lawmaking means that "Congress has given the courts the power to develop substantive law."[313] Delegated lawmaking occurs "when Congress or the framers of the Constitution have conferred power on the federal courts to fashion federal rules of decision in order to round out or complete a constitutional or statutory scheme."[314]

According to Professor Merrill, delegated lawmaking can exist "provided that two requirements are satisfied: first, that the enacting body specifically intended to delegate lawmaking power to the federal courts, and second, that the textual provision that is said to give rise to the delegation circumscribes or 'frames' with reasonable specificity the area in which judicial lawmaking is to take place."[315]

In addition to express delegated lawmaking, federal common law touches implied delegated lawmaking. This determination requires two inquiries: first, whether the delegation is sufficiently circumscribed, and second, whether a delegation was intended by the enacting body in the first place.[316] Specific considerations go into this analysis. For example, a grant of federal jurisdiction should not be considered sufficient to establish an intention to delegate lawmaking power.[317] By contrast, if in addition to granting jurisdiction to the federal courts, the enacting body adopts a broad legal standard that federal courts are directed to apply in resolving controversies, this may well support an inference of a delegation. The question is whether the "tort . . . in violation of the Law of Nations" standard fulfills either of the delegated lawmaking ideas.

In his concurring opinion in *Sosa*, Justice Scalia cited *Texas Industries.*[318] As Justice Scalia noted, the general rule is "[t]he vesting of jurisdiction in the federal courts does not in and of itself give rise to authority to formulate federal common law."[319] "This rule," Justice Scalia asserted, "applies not only to applications of federal common law that would displace a state rule, but also to applications that simply create a private cause of action under a federal statute."[320] Law as integrity reconciles this rule, as the ATS not only vests jurisdiction in the district courts, but sets out a "standard" from which federal courts fashion a limited body of federal common law: "tort . . . in violation of the law of

312. Texas Indus. v. Radcliff Materials, Inc., 451 U.S. 630, 640 (1981).
313. *Id.* at 640.
314. Merrill, *supra* note 304, at 40.
315. *Id.* at 41.
316. *Id.* at 43–44.
317. *Id.* at 44–45.
318. *Sosa*, 542 U.S. at 741 (Scalia, J., concurring).
319. *Id.* at 741–42.
320. *Id.* at 742.

nations."[321] It is not in doubt that the ATS is a jurisdictional statute, which means that the first element of implied delegated lawmaking is met. However, in this sense, the question for the ATS context is: does the phrase "tort . . . in violation of the Law of Nations" suggest specific intent from the Congress to the federal courts to develop lawmaking power, and does the phrase outline an area in which federal courts can develop a body of law? The principle of the ATS suggests the affirmative.[322] As Justice Sotomayor asserted, "Congress *expected* federal courts to identify actionable torts under international law and to provide injured plaintiffs with a forum to seek redress" (emphasis added).[323] When combined, this reasoning strongly suggests that the ATS creates an intended, uniquely federal, and limited standard from which federal courts can recognize substantive law absent a separate statute providing a cause of action.

Historically speaking, common law has been a part of our federal system since the Founding Era.[324] As Stewart Jay noted in a canonical article on the history of federal common law, "*Erie's* condemnation of . . . the doctrine of *Swift v. Tyson* was not a repudiation of federal common law adjudication *per se*, but only of federal general common law."[325] Jay goes on: "*Erie* announced a principle of federalism; it did not declare the necessity for a federal court to receive authorization from Congress before it could engage in the making of common law within an area of jurisdiction assigned to the federal judiciary by article III."[326] In other words, even though *Erie* foreclosed "federal general common law," it did not foreclose "federal common law" should the text and federal prerogatives warrant this limited responsibility for Article III courts. As Jay explains the implications of the shift from federal general common law to federal common law, "Brandeis" could not have been plainer—the flaw in the pre-*Erie* federal system was the interference by federal authorities in matters that the Constitution left to the states."[327] In other words, the fact that federal common law is less resonant to the functioning of a federal system does not mean the common law has ceased to exist altogether.

Based on the principles of the ATS, the unique federal interests over international relations and interstate controversies, and the history and evolution of the ATS, law as integrity affirms federal courts' ability to exercise the

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321. For discussion of "standards," *see supra* pt. II(A).

322. For discussion of principles, *see supra* pt. II(B).

323. *Nestlé*, 593 U.S. at 650 (Sotomayor, J., concurring).

324. Stewart Jay, *The Origins of Federal Common Law: Part One*, 133 U. PA. L. REV. 1003, 1007 (1985) ("[A]t base the Anglo-American tradition makes an assumption that is captured by reference to the 'background' nature of common law. That is, there are rights and duties that exist notwithstanding the lack of action by a legislative body with respect to the area in question."); *Id.* at 1113 ("It simply could not be denied that the common law would be the basis for much of the judicial activity in this country. Nor was it possible to ignore the fact that article III of the Constitution plainly contemplated that federal courts would have a national jurisdiction, often exclusive of the states.").

325. Stewart Jay, *History of the Origins of Federal Common Law: Part Two*, 133 U. PA. L. REV. 1231, 1312 (1985).

326. *Id.*

327. *Id. See also* Erie Ry. Co. v. Tompkins, 304 U.S. 64, 78 (1938) (Brandeis, J.) ("Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts.").

"modest common law" view by following the "tort . . . in violation of the Law of Nations" standard (Standard #1). Under this view, the ATS is *both* jurisdictional and a method for supplying a cause of action. Federal courts can establish a limited body of federal law that provides clear guidance on how U.S. citizens and entities can organize their affairs. The federal courts, as ultimate arbiter of this standard, must carefully police the recognition of new causes of action, and when it does, these will be placed under review by the traditional appellate process. This view best reconciles the rules, standards, and principles of the ATS and provides a clear path to resolve the first Core Controversy.

IV. Universal Jurisdiction or Sovereign-Specific Jurisdiction

Having advanced the "modest common law" view as the best way to understand federal courts' role in the ATS context, this Section turns its focus to the second "Core Controversy." To reiterate, this controversy concerns whether the ATS facilitates claims between foreign citizens, enabling a form of "universal jurisdiction," or whether the ATS is limited to "sovereign-specific" claims, meaning actions between a foreign citizen and U.S. citizens (persons or entities).[328]

As analyzed through the lens of law as integrity, this Section argues that the ATS is limited to claims *between* foreign citizens and U.S. citizens. While Rule #2 requires plaintiffs to be an "alien," the principle of the ATS strongly suggests that the motivation behind its enactment strictly concerned a state's duties and responsibilities *for its own persons and entities* (emphasis added).[329] In other words, the ATS is limited to a "tort . . . in violation of the law of nations" limited to claims alleged against a U.S. citizen. This point is separate from the general debate of whether "customary international law" is part of U.S. law; rather, this argument affirms that the ATS is best understood as an outgrowth of "alienage jurisdiction" for purposes of Article III of the U.S. Constitution, which extends the Judicial Power "to Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."[330] There is a critical distinction to be made between the general "Law of Nations" and the "law of nations standard" within the text of the ATS itself.

The ATS and Article III of the U.S. Constitution

The debate over the second Core Controversy is fundamentally linked to Article III of the U.S. Constitution. For absent a constitutional source the ATS

328. For simplicity's sake, this Article will use the term "U.S. citizen" to mean both persons and entities.

329. Blackstone, *supra* note 290, at 68 ("[W]here the *individuals of any state* violate this general law [of nations], it is then the interest as well as duty of the government under which they live, to animadvert upon them with a becoming severity, that the peace of the world may be maintained."); *see also* Bradley, *supra* note 274, at 619 ("There is substantial evidence suggesting that the First Congress believed that at least the law of nations portion of the Alien Tort Statute was an implementation of Article III alienage jurisdiction–that is, jurisdiction over "Controversies between . . . the Citizens [of a state], and . . . Citizens or Subjects [of a foreign state].").

330. U.S. Const. art. III, § 2.

has no ground to stand on. Therefore, it is essential to resolve what provision of Article III the ATS falls under.

There are two main constitutional provisions for consideration: the "arising under" provision and the "alienage jurisdiction" provision.[331] If the ATS is an outgrowth of the "arising under" provision of Article III, then claims between "aliens" are actionable under the ATS. In other words, the transformation of the phrase "law of nations" into "customary international law" means that the latter "arises under" either the "Constitution" and/or "the Laws of the United States" for purposes of Article III.[332]

This is what took place in *Filártiga*. In addition to having "personal jurisdiction," as both Peña-Irala and the Filártiga's were living in the United States at the time the lawsuit began, recall the Second Circuit held that this case between foreign citizens (both citizens of Peru) could proceed under the ATS for purposes of subject-matter jurisdiction.[333] As noted in Section One, the Second Circuit in *Filártiga* suggested that ATS claims fell within the "arising under" provision of Article III because "the law of nations . . . has always been part of the federal common law."[334] While approaching this question from a different angle, Justice Sotomayor's dissenting opinion in *Jesner* took a similar position, writing that the text, history, and purpose of the ATS supports the idea that corporations can be named as defendants, regardless of domicile.[335] Justice Sotomayor relied mainly on prudential justifications, writing that to absolve foreign corporations from liability under the ATS will allow them to remain immune "for human rights abuses, however egregious they may be."[336] This view reflected the pressing need to counteract the upward trend in rampant human rights abuses by multinational corporations in an increasingly globalized world.[337] Professor Harold Koh has supported this position, arguing that the lack of specificity on who can be named as a defendant in an ATS claim suggests both aliens and U.S. citizens can be named.[338]

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331. U.S. CONST. art. III, § 2 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority. . . ."); ("[T]o Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.").

332. *See* Illinois v. Milwaukee, 406 U.S. 91, 98–100 (1972) (holding that claims based on federal common law "aris[e] under the . . . laws . . . of the United States" for purposes of statutory federal question jurisdiction).

333. *Filártiga*, 630 F.2d at 889.

334. *Id.* at 885.

335. *Jesner*, 584 U.S. at 293 (Sotomayor, J., dissenting).

336. *Id.* at 323 (Sotomayor, J., dissenting).

337. *Corporations*, AMNESTY INT'L, https://www.amnesty.org/en/what-we-do/corporate-accountability [https://perma.cc/6EQH-RMHR] (last visited Aug. 5, 2024) ("There are few effective mechanisms at national or international level to prevent corporate human rights abuses or to hold companies to account.").

338. Brief for the United States as Amicus Curiae Supporting Petitioners, Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 ("The text of the ATS does not support the court of appeals' categorical bar. To the contrary, whereas the ATS clearly limits the class of plaintiffs to aliens, 28 U.S.C. 1350, it "does not distinguish among classes of defendants," Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 438 (1989).").

By contrast, if the ATS is an outgrowth of "alienage jurisdiction," then claims are limited to those between an "alien" and U.S. citizens.[339] The *Jesner* Court partially addressed this question, citing "foreign policy concerns," namely the potential for "significant diplomatic tensions with Jordan, a critical ally in one of the world's most sensitive regions," to conclude that *foreign* corporations cannot be sued under the ATS.[340] In his concurring opinion, Justice Gorsuch addressed the second Core Controversy explicitly, writing that one foreign national cannot sue another under the ATS, and that lawsuits under the ATS must have a U.S. defendant.[341] By implication, Justice Gorsuch's opinion is rooted in the "alienage jurisdiction" provision of Article III.

Much like the first Core Controversy, scholarly literature draws an array of nuanced and competing opinions. The debate between Professors Bradley and Burley is particularly illustrative in attempting to decipher original intent. On the first account, Professor Bradley asserts that the evidence from the First Congress suggests the law of nations portion of the ATS was intended "simply to implement Article III alienage jurisdiction."[342] In making this claim, Bradley relies on the relationship between Section 9, where the original ATS language derives, and Section 11, which established the original jurisdiction of the "federal circuit courts"[343] and set out "alienage jurisdiction" (cases between a citizen and a foreign national) with a $500 amount in controversy threshold from the Judiciary Act of 1789.[344] Put simply, Bradley's argument says that both Section 9 and Section 11 concerned "alienage jurisdiction," in which the former "authorized federal court jurisdiction . . . between aliens and U.S. citizens, without regard to the $500 amount in controversy limitation" while the latter did require the $500 amount in controversy limitation.[345] Further, Bradley argues that this interpretation aligns with the "perspective of the law

339. Daimler AG v. Bauman, 571 U.S. 117, 137 (2014) (a corporation is "at home" in its state of incorporation and the state where it has its principal place of business).

340. *Jesner*, 138 S. Ct. at 1406.

341. *Id.* at 1412–19 (Gorsuch, J., concurring in part and concurring in the judgment).

342. Bradley, *supra* note 274, at 590–591 ("I believe we can eliminate the possibility that the First Congress thought that suits under the Alien Tort Statute for violations of the law of nations would have been "Cases . . . arising under . . . the Laws of the United States" for purposes of Article III.").

343. In the Judiciary Act of 1789, "circuit courts" handled cases within specific geographic regions of the United States. These courts were precursors to modern U.S. Courts of Appeals, positioned between the district courts and the Supreme Court. Circuit courts had jurisdiction over both civil and criminal cases. They handled specific cases that arose under federal laws, had original jurisdiction over certain types of cases such as those involving diverse citizenship, and had appellate jurisdiction to review decisions made by the lower district courts.

344. Judiciary Act of 1789, ch. 20, 1 Stat. 73 (1789) (*SEC. 9.* "And be it further enacted, That the 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 only in violation of the law of nations or a treaty of the United States.") (*SEC. 11.* "And be it further enacted, That the circuit courts shall have original cognizance, concurrent with the courts of the several States, 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 the United States are plaintiffs, or petitioners; or an alien is a party, or the suit is between a citizen of the State where the suit is brought, and a citizen of another State.").

345. Bradley, *supra* note 274, at 591.

of international responsibility in 1789," in which "the United States generally would not have been responsible for torts committed by one alien against another, but it would have been responsible for certain torts committed by its citizens against aliens. . . ."[346] Bradley concludes that the First Congress, in enacting Sections 9 and 11, gave the "option" to alien plaintiffs suing for a tort in violation of the law of nations "when Section 11's amount in controversy requirement was satisfied."[347] This "express linkage," Bradley writes, "is further evidence that the Alien Tort Statute was intended to be an implementation of alienage jurisdiction."[348]

Professor Burley challenges this position. In exploring the historical and legal context of the ATS and its relationship to "alienage jurisdiction" of Article III, Burley argues that the ATS was motivated by a broader intent to give federal courts jurisdiction to address violations of the law of nations, which played an important role in solidifying U.S. foreign policy and international standing.[349] In the parlance of the Judiciary Act of 1789, Burley's point is that Sections 9 and 11 are not linked.[350] Burley challenges Professor Casto's argument connecting *The Federalist* No. 80, which concerned the Union's responsibility to answer to "foreign powers for the conduct of its members" and the passage of the Alien Tort Statute.[351] As Burley argues, Hamilton was "not arguing for the Alien Tort Statute," but was instead "expounding the logic of Article III . . . specifically the alienage provision of the Diversity Clause."[352] In other words, Burley asserts the original ATS language was not a direct extension of the alienage clause's jurisdictional framework. For Burley, the early commitment of the U.S. in upholding the law of nations norms, which extended beyond those involving foreign nations, provides the key to understanding the statute's scope.

Burley asserts that a "definitive proof of the intended purpose and scope of the Alien Tort Statute is impossible."[353] While that may be true, law as integrity provides a framework to resolve this issue. Recall that the ATS principle is fundamentally concerned with ensuring that federal courts are available to foreign citizens that suffer international law violations for which other nations may expect the U.S. to provide a forum for redress.[354] The central motivation underlying the enactment of the ATS was to avoid foreign policy entanglements by making sure that federal courts were available to adjudicate claims by "aliens" alleging violations of international law "where the failure to provide

346. *Id.* at 592.
347. *Id.* at 619–20.
348. *Id.* at 620.
349. Burley, *supra* note 180, at 473 ("[T]he provision may have been designed to cover all torts in violation of the law of nations other than those committed against ambassadors or other public ministers.").
350. *Id.* at 466.
351. *Id.* at 465.
352. *Id.* at 465–66. Recall the "alienage" provision of the Diversity Clause in Article III grants federal courts jurisdiction over cases involving parties who are not U.S. citizens. It is intended to ensure that cases involving foreign nations ("aliens") are heard in federal court rather than state courts.
353. *Id.* at 463.
354. *Supra* Principle 1a, pt. II(B).

one might cause another nation to hold the United States responsible for an injury to a foreign citizen."[355] Put simply, the ATS was enacted to ensure the U.S. could meet its duties and responsibilities under the law of nations, which specifically concerned providing means to redress alleged law of nations violations committed by its own persons and entities. As Bellia and Clark wrote, the ATS was a "self-executing" means to facilitate this dynamic.[356]

In his seminal treatise, 18th-Century international law scholar Emmerich de Vattel described the responsibilities of a state to prevent its own citizen-subjects from injuring the citizen-subjects of another state.[357] Vattel is particularly relevant because his treatise "was well known in England and the American states at the time of the Founding."[358] As Vattel wrote, "whoever uses a citizen ill indirectly offends the state, which ought to protect this citizen."[359] Vattel's point is that any person that inflicts harm on a citizen of another foreign nation harms that citizen's nation. A similar sentiment from Samuel von Pufendorf captures these motivations undergirding the law of nations in the U.S. legal system and in the ATS.[360] In other words, a nation is responsible to provide redress to a citizen of a foreign nation that is injured by a citizen of its own. The First Congress passed the Alien Tort Statute as a "straightforward response to what the Framers understood to be their duty under the law of nations."[361]

An exchange between Oliver Ellsworth (principal drafter of the Judiciary Act of 1789) and Thomas Jefferson regarding the meaning of President George Washington's Nov. 6, 1792 speech to Congress affirms this principle. In that

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355. *Jesner*, 138 S. Ct. at 1417.

356. Bellia Jr. & Clark, *supra* note 8, at 450.

357. Emmerich de Vattel, 1 The Law of Nations; or Principles of the Law of Nature: Applied to the Conduct and Affairs of Nations and Sovereigns bk II, ch 6 (Newberry 1759) Of the Duties of Nations towards Each Other ("Private persons who are members of one nation, may offend and ill-treat the citizens of another, and may injure a foreign sovereign: — it remains for us to examine what share a state may have in the actions other citizens, and what are the rights and obligations of sovereigns in this respect.").

358. Bellia Jr. & Clark, *supra* note 8, at 471 (citing Douglas J. Sylvester, *International Law as Sword or Shield? Early American Foreign Policy and the Law of Nations*, 32 N.Y.U. J. Int'l L. & Pol. 1, 67 (1999) (explaining that, in early American judicial decisions, "in all, in the 1780s and 1790s, there were nine citations to Pufendorf, sixteen to Grotius, twenty-five to Bynkershoek, and a staggering ninety-two to Vattel"); Edwin D. Dickinson, *The Law of Nations as Part of the National Law of the United States*, 101 U. Pa. L. Rev. 26, 35 (1952) (explaining that this treatise and the writings of Hugo Grotius, Samuel von Pufendorf, and Jean-Jacques Burlamaqui "were an essential and significant part of the minimal equipment of any lawyer of erudition in the eighteenth century").

359. Vattel, *supra* note 292, at bk II, ch 6. The principle being that the mistreatment of a citizen by a foreign entity can be seen as an affront to the state itself, which has a duty to protect its own nationals.

360. Samuel von Pufendorf, another well-known scholar of public international law expressed this similar sentiment, writing about the obligations of sovereigns in relation to their citizens' actions, Samuel von Pufendorf, 2 *De Jure Naturae et Gentium Libri Octo* bk VIII, ch 6, § 13 at 1305 (Clarendon 1934) ("[A] result of the union into a civil body is that an injury done to one of its members by foreigners is regarded as affecting the entire state."). While the extent to which a state's responsibility over their own nationals' for committing wrongful acts varies, this sentiment from von Pufendorf highlights that states may need to take measures to prevent their citizens from committing acts that would harm other nations or breach international norms.

361. Burley, *supra* note 180, at 464.

speech, President Washington urged Congress "by timely provisions, to guard against those *Acts of our own Citizens*, which might tend to disturb [the peace with other nations], and to put ourselves in a condition to give that satisfaction to foreign nations which we may sometimes have occasion to require from them" (emphasis added).[362] Ellsworth saw Washington's emphasis on complying with the law of nations as necessitating a stronger federal role to ensure the U.S. complied with international norms and obligations.[363] This included support for Washington's position that American citizens should act in ways consistent with the nation's international obligations, and to avoid actions that could lead to conflicts with the country's international relations.[364]

The discussion strongly suggests that the Law of Nations in the ATS context concerned a nation's responsibilities, particularly its federal courts, to provide civil remedies for injuries committed by its own citizen subjects. While the primary focus of the Law of Nations concerns state conduct and international relations, an unavoidable set of principles concerns a state's responsibility in ensuring its citizens-subjects do not commit abuses against the citizen-subjects of other states. Contemporary scholarship from Golove and Hulsebosch underscores this point.[365] Seen through this lens, law as integrity affirms that the ATS is best understood as an outgrowth of the "alienage jurisdiction" provision of Article III. The United States' responsibilities under the Law of Nations affirm that the only defendants that can be named are U.S. citizens (persons or entities). This is the best reading of the ATS in light of the rules, standards, and principles.[366] Early Supreme Court rulings support this view.[367] The ATS remains the backstop from which serious human rights abuses should be brought in federal courts, but this is limited to claims against U.S. citizens and entities.

The Law of Nations or "Tort . . . in Violation of the Law of Nations"

What becomes clear is the existence of (at least) two levels of customary international law (CIL) in federal common law: (1) CIL as a general set of norms

362. David Golove, *The Alien Tort Statute and the Law of Nations: Newly Uncovered Historical Evidence of Founding Era Observations* (Harv. L. Sch. Hum. Rts. Program, Working Paper No. 21-001, 2020).

363. *Id.*

364. *Id.*

365. David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, The Law of Nations, and The Pursuit of International Recognition*, 85 N.Y.U. L. Rev. 932, 936 (2010) ("[R]ather than attempt to define the underlying misconduct for which an action could be maintained . . .the First Congress simply combined two terms of art in the ATS—one drawn from the common law ('tort') and the other drawn from the law of nations ('violation of the law of nations.'). This shorthand approach employed in the ATS necessarily satisfied the United States' obligation under the law of nations to redress intentional injuries inflicted by its citizens against aliens. . . . This understanding of the text is fully consistent with the First Congress's desire to avoid violations of the law of nations by the United States and its citizens.").

366. Casto, *supra* note 6, at 511 ("However, these suits between aliens are clearly cases within the Constitution's "arising under" clause to the extent that the aliens' causes of action are created by a federal statute or a treaty of the United States, federal common law, or customary international law.").

367. *See* The Apollon, 22 U.S. (9 Wheat.) 362, 370 (1824) ("The laws of no nation can justly extend beyond its own territories, except so far as regards its own citizens.").

and principles; and (2) CIL as part of the statutory language of the ATS. This crucial distinction is consequential to resolving any confusion over the meaning and scope of the ATS.[368] For purposes of law as integrity, this distinction can be analogized through the lens of two cases, *The Paquete Habana* and *United States v. Smith*.[369]

In the well-known case of *The Paquete Habana*, the Supreme Court explored the question of whether international law protected fishing ships from capture during times of war.[370] Although an 18th-Century British case[371] had held that protecting such civilian ships was a "rule of comity," the Court found instead that "the period of a hundred years which has since elapsed is amply sufficient to have enabled what originally may have rested in custom or comity . . . to grow, by the general assent of civilized nations, into a settled rule of international law."[372] In other words, the U.S. "prize courts," in administering the Law of Nations, were bound to take "judicial notice of and give effect to a rule of international law exempting fishing vessels from capture as a prize, even though there was *no treaty or other public act of their own government* in relation to the matter" (emphasis added).[373] In ruling, the Court developed a rule of international law based on a norm ripened by consent of civilized nations: "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."[374] While there is dispute over how this particular rule of customary international law finds its way into U.S. law for purposes of Article III, the point here is that this rule is analytically distinct from the ATS. The rule of customary international law from *The Paquete Habana* is either found as "general common law" or as "arising under this Constitution" or "the Laws of the United States"[375] rather than a "standard" within the text of the ATS.

By contrast, *United States v. Smith* concerned an indictment for piracy against a prisoner named Thomas Smith, who was charged under a statute that referred to the Law of Nations for a definition of the crime of piracy.[376] The statute read, "that if any person or persons whatsoever, shall, upon the high seas, commit the crime of piracy, *as defined by the law of nations*, and such offender

368. Authors have suggested that the ATS finds its Art. III source authority from "arising under" jurisdiction. *See* Burley, *supra* note 180, at 468 n.38 (under federal question jurisdiction, "assumes that the Article III category of "cases or controversies arising under . . . the laws of the United States" included cases arising under the law of nations"). Law as integrity is not necessarily incompatible with this position. Customary international law may certainly "arise under" the "Laws of the United States" for purposes of Article III, and the "tort . . . in violation of the United States" standard can still align with the Article III "alienage jurisdiction." This two-tiered framework better aligns with the "Law of Nations" and the "law of nations" standard in the text of the ATS.

369. *The Paquete Habana*, 175 U.S.; United States v. Smith 18 U.S. 153 (1820).

370. *Id.* at 714.

371. *Id.* at 690 (citing The Young Jacob and Johanna, 1 C. Rob. 20.).

372. *Id.* at 694.

373. *Id.*

374. *Id.* at 700.

375. U.S. Const. art. III, § 2, cl. 1.

376. United States v. Smith, 18 U.S. 153, 154 (1820).

or offenders shall be brought into, or found in the United States, every such offender or offenders shall, upon conviction thereof, &c. be punished with death" (emphasis added).[377] The then-Attorney General contended that Congress, "by referring to the law of nations for a definition of the crime of piracy," adopted "the definition of the offence given by the writers on public law" who defined piracy to be "depredation on the seas, without the authority of a commission, or beyond its authority."[378] As the Court noted, "there is no defect in the definition of piracy by the authorities to which we are referred by this act. The definition given by them is certain, consistent, and unanimous . . . this renders it the more fit and proper that there should be a uniform rule as to the definition of the crime, which can only be drawn from the law of nations, as the only code universally known and recognized by the people of all countries."[379] In making this judgment, the *Smith* Court rejected arguments that the statute was "not a constitutional exercise of the power of Congress to define the crime of piracy" and that Congress was "not at liberty to leave it to be ascertained by judicial interpretation."[380] Justice Story, for the Court, affirmed that this statute was a "constitutional exercise of the power of Congress to define and punish that crime."[381] As Justice Story continued, "Offences . . . against the law of nations, cannot, with any accuracy, be said to be completely ascertained and defined in any public code recognized by the common consent of nations."[382]

Although the *Smith* Court was interpreting the scope of Congress's power "to define and punish piracies and felonies committed on the high seas, and offences against the law of nations,"[383] the lessons drawn are particularly instructive for the ATS context. Put simply, the *Smith* Court found that Congress could pass a statute requiring federal courts to interpret a crime "as defined by the law of nations." It further acknowledged that this inquiry required extracting sources such as those from public writers on international law at that time—such as Grotius, Vattel, and Pufendorf—to reach this definition, and that this exercise in judicial interpretation could come with degrees of uncertainty that eventually crystallized into a rigid definition. Justice Story confirmed that the "crime of piracy is defined by the law of nations . . . may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law."[384] In reaching this decision, Justice Story concluded that "the general practice of all nations in punishing all persons, whether natives or

377. *Id.* at 157.

378. *Id.* at 155 ("If there be any defect of precision or slight uncertainty in the definitions of the crime of piracy given by different writers on the law of nations, it is no more than what is to be found in common law writers on the crime of murder.").

379. *Id.* at 156.

380. *Id.*

381. *Id.*

382. *Id.* at 159.

383. *Id*. at 158.

384. *Id.* at 160–61. Story confirmed the determinacy of the crime of piracy as developed under the law of nations. Although there are several ways to understand "piracy," Justice Story confirmed "robbery, or forcible depredations' upon then sea, *animo furandi*, is piracy."

foreigners, who have committed this offence against any persons whatsoever, with whom they are in amity, is a conclusive proof that the offence is supposed to depend, not upon the particular provisions of any municipal code, but upon the law of nations, both for its definition and punishment."[385]

Much like the statute in *Smith*, the ATS includes language referencing or qualifying the "law of nations." Combined with the point that the ATS should be understood as an outgrowth of the Article III "alienage jurisdiction" provision, the strongest conclusion is that the ATS includes the "tort . . . in violation of the law of nations" standard governing cases between aliens and U.S citizens and entities. Much like the "piracy as defined under the law of nations" in *Smith*, the "tort . . . committed in violation of the law of nations" is a similar standard requiring judicial interpretation.

Law as integrity sets out a key distinction between the Law of Nations as a set of principles governing the duties and responsibilities among states (seen in *The Paquete Habana*), and the "law of nations" standard placed within the text of the ATS (analogy to *United States v. Smith*). The implications of this reasoning become clear: in all likelihood the *Filártiga* decision was improperly decided under the ATS. There may be another statutory or constitutional basis from which this case could have proceeded, but the ATS is very likely not one of them. At the outset of the modern line, the district court in *Filártiga* dismissed the complaint because it believed that the torture of a foreign citizen by an official of the same country did not violate the law of nations as that term is used in 28 U.S.C. 1350. Over forty years after the fact, the district court was regrettably correct.

V. Federal Courts' "Dual-Role" in Shaping Common Law

In resolving the two Core Controversies, the following normative argument is presented: under the ATS, federal courts can use their common law power to recognize causes of action pursuant to the "tort . . . committed in violation of the law of nations" standard, limited to claims between plaintiff "aliens" (foreign nationals) and defendant U.S. citizens (persons and entities). Put simply, law as integrity confirms that the ATS is both a jurisdictional grant and the textual source for a cause of action.

But a remaining question must be resolved. What is the scope of federal courts' common law power to adjudicate ATS claims?

This Section answers by articulating the "dual role" of federal courts in the ATS context. First, federal courts must look "outward" to examine sources of "customary international law" to determine whether a "tort . . . committed in violation of the law of nations" has ripened into a justiciable claim.[386] This requires developing a limited area of federal "common law" causes of action

385. *Id.* at 162.

386. *See, e.g.*, Jan v. People Media Project, No. 3:24-CV-05553-TMC, 2025 WL 359009, at 9–12 (W.D. Wash. Jan. 31, 2025) (granting leave to amend complaint dismissal because "Jan's complaint does not allege actual knowledge, his compensation allegations must be dismissed . . . [and Jan] could

that are "specific, universal, and obligatory" as referenced in *Sosa*. Second, federal courts must look "inward" to fashion a set of manageable standards in secondary and ancillary arenas to govern the adjudication of ATS claims.[387] This includes standards for "aiding and abetting" liability against U.S. citizens and entities, damages remedies for ATS violations, burdens of proof, questions of official immunity, statutes of limitations, and the presumption against extraterritoriality. Separate constitutional principles such as Political Question Doctrine still play a necessary role in deciding whether ATS claims should proceed.

The important point is that the federal courts' dual role operates under the banner of federal common law. Although federal courts must look to sources of customary international law to determine the viability of a cause of action, these are ultimately choices made by Article III judges hearing ATS claims. The ATS represents a fundamental enclave in which Congress intended for the federal judiciary to develop specific norms of ATS violations through its common law power.[388] And as the Supreme Court has recognized, federal common law may come into play when "Congress has vested jurisdiction in the federal courts and empowered them to create governing rules of law."[389] The ATS context is one of those arenas.

The "Outward" Turn to Identify Justiciable Causes of Action

The first role of federal courts in the ATS context is to examine substantive norms of customary international law to determine whether a "tort . . . committed in violation of the law of nations" has ripened into a justiciable cause of action. Metaphorically, this practice requires federal courts to turn their gaze "outward" to established and developing norms of customary international law. This coincides with the understanding that "customary international law" is a part of U.S. law yet operates as a standard within the text of a rule.

In the 2023 case of *Doe I. v. Cisco Systems, Inc.*, the Ninth Circuit illustrated the nuances inherent to this role. As Judge Berzon wrote, "to evaluate the contours of an international law norm, *Sosa* instructs courts to look to 'those sources we have long, albeit cautiously, recognized,' which include 'the customs and usages of civilized nations'; and, as evidence of these . . . the works of [qualified] jurists and commentators."[390] Judge Berzon's comment encapsulates federal courts' institutional responsibility to determine whether a particular practice or norm of nations has ripened to a "tort . . . in violation of the law of nations" that can be clearly articulated and defined.

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conceivably plead additional facts to show Defendants' conduct satisfies the *actus reus* and *mens rea* elements of accomplice liability, particularly with respect to the compensation allegations").

387. *Id.*

388. *See* Chemerinsky, *supra* note 82, 428–29 (§ 6.3.2 Congressional authorization for federal courts to create a body of common law rules "In other instances, the Supreme Court has concluded that Congress intended for the federal courts to develop a body of federal common law rules under particular statutes. Congress might provide a broad statutory mandate with the expectation that the federal judiciary will develop specific standards through a series of decisions.").

389. Texas Indus., Inc. v. Radcliff Materials Inc., 451 U.S. 630, 642 (1981).

390. Doe I v. Cisco Systems, Inc., 73 F.4th 700, 717 (9th Cir. 2023) (quoting *The Paquete Habana*, 175 U.S.).

But beyond the sources[391] of customary international law, what is a "tort . . . in violation of the law of nations" and how might one be identified? To take the Restatement approach, this can be understood as a civil wrong established by a "general and consistent practice of states out of a sense of legal obligation" for which the law provides a remedy.[392] Further, recall the first step outlined by the *Sosa* Court, where federal courts must first determine whether the claim is based on violation of an international law norm that is "specific, universal, and obligatory."[393] The challenge is in determining how courts should identify what makes a proposed "tort . . . in violation of the Law of Nations" one that is "specific, universal, and obligatory."[394] In *Sosa*, the Court acknowledged that federal courts can recognize common law claims for violations of the "present-day law of nations," provided they satisfy an important and "overarching limitation"—only those claims that "rest on a norm of international character accepted by the civilized world and defined with specificity comparable to the features of the 18th-century paradigms."[395]

A better way to think about this step is not that the "torts . . . in violation of the law of nations" must, with specificity, be compared to the *features* of the "18th-century paradigms." Rather, the critical point is that the 18th-century torts were a "tort . . . committed in violation of the Law of Nations" at the time in which the ATS was enacted. What is considered a "tort . . . in violation of the Law of Nations" will inevitably evolve as the norms of the Law of Nations evolve.[396] New torts need not parallel the "historical torts" in their *features*; rather, they need only parallel the "historical torts" in their being "specific, universal, and obligatory" to the extent that they become justiciable.

A memorandum filed in 2014 in *Al-Shimari v. CACI Premier Technology, Inc.*, provides a valuable illustration of this role.[397] Recall this case concerned the allegations of torture and abuse committed by U.S. contractors at Abu Ghraib

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391. The sources of customary international law are well known. Article 38 of the Statute for the International Court of Justice (ICJ) outlines the following sources of international law: "international conventions, whether general or particular, establishing rules expressly recognized by the contesting states," "international custom, as evidence of a general practice accepted as law," "the general principles of law recognized by civilized nations," and "judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law." Section 102 of the Restatement (Third) of Foreign Relations law also identifies sources of international law, with customary international law listed first and international agreements listed second. Under the Restatement approach, customary international law is defined as "a general and consistent practice of states followed by them from a sense of legal obligation." Or as Blackstone once wrote, the "law of nations is a system of rules . . . established by universal consent among the civilized inhabitants of the world" and "all the people."

392. *Torts*, Black's Law Dictionary ("A civil wrong for which the law provides a remedy.").

393. *Sosa*, 542 U.S. at 749.

394. The Ninth Circuit has undertaken this type of analysis, for example, by looking at various practices of international law to define the international standard for aiding and abetting liability as "knowing practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime." *See* Doe I v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002).

395. *Sosa*, 542 U.S. at 692.

396. Bergman v. De Sieyes, 71 F. Supp. 334, 337 (S.D.N.Y. 1946) ("The law of nations, like other systems of law, is progressive. Its principles are expanded and liberalized by the spirit of the age and country in which we live.").

397. Al Shimari v. CACI Premier Technology, Inc., 657 F. Supp. 2d 700 (E.D. Va. 2009). *See supra* note 4 for the 2024 judgment.

prison in Iraq. In this particular moment in the procedural timeline, plaintiffs responded to Judge Gerald Bruce Lee's request to set forth the elements of their claims of torture, cruel, inhuman or degrading treatment, and war crimes under the ATS.[398] In addition, the memo asserted liability against CACI through "participation of its employees in a conspiracy" and "aiding and abetting those who carried out the abuses."[399] In the filing, plaintiffs' attorneys submitted a brief attempting to outline the various sources of customary international law that govern those particular claims. They worked through each individual claim under two distinct banners: "The Elements of Plaintiffs' Three ATS Claims" and "Modes of ATS Liability."[400]

Although Judge Lee ultimately dismissed the case on political question grounds, this back and forth represents the responsibility and spirit of federal courts first role. Plaintiffs must perform the same task in any other federal lawsuit, by identifying the elements of that tort supplying facts in the complaint and overcoming other threshold federal issues as any other case.[401] It is the role of the litigants and the federal courts to recognize when a "tort . . . in violation of the Law of Nations" has reached a status to be justiciable. Absent these thresholds being met, federal courts should not entertain the claim at hand. Under this standard, federal courts shall recognize that ". . . customary international law evolves with the changing customs and standards of behavior in the international community."[402]

The "Inward" Turn to Fashion Secondary Doctrines

The second role that federal courts have in the ATS context is to fashion a limited body of common law in ancillary or secondary areas of responsibility. Metaphorically, federal courts look "inward" to determine the rules and standards governing these secondary and/or ancillary doctrines. This largely aligns with step two of the *Sosa* doctrine, where federal courts must determine whether

398. Plaintiffs Memorandum, Al Shimari v. CACI Int'l, Inc., 951 F. Supp. 2d 857 (E.D. Va. 2013).

399. *Id.*

400. *Id.* For example, in attempting to establish the definition of "torture," the memo cited the district court's opinion in Doe v. Nestlé, S.A., 748 F. Supp. 2d 1057 (C.D. Cal. 2010) (the basic elements of a claim of torture are "severe pain or suffering . . . intentionally inflicted on [p]laintiffs for the purposes of punishing [p]laintiffs for acts that [p]laintiffs committed, and/or for the purposes of intimidating or coercing [p]laintiffs") (internal quotations omitted). Next, in establishing "secondary liability," the memo cited to Yousuf v. Samantar, 2012 U.S. Dist. LEXIS 122403, at *31 (E.D. Va. Aug. 28, 2012) ("[V]irtually every court to address the issue' has 'recogniz[ed]secondary liability for violations of international law since the founding of the Republic.'").

401. There are other sources and evidence of the Law of Nations. *See* Wheat. Intern. Law, pt. 1, c. 1, Sec 14: (1) the rules of conduct, deducible by reason from the nature of society existing among independent states, which ought to be observed among nations; (2) the adjudication of international tribunals, such as prize courts and boards of arbitration, (3) text writers of authority; (4) ordinances of laws of particular states, prescribing rules for the conduct of their commissioned cruisers and prize tribunal's; (5) the history of the wars, negotiations, treaties of peace, and other matters relating to the public intercourse of nations; (6) treaties of peace, alliance and commerce, declaring, modifying or defining the pre-existing international law.

402. *Memorandum of the United States as Amicus Curiae* at 6, No. 79-6090, 1980 WL 340146 (2d Cir. 1980).

allowing the case to proceed is an "appropriate" exercise of judicial discretion.[403] These are ultimately "rules of decision" to be used by federal courts to resolve cases, crafted to ensure claims are decided fairly and consistently.

Consider the development of the "aiding and abetting" standard. In *Khulumani v. Barclay National Bank Ltd.*, the Second Circuit explored the sources of "aiding and abetting" for purposes of the ATS.[404] Plaintiffs were victims of apartheid-era human rights abuses in South Africa, and sued various companies, including Barclay National Bank, under the ATS and the TVPA.[405] Plaintiffs alleged these companies were complicit in or contributed to abuses committed by the South African government during apartheid.[406] While the specific facts are not relevant for our purposes, what is relevant is the court's turn to the D.C. Circuit case of *Halberstam v. Welch* to draw its conclusions on principles of aiding and abetting under federal common law.[407]

The *Halberstam* case concerned an unrelated civil action for wrongful death where the plaintiff sought to hold the defendant liable for aiding and abetting a criminal enterprise.[408] The D.C. Circuit held that a party can be held liable for aiding and abetting if they knowingly provide substantial assistance to another party in committing a wrongful act.[409] The important point here is that the *Khulumani* Court effectively applied the principles in *Halberstam* to the context of international law, concluding that for a defendant to be liable for aiding and abetting under the ATS, there must be a showing that the defendant knowingly provided substantial assistance to the principal actor committing the human rights abuses.[410] While the *Khulumani* Court undoubtedly explored aiding and abetting standards under international law, it ultimately relied on the *Halberstam* foundational principles for "aiding and abetting" liability in civil tort cases. This reflects a perfect example of the "inward" turn in federal courts' dual role.

This view is also advanced in the ATS scholarship. Hoffman and Zaheer have argued, "the proper methodology" by which federal courts should determine the circumstances under which defendants may be found liable for international human rights violations is for federal courts to "fashion federal common law based on federal jurisprudence and international authority to

403. *Sosa*, 542 U.S at 738.
404. Khulumani v. Barclay Nat. Bank Ltd., 504 F.3d 254, 260 (2007).
405. *Id.* at 258.
406. *Id*.
407. Halberstam v. Welch, 705 F.2d 472, 476–77 (D.C. Cir. 1983).
408. *Id.* at 474–75.
409. *Id.* at 477 (defining "knowledge" as "the defendant had knowledge of the principal's wrongful conduct," and "substantial assistance" defined as "the defendant provided substantial assistance to the principal in carrying out the wrongful act." For knowledge, the defendant must have had "actual knowledge" of the wrongful acts being committed or must have been recklessly indifferent to the potential for such wrongdoing. Moreover, the D.C. Circuit stressed that substantial assistance involves more than minimal support, and must be significant and material enough to the principal's commission of the wrongful act. The nature and extent of the substantial assistance, according to the court, are to be assessed in relation to how the wrongful act was facilitated.).
410. *Khulumani*, 504 F.3d at 287.

determine rules for complicity liability and other ancillary standards in ATS litigation."[411] As they argue, this approach will "further the federal and international values of uniformity, predictability, and consistency" in addition to the "historical development of federal common law in the domestic jurisprudence of the United States."[412]

Federal courts' dual-role in the ATS context is one that must be met with both courage and caution. As Judge Edwards put it in *Tel-Oren*: "The law of nations never has been perceived to create or define the civil actions to be made available by each member of the community of nations; by consensus, the states leave that determination to their respective municipal laws. Indeed, given the existing array of legal systems within the world, a consensus would be virtually impossible to reach—particularly on the technical accoutrements to an action—and it is hard even to imagine that harmony ever would characterize this issue."[413]

Conclusion

Since the beginning of the modern line, federal courts have struggled to settle the two Core Controversies of the Alien Tort Statute—strict jurisdiction versus the cause of action, and universal jurisdiction versus sovereign-specific jurisdiction. As a result, jurisprudence has evolved in a patchwork manner, drawing more confusion than certainty. The great risk faced today is an imminent decision from the Supreme Court to cut its losses and shut the door to ATS claims for good. The purpose of this Article is to resolve these fundamental controversies by turning to a non-positivist theory called "law as integrity" that places the ATS on a new course of clarity. By disaggregating the rules, standards, and principles of the ATS, the two Core Controversies can be resolved: first, by declaring that federal courts can use their common law power to recognize new causes of action under the ATS; and second, limiting the application of the "tort . . . in violation of the law of nations" standard to claims between "aliens" (foreign nationals) and U.S. citizens and entities.

Law as integrity provides institutional actors with a coherent framework to interpret the ATS going forward. It aims to do justice to the original objectives, affirm the demonstrable role of text, and confront the evolutionary nature of interpretation over time. Even if one disagrees with certain formulations, the goal is that the arguments provide a prospective foundation and path from which institutional actors can better understand this critical statute. It is likely that one will find something they disagree with in this Article. That is to be expected. If one chooses to view the ATS under the "strict jurisdictional" view no matter what the circumstance, and no matter what the evidence, then we can only agree to disagree. But if the "strict jurisdictional" view relies on

411. Paul L. Hoffman & Daniel A. Zaheer, *The Rules of the Road: Federal Common Law and Aiding and Abetting Under the Alien Tort Claims Act*, Loy. L.A. Int'l & Comp. L. Rev. 47 (2003).

412. *Id.* at 49.

413. *Tel-Oren*, 726 F.2d at 778 (Edwards, J., concurring).

the text and history of the ATS, then what does one make of the intentions of Congress? Is Justice Sotomayor's evidence that the First Congress *intended* for federal courts to recognize a modest number of international law violations, and the idea that the norms of legislation are meant to evolve through time, simply irrelevant?

The key to all of this is to understand the rules, standards, and principles of the ATS. For a normative theory to stand on an air of legitimacy requires addressing its shortcomings. Selective choice of evidence will not do. Interpretive theories often retreat to ideological strongholds when their ideas come under challenge. Law as integrity tries to reconcile how we should understand the ATS with a set of arguments about the nature of legislation itself. To combat the theory would, in this Author's view, require articulating a contrasting or alternate conception about legislation, and why a different theory better fills the gap.

Whatever the case, the development of ATS jurisprudence from its beginnings in *Filártiga* to the fundamental paradox of *Sosa* has only pushed debate further into confusion. In some sense the Court has been fighting with one hand tied behind its back. It has discussed the ATS in meaningful depth while still allowing conflicting ideas to predominate, even at the expense of consistent interpretation. No greater was this apparent than in the "limited common law" view and its flawed syllogism. The inflection point of *Sosa*, re-examined by this Author with the advantage of hindsight, appears more as an effort to find a principled solution to a tangled problem rather than an effort to establish a clear understanding of the statute's purposive enterprise.

Regardless of outcome, anyone with a vested interest in the Alien Tort Statute recognizes that it is time to reset our understanding and move forward in a clear, articulable manner. Justice Thomas indicated as much in *Nestlé*, suggesting that *Sosa* be revisited.[414] Some may reject the law of nations standard, claiming that it is imprecise and unable to provide guidance for how persons and entities should structure their affairs. If anything, the hope is that this will produce the opposite effect. In essence, the law of nations standard puts persons and entities on alert, inducing them to ensure their practices do not result in child labor, modern slavery, torture, cruel and unusual punishment, aiding and abetting human rights abuses, and so on. Evidence has shown that U.S. corporations are aware of human rights abuses prior to entering into transnational public-private agreements.[415] Contrary to unfounded fears, the law of nations standard does in fact have an outer limit. Like the "reasonable person"

414. *Nestlé*, 593 U.S. at 693 (Thomas, J.) ("[N]obody here has expressly asked us to revisit Sosa.").

415. Hoffman & Zaheer, *supra* note 411, at 47 (discussing the evidence leading up to the Doe v. Unocal Corp. ATS litigation, where Unocal's security consulting company, Control Risks, warned Unocal, prior to entering into a joint venture with French oil company Total and the Burmese military dictatorship in 1992, that the project would "give rise to human rights violations in the pipeline region", writing: ". . . [T]he potential profits will need to be unusually high to justify the high political risks involved in expanding the company's operations. . . ."). The authors continued: "Unocal knew the military was engaging in these activities," referring to a "reign of terror involving forced labor, rape and murder" but "did nothing to stop them, and instead, profited from their commission."

in your garden variety negligence, so too does the "tort . . . in violation of the law of nations" standard evolve as the accepted norms of the international community develop. The ATS will never give federal courts *carte blanche* to create boundless torts in violation of the Law of Nations. But insofar as it interprets a longstanding federal statute to ensure U.S. persons and entities meet their human rights obligations, it is undoubtedly a step forward in the fight for transnational justice.[416]

"No system of law," Lon Fuller once wrote, "whether it be judge-made or legislatively enacted—can be so perfectly drafted as to leave no room for dispute."[417] Law as integrity, insofar as it aligns with the nature of legislation, aims to provide a path forward for how to limit that space by accepting that dispute is a part of law itself. The concern of international human rights and transnational justice in U.S. courts demands that we set the ATS on a new course of clarity. The ATS can undoubtedly embrace modern precepts of customary international law while remaining faithful to its original objectives. It must do so in order to function in the 21st Century. Scholars and jurists will serve themselves well to keep that firmly in mind.

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416. Koh, *supra* note 53, at 2347–48 ("[T]ransnational public law litigation seeks to vindicate public rights and values through judicial remedies. In both settings, parties bring 'public actions,' asking courts to declare and explicate public norms, often with the goal of provoking institutional reform."); *see also* Hoffman & Zaheer, *supra* note 411, at 48 (noting how ATS litigation has been driven by "globalization" that has "brought multinational corporations into closer relationships with repressive military authorities in developing nations. . . .").

417. *See generally* Lon L. Fuller, The Morality of Law 56 (1964).