

The Constitutionality of the Alien Tort Statute: Some Observations on Text and Context

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INTRODUCTION

Filartiga v. Pena-Irala held that federal courts have subject matter jurisdiction over claims of “deliberate torture perpetrated under color of official authority” by one alien against another.¹ But the case has come to stand for a great deal more than its holding. To its supporters, *Filartiga* is the *Brown v. Board of Education* of international human rights,² a decision that spawned two decades of ground-breaking litigation both in the United States and abroad.³ To advocates of international law more generally, *Filartiga* is a ringing affirmation of

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1. 630 F.2d 876, 878 (2d Cir. 1980).

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

3. See David J. Bederman, *Dead Man's Hand: Reshuffling Foreign Sovereign Immunities in U.S. Human Rights Litigation*, 25 GA. J. INT'L & COMP. L. 255, 256 (1995) (“In a sense, all current human rights litigation owes its fortune to *Filartiga*.”).

the principle that “international law is part of our law,”⁴ and demonstrates the importance and concreteness of that law. For many in the international law community, then, to argue that *Filartiga* was wrongly decided⁵ is something like arguing that *Brown* was wrongly decided.⁶

In fact, there is less at stake than meets the eye. First, in many of the most recent alien tort suits, the defendants have not been foreign police chiefs but U.S. corporations.⁷ Even if one accepts Professor Bradley’s alienage interpretation of the Alien Tort Statute, these suits are constitutional. Second, in 1992 Congress passed the Torture Victim Protection Act (“TVPA”), which provides an express cause of action for torture and extrajudicial killing and extends a right to sue not just to aliens but to U.S. citizens.⁸ Not only does the TVPA endorse the *Filartiga* line of cases, it removes any possible Article III problems from the cases it covers, for the Act is clearly a “Law[] of the United States” under which cases may arise.⁹ Thus, Professor Bradley’s thesis threatens neither the success of most human rights litigation in the United States nor the notion that international law is part of our law, for federal courts will continue to hear cases under the TVPA and the Alien Tort Statute, and will continue to apply customary international law as the rule of decision in these cases and others.¹⁰

But, even though *Filartiga* would be constitutional if it were brought today,¹¹ was it constitutional in 1980? And do federal courts today have

4. *Filartiga*, 630 F.2d at 887 (quoting *The Paquete Habana*, 175 U.S. 677, 700 (1900)).

5. See Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT’L L. 587, 591 (2002).

6. See, e.g., Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

7. See, e.g., *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161 (5th Cir. 1999); *Doe I v. Unocal Corp.*, 110 F. Supp. 2d 1294 (C.D. Cal. 2000); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424 (D.N.J. 1999).

8. Pub. L. No. 102-256, 106 Stat. 73 (1992), codified at 28 U.S.C. § 1350 (1994).

9. U.S. CONST. art. III, § 2, cl. 1.

10. As Professor Bradley notes, federal courts routinely and unproblematically applied customary international law as a rule of decision at the time of the framing and subsequently. Bradley, *supra* note 5, at 595. Professors Bradley and Goldsmith have argued that after *Erie*, it is improper for courts to apply customary international law even as a rule of decision unless that law has been adopted as common law by the states. Curtis A. Bradley & Jack L. Goldsmith, III, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 870 (1997). This is among the weakest (and certainly the least historical) of their claims. See generally Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1830-1841 (1998).

11. *Filartiga*’s allegations of torture would bring it within the TVPA, and the suit would thus arise under the Act for purposes of Article III. See *infra* notes 22-23 and accompanying text.

jurisdiction over suits like *Wiwa v. Royal Dutch Petroleum Co.*¹² that may not fall within the TVPA and where there is no diversity of citizenship?¹³ Professor Bradley poses the question in terms of the original meanings of the Alien Tort Statute and Article III, and I am happy to join the battle on those terms. Essentially, he argues that the Alien Tort Statute is purely jurisdictional so that alien tort suits do not “arise under” the Statute itself for purposes of Article III, that the law of nations is not part of the “Laws of the United States” referred to in Article III, and that the First Congress intended the Alien Tort Statute as an implementation of alienage jurisdiction that would reach only suits against U.S. citizens.

With respect to the Judiciary Act and Article III, Professor Bradley’s arguments are contradicted by both the text and the historical context. I tend to agree with Bradley that the First Congress thought the Alien Tort Statute was purely jurisdictional (although it was certainly within Congress’s Article I powers to enact a statute under which cases would “arise” for the purposes of Article III). The argument that Congress meant to limit jurisdiction to suits against U.S. citizens, however, is contrary to the plain language of the Statute as well as the history leading to its adoption. As for Article III, I argue that the law of nations is part of the “Laws of the United States,” a phrase that is decidedly broader than the “Laws of the United States which shall be made in Pursuance [of the Constitution]” referred to in Article VI. I show that many of the Framers wanted to give the federal courts jurisdiction over suits involving the law of nations, and that at least some of the Framers and ratifiers of the Constitution understood the language of Article III to have done exactly that.

I. THE CAUSE OF ACTION THEORY AND THE AUTHORITY OF CONGRESS

Professor Bradley begins by dismissing the possibility that the First Congress thought that the Alien Tort Statute created a statutory cause of action so that alien tort suits would arise under the Statute itself for

12. 226 F.3d 88 (2d Cir. 2000), *cert. denied* 121 S. Ct. 1402 (2001).

13. The TVPA applies only to suits against “individuals” and a corporation arguably does not fit within that term. *See Beanal v. Freeport-McMoran, Inc.*, 969 F. Supp. 362, 381-82 (E.D. La. 1997) (holding that a corporation is not an “individual” under the TVPA), *aff’d on other grounds*, *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161 (5th Cir. 1999). The plaintiff in *Wiwa* was Nigerian and the defendants were Dutch and English corporations, so there was no alienage jurisdiction. The defendants argued in their petition for certiorari that the district court lacked Article III jurisdiction, *Petition for Writ of Certiorari at 24-29, Royal Dutch Petroleum Co. v. Wiwa*, 121 S. Ct. 1402 (2001) (No. 00-1168), but the Supreme Court denied cert.

Article III purposes.¹⁴ I agree that the First Congress probably viewed the Alien Tort Statute in purely jurisdictional terms, but Bradley's discussion of this question masks two important points. First, the *reason* the members of the First Congress did not provide a statutory cause of action for alien tort suits is that it would not have occurred to them that such a cause of action was necessary. The requirement of a cause of action did not enter American law until 1848.¹⁵ The First Congress assumed that torts in violation of the law of nations would be cognizable at common law, just as any other tort would be. Yet Judge Bork and Professor Bradley among others have argued that a cause of action should be required in alien tort suits.¹⁶ I have previously pointed out that such arguments are ahistorical.¹⁷ Indeed, the reason federal courts have, quite properly, read the Alien Tort Statute as granting a cause of action is precisely to eliminate this anachronism.¹⁸

Second, even if Congress did not intend the Alien Tort Statute itself to be a "Law[] of the United States"¹⁹ under which cases might arise for the purposes of Article III, Congress could have enacted such a law if it so desired. Article I gives Congress authority "[t]o define and punish Piracies and Felonies committed on the High Seas, and Offenses against the Law of Nations."²⁰ Pursuant to this power, Congress may impose liability for torts in violation of the law of nations and allow aliens injured by such torts to sue for damages.²¹ Indeed, that is precisely what

14. Bradley, *supra* note 5, at 592-97. For a contrary view, see Beth Stephens, *Federalism and Foreign Affairs: Congress's Power to "Define and Punish . . . Offenses Against the Law of Nations"*, 42 WM. & MARY L. REV. 447, 523-24 (2000).

15. See *Davis v. Passman*, 442 U.S. 228, 237 (1979).

16. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 801 (D.C. Cir. 1984) (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."); Curtis A. Bradley, *Customary International Law and Private Rights of Action*, 1 CHI. J. INT'L L. 421, 424-25 (2000) (assuming that alien tort plaintiffs must have a cause of action).

17. William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists"*, 19 HASTINGS INT'L & COMP. L. REV. 221, 243-56 (1996) [hereinafter Dodge, *Historical Origins*]. Professor Bradley now seems to accept this point. He writes: "[T]here would have been no reason for the First Congress to create a federal statutory cause of action for torts in violation of the law of nations. The law of nations was considered at that time to be part of the general common law, which could be applied by courts in the absence of controlling positive law to the contrary." Bradley, *supra* note 5, at 595.

18. See, e.g., *Abebe-Jira v. Negewo*, 72 F.3d 844, 847 (11th Cir. 1996); *Kadic v. Karadzic*, 70 F.3d 232, 236 (2d Cir. 1995); *Hilao v. Estate of Marcos*, 25 F.3d 1467, 1475 (9th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995).

19. U.S. CONST. art. III, § 2, cl. 1.

20. *Id.* art. I, § 8, cl. 10.

21. See generally Stephens, *supra* note 14, at 483-525 (demonstrating that the Offenses Clause allows Congress to impose both civil and criminal liability). That the early understanding of prescriptive jurisdiction in the new republic was highly territorial, see Bradley, *supra* note 5, at

the 102d Congress did in the Torture Victim Protection Act.²² As Professor Bradley acknowledges, “any cases arising under such congressional enactments would fall within Article III’s allowance of jurisdiction over ‘Cases . . . arising under . . . the Laws of the United States.’”²³

It is important to keep Congress’s Article I power in mind, because it allows us to view Professor Bradley’s arguments against *Filartiga* in their proper context. Rather than assert that Congress lacks the power to authorize federal courts to hear suits between two aliens for torts in violation of the law of nations, Professor Bradley must either claim that the First Congress did not intend to authorize federal jurisdiction over such suits or that it did so in the wrong way because it passed a jurisdictional statute rather than a substantive one. We should be reluctant, on such a tenuous basis, to deprive the federal courts of jurisdiction that the text of the Alien Tort Statute clearly grants.

II. BEYOND ALIENAGE JURISDICTION

As Professor Bradley acknowledges, “[t]he most significant objection to [his] alienage construction of the Alien Tort Statute is of course the Statute’s plain language.”²⁴ Section 9 of the First Judiciary Act provided in relevant part that the district courts shall “have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of *all* causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States,”²⁵ not just

594-95, is irrelevant. As Professor Bradley acknowledges elsewhere in his article, the law of nations was not viewed as being the law of a particular sovereign. *See id.* at 603. Thus, the First Congress would not have viewed a statute defining violations of the law of nations even between foreigners abroad as the extraterritorial application of U.S. law but rather as the implementation of a universally binding law.

22. Pub. L. No. 102-256, 106 Stat. 73 (1992), *codified at* 28 U.S.C. § 1350 (1994). The Senate Report accompanying the TVPA states that “Congress’ ability to enact this legislation also drives [sic] from article I, section 8 of the Constitution, which authorizes Congress ‘to define and punish . . . Offenses against the Laws of Nations.’” S. REP. NO. 102-249, at 5-6 (1991). In a previous article discussing the TVPA, Professors Bradley and Goldsmith made no suggestion that the Act exceeded Congress’s authority under Article I. *See* Curtis A. Bradley & Jack L. Goldsmith, III, *The Current Illegitimacy of International Human Rights Litigation*, 66 *FORDHAM L. REV.* 319, 363-69 (1997) [hereinafter Bradley & Goldsmith, *Illegitimacy*].

23. Bradley, *supra* note 5, at 600.

24. *Id.* at 626.

25. Judiciary Act, ch. 20, § 9, 1 Stat. 73, 77 (1789) (emphasis added). As Professor Bradley notes, the Statute has been modified at various times and now reads: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” 28 U.S.C. § 1350 (1994); *see* Bradley, *supra* note 5, at 587. I have never heard anyone suggest that the substitution of “any civil action” for

those in which the defendant was a U.S. citizen. Professor Bradley has a hard time believing that the First Congress meant what it said. This is a difficulty he shares with other academics and many courts who have read jurisdictional requirements into the Alien Tort Statute that are not apparent from its text.²⁶

Bradley's thesis is contradicted, however, not just by the text of the Alien Tort Statute but by its historical context. Research has shown that the Alien Tort Statute was the culmination of an effort dating back to at least 1781 to ensure individual tort liability for violations of the law of nations, an effort that was made more urgent by the famous Marbois Affair of 1784.²⁷ In 1781, the Continental Congress passed a resolution drafted by Edmund Randolph recommending to the States that they "provide expeditious, exemplary and adequate punishment" for violations of the law of nations and treaties to which the United States was a party.²⁸ The resolution was not limited to criminal punishment, but also recommended that the States "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."²⁹ Congress thus envisioned two different kinds of civil suits: (1) tort suits by the injured party against the tortfeasor, and (2)

"all causes" changes the Statute's meaning. Because we are concerned with what the First Congress meant, I shall stick to its language.

26. My late colleague Professor Sweeney argued that the Alien Tort Statute was limited to certain maritime torts. Joseph Modeste Sweeney, *A Tort Only in Violation of the Law of Nations*, 18 HASTINGS INT'L & COMP. L. REV. 445 (1995). I have previously argued that this is mistaken, see Dodge, *Historical Origins*, supra note 17, at 243-56, and I am pleased to see that Professor Bradley agrees. Bradley, supra note 5, at 616-18.

A number of federal courts have also limited the scope of the Alien Tort Statute to torts in violation of the law of nations that are "universal, definable, and obligatory," see, e.g., *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1540 (N.D. Cal. 1987); or to those that violate *jus cogens* norms. See, e.g., *Doe I v. Unocal Corp.*, 110 F. Supp. 2d 1294, 1304 (C.D. Cal. 2000). For an argument that the Statute properly extends to all torts in violation of the law of nations, see William S. Dodge, *Which Torts in Violation of the Law of Nations?*, 24 HASTINGS INT'L & COMP. L. REV. 351 (2001).

27. See Dodge, *Historical Origins*, supra note 17, at 225-37; Anne-Marie Burley [Slaughter], *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461, 476-80 (1989); William R. Casto, *The Federal Courts' Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 488-510 (1986). In light of this research, it is fair to say that the Alien Tort Statute is no longer a "legal Lohengrin," *IIT v. Vencap, Ltd.* 519 F.2d 1001, 1015 (2d Cir. 1975) (Friendly, J.)—we do know "whence it came." *Id.*

28. 21 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 1136-37 (Gaillard Hunt ed., 1912). Under the Articles of Confederation, Congress lacked the power to punish such violations itself. See Casto, supra note 27, at 490. The full text of the 1781 Resolution is reprinted in Dodge, *Historical Origins*, supra note 17, at 257-58.

29. 21 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, supra note 28, at 1137.

suits by the United States against the tortfeasor to reimburse the United States for compensation paid to the injured party.³⁰ It is clear from the text of the resolution that, while the second kind of suit would be limited to torts by a citizen, the first would not, but would rather extend to suits brought by one alien against another.³¹

The following year, Connecticut enacted such a statute providing not just criminal sanctions for violations of the law of nations but also a tort remedy for

any Injury . . . by any Person or Persons whatsoever to any foreign Power or to the Subjects thereof, either in Thier [sic] Persons or Property, by means whereof any Damage shall or may any ways arise happen or accrue either to any such foreign Power, to the said United States, to this State or to any particular Person.³²

While the Connecticut Act requires injury to a “foreign Power or to the Subjects thereof,” it does not require that the tortfeasor be a citizen.³³ To the contrary, the Connecticut Act expressly allows such a suit to proceed against “any . . . Persons whatsoever.”

Concern over suits between two aliens proved prescient, for the most

30. With respect to the second type of suit, the committee report preceding the resolution explained:

That as instances may occur, in which, for the avoidance of war, it may be expedient to repair out of the public treasury injuries committed by individuals, and the property of the innocent be exposed to reprisal, the author of those injuries should compensate the damage out of his private fortune.

Id. at 1136.

31. Professor Bradley argues that the “by a citizen” language applied to both types of suits by noting that in the handwritten version of the resolution there is a comma before the phrase “sustained by them from an injury” and another comma before the phrase “done to a foreign power by a citizen.” Bradley, *supra* note 5, at 632-33. If I understand him correctly, this means that one or both of the phrases following the commas could apply to the first type of suit.

If both do, the resolution would read in relevant part: “to authorise suits to be instituted for damages by the party injured . . . sustained by them from an injury, done to a foreign power by a citizen.” But “them” cannot refer to “the party injured” in the first clause for “party” is in the singular; it can only refer to “the United States” in the second clause.

If only the last phrase applies to the first type of suit, the resolution would read in relevant part: “to authorise suits to be instituted for damages by the party injured . . . done to a foreign power by a citizen.” This makes no syntactical sense at all. Professor Bradley’s reading might be plausible if he had found a comma before the phrase “by a citizen,” but that is not where the commas lie, either in the printed version or in the handwritten original.

32. 4 THE PUBLIC RECORDS OF THE STATE OF CONNECTICUT FOR THE YEAR 1782, at 157 (Leonard Woods Labaree ed., 1942) (quoted in William R. Casto, Correspondence: Letter to the Editor in Chief, 83 AM. J. INT’L L. 901, 903 (1989)).

33. Indeed the Connecticut Act does not even require, as the Alien Tort Statute does, that the tort violate the law of nations.

notorious violation of the law of nations during the 1780s involved an assault by one Frenchman against another. On May 17, 1784, the Chevalier De Longchamps threatened the French Consul General, Francis Barbe Marbois, in the home of the French Ambassador. Two days later, De Longchamps assaulted Marbois on a Philadelphia street.³⁴ The French Ambassador formally complained to the Continental Congress,³⁵ and the Dutch Ambassador threatened to leave the state unless appropriate action were taken.³⁶ After De Longchamps was apprehended, Pennsylvania specially retained James Wilson to assist in his prosecution.³⁷ De Longchamps was tried and convicted by the Pennsylvania Supreme Court for an offense against the law of nations, which the court held to be “in its full extent, . . . part of the law of this State.”³⁸

Professor Bradley questions the connection between the Marbois Affair and the Alien Tort Statute because there is no record of Marbois having brought a civil suit against De Longchamps.³⁹ The most likely reason for this, however, is simply that Pennsylvania had failed to

34. See *Respublica v. De Longchamps*, 1 U.S. (1 Dall.) 111, 111 (1784).

35. 27 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, *supra* note 28, at 478 (1784).

36. Letter from Samuel Hardy to Governor of Virginia (Benjamin Harrison) (June 24, 1784), reprinted in 7 LETTERS OF MEMBERS OF THE CONTINENTAL CONGRESS 558-59 (Edmund C. Burnett ed., 1934) [hereinafter BURNETT'S LETTERS].

37. Casto, *supra* note 27, at 492 n.141.

38. *De Longchamps*, 1 U.S. (1 Dall.) at 116.

39. Bradley, *supra* note 5, at 641. Professor Bradley also suggests that neither Congress nor foreign nations were particularly upset with the way Pennsylvania handled the prosecution and that the “obvious remedy would have been to give the national government . . . prosecutorial authority, not to create federal court jurisdiction over private tort suits.” *Id.* But the fact that Pennsylvania had acquitted itself well did not quell Congress's fears that the States might handle similar situations poorly in the future. That is why Congress passed another resolution on August 24, 1785 directing the Secretary of Foreign Affairs, John Jay, “to report the draft of an act to be recommended to the legislatures of the respective states, for punishing the infractions of the laws of nations, and more especially for securing the privileges and immunities of public Ministers from foreign powers.” 29 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, *supra* note 28, at 655. There is no record of Jay having prepared this draft. Casto, *supra* note 27, at 493 n.144. But there is also no reason to think it would have departed from the outline set forth in Congress's 1781 resolution, which expressly provided for civil liability. For Congress, both criminal and civil liability would have been the obvious remedy.

Professor Bradley further argues that the First Congress provided for jurisdiction over civil suits by ambassadors, public ministers and consuls to be vested in the Supreme Court under Section 13. See Bradley, *supra* note 5, at 644-45. That the Supreme Court's jurisdiction over such cases was expressly made non-exclusive, however, suggests that Congress intended to allow such suits to be brought in other fora, including the district courts under the Alien Tort Statute. To have required foreign officials to bring their suits in the Supreme Court would have been to convert what was intended to be a privilege into a burden. See William S. Dodge, Note, *Congressional Control of Supreme Court Appellate Jurisdiction: Why the Original Jurisdiction Clause Suggests an “Essential Role”*, 100 YALE L.J. 1013, 1025 n.75 (1991).

follow Congress's recommendation and Connecticut's example and had not provided for such suits. As Edmund Randolph would observe in 1787, "[i]f we examine the constitutions, and laws of the several states, it is immediately discovered, that the law of nations is unprovided with sanctions in many cases, which deeply affect public dignity and public justice."⁴⁰ There is little doubt that the public figures of the 1780s linked the Marbois Affair and the 1781 resolution in their own minds. During the controversy, Francis Dana, a member of the congressional committee to whom the French Ambassador's note was referred, wrote to Elbridge Gerry, a member of the same committee, bemoaning the states' failure to act upon the 1781 resolution. Dana wrote that it would be "advisable for our [state] legislatures to pass declaratory laws . . . agreeably to the recommendations of congress of the 23d of November 1781" and suggested that the Marbois Affair was one of those "cases for which remedies were intended by congress, and ought in their nature to have been provided previously."⁴¹ And when Edmund Randolph rose at the opening of the Constitutional Convention to complain that few states had laws to punish infringements of the rights of ambassadors,⁴² he had surely not forgotten the resolution that he had authored less than six years earlier, which provided for both criminal and civil liability in such cases.

When Congress set about framing a Judiciary Act for the new nation in 1789, it enjoyed a power to provide for offenses against the law of nations that it had lacked in 1781. Most of the Judiciary Act, including Section 9, was drafted by Oliver Ellsworth.⁴³ Ellsworth had been a member of both the Continental Congress that passed the 1781 resolution and the Connecticut General Assembly that passed the 1782 act,⁴⁴ and his Judiciary Act carried out each of the recommendations of the 1781 resolution. Sections 9 and 11 gave the federal courts

40. A Letter of His Excellency Edmund Randolph, Esquire, on the Federal Constitution (Oct. 10, 1787)), in 2 THE COMPLETE ANTI-FEDERALIST 86, 88 (Herbert J. Storing ed., 1981).

41. Letter from Francis Dana to Elbridge Gerry (June 28, 1784), in 8 BURNETT'S LETTERS, *supra* note 37, at 844, 845. For Dana's and Elbridge's membership on the committee, see 27 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, *supra* note 28, at 478 (1784).

42. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 25 (Max Farrand ed., 1911) [hereinafter FARRAND].

43. Section 9 of the Act was Section 10 of the draft bill submitted to Congress, see Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 73 (1923), and this section of the bill is in Ellsworth's handwriting. See *id.* at 50.

44. Casto, *supra* note 27, at 495 n.155 (noting Ellsworth's membership in the Continental Congress); Castro, *supra* note 32, at 902-03 (noting Ellsworth's membership in the Connecticut General Assembly).

jurisdiction over criminal violations of the law of nations.⁴⁵ Section 9 further gave the district courts jurisdiction over the two types of civil suits mentioned in the 1781 resolution: (1) suits by the injured alien against the tortfeasor; and (2) suits by the United States against the tortfeasor for reimbursement of compensation paid to the injured party.⁴⁶ The first of these two provisions was the Alien Tort Statute, and like both the 1781 resolution and the 1782 act with which Ellsworth was familiar, it was not limited to suits against U.S. citizens but expressly provided for jurisdiction over “*all* causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States.”⁴⁷ If Ellsworth was building on these models (and it is reasonable to think that he was), it would not have occurred to him to limit the district courts’ jurisdiction to suits against U.S. citizens. Moreover, the experience of the 1780s would have convinced him that doing so was inadvisable.

Stacked against the plain language of the Alien Tort Statute and the history leading to its adoption, the arguments that Professor Bradley marshals to support his alienage interpretation are weak. First, he relies on structural arguments that seem to link the alien tort jurisdiction in Section 9 to the alienage jurisdiction in Section 11. He argues that when the First Congress implemented case-denominated heads of jurisdiction, it made federal jurisdiction exclusive, while in implementing party-denominated heads of jurisdiction, it made federal jurisdiction concurrent with the state courts.⁴⁸ But there is a simpler explanation for making alien tort jurisdiction concurrent than adherence to such a mechanical rule. The whole point of alien tort jurisdiction was to give aliens *access* to federal courts if they desired it, not to force them to sue in federal court against their will. Thus, Section 9 followed the Judiciary Act’s general scheme of giving alien plaintiffs a choice of forum while restricting suits against them to fora that might be more neutral and convenient.⁴⁹ Professor Bradley’s other structural argument—that

45. Judiciary Act, ch. 20, §§ 9 & 11, 1 Stat. 73, 76-77, 78-79 (1789) (granting jurisdiction over crimes “cognizable under the authority of the United States”); Warren, *supra* note 43, at 73, 77 (noting that this jurisdiction included common-law crimes, including those against the law of nations).

46. Judiciary Act, ch. 20, § 9, 1 Stat. at 77. With respect to the second type of suit, jurisdiction was limited to suits for \$100 or more. *Id.*

47. *Id.* (emphasis added).

48. Bradley, *supra* note 5, at 619.

49. Thus, Section 12 permitted aliens sued in state court to remove the suit to federal court so long as the amount in controversy exceeded \$500. 1 Stat. at 79. Section 13 limited jurisdiction of suits *against* ambassadors, public ministers, and their servants to the Supreme Court, but made the Supreme Court’s jurisdiction in suits brought *by* ambassadors, public ministers, and their

Section 9 cross references Section 11 by making the district courts' jurisdiction concurrent with the circuit courts⁵⁰—simply shows that the First Congress expected that alien tort jurisdiction and alienage jurisdiction would sometimes overlap. It does not show that the First Congress expected the former to be limited by the requirements of the latter.

Second, Professor Bradley relies on a few statements by members of the First Congress that appear to link alien tort jurisdiction with alienage jurisdiction.⁵¹ The most convincing of these is William Loughton Smith's letter describing a conversation with Ellsworth, in which Ellsworth tried to respond to the charge that the Judiciary Act treated aliens more favorably than citizens. Ellsworth reportedly said:

The Citizens were already protected by [the State] Judges & Courts, but foreigners were not. The Laws of nations & Treaties were too much disregarded in the several States __ Juries were too apt to be biased [against] them, in favor of their own citizens & acquaintances: it was therefore necessary to have general Courts for causes in w[hi]ch foreigners were parties or citizens of diff[erent] States; hence arises this partiality⁵²

I read Ellsworth as making two distinct arguments: (1) that state courts tended to disregard the law of nations and treaties; and (2) that juries were too apt to be biased against foreigners and in favor of their own citizens. It is clear that Ellsworth was defending alienage and diversity jurisdiction with the second of these arguments but not with the first because the first would provide no support for diversity jurisdiction. Although questions concerning the law of nations and treaties might arise with some frequency in "causes in w[hi]ch foreigners were parties," they would not typically have arisen in suits between "citizens of diff[erent] States." The first argument would, however, have justified another "partiality" in Section 9—specifically, the clause that constitutes the Alien Tort Statute. Thus, while Smith's letter indicates that Ellsworth would have foreseen that alienage and alien tort jurisdiction would overlap, it does not prove that alien tort jurisdiction was somehow limited to suits that would also have fallen within the

servants original but not exclusive. *Id.* at 80. For further discussion of Section 13 in particular, see Dodge, *supra* note 39, at 1026-27.

50. Bradley, *supra* note 5, at 619-20.

51. *Id.* at 620-21.

52. Letter from William Loughton Smith to Edward Rutledge (Aug. 10, 1789), in 4 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, at 496-99 (Maeva Marcus ed., 1992).

alienage jurisdiction.⁵³

Third, Professor Bradley relies on the fact that Section 11 of the Judiciary Act, which confers alienage jurisdiction on the circuit courts in suits for more than \$500 in which “an alien is a party,”⁵⁴ was construed to require that there be a U.S. citizen in the case.⁵⁵ The Supreme Court read Section 11 this way in *Mossman v. Higginson*,⁵⁶ however, to avoid the plain constitutional difficulty that Article III’s alienage jurisdiction extends only to “Controversies between . . . the Citizens [of a State], and . . . foreign . . . Citizens or Subjects.”⁵⁷ No similar difficulty inheres in the interpretation of Section 9 for (as I shall explain below) suits between two aliens for violations of the law of nations arise under the “Laws of the United States” for the purposes of Article III.⁵⁸

Fourth, Professor Bradley argues that the law of state responsibility in the late 1700s made nations responsible for offenses against the law of nations committed by their citizens but not by foreign citizens.⁵⁹ This assertion is flatly contradicted by the *Marbois* case, however, in which both the French government and other governments expected the United States to punish an offense committed by a French citizen. Despite De Longchamps’ French citizenship, the Pennsylvania Supreme Court thought it had a “duty” to punish him in order to “preserve the honor of the State, and maintain peace with our great and good Ally, and the whole world.”⁶⁰ Pennsylvania’s obligation was not just to assuage

53. Professor Bradley’s other two quotations from members of the First Congress are less convincing. Smith’s description of the district courts’ jurisdiction during the House debates is so general (and so inaccurate, *see* Bradley, *supra* note 5, at 620 n.147) that it casts little light. Pendleton’s letter simply shows that suits by aliens falling outside the district courts’ alien tort jurisdiction (because they were not for torts) might have been brought in the circuit courts if the amount-in-controversy requirement were met. In other words, it illustrates that alien tort jurisdiction and alienage jurisdiction might overlap, but not that the requirements of the latter somehow limited the former.

Professor Bradley also relies on quotations from three subsequent commentators. *See id.* at 622. The quotations from St. George Tucker and Joseph Story simply show that the rule of decision in alienage cases might often be the law of nations but do not show that it was only in alienage cases that such issues might arise. The quotation from Thomas Sergeant does directly support Professor Bradley’s thesis, but it is from a treatise written more than 50 years after the Judiciary Act and it is difficult to see how this bears on what the First Congress may have intended.

54. Judiciary Act, ch. 20, § 11, 1 Stat. 73, 78 (1789).

55. Bradley, *supra* note 5, at 629.

56. 4 U.S. (4 Dall.) 12 (1800).

57. U.S. CONST. art. III, § 2, cl. 1. *See Mossman*, 4 U.S. (4 Dall.) at 14.

58. *See infra* Part III.

59. Bradley, *supra* note 5, at 630-31.

60. *Republica v. De Longchamps*, 1 U.S. (1 Dall.) 111, 117 (1784).

France but to uphold the law of nations: “The person of a public minister is sacred and inviolable. Whoever offers any violence to him, not only affronts the Sovereign he represents, but also hurts the common safety and well-being of nations; he is guilty of a crime against the whole world.”⁶¹

Finally, it is worth noting that Professor Bradley’s alienage reading does not seem to have occurred to courts construing the Alien Tort Statute during the 1790s. In *Moxon v. The Fanny*,⁶² the British owners of a ship captured by a French privateer within the territorial waters of the United States sued for restitution of the ship and its cargo as well as damages for detention of the ship.⁶³ The district court dismissed the suit on what we would call political question grounds,⁶⁴ but in dictum it also construed the Alien Tort Statute. The court stated that the suit could not be maintained under the Alien Tort Statute because it sought restitution in addition to damages and therefore “[i]t cannot be called a suit for a tort only.”⁶⁵ The court did *not* say that the suit could not be maintained because the defendant was French. In *Bolchos v. Darrel*,⁶⁶ a French privateer captured a Spanish vessel carrying slaves mortgaged to a British citizen. Once in port, the mortgagee’s agent seized and sold the slaves, and the French privateer sued for the proceeds. The district court expressed some doubt about whether it had admiralty jurisdiction, because the seizure occurred on land, but held that it had jurisdiction under the Alien Tort Statute.⁶⁷ That the defendant was British did not seem to trouble the court. Thus, in neither of these cases involving the Alien Tort Statute during the 1790s did the courts read its language to require that the defendant be a U.S. citizen, despite the fact that in each there were aliens on both sides.⁶⁸ Instead, the courts read the statute according to its plain language as granting jurisdiction over “all causes

61. *Id.* at 116.

62. 17 F. Cas. 942 (D. Pa. 1793) (No. 9,895).

63. *Id.* at 943.

64. The court reasoned that whether it was lawful to take a prize within the territorial waters of a neutral state depended on whether the neutral state would allow it, and whether the United States would allow such a capture was beyond the competence of the court. *Id.* at 946-47.

65. *Id.* at 948.

66. 3 F. Cas. 810 (D.S.C. 1795) (No. 1,607).

67. *Id.* at 810.

68. Professor Bradley dismisses these cases as insufficient authority for the proposition that Congress intended to reach suits between two aliens. Bradley, *supra* note 5, at 636. One or two decisions may not be a great deal of authority, but they are a great deal more than Bradley can cite in support of his position, for there appear to be no cases that have read the statute to require that the defendant be a U.S. citizen. Moreover, given that *Moxon* and *Bolchos* seem to be the only occasions on which the issue arose, their consistent interpretations would seem to be good evidence of how the statute would commonly be understood.

where an alien sues for a tort only in violation of the law of nations or a treaty of the United States.”⁶⁹

There is another possible reading of the Judiciary Act on which Professor Bradley does not rely. It might be possible to read the Alien Tort Statute as a combined implementation of Article III’s alienage jurisdiction, its treaty jurisdiction, its admiralty jurisdiction, and its jurisdiction over cases affecting ambassadors, but not its jurisdiction over cases arising under the “Laws of the United States.”⁷⁰ This would allow the Alien Tort Statute to reach those violations of the law of nations with which the First Congress was most familiar,⁷¹ including a repeat of the Marbois Affair, but not suits between aliens for torture. The problem with this interpretation is that it would effectively limit the Alien Tort Statute to violations of the law of nations that were recognized at the time the Statute was passed.⁷² Not only is this contrary to the word “all” in Section 9’s text, it is contrary to the Founders’ dynamic conception of the law of nations, a conception that Justice Story captured best when he wrote, “[i]t does not follow . . . that because a principle cannot be found settled by the consent or practice of nations at one time, it is to be concluded, that at no subsequent period the principle can be considered as incorporated into the public code of nations.”⁷³ The Continental Congress had recommended to the States in 1781 that they establish tribunals “with power to decide on offences

69. Judiciary Act, ch. 20, § 9, 1 Stat. 73, 77 (1789).

70. U.S. CONST. art. III, § 2, cl. 1.

71. See 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 68 (1769) (“The principal offences against the law of nations . . . are of three kinds; 1. Violations of safe-conducts; 2. Infringment of the rights of ambassadors; and, 3. Piracy.”).

72. Judge Bork made a similar argument in his *Tel-Oren* opinion. See *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 816 (D.C. Cir. 1984) (Bork, J., concurring). For a specific response to Judge Bork, see Dodge, *Historical Origins*, *supra* note 17, at 241-43.

73. *United States v. La Jeune Eugenie*, 26 F. Cas. 832, 846 (C.C.D. Mass. 1822) (No. 15,551), *overruled on other grounds*, 23 U.S. (10 Wheat.) 66 (1825). For some representative statements of the Founders themselves, see *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 281 (1796) (Wilson, J., concurring) (“When the United States declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement.”); Proclamation of Neutrality (Apr. 22, 1793), in 32 THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES, 1745-1799, at 430-31 (John C. Fitzpatrick ed., 1939) (referring to “the modern usage of nations”); Letter from Thomas Jefferson to Thomas Pinckney (May 7, 1793), *quoted in* Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 VAND. L. REV. 819, 846 (1989) (“I mean the principles of that law [of nations] as they have been liberalized in latter times by the refinement of manners & morals, and evidenced by the Declarations, Stipulations, and Practice of every civilized Nation.”); Charge to the Grand Jury for the District Court of South Carolina (May 12, 1794) (Iredell, J.), *quoted in* Jay, *supra*, at 824 (noting that the law of nations had been expounded “with a spirit of freedom and enlarged liberality of mind entirely suited to the high improvements the present age has made in all kinds of political reasoning”).

against the law of nations, *not contained in the foregoing enumeration*,”⁷⁴ and the First Congress no doubt expected federal courts exercising jurisdiction under the Alien Tort Statute to do the same. The Framers might not have anticipated the fact that the law of nations would come to prohibit one alien from torturing another, but it is unrealistic to think that they would have wanted the federal courts to shrink from enforcing the law of nations “in its modern state of purity and refinement.”⁷⁵ The honor and duty of the nation would demand it.⁷⁶ As the Pennsylvania Supreme Court wrote of another dispute between two aliens involving the law of nations, in words that could apply equally to torturers today, whoever violates the law of nations “is guilty of a crime against the whole world.”⁷⁷

In short, the First Congress meant what it said. It meant to grant the district courts original jurisdiction over “*all* causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States,”⁷⁸ not just those in which the defendant was a U.S. citizen, and not just those in which the violation of the law of nations was recognized in 1789. Such a grant of jurisdiction was constitutional because, as I explain immediately below, the law of nations is part of the “Laws of the United States” to which Article III refers.

III. THE LAW OF NATIONS AS LAW OF THE UNITED STATES

In some earlier writings, Professor Bradley and his co-author Professor Goldsmith have suggested that alien tort suits between aliens are unconstitutional unless customary international law is “federal common law.”⁷⁹ Of course, the phrase “federal common law” does not appear in the Constitution, much less Article III. The reason is plain.

74. 21 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, *supra* note 28, at 1137 (emphasis added).

75. *Ware*, 3 U.S. (3 Dall.) at 281.

76. *See* *Burley*, *supra* note 27, at 481-88.

77. *Respublica v. De Longchamps* 1 U.S. (1 Dall.) 111, 116 (1784); *see also* *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980) (“[T]he torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind.”).

78. Judiciary Act, ch. 20, § 9, 1 Stat. 73, 77 (1789) (emphasis added).

79. Bradley & Goldsmith, *Critique*, *supra* note 10, at 872 (arguing that “if [customary international law] is not federal common law, then the Article III basis for federal jurisdiction over suits involving only aliens—the large majority of international human rights suits under the ATS—is suspect”); Bradley & Goldsmith, *Illegitimacy*, *supra* note 22, at 357 (arguing that “a rejection of the view that [customary international law] is automatically federal common law would appear to render human rights litigation under the ATS in *Filartiga*-type cases inconsistent with Article III and thus unconstitutional”).

Federal common law is a post-*Erie* phenomenon.⁸⁰ At the time of the Framing, the law of nations was simply considered to be part of the general common law, which was binding on federal and state courts alike.⁸¹ Thus, the proper question, as Professor Bradley acknowledges in his latest Article, is not whether the law of nations is part of “federal common law” but whether it part of the “Laws of the United States.”⁸²

80. See Henry J. Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 405-22 (1964).

81. See, e.g., Bradley & Goldsmith, *Critique*, *supra* note 10, at 824 (“[T]he law of nations . . . had the legal status of general common law.”); Dodge, *Historical Origins*, *supra* note 17, at 240 (“[G]eneral common law was not thought of as distinctively federal, and it was binding on the States as well as the federal government.”); William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1517 (1984) (“[T]he general law was not attached to any particular sovereign; rather, it existed by common practice and consent among a number of sovereigns.”); Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1557-58 (1984) (“Early in our history, the question whether international law was state law or federal law was not an issue: it was ‘the common law.’ . . . State legislatures did not assert authority to supersede it as internal law in the state.”); Jay, *supra* note 73, at 832-33 (noting the Framers’ view that “in appropriate situations, the ‘general’ law (of which the law of nations was a part) prevailed, and thus the country was bound by it”).

82. U.S. CONST. art. III, § 2, cl. 1; see Bradley, *supra* note 5, at 597. This may be an appropriate place to note that much of the persuasive force of the Bradley-Goldsmith critique of customary international law flows from their assumption that if customary international law is federal common law, it is federal common law for all purposes. “If [customary international law] has the status of federal common law, it presumably preempts inconsistent state law pursuant to the Supremacy Clause and provides a basis for Article III ‘arising under’ jurisdiction. It may also bind the President under Article II’s Take Care Clause.” Bradley & Goldsmith, *supra* note 10, at 817. This allows them to argue backwards from these supposedly awful doctrinal consequences, that customary international law simply cannot be federal common law. *Id.* at 842-48. It also allows them to draw support from cases interpreting various statutory grants of jurisdiction not to include the law of nations. See *id.* at 824 n.53. Bradley and Goldsmith’s critics have also tended to accept their all-or-nothing formulation of the question. See, e.g., Beth Stephens, *The Law of Our Land: Customary International Law As Federal Law After Erie*, 66 FORDHAM L. REV. 393, 393-94 (1997) (“If international law is part of federal law, it provides the basis for federal court jurisdiction over cases raising well-pleaded international law claims. Moreover, if international law is part of federal law, it is the law of the land, binding on states pursuant to the supremacy clause; and state courts are bound to follow federal court decisions as to its meaning.”).

As Professor Ramsey has recently noted, however, “the Bradley/Goldsmith position, rather than being a single claim about the status of international law, is properly viewed as a series of claims . . . some of which are more persuasive than others.” Michael D. Ramsey, *International Law as Part of Our Law: A Constitutional Perspective*, 29 PEPPERDINE L. REV. (forthcoming 2001) (manuscript at 2, on file with author). One may disaggregate Bradley and Goldsmith’s argument into at least the following six questions: (1) whether federal courts may apply customary international law as a rule of decision; (2) whether federal courts’ interpretations of customary international law are binding on state courts; (3) whether customary international law is part of “the Laws” that the President must take care to execute under Article II; (4) whether customary international law is part of the “Laws of the United States” under Article III; (5) whether customary international law is part of the “Laws of the United States made in Pursuance [of the Constitution]” under Article VI; (6) and whether customary international law is within

I agree with Professor Bradley that the starting point for this analysis should be the constitutional text.⁸³ He infers from the fact that Article III does not specifically mention the law of nations that the Framers decided not to grant the federal courts a general law of nations jurisdiction.⁸⁴ But the inference is not an obvious one, because an express mention of the law of nations would have been unnecessary if it was understood to be incorporated within the “Laws of the United States.”⁸⁵ To understand this phrase, it is useful to compare it with the

various statutory grants of “arising under” jurisdiction such as 28 U.S.C. § 1331. Answering one of these questions yes, does not necessarily preclude one from answering others no; and vice versa. See Ramsey, *supra* (suggesting that Bradley and Goldsmith’s argument that customary international law does not bind the States under the Supremacy Clause is stronger than their argument that customary international law does not fall within Article III). My concern in this piece is simply with the Article III question.

83. Bradley, *supra* note 5, at 597.

84. *Id.* at 598. Professor Bradley offers three possible reasons for the decision. First, he suggests that the law of nations was considered too vague. *Id.* at 598-99. This suggestion is belied by all of the instances Bradley cites in which courts *did* apply the law of nations to decide cases. Indeed, both before and after the Constitution was written, the law of nations was considered definite enough to provide the basis for a *criminal* prosecution. See, e.g., *Respublica v. Longchamps*, 1 U.S. (1 Dall.) 111 (1784); *Henfield’s Case*, 11 F. Cas. 1099 (C.C.D. Pa. 1793) (No. 6,360).

Second, Professor Bradley suggests that the Framers may have been worried about creating federal jurisdiction over cases under the law merchant, Bradley, *supra* note 5, at 599-600, and he correctly notes that they were particularly concerned with federal courts hearing suits by British creditors. *Id.* at 624-26; see also Jay, *supra* note 73, at 831-32. But it seems unlikely that the Framers chose to deal with these issues specifically by excluding the law of nations from Article III. Such an exclusion would hardly have accomplished their goals, for many cases involving the law merchant, and nearly all of the suits by British creditors would have fallen within Article III’s provisions for diversity and alienage jurisdiction. Instead, the Framers dealt with these issues through the provisions of the Judiciary Act and the Seventh Amendment. Specifically, they imposed an amount in controversy requirement of \$500 for diversity and alienage cases; provided the right to a civil jury in the Seventh Amendment, which ensured that British creditors would have to win their cases before American juries; declined to give the federal courts general arising under jurisdiction; and (perhaps most significantly for present purposes) limited the federal courts’ jurisdiction over suits by aliens to those for a “tort only.”

Third, Professor Bradley suggests that other bases of jurisdiction in Article III covered all of the disputes likely to implicate international relations. Bradley, *supra* note 5, at 600; see also Jay, *supra* note 73, at 831. But this implies that the Framers had a static view of the law of nations, which they clearly did not. See *supra* note 73 and accompanying text.

85. The fact that Articles III and VI expressly mention “treaties” is easily explained. Under the Articles of Confederation, one of the national government’s main problems was its inability to ensure state compliance with the Treaty of Paris of 1783. See generally John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955, 2013-24 (1999). Including treaties in the Supremacy Clause was one way of solving this problem. *Id.* at 2029-32. The law of nations, by contrast, was already understood to be binding on the states as part of the common law. See *Respublica v. De Longchamps*, 1 U.S. (1 Dall.) 111, 116 (1784) (“[T]he law of nations . . . , in its fullest extent, is part of the law of this State.”); see also *supra* note 81 and accompanying text. It was therefore unnecessary to mention the law of nations in Article VI. See Jay, *supra* note 73, at 832 (“The status of the law of nations

language found in the Supremacy Clause of Article VI.⁸⁶ The Supremacy Clause provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.⁸⁷

The language we are particularly interested in is “Laws of the United States which shall be made in Pursuance thereof,” which seems to refer to laws that have been made through the Article I, Section 7 process of bicameralism and presentment. The “in Pursuance” language is found in the earliest version of the Supremacy Clause, in the New Jersey Plan, and so does not appear to be simply a matter of style.⁸⁸

Article III, by contrast, refers to “Cases . . . arising under . . . the

as general law . . . explains the omission of it and any other type of common law from the supremacy clause . . .”).

It is also fairly clear that treaties would not automatically have been considered “laws” in the same sense as statutes and the common law, at least not in the absence of some express constitutional provision establishing their binding character. *Cf. Yoo, supra* (distinguishing sharply between treaty powers and legislative powers). It was therefore necessary to mention treaties explicitly in Article III. The law of nations, by contrast, would have fit more easily within Article III’s reference to the “Laws of the United States.”

86. Professor Amar has named this interpretive technique “intratextualism.” Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999). As Amar explains,

the same (or very similar) words in the same document should, at least presumptively, be construed in the same (or a very similar) way. But the flip side of the intratextual coin is that when two (or more) clauses feature different wording, this difference may also be a clue to meaning, and invite different construction of the different words.

Id. at 761.

In making an intratextual argument for judicial review, Professor Amar quotes the relevant language of Articles III and VI and observes that “[t]he clauses are written in obviously parallel language, as is clear when we bring them side by side and quote them precisely.” *Id.* at 766. But in quoting Article VI, Amar uses an ellipsis to omit the words “which shall be made in Pursuance thereof.” *Id.* This makes the parallel more obvious, but masks an important textual difference that may bear on the proper interpretation of each Article. *See infra* notes 87-91, 110-12 and accompanying text. Resupplying the omitted language does nothing to weaken Amar’s argument for judicial review. If anything it strengthens that argument. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1803) (“[I]n declaring what shall be the supreme law of the land, the constitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the constitution, have that rank.”).

87. U.S. CONST. art. VI, cl. 2.

88. *See* 1 FARRAND, *supra* note 42, at 245 (“[T]hat all Acts of the U. States in Congs. made by virtue & in pursuance of the powers hereby & by the articles of confederation vested in them, and all Treaties made & ratified under the authority of the U. States shall be the supreme law of the respective States. . .”).

Laws of the United States.”⁸⁹ If one takes the difference in text seriously, one must conclude that there is at least one category of laws that are not “made in Pursuance” of the Constitution and yet are “Laws of the United States” for the purposes of Article III.⁹⁰ The law of nations is the most obvious candidate. A principal criticism of the Articles of Confederation was that the national government lacked the authority to prevent violations of the law of nations.⁹¹ In 1786, the Continental Congress appointed a grand committee chaired by Charles Pinckney to propose amendments to the Articles of Confederation.⁹² Among the committee’s proposals was one to create a federal court with the power to review “all Causes wherein questions shall arise on the meaning and construction of Treaties entered into by the United States with any foreign power, or on the Law of Nations.”⁹³

Just prior to the start of the Constitutional Convention in May 1787, George Mason wrote that with regard to the courts “[t]he most prevalent idea [was]. . . to establish. . . a judiciary system with cognizance of all such matters as depend upon the law of nations, and such other objects as the local courts of justice may be inadequate to.”⁹⁴ Mason’s letter does not necessarily reflect the thinking of the Convention as a whole, since many of the delegates from other states had not yet arrived,⁹⁵ but it does seem to reflect the thinking of the Virginia delegation. After Mason’s arrival on May 17, the Virginia delegation was at full strength and began to draft a plan for the Convention’s consideration.⁹⁶ Mason’s description to Lee of the changes being considered tracks the Virginia Plan that Edmund Randolph laid before the Convention on May 29.⁹⁷

89. U.S. CONST. art. III, § 2, cl.1.

90. Professor Ramsey has recently reached a similar conclusion. Ramsey, *supra* note 82 (manuscript at 21-22); *see also* 1 WILLIAM WINSLOW CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 620-22 (1953).

91. *See* THE FEDERALIST NO. 42, at 264, 265 (James Madison) (Clinton Rossiter ed., 1961) (“These articles [of confederation] contain no provision for the case of offenses against the law of nations; and consequently leave it in the power of any indiscreet member to embroil the Confederacy with foreign nations.”). *See generally* FREDERICK W. MARKS, III, INDEPENDENCE ON TRIAL: FOREIGN AFFAIRS AND THE MAKING OF THE CONSTITUTION 52-95 (1973).

92. *See* Amendments to the Articles of Confederation Proposed by a Grand Committee of Congress, 7 Aug. 1786, in 1 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 163 (Merrill Jensen ed., 1976).

93. *Id.* at 167 (article 19).

94. Letter from George Mason to Arthur Lee (May 21, 1787), reprinted in 3 FARRAND, *supra* note 42, at 24.

95. *See* Bradley, *supra* note 5, at 598 n.47 (questioning the weight that should be given Mason’s letter).

96. JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 59 (1996).

97. 1 FARRAND, *supra* note 42, at 20-22.

The Virginia Plan proposed the creation of federal courts whose jurisdiction would include “questions which may involve the national peace and harmony.”⁹⁸ Both Mason’s description of what the Virginia delegation had in mind for the judiciary and Randolph’s speech presenting its plan to the Convention, in which he complained specifically about the Continental Congress’s inability to “cause infractions of treaties or of the law of nations, to be punished,”⁹⁹ indicate that “questions which may involve the national peace and harmony” included questions that involved the law of nations.

On the same day that Randolph introduced the Virginia Plan, Charles Pinckney laid his own plan before the Convention.¹⁰⁰ Pinckney’s plan tended to follow the recommendations of the grand committee that he had chaired the previous year,¹⁰¹ and with respect to the judiciary, called for “*a federal judicial Court*” to hear appeals from the “*Courts of the several States in all Causes wherein Questions shall arise on the Construction of Treaties made by U.S.—or on the Law of Nations . . .*”¹⁰² On June 15, William Paterson introduced a new plan, the New Jersey Plan, as a substitute for the Virginia Plan.¹⁰³ The New Jersey Plan contained neither an explicit nor an implicit reference to the law of nations in its proposal for the judiciary, although it would have given the Supreme Court appellate jurisdiction “in all cases touching the rights of Ambassadors, . . . in all cases in which foreigners may be interested, [and] in the construction of any treaty or treaties.”¹⁰⁴ These initial plans show that it was clearly within the contemplation of many of the Framers to create a federal judiciary with jurisdiction over cases arising under the law of nations.

All three plans were referred to the Committee of Detail (consisting of John Rutledge, Edmund Randolph, Nathaniel Gorham, Oliver Ellsworth, and James Wilson) on July 24.¹⁰⁵ Two of the committee’s drafts of the judiciary article based on the Pinckney Plan provided

98. *Id.* at 22 (resolution nine).

99. *Id.* at 19.

100. *Id.* at 16.

101. *See supra* notes 92-93 and accompanying text.

102. 3 FARRAND, *supra* note 42, at 608 (internal quotation marks omitted).

103. 1 *id.* at 242.

104. 1 *id.* at 244. A Committee of Detail draft based on the New Jersey Plan would additionally have provided for federal appellate jurisdiction “in all Cases . . . which may arise . . . on the Law of Nations . . .” 2 *id.* at 157.

105. On July 23, the Convention voted to refer its proceedings, which were based on the Virginia Plan, to the Committee of Detail. 2 *id.* at 85; *see also* 2 *id.* at 129-33 (providing text of the Convention’s proceedings). On July 24, the Convention appointed the members of the Committee and voted to refer the Pickney and New Jersey Plans to it as well. 2 *id.* at 97-98.

explicitly for appellate jurisdiction over cases arising “on the Law of Nations,”¹⁰⁶ and a third based on the Virginia Plan would have given Congress authority “[t]o provide tribunals and punishment for mere offenses against the law of nations.”¹⁰⁷ In the draft reported to the Convention on August 6, however, Congress’s power was limited to declaring “the law and punishment . . . of offences against the law of nations,”¹⁰⁸ and the arising under jurisdiction was limited to “cases arising under laws passed by the Legislature of the United States.”¹⁰⁹

Had the text remained in this form, it would have been clear that Article III did not extend to cases arising under the law of nations, but, on August 27, the delegates voted without explanation to strike the words “passed by the Legislature,”¹¹⁰ and the phrase that was ultimately retained in Article III became the more general phrase “Laws of the United States.”¹¹¹ This deliberate change in language confirms a point already apparent from a comparison of Articles III and VI: that the phrase “Laws of the United States” was not limited to statutes enacted by the Congress. Moreover, the “Laws of . . .” formulation chosen by the Convention seems to echo Blackstone and others who maintained that the law of nations was part of the “law of the land.”¹¹² The final text of Article III thus seems to have carried out the design of the Virginia and Pinckney Plans and vested the federal courts with jurisdiction over cases arising under the law of nations.

Moreover, it is clear that at least some of the Framers understood that the federal courts would have jurisdiction over cases arising under the law of nations. John Jay wrote in *Federalist No. 3*:

106. 2 *id.* at 136, 157.

107. 2 *id.* at 143.

108. 2 *id.* at 182.

109. 2 *id.* at 186.

110. 2 *id.* at 423-24, 431. Professor Bradley dismisses this textual change on the ground that the Convention had made a similar change in the Supremacy Clause four days earlier. *See* Bradley, *supra* note 5, at 605-06. These parallel changes had quite different effects, however, because the Supremacy Clause retained the “in Pursuance” language that Article III lacks. The ultimate effect of each change was to restore the meaning that each provision had before it was referred to the Committee of Detail. In the case of Article VI, this meant limiting the Supremacy Clause to laws passed “in Pursuance” of the Constitution. *See supra* note 88 and accompanying text. In the case of Article III, however, this meant expanding the federal courts’ jurisdiction to cases arising under the law of nations. *See supra* notes 94-104 and accompanying text.

111. U.S. CONST. art. III, § 2, cl.1.

112. 4 BLACKSTONE, *supra* note 71, at 67 (“[T]he law of nations. . . is . . . adopted in it’s [sic] full extent by the common law, and is held to be a part of the law of the land”); *see also* 1 Op. Att’y Gen. 26, 27 (1792) (Edmund Randolph) (“The law of nations, although not specially adopted by the constitution or any municipal act, is essentially a part of the law of the land.”); *The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815) (Marshall, C.J.) (“[T]he court is bound by the law of nations which is a part of the law of the land.”).

Under the national government, treaties and articles of treaties, *as well as the laws of nations*, will *always* be expounded in one sense and executed in the same manner—whereas adjudications on the same points and questions in thirteen States, or in three or four confederacies, will not always accord or be consistent. . . . The wisdom of the convention in committing such questions to the jurisdiction and judgment of courts appointed by and responsible only to one national government cannot be too much commended.¹¹³

Federalist No. 80, written by Alexander Hamilton, is more ambiguous. On the one hand, Hamilton equated “the laws of the United States” with “laws of the United States, passed in pursuance of their just and constitutional powers of legislation.”¹¹⁴ On the other hand, he agreed with Jay that “cases arising upon treaties and the laws of nations . . . may be supposed proper for the federal jurisdiction.”¹¹⁵

Professor Bradley relies on a number of other statements from the ratification debates to show that “Laws of the United States” was limited to statutory law.¹¹⁶ A few support his position, but most do not. Edmund Pendleton, describing Article III to the Virginia Convention, equated “Laws of the United States” with “the laws of the Federal Legislature,”¹¹⁷ as Hamilton did in *Federalist No. 80*. On the other hand, William Grayson complained that “[t]here is to be one Supreme Court—for chancery, admiralty, common pleas, and exchequer, . . . to which are added, criminal jurisdiction and all cases depending on the law of nations—a most extensive jurisdiction!”¹¹⁸ None of the speakers

113. THE FEDERALIST NO. 3, *supra* note 91, at 41, 43 (John Jay) (emphasis added). Professor Bradley’s discussion of Jay’s essay ignores the word “always.” See Bradley, *supra* note 5, at 601.

114. THE FEDERALIST NO. 80, *supra* note 91, at 475, 475 (Alexander Hamilton). See Bradley, *supra* note 5, at 601-02.

115. THE FEDERALIST, NO. 80, *supra* note 91, at 475, 476 (Alexander Hamilton). It is worth noting that Hamilton understood Article II’s command that the President “take Care that the Laws be faithfully executed,” U.S. CONST. art. II, § 3, as including the law of nations. Alexander Hamilton, *Letters of Pacificus, No. 1* (1793), reprinted in 15 THE PAPERS OF ALEXANDER HAMILTON 33, 40 (Harold C. Syrett ed., 1969) (“The Executive is charged with the execution of all laws, the laws of Nations as well as the Municipal law, which recognises and adopts those laws.”); *id.* at 43 (“The President is the constitutional EXECUTOR of the laws. Our Treaties and the laws of Nations form a part of the law of the land.”). Madison agreed, referring to Hamilton’s point about the law of nations as “a truth.” James Madison, *Letters of Helvidius, No. 2* (1793), reprinted in 15 THE PAPERS OF JAMES MADISON 86 (Thomas A. Mason et al. eds., 1985).

116. Bradley, *supra* note 5, at 606-07.

117. See 10 THE DOCUMENTARY HISTORY OF THE CONSTITUTION 1398 (John P. Kaminski & Gaspare J. Saladino eds., 1993).

118. *Id.* at 1445-46. Grayson referred to the Supreme Court because Article III did not require Congress to create any inferior courts. See U.S. CONST. art. III, § 1.

who followed Grayson at the Virginia Convention controverted his assertion that the judicial power granted by Article III would include “all cases depending on the law of nations.” James Madison explained to the Virginia Convention that, “[w]ith respect to the laws of the Union, it is so necessary and expedient that the Judicial power should correspond with the Legislative, that it has not been objected to.”¹¹⁹ But a judicial power over cases involving the law of nations *would* correspond to the legislative power granted by the Constitution, for Article I gave Congress legislative power over offenses against the law of nations.¹²⁰ Thus, neither Madison’s statement, nor similar statements by James Wilson, Oliver Ellsworth, William Davie, and Alexander Hamilton¹²¹ are inconsistent with Grayson and Jay’s understanding that the federal courts would have jurisdiction over cases depending on the law of nations. In short, a fair reading of the ratification debates shows that the text of Article III could easily be read to comprehend the law of nations.

But perhaps the most persuasive evidence that Article III’s reference to “Laws of the United States” included the law of nations is the Alien Tort Statute itself. Oliver Ellsworth, who drafted the Judiciary Act, had been a member of the Connecticut delegation to the Constitutional Convention and had served on the Committee of Detail. Other members of the First Congress had also been present at Philadelphia in 1787. Unless Article III’s “Laws of the United States” included the law of nations, Section 9 of the Judiciary Act would have been unconstitutional in cases between two aliens that did not fall either within the federal courts’ admiralty jurisdiction, treaty jurisdiction, or their jurisdiction over cases affecting ambassadors. Yet Section 9 expressly granted jurisdiction over “*all* causes where an alien sues for a tort only in

119. 10 THE DOCUMENTARY HISTORY OF THE CONSTITUTION, *supra* note 117, at 1413 (quoted in Bradley, *supra* note 5, at 605 n.77).

120. U.S. CONST. art. I, § 8, cl. 10.

121. See 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 517 (Merrill Jensen ed., 1976) (James Wilson) (“If a law should be made inconsistent with those powers vested by this instrument in Congress, the judges . . . will declare such law to be null and void.”); 3 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 483 (Merrill Jensen ed., 1978) (Oliver Ellsworth) (“[Federal] courts are not to intermeddle with your internal policy and will have cognizance only of those subjects which are placed under the control of a national legislature.”); 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 158 (Jonathan Elliot ed., 1886) (William Davie) (“I thought, if there were any political axiom under the sun, it must be, that the judicial power ought to be coëxtensive with the legislative.”); THE FEDERALIST NO. 80, *supra* note 91, at 475, 476 (Alexander Hamilton) (“If there are such things as political axioms, the propriety of the judicial power of a government being coextensive with its legislative may be ranked among the number.”).

violation of the law of nations or a treaty of the United States.”¹²² Judging their work from a distance of more than 200 years, we should not lightly attribute to the First Congress an intent to violate the Constitution.

The further in time one strays from 1787-1789, the more questionable it becomes that remarks made are good evidence of either the Framers’ intent or the ratifying States’ understanding of a particular constitutional provision. During the 1790s, there was tremendous dispute about whether federal courts had jurisdiction over common-law crimes, a dispute that centered first on prosecutions for violations of U.S. neutrality and then over prosecutions for sedition.¹²³ The Washington Administration took the position that violations of U.S. neutrality were cognizable by the federal courts at common law as offenses against the law of nations.¹²⁴ Professor Bradley argues that in each of these cases there was a basis for Article III jurisdiction other than the “Laws of the United States,” specifically admiralty and treaty jurisdiction.¹²⁵ But neither does anyone seem to have argued in these cases that the law-of-nations offenses were beyond the courts’ Article III jurisdiction. And, as Professor Bradley notes, a grand jury charge for one of these prosecutions drafted by John Jay (by then Chief Justice of the United States) expressly defined “Laws of the United States” to include “The laws of nations.”¹²⁶

To refute the implication of these neutrality prosecutions that offenses against the law of nations were within the federal courts’ Article III jurisdiction, Professor Bradley relies heavily on a letter from John Marshall to Henry St. George Tucker in which Marshall denies that the common law of England was adopted as the common law of America by the Constitution, and states that in the neutrality prosecutions the common law was not relied on as giving the court jurisdiction but as a rule of decision.¹²⁷ By this point, however, the

122. Judiciary Act, ch. 20, § 9, 1 Stat. 73, 77 (1789) (emphasis added).

123. See Stewart Jay, *Origins of Federal Common Law: Part One*, 133 U. PA. L. REV. 1003, 1039-93 (1985).

124. See *Henfield’s Case*, 11 F. Cas. 1099 (C.C.D. Pa. 1793) (Case No. 6,360).

125. Bradley, *supra* note 5, at 610.

126. John Jay’s Charge to the Grand Jury of the Circuit Court for the District of Virginia (May 22, 1793), in 2 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, at 381; see Bradley, *supra* note 5, at 614. Bradley suggests that Jay was not referring to Article III, but was “merely instructing the jury about the types of offenses that it could hear.” *Id.* But if this is so, it seems odd that Jay used the exact phrase found in Article III.

127. Letter from John Marshall to St. George Tucker (Nov. 27, 1800), reprinted in Stewart Jay, *Origins of Federal Common Law: Part Two*, 133 U. PA. L. REV. 1231, 1326-28 (1985); see Bradley, *supra* note 5, at 610-11.

Federalists had lost the battle over common-law crimes,¹²⁸ and Marshall had little to gain and potentially much to lose by endorsing federal common law criminal jurisdiction.¹²⁹ Other post-1800 statements on the question should be viewed in a similar light, either as the triumphant statements of Republican partisans,¹³⁰ or as the reluctant concessions of vanquished common-law defenders.¹³¹

The better reading of “Laws of the United States,” then, is that it extends not simply to those laws “which shall be made in Pursuance [of the Constitution]” but also to the law of nations. This reading makes sense of the difference in language between Articles III and VI, it is consistent with the history of Article III’s drafting, it is certainly how some of the Framers understood the phrase, and it is almost certainly how the First Congress understood it, for otherwise the word “all” in the alien tort provision of Section 9 would have made that provision unconstitutional in some cases.

IV. CONCLUSION

In the end, Professor Bradley’s argument is that we should read the Alien Tort Statute in a way that is contrary to its text,¹³² and deny the federal courts jurisdiction over a class of cases that Congress plainly has authority to reach,¹³³ in order to avoid a constitutional problem that does not exist.¹³⁴ Both the text of the Alien Tort Statute and its historical context demonstrate that the First Congress did not mean to limit jurisdiction to suits against U.S. citizens or even to violations of the law of nations that were recognized at that time. Rather, they intended that the district courts “have cognizance . . . 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.”¹³⁵ The text of the Constitution also shows that “Laws of

128. See Gary D. Rowe, Note, *The Sound of Silence: United States v. Hudson & Goodwin, the Jeffersonian Ascendancy, and the Abolition of Federal Common Law Crimes*, 101 YALE L.J. 919, 923 (1992) (noting that the dispute over common law criminal jurisdiction was settled by the Jeffersonian “Revolution of 1800,” which *Hudson* simply codified).

129. See Jay, *supra* note 127, at 1329-33.

130. See, e.g., 1 ST. GEORGE TUCKER, BLACKSTONE’S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS OF THE UNITED STATES app. 419 (1803) (quoted in Bradley, *supra* note 5, at 608); 5 Op. Att’y Gen. 691 (1802) (Levi Lincoln) (quoted in Bradley, *supra* note 5, at 615).

131. See, e.g., JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION 610 (1833) (quoted in Bradley, *supra* note 5, at 608).

132. See *supra* Part II.

133. See *supra* Part I.

134. See *supra* Part III.

135. Judiciary Act, ch. 20, § 9, 1 Stat. 73, 77 (1789) (emphasis added).

the United States” in Article III is broader than “Laws of the United States which shall be made in Pursuance [of the Constitution]” under Article VI, and history shows that Article III’s phrase was read at the time, and may be fairly read today, as including the law of nations. To say this is, of course, not to resolve every aspect of the debate over the role of customary international law in the U.S. legal system,¹³⁶ but it is to say that *Filartiga* was constitutional when it was decided.

136. *See supra* note 82.