Forthcoming 101 Va. L. Rev. (2015)
Please do not quote or cite without permission.

The Process Acts and the Alien Tort Statute

Anthony J. Bellia Jr.[*]
Bradford R. Clark[**]

INTRODUCTION

Judges and scholars have long debated the authority of federal courts to recognize "federal common law" causes of action—causes of action created by neither Congress nor state law. The question of federal judicial power to recognize such actions arises in a range of contexts in the field of federal courts. For instance, can federal courts recognize an implied cause of action for the violation of a federal statute that does not itself create a cause of action?

[*] Professor of Law and Notre Dame Presidential Fellow, Notre Dame Law School.
[**] William Cranch Research Professor of Law. We thank Tricia Bellia and John Manning for helpful comments on prior drafts of this Article. We also thank Notre Dame law students Stephen DeGenaro and Monica Bonilla-Romero for excellent research assistance.

Relatedly, can federal courts recognize an implied cause of action for the violation of the Constitution when neither the Constitution nor a federal statute creates one? Although courts and scholars have long disputed these questions, they have failed to reach any consensus on how to resolve them. Recently, the debate over the power of federal courts to create federal common law causes of action has arisen in context of interpreting and applying the Alien Tort Statute ("ATS").[1] The ATS is a 1789 act of Congress that grants federal courts subject matter jurisdiction over claims by aliens for torts in violation of the law of nations, but which creates no statutory cause of action itself.[2] In the last decade, the Supreme Court has twice interpreted the ATS and, in the process, has considered the extent to which federal courts may recognize federal common law causes of action when exercising jurisdiction under the ATS.[3]

In considering whether courts have power to recognize federal common law, judges and scholars have reached different conclusions at different times and in different contexts. From the Founding through the nineteenth century, the Supreme Court did not recognize "federal common law"—that is, "federal rules of decision whose content cannot be traced directly by traditional methods of interpretation to federal statutory or constitutional commands."[4] Although federal courts applied general law—a transnational source of law that included the law merchant, the law maritime, and the law of state-state relations—in certain cases within their jurisdiction, general law was not federal common law. Unlike modern federal common law, general law neither supported federal question jurisdiction nor preempted contrary state law. The Supreme Court stopped applying general law as such in 1938 when it held in *Erie Railroad v. Tompkins* that "[t]here is no federal general common law."[5] Nonetheless, following *Erie*, the Court recognized several "enclaves" of federal common law. In recent decades, the Court has been reluctant to recognize new enclaves because of concerns that

---

[1] 28 U.S.C. § 1350.

[2] *Id.*

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

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

[5] 304 U.S. 64, 78 (1938).

judicial creation of federal common law is in tension not only with *Erie*, but also with both separation of powers and federalism.[6]

Against this backdrop, the Supreme Court interpreted the ATS for the first time in 2004. In *Sosa v. Alvarez-Machain*,[7] the Court concluded that "the ATS is a jurisdictional statute creating no new causes of action."[8] Nonetheless, the Court believed that the "jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time."[9] This belief rested on the assumption that "the ambient law of the era" would have provided the causes of action that ATS jurisdiction encompassed.[10] In other words, the Court "assume[d] 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."[11] On the basis of this assumption, the Court suggested that federal courts today may "recognize private claims under federal common law" for a narrow range of international law violations.[12]

Commentators have been quick to embrace *Sosa*'s vision of ambient law and federal judicial power at the Founding with little independent historical analysis. Following *Sosa*, many scholars have repeated and relied on its claim that early federal courts found causes of action in principles of general law.[13]

The claim that early federal courts relied on general law to create causes of action rests on a false historical premise. Ambient general law neither supplied nor was understood by the Founders to supply the cause of action in cases (including ATS claims) within the jurisdiction of early federal courts. Members of the First Congress did not leave the existence or non-existence of civil causes of action to be determined by judges in accordance with free-floating principles of "the common law." Rather, they enacted specific statutes to govern this question and related matters. Members of the First Congress debated many aspects of federal judicial power over civil disputes—including whether litigants would enjoy the right to a

---

[6] *See* Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245 (1996).

[7] 542 U.S. 692 (2004).

[8] *Id.* at 724.

[9] *Id.*

[10] *Id.* at 714.

[11] *Id.* at 724.

[12] *Id.* at 732.

[13] *See infra* notes 69-72 and accompanying text.

jury trial,[14] how expansively federal courts would exercise equity jurisdiction,[15] how expensive and otherwise inconvenient federal litigation would be,[16] and how federal courts would order executions on their judgments.[17] The resolution of these questions depended in part on the forms of proceedings that federal courts would use in civil cases. Prior to the adoption of the Constitution and the First Judiciary Act, state courts generally relied on common law forms of proceeding to adjudicate cases because all thirteen states had received the common law by statute, constitutional provision, or judicial decision. These state law forms of proceeding defined the remedy that was available to a plaintiff for a particular wrong, and how state courts would determine the plaintiff's right to that remedy. In other words, the forms of proceeding defined the cause of action available to a plaintiff and the procedures for adjudicating it.

Common law forms of proceeding would not have automatically applied in the newly minted federal courts because the United States never attempted to receive the common law for the nation as a whole, and any attempt to do so would have exceeded enumerated federal powers as then understood. Accordingly, the common law—including its forms of proceeding—did not apply in federal court simply by virtue of the creation of such courts and the adoption of the common law by the states. Nonetheless, common law forms of proceeding could apply in federal court to the extent that Congress authorized their application pursuant to a proper exercise of its enumerated powers.

Under the Necessary and Proper Clause, Congress had to decide whether to create lower federal courts, what their jurisdiction would be, and what law they would apply once jurisdiction attached. Congress could have adopted uniform forms of proceeding for use in federal court. The First Congress, however, was unable (or

---

[14] *See, e.g.*, Remarks of Rep. Aedanus Burke (S.C.), *reprinted in* 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, 1789-1791, at 1392 (Charlene Bangs Bickford et al. eds., 1992) (expressing concern with measures that "will materially affect the trial by jury").

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

[16] *See, e.g.*, Remarks of Rep. Samuel Livermore (N.H.), *reprinted in* 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 14, at 1329, 1331 (expressing concern with expense of federal court jurisdiction).

[17] *See, e.g.*, Remarks of Rep. Michael Stone (Md.), *reprinted in* 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 14, at 1373 (expressing concern with the manner in which executions would proceed on federal court judgments).

unwilling) to do so.[18] Members of the First Congress were well aware that every sovereign nation or government enjoyed plenary authority to define the causes of action that its courts could adjudicate. They also were aware that sovereigns exercised such authority in different ways. For example, although states generally adopted English common law forms of proceeding for their own courts, they also adopted significant variations from state to state. Uniform forms of proceeding for federal courts would have required Congress to make controversial choices and alienate powerful members of the legal profession. The political challenge for the First Congress was to create an effective federal judiciary while safeguarding the role of the states in response to Anti-Federalist concerns about consolidated national power.[19]

Ultimately, the First Congress resolved this challenge in the Process Acts of 1789 and 1792 by providing that, in actions at law, a federal court must follow the forms of proceeding of the state in which it was located. Members of Congress argued that the interests of the people would be most "secure under the legal paths of their ancestors, under their modes of trial, and known methods of decision."[20] Accordingly, the First Congress established a "species of continuity" with diverse state practices by adopting the forms of proceeding of each state as the governing forms of proceeding for federal courts located in that state.[21] In cases in equity and admiralty, the First Congress directed federal courts to use the traditional forms of proceeding that applied in such cases. In doing so, Congress did not leave federal courts free to use "ambient" general common law to derive the causes of action they would employ. Rather, Congress specifically adopted state legal causes of

---

[18] *See* 4 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, 112 (Maeva Marcus et al., eds. 1992) (describing the "inability or unwillingness" of the First Congress "to agree on uniform rules for the operation of the federal courts").

[19] *See id*. at 108 (explaining that in framing a federal court system "those who favored a strong, centralized federal court system had to contend with those who feared a loss of autonomy by the individual states"); *see also* JULIUS GOEBEL, JR., 1 HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801, at 492. 510 (Paul A. Freund ed., 1971) (describing tension between consolidated federal court system and Anti-Federalist concerns).

[20] Remarks of Rep. James Jackson (Ga.), reprinted in 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, *supra* note 14, at 1353-54; *see also* Remarks of Rep. Michael Stone (Md.), *reprinted in id.*, at 1384 (describing mischiefs if state and federal courts had different modes of executions); Bank of the United States v. Halstead, 23 U.S. (10 Wheat.) 51, 59 (1825) ("This course was no doubt adopted, as one better calculated to meet the views and wishes of the several States, then for Congress to have framed an entire system for the Courts of the United States, varying from that of the States Courts.")

[21] GOEBEL, *supra* note 19, at 458; *see also id.* at 473 (describing "the localization of the federal inferior courts").

action and traditional actions in equity and admiralty as the causes of action available to litigants in federal court.

This regulatory scheme has been largely forgotten by today's lawyers and judges, not only because it is no longer relevant to their work, but also because modern legal sensibilities no longer connect "process" with "causes of action."[22] But when the Process Acts of 1789 and 1792 adopted state legal and traditional equitable forms of proceeding for use in federal court, Congress did not adopt a set of abstract procedures found in ambient law. Rather, Congress adopted the specific causes of action that state law provided and the traditional practices that courts of equity and admiralty employed. Congress contemplated that federal courts would hear only those causes of action that legal and equitable forms of proceeding already provided. At the time, lawyers, judges, and other public officials understood that these forms of proceeding—not ambient general law—defined the causes of action available to litigants. This method of proceeding would have been sufficiently obvious to members of the First Congress and the judiciary that it warranted little, if any, discussion once established.

This background has important implications for interpreting the ATS. The Supreme Court has self-consciously sought to identify and implement the First Congress's understanding of the ATS. The Court has proceeded, however, on the false assumption that the First Congress expected federal courts to adopt causes of action in ATS cases from "the 'brooding omnipresence' of the common law then thought discoverable by reason."[23] The Process Acts demonstrate that the First Congress held no such expectation. Under the Process

---

[22] Although courts and scholars have largely left unexamined the relationship between the Process Acts and the causes of action available in federal courts, certain scholars have examined federal judicial and legislative power over modern matters of procedure in light of the Process Acts. *See* Benjamin H. Barton, *An Article I Theory of the Inherent Powers of the Federal Courts*, 61 CATH. U. L. REV. 1, 23-27 (2011) (describing the Process Act and the Judiciary Act as reflecting the proposition that "the first Congress considered its Article I power over court process and procedure to be plenary"); Amy Coney Barrett, *Procedural Common Law*, 94 VA. L. REV. 813, 864-76 (2008) (discussing Process Acts in examining whether federal courts have an inherent authority to govern their own procedure absent legislation from Congress); Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405, 414–16 (2008) (considering the respective responsibilities of Congress and courts in crafting procedural rules); Amy Coney Barrett, *The Supervisory Power of the Supreme Court*, 106 COLUM. L. REV. 324, 368–71 (2006) (discussing Process Acts in examining the inherent supervisory power of the Supreme Court); Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 747-51 (2001) (discussing the framework of the Process Act of 1789); William F. Ryan, *Rush to Judgment: A Constitutional Analysis of Time Limits on Judicial Decisions*, 77 B.U. L. REV. 761, 770-72 (1997) (arguing that both history and precedent reveal that the legislature and not the courts had primary control over court procedure).

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

Acts, federal courts adjudicating any of the legal claims over which the First Judiciary Act gave them jurisdiction—including ATS claims—would have applied the forms of proceedings used by the courts of the state in which they sat. Neither early congressional legislation nor early federal judicial practice supports recent judicial efforts to employ novel—and overly restrictive—federal common law causes of action for ATS cases. On a proper original reading of the ATS, state law causes of action would remain available to federal courts exercising jurisdiction under the ATS—not under the now-defunct Process Acts, but under *Erie* and the Rules of Decision Act.

This Article proceeds as follows. Part I describes how the Supreme Court has interpreted the ATS to authorize the creation of limited federal common law causes of action. The Court's approach is based on the mistaken historical premise that the First Congress did not specify the causes of action available to federal courts exercising jurisdiction under the ATS.

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

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

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

I. THE CAUSE OF ACTION IN ATS CASES

The ATS is a jurisdictional provision enacted as part of section 9 of the Judiciary Act of 1789. As enacted, it provided that "the district courts . . . shall [] have cognizance, concurrent with the

courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States."[24] Although section 9 gave federal courts jurisdiction over these "causes," it did not define the causes or specify the source of law that would define them. Litigants and courts invoked the statute very few times before the 1980s, when federal courts began relying on the ATS to adjudicate cases between aliens arising outside of the United States.[25] At first, some lower federal courts suggested that customary international law itself could supply the cause of action. The Supreme Court, however, declined to adopt this position. Instead, the Court indicated that federal courts could recognize only a limited number of federal common law causes of action that corresponded to a narrow set of cases that the Court believed the First Congress probably had in mind when it enacted the ATS. The Court justified this approach on the ground that federal courts found causes of action in ambient general common law at the time the ATS was enacted.

This Part describes in more detail how lower federal courts and the Supreme Court have interpreted the ATS—and, in particular, how they have defined the source of the cause of action in ATS cases. To place these decisions in context, this Part begins by discussing the original role and meaning of the ATS in the First Judiciary Act. As the remainder of this Article explains, neither the Supreme Court nor lower federal courts have defined the source of the cause of action in ATS cases in a way that is consistent with the reasonable expectations of the First Congress.

A. *The Original Function of the ATS*

As we have explained at greater length in a recent article, the First Congress included the ATS in the Judiciary Act of 1789 in order to give federal courts jurisdiction over disputes by aliens against Americans for intentional torts of violence against their person or personal property.[26] Under the law of nations at the time, a nation became responsible for such torts to the victim's nation if it did not provide redress in one of three ways. The nation could

---

[24] Judiciary Act of 1789, § 9, 1 Stat. 73, 76-77, codified as amended at 28 U.S.C. § 1350.

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

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

criminally punish the offender, extradite the offender to the victim's nation, or provide a civil remedy to the foreign victim.[27] If the offender's nation failed to redress the injury in one of these ways, the victim's nation had just cause to retaliate against the offender's nation, including by waging war.

Following the United States' independence from Great Britain, violence by Americans against aliens (especially British subjects returning to recover their debts and property) posed a threat to the peace and security of the new nation. During the Confederation era, Congress urged the states to redress such violence by their citizens, but only Connecticut enacted legislation for this purpose. In addition, state court juries were notorious for favoring Americans over British subjects in the years immediately following the war. With the adoption of the Constitution in 1789, Congress now had the means to redress such violence itself without reliance on the states. Congress could have made all violence by Americans against friendly aliens a federal crime, but this would have required action by federal prosecutors who were not yet in place. Congress also could have encouraged the President to extradite of Americans who committed serious torts against aliens, but the United States did not yet have extradition treaties with other nations.

Under these circumstances, the First Congress chose to satisfy the United States' obligation to redress violence by its citizens against aliens by providing a civil remedy in the newly-minted federal courts. In the same statute creating lower federal courts, Congress gave them jurisdiction to hear claims by aliens for torts in violation of the law of nations. This was a short-hand way of referring to torts committed by Americans against aliens which, if not redressed, would be attributable to the United States and place it in violation of the law of nations. Federal courts might have heard some of these alien tort cases under their foreign diversity jurisdiction, but the $500 amount-in controversy requirement would have left most such cases to be adjudicated in state court. Because the ATS included no amount-in-controversy requirement, it allowed federal courts to hear all claims by aliens who suffered an intentional injury at the hands of Americans, thereby satisfying the United States' obligations under the law of nations. In other words, the ATS established a mode of redress that ensured that the United States would not be held responsible by other nations for its citizens' torts against aliens. Although Article III of the Constitution limited

[27] *See id.* at 474-75.

federal courts' jurisdiction to a limited set of cases and controversies, ATS jurisdiction fell squarely within Article III's grant of foreign diversity jurisdiction.

B. *The ATS in the Lower Federal Courts*

Aliens rarely invoked jurisdiction under the ATS in the decades following its enactment, at least in recorded cases. In some instances, aliens subject to violence at the hands of Americans may have simply left the country rather than remain and pursue legal redress.[28] At the same time, commercial relations improved between the United States and Great Britain, especially after the Jay Treaty was signed in 1794. The treaty both strengthened trade between the two nations and resolved American debts to British creditors. Rather than assault British subjects, as they had in the 1780s, many Americans came to embrace them as important trading partners. In turn, British subjects may have been content to pursue tort remedies in state court rather than federal court. Perhaps for these reasons, federal courts mentioned the ATS in only two early cases—*Moxon v. The Fanny* (decided in 1793)[29] and *Bolchos v. Darrel* (decided in 1795).[30] Neither case sheds much light on the scope of ATS jurisdiction,[31] because both were libel actions—a traditional form of action in admiralty—brought within the federal courts' admiralty and maritime jurisdiction.

The ATS lay largely dormant for almost two centuries until the Second Circuit invoked the statute in in *Filartiga v. Pena-Irala*.[32] There, the court allowed citizens of Paraguay to sue another citizen of Paraguay for torturing and killing their son in Paraguay. The court concluded that "deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties."[33] The court found that the ATS conferred federal jurisdiction over the case because an alien was suing for a tort in violation of the law of nations.[34] Because the suit was between aliens, however, it did not obviously fall within the limited subject

---

[28] *See* Bellia & Clark, *Alien Tort Statute and Law of Nations*, *supra* note 26, at 525.

[29] 17 F. Case. 942 (No. 9,895) (D. Pa. 1793).

[30] 3 F. Cas. 810 (No. 1,607) (D. S.C. 1795).

[31] *See* Bellia & Clark, *Alien Tort Statute and Law of Nations*, *supra* note 26, at 458-59, 459 n. 56 (2011).

[32] 630 F.2d 876, 878 (2d Cir. 1980).

[33] *Id.*

[34] *See id.*at 878-79.

matter jurisdiction of Article III courts. The Second Circuit resolved this problem by asserting that the law of nations "has always been part of the federal common law."[35] On this view, customary international law not only provided the cause of action, but also established federal question jurisdiction under Article III.

Four years after the Second Circuit's ruling, the DC Circuit declined to apply its approach in *Tel-Oren v Libyan Arab Republic*.[36] Israeli citizens sued the Palestine Liberation Organization ("PLO"), Lybia, and several other organizations, alleging that they were responsible for an armed attack on a civilian bus in Israel that killed and injured numerous civilians and thus amounted to several torts in violation of the law of nations (including terrorism, torture, and genocide).[37] The DC Circuit affirmed the dismissal of the complaint in a *per curiam* opinion, but all three judges wrote separate concurrences. Judge Edwards seemed to favor *Filartiga*'s approach to the ATS, but emphasized that the statute allowed federal courts to hear only a narrow range of cases alleging violations of established international law—such as genocide, slavery, and systematic racial discrimination. Judge Edwards concluded that the PLO's actions against civilians did not rise to the level of a claim under the statute.[38] Judge Robb concurred on the ground that the dispute presented a nonjusticiable political question because courts should leave politically sensitive issues such as the international legal status of terrorism to the executive branch for diplomatic resolution.[39]

In a widely cited opinion, Judge Bork concluded that the ATS was solely a jurisdictional statute that conferred no cause of action. In the course of his opinion, Judge Bork made several important points that appear to have influenced the Supreme Court's subsequent interpretation of the ATS.[40] First, he stressed that "it is essential that there be an explicit grant of a cause of action before a private plaintiff be allowed to enforce principles of international law in a federal tribunal."[41] Second, he stressed the constitutional separation of powers. In his view, "[t]he crucial element of the

---

[35] *Id.* at 885-86. *Filartiga*'s assertion that the law of nations "has always been part of the federal common law" is anachronistic and inconsistent with the way in which early federal courts understood the law of nations. *See* Bellia & Clark, *Alien Tort Statute and Law of Nations*, *supra* note 26, at 547-48.

[36] 726 F.2d 774 (D.C. Cir. 1984) (per curiam).

[37] *Id.* at 775.

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

[39] *Id.* at 826-27 (Robb, J., concurring).

[40] *See* Bradford R. Clark, Tel-Orin, Filartiga, *and the Meaning of the Alien Tort Statute*, 80 U. CHI. L. REV. DIALOGUE 177 (2013).

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

doctrine of separation of powers in this case is the principle that '[t]he conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—"the political"—Departments.'"[42] Third, Judge Bork offered some speculative thoughts regarding the original meaning of the ATS. He began by rejecting *Filartiga*'s broad reading of the statute to authorize a cause of action whenever the plaintiff alleges a violation of international law. Judge Bork found no evidence that Congress intended *Filartiga*'s broad reading when it enacted the statute.[43] For this reason, he interpreted the statute (narrowly) in light of the Founders' goal of opening "federal courts to aliens for the purpose of avoiding, not provoking, conflicts with other nations."[44]

Although it was unnecessary to his decision, Judge Bork spent several pages speculating "what [the ATS] may have been enacted to accomplish."[45] He looked to Blackstone—"a writer certainly familiar to colonial lawyers"—and explained that Blackstone identified three principal offenses against the law of nations incorporated by the law of England: violation of safe-conducts, infringement of the rights of ambassadors, and piracy.[46] According to Judge Bork, "[o]ne might suppose that these were the kinds of offenses for which Congress wished to provide tort jurisdiction for suits by aliens in order to avoid conflicts with other nations."[47] Lower federal courts continued to struggle with the meaning of the ATS prior to the Supreme Court's 2004 decision in *Sosa*.

C. *The ATS in the Supreme Court*

The Supreme Court interpreted the ATS for the first time in *Sosa v. Alvarez-Machain*.[48] Alvarez (a doctor who was a Mexican national) sued Sosa (a fellow Mexican national), other Mexican nationals, four agents of the U.S. Drug Enforcement Agency (DEA), and the United States for kidnapping him in Mexico and bringing him to the United States to stand trial for the alleged torture and

---

[42] *Id.* (quoting Oetjen v. Central Leather Co., 246 U.S. 297, 302 (1918)).
[43] *Id.*
[44] *Id.*
[45] *Id.* at 813.
[46] *Id.*
[47] *Id.* at 813-14. Judge Bork acknowledged that his thoughts as to the original meaning of the ATS were "speculative," but offered them "merely to show that the statute could have served a useful purpose even if the larger tasks assigned to it by *Filartiga* . . . are rejected." *Id.* at 815.
[48] 542 U.S. 692 (2004).

murder of a DEA agent in Mexico.[49] The district court dismissed the claims against the U.S. defendants, leaving only a dispute between aliens (Mexican nationals). The Supreme Court held that federal courts lacked jurisdiction to hear this dispute under the ATS. The Court began by holding that "the statute is in terms only jurisdictional."[50] The Court characterized as "implausible" the plaintiff's argument that "the ATS was intended not simply as a jurisdictional grant, but as authority for the creation of a new cause of action for torts in violation of international law."[51] It emphasized that the text of the statute, its placement in the Judiciary Act, and "the distinction between jurisdiction and cause of action" known to the Founders[52] all supported the conclusion that "the ATS is a jurisdictional statute creating no new causes of action."[53]

Nonetheless, the *Sosa* Court believed that federal courts could hear a limited number of claims under the ATS. According to the Court, "Sosa [the defendant] would have it that the ATS was stillborn because there could be no claim for relief without a further statute expressly authorizing adoption of causes of action."[54] The Court rejected this position. Instead, the Court concluded that the "jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time."[55] Taking a page from Judge Bork's opinion in *Tel-Orin*, the Court suggested that these violations corresponded to the three crimes against the law of nations discussed in Blackstone's treatise: infringement of the rights of ambassadors, violation of safe conducts, and piracy.[56] Starting from this premise, the Court concluded that the ATS gives federal courts jurisdiction to adjudicate a limited number of claims "based on the present-day law of nations" so long as they "rest on a norm of international character accepted by the civilized world and defined

---

[49] *Sosa*, 542 U.S. at 698.
[50] *Id.* at 712.
[51] *Id.* at 713.
[52] *Id.*
[53] *Id.* at 724.
[54] *Id.* at 714.
[55] *Id.* at 724; *see also id.* at 719 (stating that "there is every reason to suppose that the First Congress did not pass the ATS as a jurisdictional convenience to be placed on the shelf for use by a future Congress or state legislature that might, someday, authorize the creation of causes of action").
[56] *Id.* at 724.

with a specificity comparable to the features of the 18th-century paradigms we have recognized."[57]

The important point for present purposes is that the *Sosa* Court believed that the First Congress expected unwritten law to provide a cause of action in ATS cases. In particular, the Court assumed that Congress understood early federal courts to have inherent power to draw on general common law—"the ambient law of the era"—to supply causes of action in cases within the federal court's subject matter jurisdiction, including ATS cases.[58] "[I]n the late 18th century," the Court explained, "positive law was frequently relied upon to reinforce and give standard expression to the 'brooding omnipresence' of the common law then thought discoverable by reason."[59] Although the Court acknowledged that ambient general common law no longer supplies causes of action in federal court, the *Sosa* Court suggested that federal courts today may "recognize private claims [for the international law violations that the ATS covers] under federal common law."[60] The Court stressed, however, that federal courts should use this federal common law power sparingly. Accordingly, the Court concluded that the lower court erred in permitting the plaintiff to pursue his claims for kidnapping and arbitrary detention under the ATS because these claims were not sufficiently analogous to the Blackstone crimes.

The Supreme Court construed the ATS a second time in *Kiobel v. Royal Dutch Petroleum*,[61] and simply repeated *Sosa*'s account of the source of causes of action in ATS cases. The plaintiffs in *Kiobel*, a group of Nigerian nationals (living in the United States as legal residents) filed an ATS suit in federal court against certain Dutch, British, and Nigerian corporations, alleging

---

[57] *Id.* at 725. Scholars have extensively considered the meaning and import of the Court's decision in *Sosa*. *See, e.g.*, Curtis A. Bradley et al., Sosa, *Customary International Law, and the Continuing Relevance of* Erie, 120 HARV. L. REV. 869, 893–901 (2007) (observing that the scope of causes of action within ATS jurisdiction after *Sosa* remains ambiguous); Eugene Kontorovich, *Implementing* Sosa v. Alvarez-Machain*: What Piracy Reveals About the Limits of the Alien Tort Statute*, 80 NOTRE DAME L. REV. 111, 155–56 (2004) (arguing that modern customary international law is inconsistent with historical antecedents and thus does not satisfy what *Sosa* requires for a cause of action to fall within ATS jurisdiction); Ralph G. Steinhardt, *Laying One Bankrupt Critique to Rest:* Sosa v. Alvarez-Machain *and the Future of International Human Rights Litigation in U.S. Courts*, 57 VAND. L. REV. 2241, 2255 (2004) (arguing that *Sosa* recognized the continued applicability of international law norms to federal law after *Erie*); Beth Stephens, Comment, Sosa v. Alvarez-Machain*: "The Door Is Still Ajar" for Human Rights Litigation in U.S. Courts*, 70 BROOK. L. REV. 533, 535 (2004) (heralding *Sosa* as a "clear victory" for many human rights activists).

[58] *Id.* at 714.

[59] *Id.* at 722 (quoting Southern Pacific Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting)).

[60] *Id.*

[61] 133 S. Ct. 1659 (2013).

that they aided and abetted the Nigerian government in committing various international human rights violations in Nigeria, including extrajudicial killings, crimes against humanity, and torture.[62] The Second Circuit held that the ATS does not give federal courts subject matter jurisdiction over claims against corporations,[63] and the Supreme Court initially granted certiorari to decide that question. After argument, however, the Court ordered the parties to brief and argue an additional question: "Whether and under what circumstances the [ATS] allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States."[64]

Following re-argument, the Supreme Court applied the presumption against extraterritorial application of U.S. law to affirm the dismissal of the case. The Court acknowledged that the presumption ordinarily is used to determine the extraterritorial application of substantive statutes that regulate conduct and reaffirmed Sosa's conclusion that the ATS is "strictly jurisdictional" and thus "does not directly regulate conduct or afford relief."[65] Nonetheless, the Court concluded that "the principles underlying the canon of interpretation similarly constrain courts considering causes of action that may be brought under the ATS."[66]

In reaching this conclusion, the *Kiobel* Court endorsed *Sosa*'s assessment of the source of the cause of action in ATS cases. Quoting *Sosa*, the Court explained that the ATS's "grant of jurisdiction is . . . 'best read as having been enacted on the understanding that the common law would provide a cause of action for [a] modest number of international law violations.'"[67] The *Kiobel* Court explained that in *Sosa* "[w]e thus held that federal courts may 'recognize private claims [for such violations] under federal common law.'"[68] Given the policies underlying the presumption against extraterritorial application of U.S. law, the Court found the presumption to be fully applicable to federal common law causes of action recognized in ATS cases.

Many scholars are sympathetic to the Supreme Court's view that the First Congress would have expected federal courts to derive

---

[62] *Kiobel*, 133 S. Ct. at 1662-63.

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

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

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

[66] *Id.* According to the Court, to rebut the presumption, the ATS would have to evince a clear indication of extraterritoriality, and the Court found no such indication.

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

[68] *Id.* (quoting *Sosa*, 542 U.S. at 732).

the cause of action in ATS cases from ambient general common law. Some scholars have specifically claimed that in 1789 courts would have applied pre-existing general common law causes of action in exercising their jurisdiction under the ATS.[69] Other scholars have claimed that in 1789 federal courts possessed and would have exercised judicial power to create common law causes of action.[70] In recent years, numerous scholars have embraced and recited the *Sosa* Court's claim that ambient common law originally supplied the cause of action in ATS cases[71] and beyond.[72] As the remainder of this Article explains, however, these accounts contradict the actual history regarding the source of the causes of action adjudicated by early federal courts. Because the Supreme Court's stated goal has been to identify and implement the original public meaning of the ATS,[73] the Court should reconsider its approach to the statute in light of this history.

---

[69] *See, e.g.*, David H. Moore, *An Emerging Uniformity for International Law*, 75 GEO. WASH. L. REV. 1, 35 (2006) ("The First Congress's intent that federal courts recognize a limited number of common-law causes of action based on the law of nation was easy to achieve at the time the ATS was enacted, as federal courts could legitimately apply CIL as general federal common law."); William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists"*, 19 HASTINGS INT'L & COMP. L. REV. 221, 239 (1996) ("[T]he First Congress understood that torts in violation of the law of nations would be cognizable at common law, just as any other tort would be.").

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

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

[72] *See* Anya Bernstein, *Congressional Will and the Role of the Executive in Bivens Actions: What is Special about Special Factors?*, 45 IND. L. REV. 719, 726 (2012) ("At the time the U.S. Constitution was written, a common law cause of action was simply presumed to exist, and for at least a century after the Constitution was framed, individuals could sue public officials who had violated their constitutional rights for damages."); Carlos M. Vázquez & Stephen I. Vladeck, *State Law, the Westfall Act, and the Nature of the* Bivens *Question*, 161 U. PA. L. REV. 509, 539-40 (2013) (arguing that because "the common law was regarded as part of the 'general' law" during the pre-*Erie* era, federal courts "interpreted and applied the common law according to their own best judgment").

[73] *See, e.g.*, *Sosa*, 542 U.S. at 732 (stating that "federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and

II. THE PROCESS ACTS AND THE CAUSE OF ACTION

As discussed, in *Sosa*, the Supreme Court asserted that the First Congress expected federal courts exercising jurisdiction under the ATS to find the applicable causes of action in the "ambient" general common law of the era.[74] Members of the First Congress, however, did not rely on concepts of ambient law to supply the causes of action available in the newly-created federal court system.[75] Rather, they specified the applicable causes of action by statute.

A struggle occurred in the First Congress between those who favored a centralized national judiciary with its own distinctive procedures and those wanted to tie federal judicial procedures to local state law and practice. Those who opposed a centralized federal judiciary prevailed in many respects, including with respect to the causes of action that would be available to federal courts in common law cases. Rather than leave federal courts free to find or create causes of action on the basis of general common law, the First Congress enacted specific statutes—most importantly, the Process Acts of 1789 and 1792—that specified the causes of action to be used in federal courts. It is easy today to overlook the role played by these provisions. Congress wrote them in eighteenth century legalese, little contemporaneous exposition of their meaning survives, and they no longer govern how federal courts operate. But read in light of background understandings of a "cause of action" in 1789, these statutes specified the causes of action that federal courts were authorized to adjudicate. The background understandings that illuminate the meaning of these provisions are largely foreign to modern readers. They were elementary, however, to eighteenth century lawyers. Read in context, the Process Acts directed federal courts to apply state law causes in actions at law, and traditional equitable remedies in cases in equity. In short, Congress did not leave federal courts free to discover causes of actions from ambient common law principles; rather, Congress specified available causes of action by statute.

This Part explains, first, the concept of the cause of action as understood in 1789 when the First Congress took up the question of

---

acceptance among civilized nations than the historical paradigms familiar when [the ATS] was enacted").

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

[75] *See id.* at 714, 726 (describing "ambient law" or "general common law" as the source of causes of action in early federal courts).

what causes of action should apply in federal court. It then explains how members of the First Congress sought to ensure the application of local state law in federal courts, including state common law causes of action, and why leaving federal courts free to discern the existence of causes of action from general common law principles was not an approach that Congress would have considered. Finally, this Part describes the statutes that Congress enacted to regulate the causes of action available in federal court, and how these statutes in fact precluded federal courts from defining causes of action in accordance with general common law principles. The Judiciary Act of 1789 and the Process Acts of 1789 and 1792 defined the causes of action available in federal court with precision, most importantly by requiring federal courts to apply state law causes of action in common law cases.

A. *Causes of Action in the Late Eighteenth Century*

To understand how early acts of Congress defined the causes of action available in federal court, the modern reader must become familiar with two important facets of judicial practice in England and America when the First Congress met to establish the federal judiciary. First, local law, not general law, determined the existence of a cause of action. In other words, each sovereign determined for itself the kind of injuries for which its courts would provide remedies. There was no transnational, general law system defining causes of action or their availability. Second, a plaintiff had a cause of action if the local law of the sovereign provided a form of proceeding that supplied a remedy for the kind of injury the plaintiff had suffered. This background provides essential context for understanding early acts of Congress defining the causes of action available in federal courts. In the Process Acts of 1789 and 1792, Congress required federal courts to apply state forms of proceeding in actions at law, thus incorporating state law causes of action in common law cases adjudicated in federal court.

1. *A Matter of Local Law, Not General Law*

The Supreme Court's opinion in *Sosa* suggested that the First Congress would have expected federal courts to look to general law for causes of action in ATS cases. This suggestion is at odds with historical practice. The laws of England drew a distinction between local law and general law. Local law was law that governed only

within the jurisdiction or borders of a particular sovereign.[76] Local law was law local to a sovereign state or nation (not necessarily, as we use the phrase today, local to a subunit of government, such as a county or town). "Matters subject to local law were typically those that occurred within the territorial jurisdiction of the state and affected only that state, such as trusts and estates, property, local contracts, civil injuries, and crime."[77] In contrast, general law was the law applicable not just in one sovereign, but in all civilized nations, based on custom and the law of reason.[78] "Matters governed by general law originally were those of interest to more than one state, such as commercial transactions between citizens of different states, maritime matters, and the relations between sovereign states."[79] The law merchant, the law maritime, and the law of state-state relations—all branches of general law—governed such matters, respectively.[80]

Local law, not general law, defined the causes of action that a litigant could pursue in English and American state courts after the War of Independence. Blackstone began his chapter on "the Cognizance of Private Wrongs" in English courts by explaining that local English law defined the causes of action that any court of England could hear.[81] "Every nation must and will abide by its own municipal laws" regarding the jurisdiction of its courts and what causes of action will be permitted, "which various accidents conspire to render different in almost every country in Europe."[82] In other words, English courts did not look to general law to define the causes of action they could hear; rather, they looked to the local law of England.

2. *The Cause of Action in English Law*

In the late eighteenth century, lawyers and judges trained in the English common law tradition understood the concept of a cause of action differently than lawyers and judges understand it today.

---

[76] *See* Anthony J. Bellia Jr. & Bradford R. Clark, *General Law in Federal Court*, 54 WM. & MARY L. REV. 655, 665-667 (2013) [hereinafter "*General Law in Federal Court*"] (defining local law and its distinction from general law).

[77] *Id.* at 666.

[78] *Id.* Blackstone equated the idea of "general law" with the "law of nations," describing general law to include the law of state-state relations, the law merchant, and the law maritime. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *66.

[79] Bellia & Clark, *General Law in Federal Court*, *supra* note 76, at 666.

[80] *Id.*

[81] 3 BLACKSTONE, *supra* note 78, at *86-87.

[82] *Id.* at 87.

Today, we typically ask whether a person who has suffered an injury is legally entitled to request a judicial remedy for that injury—if so, that person has a cause of action.[83] At the Founding, the question proceeded differently. At law, there were pre-determined forms of action that authorized certain remedies. An injured plaintiff could seek a judicial remedy only if he could fit his case into an established form of action by pleading sufficient facts to demonstrate that he was entitled to the writ in question. In other words, as William Blackstone explained, the specific remedy that a particular writ provided was the "foundation of the suit."[84] "When a person has received an injury, and thinks it worth his while to demand a satisfaction for it, he is to consider . . . what redress the law has given for that injury; and thereupon is to make application or suit . . . for that particular specific remedy . . . ."[85] A cause of action existed at law, then, when a form of action provided a remedy for the kind of injury that the plaintiff had suffered.[86] In this system, the availability of the remedy determined the existence of a cause of action, rather than the existence of a cause of action determining the availability of a remedy. The same concept of a cause of action also prevailed in equity and admiralty. In equity and admiralty, a plaintiff commenced a suit by filing a bill or a libel, respectively, specifying the right or title upon which the court could grant a particular remedy.[87]

It is important to appreciate the terminology that defined causes of action in the late eighteenth century in order to understand how the First Congress specified the causes of action that would be available in federal courts. In cases at law, a plaintiff would commence an action by seeking an appropriate "writ." A writ provided a "form of action" or a "form of proceeding."[88] Each form

---

[83] *See* Anthony J. Bellia Jr., *Article III and the Cause of Action*, 89 IOWA L. REV. 777, 792-99 (2004) (explaining the development of modern understandings of causes of action).

[84] 3 BLACKSTONE, *supra* note 78, at * 272.

[85] *Id.*

[86] *See* Bellia, *supra* note 83, at 784-89 (describing the concept of a legal cause of action that prevailed at the time of the Founding); *see also* G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 9-10 (2d ed. 2003) (describing how common law writs determined, for example, the substance of tort law).

[87] *See* Bellia, *supra* note 83, at 789-92.

[88] For example, in Jefferson v. Bishop of Durham, 126 E.R. 804 (C.P. 1797), a question before the court was "[w]hether a writ of prohibition lies in the Court of Common Pleas to restrain a bishop from committing waste in the possession of his see." *Id.* at 812-13. To determine whether the writ would lie, Chief Justice Eyre examined "the forms of proceeding contained in books of very high authority." *Id.* at 813. For an example from an reported case in America, see Black v. Digges's Ex'r, 1 H. & McH. 153, 155 (Md. Prov. 1744) (explaining that a writ of "indebitatus assumpsit will not lie but where debt where lie" and "[t]hat neither indebitatus assumpsit nor debt will iie upon any collateral undertaking,

of proceeding required its own "method of pursuing and obtaining" a remedy in court.[89] Lawyers and judges sometimes used the phrase "mode of proceeding" to describe the particular method of obtaining a remedy under a given form of proceeding,[90] and sometimes they used "mode of proceeding" as a synonym for "form of proceeding."[91]

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

> [B]eating another is a trespass; for which . . . an action of trespass *vi et armis* in assault and battery will lie; taking or detaining a man's goods are respectively trespasses; for which an action of trespass *vi et armis*, or on the case in trover or conversion, is given by the law: so also non-performance of promises or undertakings is a trespass, upon which an action of trespass on the case or *assumpsit* is grounded.[92]

Other forms of proceeding were less common. For example, "the old writ of admeasurement and pasture" provided a specific remedy for a narrowly defined legal injury.[93] "By that mode of proceeding," as Justice Buller explained in 1790, "if the defendant put more cattle on the common than he ought, the plaintiff was entitled to have a certain quantity admeasured to the defendant; the excess then is the injury in these cases."[94] However broadly or narrowly applicable, a writ that fit the plaintiff's alleged injury was necessary to commence an action at law. Without an applicable writ, the plaintiff had no cause of action.

In England, both the common law and statutes precisely defined the forms and modes of proceeding available in English courts.[95] When a statute provided the form of proceeding, courts in

---

though assumpsit will, and the difference between the actions arises from the different form of proceeding").

[89] 3 BLACKSTONE, *supra* note 78, at *115.

[90] *See, e.g.*, King v. Almon, 97 E.R. 94, 101 (K.B. 1765) (considering attachment and trial by jury as different "modes of proceeding").

[91] *See, e.g.*, Mason v. Sainsbury, 99 E.R. 538, 539 (K.B. 1782) (argument of counsel) (arguing that "a man who has two remedies may pursue either of them, and that it is no defence to say he has another mode of proceeding").

[92] 3 BLACKSTONE, *supra* note 78, at *208.

[93] Hobson v. Todd, 100 E.R. 900, 901 (K.B. 1790).

[94] *Id.*

[95] 1 BLACKSTONE, *supra* note 78, at *67.

England and America considered themselves bound to follow the statutory form.[96] English and American state courts also considered themselves bound to follow the forms and modes of proceeding provided by the common law of their respective jurisdictions. In England, common law forms and modes of proceeding, like all unwritten English law, depended "upon immemorial usage" for their support.[97] In America, the states individually adopted the common law of England, subject to their own development and adaptation of it to local circumstances.[98] English and American courts did not consider themselves free to create new forms of proceeding that neither statutes nor the common law of their respective jurisdictions provided. As a Connecticut court observed in 1787, "[a] court cannot employ a mode of proceeding that is not established by law."[99]

Although late eighteenth century English and American courts could not create new forms of proceeding, they did at times apply existing forms of proceeding with enough flexibility to meet the demands of justice. For example, in discussing ejectments, Lord Mansfield wrote that "the great advantage of this fictitious mode of proceeding is, that being under the control of the court, it may be so modelled as to answer in the best manner every end of justice and convenience."[100] The line between courts improperly creating new forms of proceeding and properly molding old ones to meet the demands of justice was not perfectly clear, but it was a line that English courts and treatise writers attempted to maintain.[101]

---

[96] For an example of an English case, see Goodwin v. Parry, 100 E.R. 1185, 1186 (K.B. 1792) ("[T]he words of the Act of Parliament are positive that no process shall be sued out until the affidavit has been first duly made and filed: and though in ordinary cases a party may waive taking advantage of any trifling irregularity in the mode of proceeding by not objecting in the first instance, the defendants in this case could not waive this objection, because the Court are to take care that an action on a penal statute shall not be commenced in a mode prohibited by that statute."). For examples of American state cases, see Paine v. Ely, 1 N. Chip. 14, 21 (Vt. 1789) ("[T]he mode of proceeding . . . is pointed out and regulated, not by the common law, but solely by statute; and must be strictly pursued—A different mode cannot be adopted, under pretence of its being more convenient for the debtor, or for the Justices—This would be to assume an arbitrary power not warranted by law."); Miller v. The Lord Proprietary, 1 H. & McH. 543, 548 (Md. Prov. 1774) (argument of Attorney General) ("[W]here statutes point out a particular mode of proceeding, such mode of proceeding must be followed.").

[97] 1 BLACKSTONE, *supra* note 78, at *67.

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

[99] Case v. Case, 1 Kirby 284 (Conn. Super. 1787).

[100] Fair-Claim ex dem. Fowler v. Sham-Title, 97 E.R. 837, 840 (K.B. 1762). For an American state case, see Den ex dem. Rossell v. Inslee, 6 N.J. L. 475, 476 (N.J. 1799) ("It is clear that an ejectment is almost entirely a fictitious proceeding, introduced from views of general convenience, which courts have assumed the power of moulding, so as to answer the purposes of justice, and in order to prevent a fiction from working injustice to any one.").

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

The forms and modes of proceeding that defined causes of action varied among courts of different jurisdictions. In England, the common law courts, equity courts, and admiralty courts all had different forms and modes of proceeding.[102] In the United States, state forms of proceeding differed in important respects from English forms of proceeding and from the forms of proceeding of other states.[103] In 1785, the Pennsylvania Court of Common Pleas observed that Pennsylvania had "a positive act of Assembly directing the mode of proceeding, upon mortgages, intirely different from the modes prescribed in England."[104] The court was not referring here to what we would consider mere matters of procedure. Rather, the court was referring to the cause of action necessary to obtain a particular remedy. Instead of allowing the same action for a remedy that English law allowed, the Pennsylvania act "confine[d] the remedy of the mortgagee to the recovery of the principal and interest due on the mortgage."[105] State forms of action also commonly varied from each other. Shortly before he left the Maryland General Court for the Supreme Court of the United States, Maryland Chief Justice Samuel Chase casually observed that "[t]he mode of proceeding for the recovery of debts, is variant in the several states."[106]

* * *

To understand the acts of the First Congress establishing and regulating federal courts, it is important to appreciate these two key

---

> [The court of King's Bench,] like all the other courts of this country, is bound to judge according to the known and fixed laws of the land, that is to say, the common law . . . and the written or statute law; nor can the one or the other be altered, but by express statute: the rules of practice, or mode of proceeding in each court, are indeed, of course, much under the regulation of the respective courts, yet any material alteration in this respect, or such as may, in any very considerable degree, affect the subject, are generally, and indeed it is to be wished every may be, made by act of parliament.

JOHN SHERIDAN, THE PRESENT PRACTICE OF THE COURT OF KING'S BENCH 17 (1784).

[102] The forms and modes of proceeding had long varied in other courts in England as well, such as ecclesiastical courts. *See* Anonymous, 89 E.R. 207 (K.B. 1675) (describing a form of proceeding that obtained in the Ecclesiastical Court that did not obtain as an original matter in the King's Bench).

[103] *See* GOEBEL, *supra* note 19, at 472-73 ("There flourished . . . divergencies from English common law procedures and native inventions in every state peculiar to its jurisprudence.").

[104] Dorrow's Assignee v. Kelly, 1 U.S. (1 Dall.) 142, 144-45 (Pa. Com. Pl. 1785).

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

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

points: first, that the local law of a particular sovereign determined the causes of action that its courts could adjudicate, and, second, that in English and American state courts, the forms and modes of proceeding provided by the law of each respective sovereign defined the causes of action that its courts were authorized to adjudicate.

B. *The First Congress and Federal Judicial Power*

When the First Congress met in 1789, a struggle ensued between those who wanted more consolidated federal judicial power and those who wanted to preserve the existing power of state judiciaries. This struggle was a continuation of debates that occurred at the Federal Convention and during the ratification debates over the scope of federal judicial power. Opponents of creating inferior federal courts argued that such courts would unduly interfere with state sovereignty[107] and potentially obliterate state courts.[108] They argued that federal courts would be inconvenient fora for litigants, especially defendants haled into distant courts.[109] Opponents also expressed concerns about the procedures that federal courts would employ. They were especially concerned that federal courts would fail to draw juries from the locality of the crime or deny jury trial rights altogether.[110] At the time, the right to jury trials and the method of jury selection varied throughout the United States, and how federal courts would treat these matters was an open question.[111] Opponents of a strong national judiciary were concerned, moreover, that federal courts once created would exercise unfettered equity powers.[112]

In the First Judiciary Act, Congress reached an initial compromise regarding the establishment of inferior federal courts for the United States. It created district and circuit courts, and defined their respective jurisdictions.[113] In light of long-standing concerns about the scope of federal judicial power, the Act contained important limitations on the powers of federal courts. In section 34, the Judiciary Act famously directed federal courts to apply local state law rules of decision absent preemption by the Constitution,

---

[107] *See* Marcus, *supra* note 14, at 5, 10-11 (discussing the basis of such opposition).
[108] *Id.* at 12.
[109] *See* GOEBEL, *supra* note 15, at 473 (discussing such arguments).
[110] *See* Marcus, *supra* note 14, at 8, 14-15 (discussing such concerns).
[111] *See id.* at 17 (discussing such variability).
[112] *See id.* at 12 (discussing such concerns).
[113] The First Judiciary Act defined most of the jurisdiction of federal courts in sections 9 to 13.Judiciary Act of 1789, ch. 20, §§ 9-13, 1 Stat. 73, 76-81. In sections 14 to 17, the Act proceeded to confer certain powers on federal courts. *Id.* § 14-17, 1 Stat. 73, 82.

laws, treaties of the United States: "the laws of the several States except where the Constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the Court of the United states in cases where they apply."[114] Although little evidence survives regarding the drafting of this text,[115] it is believed that "[t]he addition of section 34 was induced . . . by the need for some positive direction regarding the basic law by which the new courts were to be governed."[116] In section 16, the Act limited the authority of federal courts to act in equity if an adequate remedy existed at law.[117] This provision prevented federal courts from extending their equity jurisdiction beyond its conventional limits, which in turn could have deprived litigants of a jury trial.

Amidst these compromises and limitations, it would have been surprising if members of the First Congress had left federal courts free to find or create causes of action on the basis of "general common law." English and American courts had never understood the causes of action available to litigants to be supplied by general law. As explained, general law covered subjects of mutual interest to multiple nations, namely the law of state-state relations, the law merchant, and the law maritime.[118] There were no causes of action recognized by general law because causes of action were considered to be matters of local law. Even if it were possible for a court somehow to derive causes of action from principles of general law, it is unlikely that the First Congress would have given federal courts free reign to undertake such a novel experiment in setting up the new government. The Constitution granted federal courts the "judicial power" and strictly limited their subject matter jurisdiction.[119] The Constitution itself did not create federal courts with greater remedial powers than English or state courts enjoyed. Local law, not general law, had long governed the causes of action available in English and American state courts, and this fact was undoubtedly known to members of the First Congress.[120]

---

[114] Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73, 92.

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

[116] *Id.*

[117] Congress provided in section 16 "[t]hat suits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate and complete remedy may be had at law." Judiciary Act of 1789, ch. 20, § 16, 1 Stat. 73, 82.

[118] *See supra* notes - , and accompanying text.

[119] U.S. CONST. art. III, § 2.

[120] *See supra* notes - , and accompanying text.

Because members of the First Congress would have understood local law, not general law, to define the causes of action available in the court of any given sovereign, it is not surprising that they do not appear to have considered the possibility that general law would supply causes of action in federal court. The question Congress considered was how the local law of the United States should define the causes of action available in federal courts—particularly whether Congress should undertake to define the content of this aspect of local U.S. law or instead borrow the local law of the individual states.

The specific question Congress considered was whether to create uniform forms of proceeding for federal courts, or rather whether to tie the forms of proceeding available in federal court to local state practice, at least with respect to actions at law. In the end, the First Congress decided to require federal courts to borrow the forms of proceeding governing actions at law in the courts of the state in which they sat, in order "to quiet the alarms raised regarding the threatened inconvenience of the federal system,"[121] as the next section explains.

C. *The First Judiciary Act and the Process Acts*

Courts and scholars have largely overlooked the role of the First Judiciary Act and the Process Acts in specifying the causes of action that early federal courts could adjudicate. Because none of these statutes used the phrase "cause of action," modern readers may erroneously assume that the Acts related only to other matters. Read in context, however, the Acts used legal terms of art that were understood at that time to provide the causes of action that federal courts could adjudicate. Most importantly, in cases at law, Congress required federal courts to adjudicate causes of action recognized under the law of the state in which the federal court sat. Although some members of Congress wanted to create uniform forms of proceeding for federal courts throughout the nation, Congress rejected that approach. Instead, Congress instructed federal courts to adopt state forms of proceeding in common law cases, thus synchronizing the causes of action available in federal and state courts in actions at law.

As this section explains, a late eighteenth century reader of acts of the First Congress, knowledgeable of background legal

[121] GOEBEL, *supra* note 15, at 473.

principles, would have understood section 14 of the Judiciary Act and the Process Acts of 1789 and 1792 to specify the causes of action that federal courts were authorized to hear. Although modern readers have overlooked their original function, these Acts operated to define the causes of action that were available to litigants in federal court. Section 14 of the Judiciary Act was enacted on September 24, 1789, and provided federal courts with general authority to adjudicate traditional common law causes of action. Shortly thereafter, however, on September 29 1789, Congress gave federal courts more specific instructions in the first Process Act. This Act required federal courts to apply state forms of proceeding in actions at law. Congress reenacted this requirement with certain modifications in the Process Act of 1792.

The Process Act applied when Congress did not otherwise provide any specific form of proceeding for the enforcement of a claim within the subject matter jurisdiction of the federal courts. Congress always could—and occasionally did—enact a specific cause of action for the enforcement of a specific federal right. For example, in the Patent Act of 1790, Congress gave patent-holders a right against infringement that was enforceable through an "action on the case."[122] Similarly, in the Copyright Act of 1790, Congress gave copyright holders a right against republication that was enforceable through an "action of debt," and a right against first publication of a manuscript that was enforceable through an "action on the case."[123] Actions of debt and actions on the case were common law forms of proceeding at the time. For most cases within federal court jurisdiction, however—such as diversity cases—Congress had neither created a federal right nor specified a form of proceeding. In such cases, the Process Acts established a background rule that directed federal courts to apply state forms of proceeding in actions at law. This section describes the Process Acts of 1789 and 1792 and, to place them in context, recounts the more general—if short-lived—direction that Congress initially provided in section 14 of the First Judiciary Act.

1. Section 14 of the Judiciary Act of 1789

Section 14 of the Judiciary Act was the first provision Congress enacted that pertained to the causes of action available in

[122] Act of Apr. 10, 1790, 1 Stat. 109, 111 (1790).
[123] Act of May 31, 1790, 1 Stat. 124, 125-26 (1790).

federal courts. The Judiciary Act, of course, created lower federal courts, so it was natural for Congress to address this issue in some way. Section 14 empowered federal courts to issue all writs "which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law."[124] Although this provision is not usually read to concern the power of federal courts to adjudicate causes of action, this was its apparent function when understood in historical context. Section 14 authorized federal courts to issue original writs—the writs that defined causes of action—so long as they were agreeable to established principles and usages of law. The "law" contemplated here was the common law, as applied by common law courts in England and the states. In the Process Acts, Congress would soon provide more specific direction about the kinds of causes of action that federal courts were empowered to hear, and the manner in which federal courts would adjudicate them. To understand the Process Acts, however, it is important to begin with a proper understanding of section 14 of the First Judiciary Act.

In section 14, Congress provided, specifically, that "courts of the United States, shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law."[125] Because contemporaneous statements explaining the meaning of this language do not survive, background legal context provides the best evidence of its meaning. At the time, a writ was the means by which an individual gained access to a court, including access to file an original action. Original writs corresponded to forms of action, defining the causes of action a plaintiff could bring.[126] Thus, the most plausible reading of section 14, as Julius Goebel explained, is that it authorized federal courts to use "the traditional mandates which set in motion civil litigation."[127] The writs were not concerned only with "procedure." Rather, they also encompassed substantive legal requirements that a plaintiff had to allege and ultimately demonstrate in order to prevail.[128] The language

---

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

[125] *Id.*

[126] *See supra* notes - , and accompanying text.

[127] Goebel, *supra* note 19, at 509. Courts and scholars have struggled to interpret this language, but Professor Goebel's account seems the most plausible in light of background understandings.

[128] *See* Bellia, *supra* note 83, at 784-89; *see also* Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 VA. L. REV. 575, 679 (2008) (explaining that at the time section 14 was enacted, "English and American jurists . . .

"agreeable to the principles and usages of law" codified a traditional limit on common law courts—specifically, that courts could not create new forms or modes of proceeding.[129] The function of section 14 is commonly overlooked. In section 14, Congress specifically authorized federal courts to employ only recognized legal causes of action in cases within their jurisdiction.

The writs that initiated common law proceedings defined not only remedies and the right to sue, but also some matters that we would describe as "procedure."[130] The writs did not encompass all matters of judicial practice, however, such as summons, defaults, costs, contempts, and return dates.[131] Thus, section 14 did not purport to provide comprehensive rules of practice governing federal courts. Section 17 of the Judiciary Act of 1789 filled this gap by authorizing federal courts to make general rules of practice. Specifically, section 17 provided that "all the said courts of the United States shall have power . . . to make and establish all necessary rules for the orderly conducting business in the said courts, provided such rules are not repugnant to the laws of the United States."[132]

There are good reasons to think that members of the First Congress did not regard sections 14 and 17 of the Judiciary Act as providing a permanent framework. First, the Process Act of 1789 was enacted just five days later, and replaced key aspects of section 14. In addition, as explained, the forms of action defined by writs varied among and between English and American state courts. Although the language "agreeable to the principles and usages of

---

believed that a writ—an individual's means of access to a court—was also the equivalent of a substantive legal doctrine).

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

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

[130] *See supra* notes - , and accompanying text.

[131] For an example of a state law addressing such matters, see An Act Prescribing Forms of Writs in Civil Cases, and Directing the Mode of Proceeding Therein (Oct. 30, 1784), in Acts and Laws Passed by the General Court of Massachusetts (1784).

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

law" constrained federal courts in some measure, it arguably left them free to pick among varying "principles and usages of law" in deciding what writs they would make available. Anti-Federalists had expressed strong distrust of federal judicial power, and they were familiar with how courts could use forms and modes of proceeding to thwart or promote certain interests.[133] Had it not been quickly limited by the Process Act, the broad language of section 14 could have empowered federal courts to adopt forms of proceeding that would advance the interests of consolidated federal governance against state interests. It also could have empowered them to expand the scope of their equity jurisdiction. Although section 16 of the Judiciary Act prohibited federal courts from exercising equity powers when a remedy existed at law,[134] section 14 left federal courts with room to limit the availability of common law writs and thereby expand the realm of their equity powers. Anti-Federalist members of Congress had a strong distrust of equity and how its expansion could dilute jury trial rights.[135]

Perhaps for these reasons, although the Judiciary Act was necessary to get the federal courts up and running, the First Congress did not leave the general terms of sections 14 and 17 in place for long.[136] As Professor Goebel pointed out, the Senate Committee that drafted the First Judiciary Act likely never had any "intention of leaving matters on such a vague footing."[137] In a letter dated June 16, Senator George Read (Delaware) wrote to John Dickinson that "[t]he same committee who reported this bill are preparing another, for prescribing and regulating the process of those respective courts."[138] Thus, the Judiciary Act and the Process Act were drafted at the same time and were enacted within days of one another—the Judiciary Act on September 24, 1789, and the Process Act five days later.

2. The Process Acts of 1789 and 1792

On September 29, 1789, the President signed into law a statute entitled, an "Act to Regulate Processes in the Courts of the

---

[133] *See supra* notes - , and accompanying text.
[134] Judiciary Act of 1789, ch. 20, § 16, 1 Stat. 73, 82.
[135] *See supra* notes - , and accompanying text.
[136] *See* GOEBEL, *supra* note 19, at 510, 537.
[137] *Id.* at 510.
[138] *Id.* (quoting WILLIAM T. READ, LIFE AND CORRESPONDENCE OF GEORGE READ, A SIGNER OF THE DECLARATION OF INDEPENDENCE 480-81 (1870).

United States."[139] This act came to be known as the Process Act of 1789. The Process Act of 1789 provided more specific direction to federal courts about the forms of action and modes of proceeding that they were to follow. Three years later, Congress enacted the Process Act of 1792. This statute reenacted key provisions of the first Process Act as a more permanent measure, with some revisions.

The Process Acts were "doomed to be little regarded by historians, for the subject matter was hardly such to captivate those to whom the larger aspects of institutional development were to be more beguiling."[140] The Process Acts, however, hold large and underappreciated significance for understanding the institutional development of federal courts in the United States. Rather than concerning "mere" procedure, the Process Acts defined the causes of action that were available in federal court. The Acts adopted state forms of action as causes of action at law in federal courts, and traditional remedies in equity and admiralty as causes of action for cases within those respective jurisdictions. In important respects, the Process Acts were a victory for antifederalists against proponents of centralized federal judicial power.[141] The Acts denied federal courts the power to devise a uniform system of federal causes of action that potentially could have harmed state interests. The Acts also prevented the development of two fundamentally different remedial systems in the same state, and protected litigants and lawyers from having to learn a new system.

a. The Process Act of 1789

The Senate Committee that framed the Judiciary Act of 1789 also drafted a separate bill that would have established uniform rules of proceeding for federal courts. The draft bill addressed the form of writs and processes issuing from federal courts, how process would commence in civil actions, rules of service, notice of pleas, bail, default, and execution on judgments.[142] Due at least in part to opposition by Anti-Federalists to "consolidated government,"[143] however, Congress was unable to agree on a uniform set of

---

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

[140] GOEBEL, *supra* note 19, at 509.

[141] *See id.* at 510 ("Considered in its historical setting the controversy may be viewed as an aspect of the sustained offensive conducted by the antifederalists against a 'consolidated government.'"); Marcus, *supra* note 14, at 108 (discussing how advocates of state interests carried the day in the Process Acts).

[142] Marcus, *supra* note 18, at 115-18. For detailed descriptions of this bill, see *id.* at 108-110; GOEBEL, *supra* note 19, at 514-35.

[143] GOEBEL, *supra* note 19, at 510.

procedures for federal courts,[144] and the bill was never enacted. Instead, Congress enacted the Process Act, which adopted state legal forms of action and civil equitable remedies as the actions that would be available in federal court. "The entire Process Act of 1789 reflected Congress's inability or unwillingness to agree on uniform rules for the operation of the federal courts."[145]

The Process Act of 1789 provided, first, that "the forms of Writs and Executions, except their Style; and modes of process and rates of fees, except fees to Judges, in the Circuit and district Courts, in suits at common law, shall be the same in each State respectively as are now used or allowed in the supreme Courts of the same."[146] In other words, the Act provided that, in actions at law, a federal circuit or district court was to apply the forms of writs and executions that prevailed in the supreme court of the state in which it sat.[147] Taken in historical context, this provision operated to define the causes of action that federal courts could enforce in actions at law by reference to state law. The form of the writ employed defined a cause of action, as explained in Part I.A.[148] For example, under the Process Act, if a plaintiff wished to recover damages in federal court for bodily injury intentionally inflicted, the plaintiff would seek a writ of trespass, so long as state law allowed such a writ, in the form that state law provided. If a plaintiff sought a writ not recognized under state law, the plaintiff's suit would fail because the district and circuit courts had no authority to go beyond the forms of writs used or allowed by the supreme court of the state in which it sat. Rather than adopt a uniform system of writs and modes of process for circuit and district courts, Congress instead tethered

---

[144] *See* Marcus, *supra* note 18, at 112.

[145] Marcus, *supra* note 18, at 112. *See also* GOEBEL, *supra* note 15, at 510 ("The surviving materials relating to the history of this act, the revision of 1792 and the supplementary statute of 1793, are not rich, consisting as they do of committee bills, journal entries and exiguous reports of debates, yet it is manifest from these sources that a struggle took place between the legislators who favored creation of a uniform procedure for the new federal courts and those who conceived that in each district state forms and modes of process should prevail."); *id.* at 539-40 ("If there was truth in the antifederalists' charge that the most ardent federalists were aiming at a 'consolidated' government, the Act for Regulating Processes in its final form was a defeat for such ambitions.").

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

[147] The federal court did not have to follow the style associated with such writs, however, because the Process Act made other provisions for styles. The Act provided, regarding style, "[t]hat all Writs and processes issuing, from a Supreme or a Circuit Court, shall bear test of the Chief Justice of the Supreme Court, and if from a district Court, shall bear test of the Judge of such Court; and shall be under the Seal of the Court from whence they issue; and signed by the Clerk thereof." *Id.*, § 1, 1 Stat. at 93. Regarding fees,

[148] *See supra* notes - , and accompanying text.

federal courts to the forms of writs and modes of process that prevailed in state courts.[149]

Second, for cases of equity and admiralty and maritime jurisdiction, the Process Act of 1789 provided that "the forms and modes of proceedings . . . shall be according to the course of the Civil law."[150] Evidence suggests that Congress drafted this provision "in haste" given prevailing prejudices toward the civil law and the unrealistic expectation that judges or lawyers would actually employ the civil law in such cases.[151] It is also worth noting that Congress could not—as it had done for actions at law—simply borrow state forms of proceeding in equity because not all states had equity courts.[152] In any event, this provision specified the source of the forms and modes of proceedings that federal courts were to apply in cases in equity, as well as in their admiralty and maritime jurisdiction.

It is useful to examine the Process Act of 1789 by reference to the changes it made to the regime originally established by section 14 of the First Judiciary Act. As explained, section 14 authorized federal courts to issue writs "agreeable to the principles and usages of law."[153] Such "principles and usages of law" in theory could refer to either traditional English common law or distinctive state common law. (Indeed, in time the Supreme Court would hold that "the principles and usages of law" in fact referred to both English and state law.[154]) Either way, section 14 gave federal courts an array of law from which to choose. At the time, the form and availability of common law remedies varied significantly among the states, and between the states and England.[155] The Process Act significantly narrowed section 14's broad grant of authority by limiting federal circuit and district courts to the forms of action that prevailed in the

---

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

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

[151] GOEBEL, *supra* note 19, at 534. Professor Kristin Collins describes this provision as "riddled with ambiguity." Collins, *supra* note 15, at 271.

[152] *See* THE FEDERALIST No. 83, at 501 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (stating that Georgia lacked courts of equity).

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

[154] *See supra* note , and accompanying text.

[155] *See supra* notes - , and accompanying text.

states in which they sat.[156] The Process Act also narrowed the authority of federal courts under section 17 of the First Judiciary Act. Section 17 conferred broad authority on federal courts "to make and establish all necessary rules for the orderly conducting business in the said courts, provided such rules are not repugnant to the laws of the United States."[157] The Process Act limited this power in circuit and district courts by requiring such courts to follow state modes of process.[158] Although section 14 was an important symbolic step in establishing the forms of proceeding available in federal court, it had very little practical effect because it was superseded so quickly by the Process Act.

b. Developments from 1789-92

After Congress enacted the first Process Act, federal circuit and district courts generally followed the forms of writs and modes of process in use in the supreme courts of the state in which they sat in actions at law.[159] "This system," Maeva Marcus has observed, "while undoubtedly confusing for justices of the Supreme Court, must have been popular with the clerks of court and with practitioners, who were spared the necessity of familiarizing themselves with a new set of federal rules."[160] In cases in equity, however, it is unclear how strictly federal courts strictly complied with the Process Act's directive to follow "the course of the Civil law."[161] "Because the legal profession was hardly prepared to go to school to execute literally the injunction of the first Process Act, existing chancery practice was bound to be treated as substantial compliance."[162] In 1791, the Supreme Court promulgated an order adopting the rules of Chancery to "afford outlines for the practice of this court" in equity cases.[163] In practice, it appears that circuit and district courts resorted to local equity practices where they

---

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

[157] Judicary Act of 1789, ch. 20, § 17, 1 Stat. 73.

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

[159] Marcus, *supra* note 18, at 113.

[160] *Id.*

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

[162] GOEBEL, *supra* note 19, at 580.

[163] Rules & Orders of the Supreme Court of the U.S., 5 U.S. (1 Cranch), at xvi (1804) (Rule VII, dated Aug. 8, 1791).

existed.[164] Thus, during the time that the first Process Act governed, lower federal courts appear generally to have followed state forms and modes and proceeding in both actions at law and cases in equity.

Congress quickly realized that the Process Act of 1789 had its flaws. Amid criticism for tying equity jurisdiction to the civil law and suggestions for some degree of greater uniformity in the forms of executions in federal court,[165] Congress revisited the Process Act in 1792.[166]

c. The Process Act of 1792

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

First, the Act provided that "the forms of writs, executions and other process, except their style and the forms and modes of proceeding in suits in those of common law shall be the same as are now used in the said courts respectively in pursuance of [the Process Act of 1789]."[167] In this provision, Congress continued to require federal courts to apply state forms of writs, as the original Process Act had required. In the second Process Act, however, Congress replaced the phrase "mode of process" with the phrase "forms and modes of proceeding." It is unclear why Congress made this change, but, whatever the reason, the new language strengthened the directive that federal courts apply state causes of action in cases at law. In the eighteenth century, courts in England and America routinely used the phrases "form of proceeding" or "mode of proceeding" to define not only what we think of today as "procedure,"[168] but also the forms of action that gave plaintiffs a

---

[164] *See* GOEBEL, *supra* note 19, at 580-85; Collins, *supra* note 15, at 271.

[165] In his 1790 report on the judiciary, Attorney General Edmund Randolph criticized the Process Act for requiring equity to proceed according to the civil law, and he suggested some change in the forms of executions used in federal courts. Edmund Randolph, Judiciary System, H.R. Rep. No. 1-17, at 21 (3d Sess. 1790). In December 1790, President Washington suggested that Congress might enact "an uniform process of executions on sentences issuing from the Federal Courts." 1 JOURNAL OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA 332 (Washington, Gales & Seaton 1826).

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

[167] Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275, 276.

[168] *See, e.g.*, King v. Almon, 97 E.R. 94, 101 (K.B. 1765) (describing attachment and trial by jury as different "modes of proceeding").

right to a legal remedy.[169] The Process Act of 1792 thus cemented Congress's adoption of state law causes of action as the proper legal actions available in federal court. In time, the Supreme Court interpreted this provision to require "static" conformity to state forms and modes of proceeding—in other words, conformity to state forms and modes of proceeding as they existed in 1792 when the Act was adopted, not conformity to how they might develop in the future.[170]

Second, the Process Act of 1792 changed the source of law governing cases in equity and admiralty jurisdiction. Under the 1789 Process Act, federal courts were to follow the civil law in adjudicating equity and admiralty cases.[171] The 1792 Process Act provided that the "forms and modes of proceeding" in cases "of equity" and "of admiralty and maritime jurisdiction" were to be "according to the principles, rules and usages which belong to courts of equity and to courts of admiralty respectively, as contradistinguished from courts of common law."[172] Congress thus adopted traditional forms of proceeding in equity and admiralty as causes of action for federal courts, not causes of action derived from the civil law.[173]

---

[169] *See e.g.*, Jefferson v. Bishop of Durham, 126 E.R. 804, 813 (C.P. 1797) (Eyre, C.J.) ("As far as can be collected from the text writers of a very early period, and from the forms of proceeding contained in books of very high authority, such as the Register and Fitzherbert's Natura Brevium, it seems that there did not occur in practice, and that there was not in fact any remedy at common law against churchmen committing waste, sufficiently known for them to treat of."); Farr v. Newman, 100 E.R. 1209, 1224 (K.B. 1792) (Kenyon, C.J.) (describing different "form of proceedings" for actions against executors); Hobson v. Todd, 100 E.R. 900, 901 (K.B. 1790) (Buller, J.) (describing "the old writ of admeasurement of pasture" and explaining that "[b]y that mode of proceeding, if the defendant put more cattle on the common than he ought, the plaintiff was entitled to have a certain quantity admeasured to the defendant; the excess then is the injury in these cases"); Hancock v. Haywood, 100 E.R. 661, 662 (K.B. 1789) (argument of counsel, with respect to whether assignees could bring one action for separate debts, that "[i]n the first place, it is a great objection to the form of an action, that it is perfectly new: no instance of this mode of proceeding has ever occurred"); Mason v. Sainsbury, 99 E.R. 538, 539 (K.B. 1782) (argument of counsel that "though it is true that a man who has two remedies may pursue either of them, and that it is no defence to say he has another mode of proceeding, yet, where he has once availed himself of one remedy, and recovered, he shall not be allowed to pursue the other"); Rex v. Blooer, 97 E.R. 697, 698 (K.B. 1760) ("A mandamus to restore is the true specific remedy where a person is wrongfully dispossessed of any office or function which draws after it temporal rights; in all cases where the established course of law has not provided a specific remedy by another form of proceeding . . . ."); *see also* Black v. Digges's Ex'r, 1 H. & McH. 153, 155 (Md. Prov. 1744) ("That indebitatus assumpsit will not lie but where debt where lie. . . . That neither indebitatus assumpsit nor debt will iie upon any collateral undertaking, though assumpsit will, and the difference between the actions arises from the different form of proceeding.").

[170] Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 49-50 (1825); Bank of United States v. Halstead, 23 U.S. (10 Wheat.) 51, 59 (1825).

[171] *See supra* notes - , and accompanying text.

[172] Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275, 276.

[173] In 1832, in Bains v. The James and Catherine, 2 F. Cas. 410 (C.C. D. Pa. 1832) (No. 756), Justice Henry Baldwin, as Circuit Justice, explained that both section 14 of the First Judiciary Act and the Process Act of 1792 excluded federal courts from resorting to the civil law: "We must then resort to that system of jurisprudence, in which there are courts of common law, as contradistinguished from

Third, the Process Act of 1792 added a grant of residual authority to federal courts to make "such alterations and additions as the said courts respectively shall in their discretion deem expedient, or to such regulations as the supreme court of the United States shall think proper from time to time by rule to prescribe to any circuit or district court concerning the same."[174] This provision granted federal courts a bounded discretion to alter or amend state forms of proceeding at law and traditional forms of proceedings in equity and admiralty. Over time, the Marshall Court determined that section 14 of the Judiciary Act cabined the residual authority of federal courts to alter state forms of proceeding under the Process Act of 1792. Under section 14 of the Judiciary Act, federal courts could issue only writs that were "agreeable to the principles and usages of law."[175] The Supreme Court interpreted this provision to authorize federal courts to issue writs agreeable to traditional common law principles or to developing state law.[176] Accordingly, the Court concluded that federal courts could exercise their residual authority under the Process Act of 1792 to alter or amend legal forms of proceeding only within the bounds of established common law principles or state law. As explained in Part I.A, English courts lacked power to create new forms of proceeding, but they understood themselves to have some flexibility to mold existing forms of proceeding to meet new exigencies. In keeping with this tradition, the Court interpreted the Process Act's residual grant of authority to federal courts to require adherence to state law or traditional common law principles, not to allow the creation of completely new forms of proceeding.

Over time, federal courts exercised their power to alter or amend state forms of proceeding in two instances. Sometimes, federal courts used their residual authority to adopt state forms of

---

courts of equity and admiralty; to resort to the civil law for the rules which define the respective jurisdiction of these courts, when congress have excluded them as to the forms and modes of proceeding, would be manifestly opposed to the law." *Id.* at 420.

[174] Act of May 8, 1792, ch. 26, § 2, 1 Stat. 275, 276 (repealed 1872).

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

[176] In United States v. Burr, 25 F. Cas. 187 (C.C. D. Va. 1807) (No. 14,694), Chief Justice Marshall, as Circuit Justice, "understood those general principles and those general usages" to be such as are "found not in the legislative acts of any particular state, but in that generally recognized and long established law, which forms the substratum of the laws of every state." *Id.* at 188. In 1825, in Bank of the United States v. Halstead, 23 U.S. (10 Wheat.) 51 (1825), the Court understood "principles and usages of law" to refer both to writs authorized by the common law and to writs unknown to the common law but authorized under state law. "It was well known to Congress, that there were in use in the State Courts, writs of execution, other than such as were conformable to the usages of the common law. And it is reasonable to conclude, that such were intended to be included under the general description of writs agreeable to the principles and usages of law." *Id.* at 56.

proceeding that emerged after 1792.[177] The Supreme Court interpreted the Process Act of 1792, recall, to require "static" conformity to state law as it existed in 1792.[178] Sometimes, application of outdated state forms of proceeding proved inconvenient or unfair, so federal courts exercised their residual authority to employ more current state forms of proceeding. The Supreme Court also adopted rules of practice for cases with the federal courts' equity jurisdiction in 1822 and 1842 pursuant to this grant of discretion.[179]

The Process Act of 1792 continued in force until 1872, when Congress replaced it with the first Conformity Act. Whereas the Process Act of 1792, as interpreted by the Court, required "static" conformity to 1792 state forms of proceeding, the Conformity Act adopted a principle of "dynamic" conformity, directing federal courts to apply state legal forms of proceeding as currently "existing at the time."[180] In the late nineteenth century and early twentieth century, with the rise of code pleading, the source of the causes of action available in state and federal courts gradually shifted from the realm of "procedure" to the realm of "substance."[181] Even as states came to abolish forms of proceeding and define causes of action outside the realm of procedure, federal courts continued to apply local state causes of action in cases within their jurisdiction—just not as "forms of proceeding" under the Conformity Act, but rather as "rules of decision" under section 34 of the First Judiciary Act. Of course, following the Civil War, the Supreme Court expanded the *Swift* doctrine and increasingly treated traditionally local matters as

---

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

In addition to the problem of whether to adopt subsequently developed state forms of proceeding, courts also faced the problem of what forms of proceeding to apply in states that adopted aspects of the civil, not the common law distinction between law and equity, and newly admitted states that had no forms of proceeding in 1792. Eventually, Congress enacted laws to address these problems. In 1834, Congress enacted a special process act for Louisiana, Act of May 26, 1824, ch. 181, § 1, 4 Stat. 62, 62-63, and in 1828 Congress adopted a Process for newly admitted states that adopted state forms of proceeding in actions at law and required proceedings in equity to be conducted "according to principles, rules, and usages which belong to courts of equity." The Process Act of 1828, ch. 68, 4 Stat. 278, 278-79.

Moreover, because the Supreme Court would hold that federal law, not state law, determined whether a case was legal or equitable, *see infra* notes - , and accompanying text, federal courts in theory might have to adopt legal forms of proceeding to cover cases that state law deemed equitable but federal law deemed legal.

[178] *See supra* notes - , and accompanying text.

[179] Rules of Practice for the Courts of Equity of the U.S., 20 U.S. (7 Wheat.), at v, v-xiii (1822); Rules of Practice for the Courts of Equity of the U.S., 42 U.S. (3 How..), at xli, xli-lxx (1842).

[180] Conformity Act of 1872, ch. 255, § 5, 17 Stat. 196, 197 (repealed 1934).

[181] *See* Bellia, *supra* note 83, at 792-99 (describing this process).

governed by "general" law. This enabled federal courts to exercise independent judgment as to the content of such law at the expense of unwritten state law.

By 1938, however, federal courts finally promulgated their own rules of procedure, and the Supreme Court abandoned the *Swift* doctrine as "unconstitutional." In 1934, Congress authorized the Supreme Court to prescribe uniform rules of procedure for federal courts,[182] and the Supreme Court ousted the old forms of action from federal court in 1938 in the Federal Rules of Civil Procedure.[183] At the same time, in *Erie Railroad Co. v. Tompkins*,[184] the Court ruled that the Constitution required federal courts to apply the substantive law of the state in which they sat, including the decisions of state courts governing the content of state common law. Accordingly, even after the Federal Rules of Civil Procedure abolished the forms of action in federal court, *Erie and* the Rules of Decision Act (originally enacted as part of the Judiciary Act of 1789) required federal courts to recognize and adjudicate state law causes of action, absent preemption by federal law.

* * *

The First Judiciary Act and the Process Acts specified the causes of action that federal courts could adjudicate. Section 14 of the First Judiciary Act authorized federal courts to issue writs that were agreeable to established principles of law. Almost immediately, however, Congress provided federal courts with more specific direction. The Process Acts of 1789 and 1792 required federal courts to apply state causes of action and procedures in cases at law, and traditional equitable actions and procedures in cases in equity. Congress gave federal courts residual authority to mold these forms and modes of proceeding, but not to go beyond the requirements of state law or traditional common law practice.

III. THE CAUSE OF ACTION IN EARLY FEDERAL COURTS

To understand the source of causes of action in cases heard by early federal courts (including ATS cases), it is useful to begin by

---

[182] Act of June 19, 1934, Pub. L. No. 73-415, 48 Stat. 1064.

[183] Rules of Civil Procedure for the District Courts of the United States, 308 U.S. 645 (1938). Under the Federal Rules of Civil Procedure, there are no particular forms of proceeding for cases at law or in equity; there is simply "one form of action to be known as 'civil action.'" FED. R. CIV. P. 2.

[184] 304 U.S. 64 (1938).

comparing early federal court adjudications of civil causes of action with early federal court adjudications of criminal actions. For two decades following ratification, judges and other public officials debated whether federal courts had jurisdiction to adjudicate criminal actions that Congress had not created or authorized—in other words, to adjudicate federal common law crimes.[185] The Judiciary Act of 1789 had given federal courts exclusive jurisdiction of crimes and offenses "cognizable under the authority of the United States."[186] The question for debate was whether this jurisdiction extended to common law criminal actions brought by federal executive officials on behalf of the United States but not sanctioned by Congress. The Supreme Court settled this debate in 1812 in *United States v. Hudson & Goodwin*,[187] when it held that federal courts have no jurisdiction to hear common law criminal actions. Before a federal court may exercise jurisdiction over a criminal action, the Court held, "[t]he legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence."[188]

It is telling that there were no corresponding claims in the first decades of the Union that federal courts had power to adjudicate *civil* actions that Congress had not created—in other words, to adjudicate federal common law civil causes of action. At first glance, it might seem strange that members of the Founding generation would debate federal judicial power to hear common law criminal actions but not common law civil actions. The issue of federal judicial power to hear common law civil actions was arguably as important, if not more important, than the issue of federal judicial power to hear common law criminal actions. Civil actions far outnumbered criminal actions in federal courts. Federal courts' civil jurisdiction included cases of concern to opponents of consolidated national power, such as diversity claims by out-of-state and foreign creditors.[189]

The reason for the difference, however, was based on congressional action with respect to civil cases and congressional inaction with respect to criminal cases. For civil cases, unlike

---

[185] For a discussion of the early debate over federal common law crimes, see Bellia & Clark, *Federal Common Law of Nations*, *supra* note 98, at 47-55.

[186] Judiciary Act of 1789, § 9, 1 Stat. at 76-77 (conferring jurisdiction on district courts); § 11, 1 Stat. at 78-79 (conferring jurisdiction on circuit courts).

[187] 11 U.S. (7 Cranch) 32 (1812).

[188] *Id.* at 32.

[189] *See* Bellia & Clark, *Federal Common Law of Nations*, *supra* note 98, at 42-44 (describing origins and operation of federal court diversity jurisdiction).

criminal cases, the Process Acts specified the forms of actions that federal courts could entertain. As explained, the Process Acts provided the causes of action that federal courts could adjudicate in the absence of an express cause of action created by Congress. Neither the Judiciary Act nor the Process Acts provided corresponding guidance to federal courts in criminal cases. Indeed, Congress did not expressly adopt any federal crimes until the Crimes Act of 1790.

There are several possible reasons why the Process Acts are rarely discussed today in connection with debates over federal judicial power to recognize new causes of action. One reason may be that the Acts use terms of art that we do no longer associate with causes of action. Although the phrase "form of proceeding" may not be used to refer to a cause of action today, it was in 1789. Another reason why the import of the Process Acts has been lost is that early federal judges and lawyers applying the Process Acts did not often identify the Acts as the source of the causes of action in the civil cases they handled. Rather, they simply fell into the habit of using the state forms of proceeding—and thus the state causes of action—in federal court cases. Finally, once the Process Acts established the use of state forms of action as the proper background rule in actions at law, there was no real dispute about their application. Accordingly, today's courts and scholars will not find many early federal court decisions that cite or discuss the Process Acts as authority for the causes of action being adjudicated.

It would be a mistake, however, to conclude that because federal courts did not always reference the Process Acts, they somehow considered themselves free to ignore the Acts' instructions and instead derive causes of action from ambient general common law. Today, by analogy, federal judges rarely recite well-established statutory directives unless they are actually contested—such as the background principles that the Federal Rules of Civil Procedure apply in federal court, that diversity cases require diverse parties and a minimum amount in controversy, or that state law supplies the applicable rules of decision unless preempted by contrary federal law. The First Congress required the newly-created lower federal courts to use existing state forms of action, at least in part, to facilitate adjudication in federal court by lawyers and judges familiar with state practice. Judges and lawyers in the early republic quickly understood that state forms and modes of proceeding—the forms and modes of proceeding that they had long used in state courts—now

also applied in actions at law in federal courts, and they had no reason to discuss this requirement in every common law case. It was more natural for litigants and judges simply to apply those forms and modes rather than to recite repeatedly Congress's well-known command that they do so.[190] In other words, lawyers and judges were accustomed to using state forms of proceeding in state court, and they simply followed Congress's command to do the same in federal court.

When federal courts did address the source of their power to adjudicate a particular cause of action, it was because they had to resolve a dispute over their power to do so. The Supreme Court made clear early on that federal courts could only adjudicate forms of action that Congress had authorized them to hear.[191] The most revealing cases about the source of causes of action in early federal courts are those in which a dispute arose regarding the source of law defining the cause of action. In some cases, litigants disputed the proper form of proceeding in federal court. In other cases, federal courts had to decide whether they were applying state law as a form of proceeding under the Process Acts or as a rule of decision under section 34 of the First Judiciary Act. In such cases, federal courts were aware that under the Process Acts state law, not general common law, supplied the causes of action at law available in federal courts. Likewise, federal courts were aware that the Process Acts, not ambient general common law, required them to apply traditional causes of action in equity and admiralty in the exercise of those respective jurisdictions. This section examines how early federal courts understood the source of their authority to adjudicate causes of action under the Process Acts, both in actions at law and in cases in equity and admiralty.

---

[190] The same applied when early federal courts enforced local common law as rules of decision in diversity cases. Section 34 of the First Judiciary Act required application of such law, but federal courts did not consider it necessary to recite that provision in every case. *See* Bellia & Clark, *General Law in Federal Court*, *supra* note 76, at 669-77 (describing early federal courts application of local state law as rules of decision). That federal courts applied local common law without reciting section 34 does not mean that section 34 did not require what the courts were doing. In the same way, that federal courts did not recite *ad nauseum* that the Process Acts required application of state forms of proceeding in actions at law does not mean that the Process Acts did not require what its terms plainly did require.

[191] For example, in *Ex Parte Bollman*, 8 U.S. (4 Cranch) 75 (1807), when Chief Justice Marshall addressed the power of federal courts to issue writs of habeas corpus under section 14, he emphasized that federal courts only could issue writs that Congress authorized them to issue. Although federal courts could resort to the common law for the meaning of a term such as "habeas corpus," "the power to award the writ by any of the courts of the United States, must be given by written law." *Id.* at 93-94. That written law included not only section 14, but the Process Acts as well. When disputes arose over the power of federal courts to adjudicate a particular cause of action, courts analyzed their authority under these statutes.

A. *Actions at Law*

The ATS gave federal courts jurisdiction to hear an important category of cases at law—that is, "causes where an alien sues for a tort only." Tort claims, of course, were traditionally actions at law and were initiated using common law forms of proceeding. Pursuant to the Process Acts, federal courts routinely applied state forms of proceeding in actions at law during the first decades following the creation of such courts. In most cases, federal courts presumed that state forms of proceeding followed the common law of England. States generally had adopted the common law as state law, and state decisions were not widely reported. Accordingly, absent evidence to the contrary, federal courts proceeded on the assumption that states had adopted traditional common law forms and modes of proceeding in actions at law. In many cases, federal courts applied traditional common law forms of proceeding in actions before them, including in cases involving pleading requirements,[192] evidence,[193] and the availability of forms of proceeding to certain plaintiffs.[194]

The Supreme Court's 1817 decision in *Raborg v. Peyton*[195] is illustrative. In *Raborg*, the Court applied "the well-settled doctrine that [an action in] debt lies in every case where the common law creates a duty for the payment of money, and in every case where

---

[192] *See, e.g.*, Covington v. Comstock, 39 U.S. (14 Pet.) 43, 44 (1840) (holding that in "an action against the drawer of a note payable at a particular place, . . . the place of payment is a material part in the description of the note, and must be set out in the declaration"); Wallace v. McConnell, 38 U.S. (13 Pet.) 136, 144-50 (1839) (holding, on the basis of "a uniform course of decision for at least thirty years" in American state courts, that in an action on a promissory note or bill of exchange, the plaintiff need not aver a demand of payment, and explaining that "[i]t is of the utmost importance, that all rules relating to commercial law should be stable and uniform"); Pearson v. Bank of the Metropolis, 26 U.S. (1 Pet.) 89, 93 (1828) (determining that plaintiffs had sufficiently alleged the agreement in an action on a promissory note); Sheehy v. Mandeville, 11 U.S. (7 Cranch) 208, 217-18 (1812) (determining that for a plaintiff to receive judgment on a promissory note under the common law, the note that the plaintiff pleads in the declaration must correspond to the note that the plaintiff offers in evidence); Sheehy v. Mandeville, 10 U.S. (6 Cranch) 253 (1810) (determining that "[s]ince . . . the plaintiff has not taken issue on the averment that the note was given and received in discharge of the account, but has demurred to the plea, that fact is admitted").

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

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

[195] 15 U.S. (2 Wheat.) 385 (1817).

there is an express contract for the payment of money."[196] On the basis of this doctrine, the Court held "that debt lies upon a bill of exchange by an endorsee of the bill against the acceptor, when it is expressed to be for value received." Although the Court did not recite the Process Act in this case, its application of a traditional common law form of proceeding as presumptive state law was commonplace.

The Court similarly applied the common law as presumptive state law in later opinions by Justice Story. For example, in 1831 in *Doe v. Winn*,[197] the Court addressed whether a state-certified copy of a land grant was admissible evidence in an action of ejectment.[198] As Justice Story explained on behalf of the Court, under common law modes of proceeding, "an exemplification of a public grant under the great seal, is admissible in evidence."[199] The Court applied this common law mode of proceeding on the assumption that it was the law of Georgia:

> The common law is the law of Georgia; and the rules of evidence belonging to it are in force there, unless so far as they have been modified by statute, or controlled by a settled course of judicial decisions and usage. Upon the present question it does not appear that Georgia has ever established any rules at variance with the common law.[200]

Under Justice Story's approach, federal courts could assume that state law adopted common law modes of proceeding, unless the state departed from them by statute or a settled course of judicial decisions.[201] This analysis illustrates how federal courts complied

---

[196] *Id.* at 389.

[197] 30 U.S. (5 Pet.) 233 (1831).

[198] *Id.* at 241.

[199] *Id.*

[200] *Id.*

[201] Justice Story's earlier opinion in Nicholls v. Webb, 21 U.S. (8 Wheat.) 326 (1823), comports with this analysis. In *Nicholls*, the endorsee of a promissory note brought an action against the endorser. For such actions to proceed under the common law, plaintiffs had the burden to show that they had made a due demand for payment from the maker and given the endorser due notice of non-payment. One question before the Court was whether a protest by a notary, who had died before trial, was in itself evidence of a proper demand. *Id.* at 331. The Court held that the notary's protest was not itself sufficient evidence because "[i]t does not appear that, by the laws of Tennessee, a demand of the payment of a promissory note is required to be made by a notary public, or a protest made for non-payment, or notice given by a notary to the endorsers." *Id.* Moreover, "by the general commercial law, it is perfectly clear, that the intervention of a notary is unnecessary in these cases." *Id.* The Court went on, then, to determine whether the notary's protest was "admissible secondary evidence . . . to prove due demand and notice." *Id.* at 332. Justice Story began by observing that "[c]ourts of law are . . . extremely cautious in the introduction of any new doctrines of evidence which trench upon old and established principles." *Id.* Nonetheless, Justice Story continued, "as the rules of evidence are founded upon general interest and convenience, they must, from time to time, admit of modification, to adapt

with the Process Acts when they applied traditional common law forms and modes of proceeding, absent state law variations.

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

First, federal courts expressly referred to state laws governing forms of proceeding when such state laws were contested or departed from common law principles. For instance, in 1803 in *Mandeville v. Riddle*,[202] the parties disputed "[w]hether an action of *indebitatus assumpsit* can be maintained by the assignee of a promissory note made in Virginia, against a remote assignor."[203] In an opinion by Chief Justice Marshall, the Supreme Court determined that an assignee could not maintain such an action under the common law of Virginia when there was a lack of privity between the assignee and the remote assignor,[204] and that no act of the Virginia assembly conferred a right to sue in such cases.[205] In *Breedlove v. Nicolet*,[206] Chief Justice Marshall looked to Louisiana law to decide whether a plaintiff could maintain a particular form of proceeding on a promissory note. The defendants argued that the plaintiffs could not maintain their action because they claimed joint and several liability but failed to sue out process against all of the alleged obligors on the note. In rejecting this argument, Chief Justice Marshall acknowledged that the fact "that the suit is brought against two of three obligors, might be fatal at common law."[207] He explained, however, that "the courts of Louisiana do not proceed

---

them to the actual condition and business of men, or they would work manifest injustice." *Id.* Justice Story proceeded to conclude, upon consideration of English and state court precedent—and the importance to commerce of the admissibility of such evidence—that the evidence of the deceased notary's protest "was rightly admitted." *Id.* at 332-37. This analysis is consistent with the Process Act. It appears from Justice Story's analysis that if Tennessee had a settled practice on this question, the Court would have applied Tennessee law. Because Tennessee did not, however, the Court presumed that the common law, which the state had adopted, applied. If this rule of evidence constituted a form or mode of proceeding, the Court had residual authority in any event to settle the question under the Process Act of 1792.

[202] 5 U.S. (1 Cranch) 290 (1803).

[203] *Id.* at 298.

[204] *Id.*

[205] *Id.*

[206] 32 U.S. (7 Pet.) 413 (1833).

[207] *Id.* at 429.

according to the rules of the common law. Their code is founded on the civil law, and our inquiries must be confined to its rules."[208] The Court applied state law in many other cases to determine the availability of forms of action.[209] The Court also applied state law to determine additional "procedural" matters, such as pleading requirements,[210] questions of evidence,[211] and statutes of limitations.[212]

In addition, federal courts addressed source of law questions when they had to determine whether state law qualified as a "form of proceeding" under the Process Acts or as a "rule of decision" under section 34 of the Judiciary Act. In actions at law, the Process Acts directed federal courts to apply state forms of proceeding, and section 34 directed them to apply state "rules of decision" absent preemption by federal law.[213] Whether state law applied as a "form of proceeding" or as a "rule of decision" could make a difference in certain cases. First, this distinction could determine whether a federal court had to apply state law as it existed in 1792, or as it existed at the time an action arose. Under the Process Act of 1792, federal courts applied state forms of proceeding as they existed when the Act was adopted. In other words, the Process Act required a "static incorporation" of state law as the law defining the forms and modes of proceeding available in federal court.[214] By contrast, under section 34, federal courts applied state law rules of decision as they existed when the cause of action arose.[215]

---

[208] *Id.*

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

[210] *See, e.g.*, Wilson v. Lenox, 5 U.S. (1 Cranch) 194, 211 (1803) (holding under a Virginia statute that the plaintiff was obliged to plead "the charges of protest which constitute a part of the debt claimed").

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

[212] *See, e.g.*, Spring v. Ex'rs of Gray, 31 U.S. (6 Pet.) 151, 163-69 (1832) (interpreting and applying Maine statute of limitations); Kirkman v. Hamilton, 31 U.S. (6 Pet.) 20, 23-24 (1832) (determining that various North Carolina acts did not apply to bar plaintiff's action of debt).

[213] *See supra* notes - , and accompanying text.

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

[215] In *Ross v. Deval*, 38 U.S. (13 Pet.) 45 (1839), the Court devoted several paragraphs to explaining why a state act specifying a time for reviving judgments was an act of limitation rather than

Second, whether state law applied as a "form of proceeding" or as a "rule of decision" also could determine whether federal courts had authority to alter or amend the state rule in question. Federal courts had no authority to alter or amend rules of decision under section 34, whereas they had residual authority under the Process Act of 1792 to alter or amend state forms and modes of proceeding.[216] Thus, in certain cases, federal courts had to decide whether a state law was a form or mode of proceeding (and thus alterable by federal courts) or a rule of decision (and thus unalterable by federal courts).[217] Accordingly, on several occasions, the Supreme Court considered whether certain matters qualified as rules of decision (and were thus fixed by state law) or forms or modes of proceeding (and thus were subject to federal courts' delegated authority to alter or add to state forms of proceeding).[218]

---

an act regulating proceedings. *Id.* at 60-61. If it had been an act regulating proceeding, the Court could not have applied it under the Process Act of 1792 because it was enacted subsequent to the Process Act. Specifically, the Court determined that a state limitation law was not a rule of practice but "a rule of property; and under the 34th section of the judiciary act, is a rule of decision for the Court of the United States." *Id.* at 60. In *Ross*, the Court made clear that section 34 did not apply to rules of proceeding. *Id.* at 59 (stating that "the thirty-fourth section of the judicial act . . . has no application to the practice of the Court"). Unlike rules of proceeding, section 34 required federal courts to apply state law as it governed when a cause of action arose, not as it existed in 1789, when section 34 was enacted.

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

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

[218] In 1825 in *United States v. Halstead*, 23 U.S. (10 Wheat.) 51 (1825), the Court considered "whether the laws of the United States authorize the Courts to so alter the form of the process of execution, which was in use in the Supreme Courts of the several States in the year 1789." *Id.* at 55. The Court, relying on *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1 (1825), determined that the Rules of Decision Act "has no application to the practice of the Courts." *Halstead*, 23 U.S. (10 Wheat.) at 54. Rather, as *Wayman* had explained, the Process Act of 1792 "enables the several Courts of the Union to make such improvements in its forms and modes of proceeding, as experience may suggest." *Wayman*, 23 U.S. (10 Wheat.) at 41-42. In *Wayman*, the Court concluded that the Rules of Decision Act did not require federal courts to apply state laws governing execution of judgment because rules of decision only governed pre-judgment questions. *Id.* at 26. In other cases, the Court concluded it lacked authority to reject state law on the ground that the state law at issue was a rule of decision under section 34, and thus not a form or mode of proceeding subject to federal court alternation. In 1838 in *McNeil v. Holbrook*, 37 U.S. (12 Pet.) 84 (1838), Holbrook brought an action in the United States Circuit Court for the District of Georgia on promissory notes that others had endorsed over to him. Under an 1810 Georgia act, an endorsement of a promissory note was sufficient evidence that the endorser had transferred the note. The Georgia act did not require proof of the endorser's handwriting. Holbrook brought an action in the United States Circuit Court for the District of Georgia on promissory notes that others had endorsed over to him. Under an 1810 Georgia act, an endorsement of a promissory note was sufficient evidence that the endorser had transferred the note. The Georgia act did not require proof of the endorser's handwriting. The Supreme Court held that federal courts must apply the Georgia act under the Rules of Decision Act. The Court did "not perceive any sufficient reason for so construing this act of congress as to exclude from its provisions those statutes of the several states which prescribe rules of evidence, in civil cases, in trials at common law." *Id.* at 89. In this context, the Court considered the rule of evidence to be bound up with the plaintiff's property right under the

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

B. *Cases in Equity and Admiralty*

The Process Acts directed federal courts to apply state forms of proceeding in actions at law—including actions brought within the federal courts' ATS jurisdiction. Even in (non-ATS) cases of equity and of admiralty and maritime jurisdiction, however, the Acts provided federal courts with important direction. As explained, the Process Act of 1789 provided that federal courts were to apply "civil law" forms of proceeding in cases in their equity and admiralty jurisdiction.[219] The Process Act of 1792 modified this command by directing federal courts to look to the forms of proceeding used by English courts of equity and admiralty. Specifically, the Act

---

promissory note: "Indeed, it would be difficult to make the laws of the state, in relation to the rights of property, the rule of decision in the circuit courts; without associating with them the laws of the same state, prescribing the rules of evidence by which the rights of property must be decided." *Id.* Under the Rules of Decision Act, it concluded, the state law of evidence applied in federal court:

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

Id. at 89-90. Similarly, in Fullerton v. Bank of the United States, 26 U.S. (1 Pet.) 604 (1828), Justice Johnson had explained that "[i]t is not easy to draw the line between the remedy and the right, where the remedy constitutes so important a part of the right; nor is it easy to reduce into practice the exercise of plenary power over contracts, without the right to declare by what evidence contracts shall be judicially established." *Id.* at 614.

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

provided that, in cases "of equity" and "of admiralty and maritime jurisdiction," federal courts should apply the "forms and modes of proceeding" "according to the principles, rules and usages which belong to courts of equity and to courts of admiralty respectively, as contradistinguished from courts of common law."[220] Of necessity, this directive was more general than the directive governing actions at law. All states had common law courts, and all states had adopted the common law (including its forms of proceeding) as their own. By contrast, following the adoption of the Constitution, states no longer had admiralty and maritime courts, and at least one lacked courts of equity. This meant that Congress could not—as it had for actions at law—simply instruct federal courts to borrow state forms of proceeding in equity and admiralty cases.

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

In adjudicating equity cases, "federal courts generally applied a 'uniform body' of principles respecting equitable remedies and procedures pursuant to the Process Acts."[221] In equity, as in law, the available remedy defined the cause of action. For example, in 1832 *Boyle v. Zacharie*, the Supreme Court explained that "[t]he chancery jurisdiction given by the constitution and laws of the United States is

---

[220] Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275, 276.

[221] Collins, *supra* note 15, at 254. There has been some disagreement among scholars about whether federal courts sitting in equity followed state law to determine substantive rights. *Compare* William Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1529-30 n. 72 (1984) (stating that "as a routine matter, federal courts sitting in equity followed state law"), *with* Ann Woolhandler & Michael G. Collins, *The Article III Jury*, 87 VA. L. REV. 587, 619 (2001) (stating that "the substantive law that applied in federal equity proceedings was frequently either federal or general law rather than state law"). *See* Collins, *supra* note 15, at 282-83 (describing disagreement among scholars).

the same in all states of the union," and "the remedies in equity are to be administered, not according to state practice, but according to the practice of courts of equity in the parent country."[222] Similarly, in *Mayer v. Foulkrod*, Justice Bushrod Washington, riding circuit, explained that under the Process Act of 1792, federal courts applied uniform remedies in cases in equity, not state law remedies, as the Process Act directed federal courts to do in cases at law.[223]

Within admiralty and maritime jurisdiction, federal courts also applied a uniform set of "forms and modes of proceeding" pursuant to the Process Act of 1792. In 1825, for example, in *Manro v. Almeida*, the Court considered whether a libellant could bring an *in personam* action for a maritime tort within the admiralty jurisdiction of a federal district court.[224] The Court did not appeal to the ambient unwritten law to decide this question. Rather, the Court examined whether Congress had authorized district courts to hear such *in personam* actions within their admiralty jurisdiction. Under the Process Act of 1789, which directed federal courts to use civil law forms and modes of proceeding in cases within their admiralty jurisdiction,[225] district courts could hear such *in personam* actions. The civil law, as the Court observed, clearly allowed them. In 1825, however, the governing law was the Process Act of 1792, which had superseded the prior Act. "The forms and modes of proceeding in causes of admiralty and maritime jurisdiction," the Court explained, "are prescribed to Courts by the second section of the Process Act of 1792."[226] To decide the case, then, the Court had to construe the 1792 Act. "In giving a construction to the act of 1792, it is unavoidable, that we should consider the admiralty practice there alluded to, as the admiralty practice of our own country, as grafted upon the British practice."[227] The Court concluded from its review of admiralty and maritime practice in the United States and from "respectable authority" of "remote origin" that the *in personam* action was agreeable to the "principles, rules, and usages, which belong to Courts of admiralty" under the Process Act of 1792.[228]

---

[222] 31 U.S. (6 Pet.) 648 (1832).

[223] 16 F. Cas. 1231, 1234-35 (C.C.E.D. Pa. 1823) (No. 9341) (explaining that "as to suits in equity, state laws, in respect to remedies, . . . could have no effect whatever on the jurisdiction of the court, the [Permanent Process Act of 1792] having prescribed a rule, by which the line of partition between the law and the equity jurisdiction of those courts is distinctly marked.").

[224] 23 U.S. (10 Wheat.) 473 (1825).

[225] *Id.* at 491.

[226] *Id.* at 488.

[227] *Id.* at 489-90.

[228] *Id.* at 491.

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

IV. IMPLICATIONS FOR THE ALIEN TORT STATUTE

Although the Process Acts no longer apply in federal court, understanding how they originally operated to specify the causes of action available in federal court has potential implications for the proper interpretation of the ATS. In a recent article, we identified two myths commonly associated with the ATS.[229] In this part, we identify and discuss a third myth—namely, that the First Congress enacted the ATS on the assumption that federal courts would derive the applicable causes of action in ATS cases from the general ambient law of the era.

As explained, the ATS was enacted as part of the Judiciary Act of 1789 and gave federal courts jurisdiction over claims by aliens "for a tort only in violation of the law of nations or a treaty of the United States."[230] Most scholars and judges have simply assumed that at the time Congress conferred this jurisdiction, it would have expected federal courts to find or create causes of action on the basis of ambient law in the exercise of such jurisdiction. This assumption is mistaken. Rather than find or create common law causes of action in exercising ATS jurisdiction, federal courts would have applied state forms of proceeding under the Process Acts. Congress, not courts or ambient general law, provided the cause of action in ATS cases from the start. This history has important implications for how judges should understand the ATS today.

This Part explores some of these implications. First, it explains how federal statutes, not ambient general law, specified what causes of action were available in ATS cases. Second, it Part explains the implications of this lost history for current debates over the ATS. Claims that federal common law supplies the cause of action in ATS cases today are anachronistic and rely on the mistaken assumption that general common law originally supplied the cause

---

[229] *See* Anthony J. Bellia Jr. & Bradford R. Clark, *Two Myths About the Alien Tort Statute*, 89 NOTRE DAME L. REV. 1609 (2014) [hereinafter "*Two Myths*"].

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

of action in ATS cases. On the other hand, claims that the ATS today encompasses causes of action authorized by Congress or state law are consistent with historical understandings and practice. This analysis reveals that the Supreme Court's approach to the ATS has been both too broad (in recognizing any federal common law causes of action) and too narrow (in strictly limiting the causes of action available under the ATS).

A. *The Process Acts and the ATS*

When the First Congress included the ATS in section 9 of the Judiciary Act of 1789, it did not assume—as *Sosa* suggests—that federal courts would exercise an inherent power to find or create causes of action on the basis of general common law. To the contrary, in section 14 of the very the Judiciary Act that included the ATS, Congress explicitly authorized federal courts to issue writs—the traditional means of seeking a judicial remedy—that were "agreeable to the principles and usages of law."[231] As discussed, however, even as Congress enacted the Judiciary Act, its members were working on more specific legislation defining the forms and modes of proceeding that would be available in federal court (including ATS cases).[232] In the Process Act of 1789—enacted five days after the ATS—Congress required federal courts to apply state forms and modes of proceeding in actions at law, and traditional forms and modes of proceeding that belonged to courts of equity and admiralty in cases within those respective jurisdictions.[233]

Thus, under the Process Acts, a plaintiff could bring an action at law within a federal court's ATS jurisdiction whenever the forms and modes of proceeding of the state in which the federal court sat afforded a remedy for the plaintiff's alleged wrong. Although the ATS was rarely invoked by early federal courts, two early libel actions within the courts' admiralty jurisdiction—*Moxon v. The Fanny*[234] and *Bolchos v. Darrel*[235]—mentioned the ATS as a possible alternative ground for jurisdiction. Even in this context, the Process Acts—rather than ambient general law—provided the cause of action. In *Moxon*, British owners of a ship captured by a French

---

[231] Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 82. *See supra* notes - , and accompanying text (discussing section 14).

[232] *See supra* notes - , and accompanying text (explaining that committee was working on this as the First Judiciary Act was being enacted).

[233] *See supra* notes - , and accompanying text (describing Process Acts).

[234] 17 F. Case. 942 (No. 9,895) (D. Pa. 1793).

[235] 3 F. Cas. 810 (No. 1,607) (D. S.C. 1795).

vessel in U.S. waters libeled the ship and sought restoration of it in U.S. district court.[236] In *Bolchos*, a French privateer brought an enemy Spanish vessel that it had captured on the high seas into port in South Carolina.[237] There was no need in either case for the court to address the source of the cause of action explicitly. As discussed in Part II, the Process Act of 1792 instructed federal courts to apply the "forms and modes of proceeding" in admiralty cases "according to the principles, rules and usages which belong to . . . courts of admiralty."[238] Because libel was so well understood to be the appropriate form of proceeding in prize cases, it would have been odd or superfluous for these courts to explain it at the time. The *Moxon* and *Bolchos* courts entertained the libel actions not because the "brooding omnipresence" of general common law required them to do so. (Indeed, *Moxon* and *Bolchos* were not even common law cases; they were cases in admiralty.) Rather, those courts entertained the libel actions because Congress expressly directed them to do so.

As we explained in Part I.A., Congress originally adopted the ATS in order to give federal courts jurisdiction over claims by an alien for *any* intentional tort committed by a U.S. citizen against the alien's person or personal property.[239] The tort itself did not have to be an "international" tort, like piracy or an assault on a foreign ambassador. Rather, under the law of nations at the time, the United States had an obligation to redress any intentional tort committed by one its citizens against the person or personal property of an alien. If it failed to do so, then the United States itself became responsible for the injury and could face justified retaliation by the alien's nation.[240] The ATS was one means by which Congress discharged the United States' obligation to redress injuries committed by U.S. citizens against alien plaintiffs.[241]

In a prototypical ATS case, then, the First Congress would have expected an alien plaintiff to seek redress against an American defendant in federal court for an intentional tort of violence through an ordinary state law writ of trespass. Under the Process Acts, that writ was available to all plaintiffs in federal courts so long as it remained an appropriate form of proceeding under the law of the

---

[236] *Moxon*, 17 F. Cas. at 947.
[237] *Bolchos*, 3 F. Cas. at 810.
[238] Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275, 276.
[239] *See* Bellia & Clark, *Alien Tort Statute and Law of Nations*, *supra* note 26; *see also supra* notes - , and accompanying text.
[240] *See id.* at 466-94.
[241] *See id.* at 507-39.

state in which the federal court sat. In 1789, a writ of trespass was an available form of proceeding in the courts of every state (and thus in every federal court). But that does not mean—as *Sosa* suggested—that the First Congress expected federal courts to find a writ of trespass in the "ambient law of the era."[242] To the contrary, the First Congress specifically instructed federal courts in the Process Act to find the appropriate cause of action in state law.

The *Sosa* Court's (mistaken) belief that the First Congress assumed that federal courts would find causes of action in ambient general law caused the Court to interpret the ATS both too broadly and too narrowly. The Court read the ATS too broadly by suggesting that it permitted federal courts to recognize a cause of action regardless of whether federal or state law authorized it. On the other hand, the Court read the ATS too narrowly by insisting that the First Congress would have understood only a small handful of "international" tort actions to fall within the jurisdiction conferred by the statute.[243] As noted, the *Sosa* Court concluded that ATS jurisdiction originally encompassed only torts corresponding to three criminal offenses against the law of nations that Blackstone highlighted—violations of rights of ambassadors, safe conduct violations, and piracy.[244] There is no sound historical basis for this conclusion. Indeed, this narrow reading of the ATS actually thwarts its original function of providing redress for any intentional tort of violence committed against a friendly alien by an American.[245]

The *Sosa* Court's "ambient law" theory of the cause of action in ATS cases not only ignores the Process Acts, but is anachronistic because it disregards the accepted nature of "procedural" law in 1789. In 1789, local law—not general law—governed the forms and modes of proceeding that were available in a sovereign's courts.[246] The modern claim that courts found or created causes of action as a matter of general common law contradicts this elementary

---

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

[243] *See* Bellia & Clark, *Alien Tort Statute and Law of Nations*, *supra* note 26, at 540-45; Bellia & Clark, *Two Myths*, *supra* note 229, at 1637-40.

[244] *Sosa*, 542 U.S. at 716-17; 4 BLACKSTONE, *supra* note 78, at *64.

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

[246] *See supra* notes - , and accompanying text (describing the difference between general law and local law, and how forms of proceeding were local law.)

distinction between general law and local law well known to lawyers, judges, and Congress at the time. Members of the First Congress debated whether they should adopt one consolidated "local" federal law of procedure and remedies for federal courts, or whether they should instruct federal courts to incorporate "local" state forms and modes of proceeding.[247] The Process Acts were a victory for those who favored the latter option, at least with regard to actions at law. The Process Acts were also at least a partial victory for those wished to constrain federal courts' powers in equity. Although the Process Acts did not tie federal courts down to state equity practices, they did tie such courts down to the traditional forms and modes of proceeding of courts of equity. The idea that federal courts could derive or create causes of action from general common law contradicts this history and ignores both the existence and clear import of the Process Acts.

B. *Implications for ATS Causes of Action Today*

The forgotten role of the Process Acts has several potentially important implications for ATS cases today. Arguments that federal common law supplies the cause of action in ATS cases today find no support in the original understanding of the source of the cause of action in ATS cases. As in all cases within federal court jurisdiction, Congress specified the applicable causes of action in the Process Acts. This is a central point for understanding the early operation of federal courts. Congress *authorized* the causes of action that were available in federal courts. Federal courts did not exercise judicial power to divine or create causes of action as a matter of "general common law" or "ambient law." Accordingly, the actual historical practice of early federal courts under the Process Acts provides no support for the current argument that federal courts have judicial power to create federal common law causes of action in ATS cases. Such arguments must find their justification elsewhere.

On the other hand, those who argue that courts today should interpret the ATS to encompass causes of action created by state law or foreign law may find support for their position in early acts of Congress and federal judicial practice.[248] In 1789, Congress and federal courts understood causes of action to be a matter of

---

[247] *See supra* notes - , and accompanying text.

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

"procedural" or "remedial" law. Accordingly, the law of the forum sovereign governed the causes of action that were available in its courts. Over time, legislatures and courts came to understand causes of action to be a matter of "substance" rather than "procedure." Accordingly, the source of federal law that governed the causes of action available in federal courts—absent congressional creation of a cause of action—has shifted from the Process Acts to section 34 of the First Judiciary Act (today known as the "Rules of Decision Act"):

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.[249]

Under this provision, federal courts often apply state substantive law creating causes of action absent federal law to the contrary. In addition, under the rule of *Klaxon Co. v. Stentor Electric Manufacturing Co.*,[250] federal courts apply state choice of law rules to determine the application of foreign law, including causes of action created by foreign law. Today, then, because legislatures and courts consider causes of action to be substantive rather than procedural, federal courts may apply state causes of action—and, under state choice of law rules, foreign causes of action—under the Rules of Decision Act. Interestingly, although the basis of authority has changed, the result today is largely the same as it would have been in 1789: federal courts would look to state law to determine the availability of a cause of action in ATS cases in the absence of a federal statute (such as the Torture Victim Protection Act of 1991[251]) expressly granting a specific federal cause of action.

All of this suggests that the Supreme Court—if it truly seeks to implement the original understanding of the ATS—should revisit some of the conclusions it reached in *Sosa* and *Kiobel*. First, the Court should abandon the idea that federal common law provides a strictly limited set of causes of action available in ATS cases. There was no such thing as true federal common law in 1789; it is a twentieth century construct.[252] Accordingly, a court seeking to

---

[249] 28 U.S.C. § 1652.

[250] 313 U.S. 487 (1941).

[251] Pub. L. No. 102-256, 106 Stat. 73 (1992).

[252] *See* Bradford R. Clark, *The Procedural Safeguards of Federalism*, 83 NOTRE DAME L. REV. 1681, 1696-97 (2008).

implement the original meaning of the ATS would not exercise a power to create (and limit) the available causes of action as federal common law. Moreover, if the *Sosa* Court had confined the ATS—in accordance with its original meaning—to suits by aliens against U.S. citizens,[253] then it would have had no need to impose strict limits on the kinds of causes of action that federal courts could recognize under the ATS.[254]

This approach would also relieve the Supreme Court—and federal courts in general—of the difficult and controversial task of crafting federal common law causes of action in ATS cases. In the past half century, the Court has come to disfavor the creation of federal common law causes of action. The Court has all but halted the recognition of implied federal causes of action by requiring congressional intent to create them in the underlying statute.[255] In the case of the ATS, the Court has already found to be "implausible" the claim "that the ATS was intended not simply as a jurisdictional grant, but as authority for the creation of a new cause of action for torts in violation of international law."[256] This means that an implied cause of action, strictly speaking, is not available under the ATS.

Creation of a federal common law cause of action outside the context of implied federal rights of action is even more difficult and controversial. The Supreme Court has rarely, if ever, recognized a federal common law cause of action outside of this context.[257] Even recognition of federal common law defenses has been controversial in recent years.[258] The reasons were summarized by Justice

---

[253] *See* Bellia & Clark, *Alien Tort Statute and Law of Nations*, *supra* note 26.

[254] The Court would also have no need to confront the difficult question of subject matter jurisdiction that arises when all parties to an ATS suit are aliens—a question the Court has yet to address or resolve. *See* Bellia & Clark, *Two Myths*, *supra* note 229, at 1640 & n.177.

[255] *See, e.g.*, Alexander v. Sandoval, 532 U.S. 275 (2001).

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

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

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

Brennan, dissenting from the Court's recognition of a federal common law defense for federal military contractors.[259] In his view, the Court has rightly "emphasized that federal common law can displace state law in 'few and restricted' instances"[260] because it is in tension with both federalism and separation of powers. The creation of a new federal contractor defense did not fall within any of these established enclaves, and thus amounted the exercise of legislative rather than judicial power. As he put it, "I would leave that exercise of legislative power to Congress, where our Constitution places it."[261]

Finally, a return to the original meaning of the ATS would have obviated the Supreme Court's need to apply the presumption against extraterritorial application of U.S. law in *Kiobel*. Because the *Sosa* Court suggested that the cause of action in ATS cases was a matter of substantive federal common law, the application of such law to the conduct of aliens in the territory of another country raised the same kinds of foreign policy concerns as the extraterritorial application of federal statutes. Accordingly, the Court felt compelled to extend the presumption beyond substantive federal statutes to federal common law causes of action under the ATS. This novel extension of the presumption would have been entirely unnecessary had the Court recognized that the nature of the cause of action in ATS cases is no different than the nature of the cause of action in diversity cases. In both instances, federal courts should apply the substantive law of the state in which they sit, including choice of law rules. This would allow aliens injured by U.S. citizens to invoke either ATS jurisdiction (with no amount-in-controversy) or foreign diversity jurisdiction (with an amount-in-controversy requirement), as they saw fit. It would also allow aliens to sue Americans for torts occurring in other countries under the well-established common law doctrine of transient torts.

CONCLUSION

In recent debates regarding the meaning of the ATS, courts and scholars have claimed that early federal courts found or created causes of action on the basis of ambient general common law. The Supreme Court endorsed this idea in *Sosa*. Early federal courts, however, did not find causes of action in general common law or

---

[259] *Boyle*, 487 U.S. at 515 (Brennan, J., dissenting).
[260] *Id.* at 518 (quoting *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963)).
[261] *Id.* at 516.

exercise any power to create general common law causes of action. In the Process Acts, early Congresses explicitly directed federal courts to apply state law causes of action in cases at law, and to apply traditional causes of action in equity and admiralty cases. In other words, Congress specified the causes of action that were available in federal courts. Congress did not leave federal courts free to find or create them on their own. This forgotten history has significant implications for our understanding of the ATS.

The Supreme Court has suggested that today federal courts may create a limited number of federal common law causes of action for cases within ATS jurisdiction because early federal courts would have applied causes of action found in ambient general common law. The premise of this claim lacks support in—and is actually contradicted by—the historical record. The same Congress that enacted the ATS required federal courts to apply state causes of action in cases within that jurisdiction. In future cases, the Court should reconsider its assumptions in *Sosa* and—if the Court still seeks to implement the original meaning of the ATS—take seriously claims that state (and perhaps foreign law) continue to supply the relevant causes of action in ATS cases.