An Alien by Any Other Name: Debunking a New Attempt to Re-Write the Original Language of the Alien Tort Statute

by

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Responding to M. Anderson Berry, *Whether Foreigner or Alien: A New Look at the Original Language of the Alien Tort Statute*, 27 BERKELEY J. OF INT'L. L. 316 (2009).*

INTRODUCTION

The Alien Tort Statute ("ATS") grants federal district courts jurisdiction over claims by an "alien" for torts committed in violation of the law of nations.[1] The statute was enacted in 1789 as part of the First Judiciary Act.[2] Since 1980, when the U.S. Court of Appeals for the Second Circuit decided *Filartiga v. Pena-Irala*,[3] the law has been used by victims of egregious human rights abuses to seek redress from the officials who committed or commanded those who committed such abuses.[4] More recently, victims have

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1. 28 U.S.C. §1350 (2006) ("The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.").

2. The law originally stated that federal 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." Judiciary Act of 1789, ch. 20, §9(b), 1 Stat. 73, 76-77 (1789).

3. 630 F.2d 876 (2d Cir. 1980).

4. *E.g.*, *Forti v. Suarez-Mason*, 694 F. Supp. 707 (N.D. Cal. 1988); *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995); *Cabello v. Fernandez-*

filed ATS suits against corporations alleged to be complicit in horrific human rights violations.[5] Many, if not most, ATS cases have been filed by non-resident aliens harmed in their home countries.[6]

In recent years, virtually all aspects of ATS human rights litigation have been controversial among scholars and vigorously contested in the courts. The original meaning of the ATS is one area that has attracted extraordinary academic attention, and in which lively debate has raged. The literature includes a host of articles proposing various and often mutually exclusive theories regarding the ATS's original meaning and the Framers' purposes in enacting it.[7] Some of these theories support the prevailing ATS jurisprudence, while others would undermine it. Defendants have seized upon the revisionist scholarship to make arguments that, if adopted, would limit the scope of the ATS and overturn settled and uniform ATS caselaw.[8]

Larios, 402 F.3d 1148 (11th Cir. 2005); *Doe v. Saravia*, 348 F. Supp. 2d 1112 (E.D. Cal. 2004); *In re Estate of Marcos*, 25 F.3d 1467 (9th Cir. 1994); *Kadic v. Karadzic,* 70 F.3d 232 (2d Cir. N.Y. 1995); *Chavez v. Carranza*, 413 F. Supp. 2d 891 (W.D. Tenn. 2006); *Jean v. Dorelien,* 431 F.3d 776 (11th Cir. 2005).

5. *E.g.*, *Bowoto v. Chevron Corp.*, 557 F. Supp. 2d 1080 (N.D. Cal. 2008); *Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002), *vacated by grant of reh'g en banc*, 395 F.3d 978 (9th Cir. 2003); *Royal Dutch Petroleum v. Wiwa*, 226 F.3d 88 (2d Cir. 2000); *Khulumani v. Barclay Nat'l Bank*, 509 F.3d 148 (2d Cir. 2007); *Presbyterian Church of Sudan v. Talisman Energy*, 582 F.3d 244 (2d Cir. 2009); *Romero v. Drummond*, 552 F.3d 1303 (11th Cir. 2008).

6. This is true of all of the cases cited in the previous footnote. *See also*, *e.g.*, *Hilao v. Estate of Marcos*, 103 F.3d 767, 774, 782-83 (9th Cir. 1996).

7. *E.g.*, Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L. L. 461 (1989); William R. Casto, *The Federal Courts' Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467 (1986); William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists,"* 19 HASTINGS INT'L & COMP. L. REV. 221 (1996); Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 COLUMBIA L. REV. 830 (2006); Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587 (2002); William S. Dodge, *The Constitutionality of the Alien Tort Statute: Some Observations on Text and Context*, 42 VA. J. INT'L L. 687 (2002); William Fletcher, *International Human Rights in American Courts*, 93 VA. L. REV. 653 (2007); Joseph Modeste Sweeney, *A Tort Only in Violation of the Law of Nations*, 18 HASTINGS INT'L & COMP. L. REV. 445 (1995); Kenneth C. Randall, *Federal Jurisdiction over International Law Claims: Inquiries into the Alien Tort Statute*, 18 N.Y.U. INT'L L. & POL. J. 1 (1985).

8. *See, e.g.*, *Kadic v. Karadzic*, 74 F.3d 377, 377-78 (2d Cir. 1996) (rejecting defendant's argument, based on the reasoning of Joseph Modeste Sweeney's *A Tort Only in Violation of the Law of Nations*, 18 HASTINGS INT'L

A recent article by M. Anderson Berry, *Whether Foreigner or Alien: A New Look at the Original Language of the Alien Tort Statute*, is part of this effort. The piece, published in the Berkeley Journal of International Law, seeks to reinterpret the ATS in a manner that would eliminate jurisdiction that has been universally accepted in ATS cases since *Filartiga*.[9] Berry attempts to show that the term "alien" in the ATS, referred, as a matter of original understanding, only to non-citizens who resided within the United States.[10] That contention, if adopted as a current limitation, would drastically circumscribe ATS jurisdiction by precluding all claims by plaintiffs who currently live abroad.

Creating such a limit is the purpose animating Berry's article. Berry is an associate at a large firm that handles various ATS cases for defendant corporations.[11] Recently, he served as co-counsel for the Defendant, Chevron Corporation, in *Bowoto v. Chevron*,[12] an ATS suit arising out of the shooting of protestors at an oil platform offshore Nigeria. There, Chevron Corporation made the same argument Berry presents in *Whether Foreigner or Alien*, albeit in a much abbreviated form.[13] The district court rejected that argument, noting that "[c]ourts have consistently permitted the extraterritorial application of the ATS to non-U.S. nationals . . . ."[14] To date, no

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& COMP. L. REV. 445 (1995), that the ATS was intended only to authorize federal jurisdiction for torts committed in violation of the law of nations by crews of vessels boarding ships believed to be aiding an enemy in wartime, and noting that such a construction would conflict with circuit precedent established in *Filartiga*).

9. M. Anderson Berry, *Whether Foreigner or Alien: A New Look at the Original Language of the Alien Tort Statute*, 27 BERKELEY J. OF INT'L. L. 316 (2009).

10. *Id*.

11. For example, Berry's law firm, Jones Day, represented or filed *amicus curiae* briefs on behalf of corporate defendants in the following cases brought under the ATS: *John Doe I, et al. v. Bridgestone Corporation, et al.*, Case No. 1:06-CV-00627-DFH-JMS (S.D. Ind., March 4, 2009); *Bowoto*, 557 F. Supp. 2d 1080; *Sosa v. Alvarez-Machain,* 542 U.S. 692 (2004); *Abagninin v. AMVAC Chem. Corp.*, 545 F.3d 733 (9th Cir. 2008); *Khulumani*, 509 F.3d 148; *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193 (9th Cir. 2007); *Ntsebeza v. Daimler A.G. (In re South African Apartheid Litig.)*, 624 F. Supp. 2d 336 (S.D.N.Y. 2009).

12. *Bowoto*, 557 F. Supp. 2d 1080; http://www.jonesday.com/aberry/. Nowhere in his article does Berry mention his or his firm's participation in ATS litigation.

13. *Bowoto*, Case 3:99-cv-02506, Docket No. 1695 at 13 (Jan. 16, 2008); *Id*., Docket No. 1723 at 11 (Feb. 15, 2008).

14. *Bowoto*, 557 F. Supp. 2d at 1088.

court has ever imposed the residency limitation on the ATS that Berry suggests.

Indeed, the United States Supreme Court has already foreclosed Berry's argument. Many observers, including Berry, erroneously assume that *Sosa v. Alvarez-Machain*[15] marked the first time that the Court addressed the meaning or scope of the ATS post-*Filartiga*, (apart from a case addressing the relationship between the ATS and the Foreign Sovereign Immunities Act).[16] In fact, the day before it issued *Sosa*, the Supreme Court, in *Rasul v. Bush*, addressed the very question Berry's article raises.[17]

Rasul expressly held that non-resident aliens may bring suit under the ATS. In upholding the availability of an ATS cause of action to non-resident aliens confined in military detention at Guantanamo Bay, the Court concluded:

> [N]othing in . . . any of our [] cases categorically excludes aliens detained in military custody outside the United States from the "'privilege of litigation'" in U.S. courts. 321 F.3d at 1139. The courts of the United States have traditionally been open to nonresident aliens. *Cf. Disconto Gesellschaft v. Umbreit*, 208 U.S. 570, 578 (1908) ("Alien citizens, by the policy and practice of the courts of this country, are ordinarily permitted to resort to the courts for the redress of wrongs and the protection of their rights"). And indeed, 28 U.S.C. § 1350 explicitly confers the privilege of suing for an actionable "tort . . . committed in violation of the law of nations or a treaty of the United States" on aliens alone.[18]

Thus, Berry's position, suggesting the ATS is limited to claims brought by resident aliens, currently lacks even potential utility for ATS defendants. Nonetheless, given the breadth of academic focus on the original meaning of the ATS, the original meaning of the term "alien" in the statute presumably remains of scholarly and

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15. 542 U.S. 692.

16. In *Argentine Republic v. Amerada Hess Shipping*, 488 U.S. 428 (1989), the Supreme Court held that whether a court has jurisdiction over a foreign state must be determined under the Foreign Sovereign Immunities Act, even if such jurisdiction would otherwise be available under the ATS. The Court did not consider the meaning of the ATS except to that limited extent.

17. *Rasul v. Bush*, 542 U.S. 466 (2004).

18. *Id.* at 484.

historical interest. More importantly, should an ATS case brought by a non-resident plaintiff reach the Supreme Court, the defendant might ask the Court to reconsider *Rasul.* We therefore address Berry's argument on its merits, and show that the term "alien" in the ATS was never limited to residents, thus refuting the suggestion that much of contemporary ATS jurisprudence rests on ahistorical foundations.

This piece considers the issue through a historical examination similar to Berry's, but demonstrates that the historical record belies Berry's conclusion. First, we examine the accepted legal definition of the term "alien" at the time of the law's passage and demonstrate that it included non-residents. Second, we show that those who drafted and applied the ATS understood the term to include non-residents in the specific context of the ATS. Third, we demonstrate that the original purposes of the ATS suggest that the Framers would not have sought to exclude non-resident aliens. Finally, we show that the word "alien" as used elsewhere in the First Judiciary Act has always been understood to include non-residents. In short, the Supreme Court's holding in *Rasul* that the ATS extends to non-resident alien plaintiffs fully accords with the text and history of the statute.[19]

THE DEFINITION OF "ALIEN"

At the heart of Berry's argument that the ATS was, as a matter of original intent, limited to resident plaintiffs is the claim that Congress chose the word "alien" over the word "foreigner" for precisely this purpose. According to Berry, the version of the ATS submitted by the Senate to the House of Representatives used the word "forreigner," but the language was subsequently changed to

19. This text and history also refutes any suggestion that the ATS does not apply to conduct that occurred abroad. As noted above, cases brought by non-resident aliens typically involve such conduct. *Supra* notes 5-6. No court has ever held that the ATS lacks extraterritorial application. *E.g. In re Estate of Marcos*, 978 F.2d 493, 500 (9th Cir. 1992) ("we are constrained by what § 1350 shows on its face: no limitations as to . . . the locus of the injury."). Recently, however, one circuit judge suggested that, in his view, the ATS does not apply to torts committed abroad, at least where the tort was not committed by an American. *Sarei v. Rio Tinto, PLC*, at 17567-8 (9th Cir. October 26, 2010) (en banc) (Kleinfeld, J. dissenting). Our showing that the definition of "alien" included non-residents demonstrates that extraterritorial application is fully consistent with the original meaning of the text, and as detailed below, the history and purposes of the statute confirm that the drafters intended the law to apply to extraterritorial conduct. *See* "THE ORIGINAL UNDERSTANDING OF THE ATS" and "THE ORIGINAL PURPOSES OF THE ATS" *infra*.

"alien" to exclude non-residents.[20] Berry concedes, however, that "there is no legislative history regarding this change."[21] Accordingly, his claim as to Congress' *purpose* is unfounded speculation.

As to the law's *meaning*, Berry asserts that "the best place to gain understanding of the plain language [of the statute] is from the relevant and available dictionaries and treatises of the day."[22] His claim, however, that "alien" meant *only* a resident non-citizen in the 18th century simply cannot be reconciled with these historical sources. Critically, it would not be sufficient for Berry to merely show that *some* sources accepted the distinction he posits. If other sources defined "alien" to include non-residents, then the well-established reading of the ATS accords with contemporary usage, notwithstanding any divergence in that usage.

Regardless, as is shown below, the leading dictionaries and legal commentaries of the period make clear that, when the First Judiciary Act was passed, the ordinary understanding of the word "alien" included both residents and non-residents. Berry's article contains a long list of references to uses of the word "alien" at the time of and prior to the enactment of the Judiciary Act of 1789. Unfortunately, those references do not support his conclusion. Berry consistently omits or misinterprets uses of "alien" that conflict with his thesis. Our review of these sources demonstrates that Berry's argument is contrary to the original meaning of the ATS, and that even the sources Berry cites fail to support his narrow reading of the term "alien".

Many of Berry's sources actually refute his position in that they defined "alien" by place of birth, without reference to current residence. For example, Jacob's Law Dictionary defined "alien" as "one born in a foreign country, out of the allegiance of the King" and detailed rules concerning "an alien enemy coming into this kingdom"; the entry for "foreigner" simply says "See title Alien."[23]

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20. Berry, *supra* note 9, at 327-336.

21. *Id*. at 335.

22. *Id*. at 337.

23. 1 A MODERN LAW DICTIONARY CONTAINING THE PRESENT STATE OF THE LAW IN THEORY AND PRACTICE: WITH A DEFINITION OF ITS TERMS; AND THE HISTORY OF ITS RISE AND PROGRESS (T.E. Tomlin ed., 1797) (unpaginated). The specific rule JACOB'S referred to regarding "an alien enemy coming into this kingdom" was that such person shall suffer death under martial law. Berry purports to quote this passage, but inexplicably declines to quote the words "alien enemy," and instead refers to such person as a "foreigner." *See* Berry, *supra* note 9, at 351.

These definitions refute Berry's claims that an alien necessarily resided in the country and that there was a distinction between an "alien" and a "foreigner." The same is true of Blount's *Glossographia*, which defined "alien" as: "[a] foreigner, a stranger born, and not here enfranchised."[24]

Similarly, Tomlin's *Law of Wills* defined an "alien" as "one born out of the King's dominions, and whose father was not a British subject."[25] To Burn & Burn, an "alien" was "one that is born out of the dominions of the crown of England."[26] Likewise,

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Jacob's also described rules that applied to children born abroad where one parent was natural born and the other was an alien. The plain-language understanding of these rules is that they applied no matter where the parents lived, including where both parents were living abroad at the time of the birth. Under Berry's conception, however, these rules would have applied only if the alien parent was living in England, and the mother happened to be abroad at the time of birth. That seems exceedingly unlikely, and would not explain what rules governed in the surely more common situation where both parents lived abroad when their baby was born.

24. THOMAS BLOUNT, GLOSSOGRAPHIA, OR A DICTIONARY INTERPRETING THE HARD WORDS OF WHATSOEVER LANGUAGE NOW IN OUR REFINED ENGLISH TONGUE WITH ETYMOLOGIES, DEFINITIONS, AND HISTORICAL OBSERVATIONS ON THE SAME: ALSO THE TERMS OF DIVINITY, LAW, PHYSICK, MUSICK, MATHEMATICS, WAR HERALDRY, AND OTHER ARTS AND SCIENCES EXPLICATED 18 (5th ed. 1681).

25. THOMAS E. TOMLINS, A FAMILIAR, PLAIN, AND EASY EXPLANATION OF THE LAW OF WILLS: THE LAW OF DESCENT AND DISTRIBUTION, IN CASE NO WILL IS MADE: AND THE OFFICE AND DUTY OF EXECUTORS AND ADMINISTRATORS: WITH FORMS OF WILLS, AND OTHER PRACTICAL INSTRUCTIONS 13 (1785), *cited by* Berry, *supra* note 9, at 357-58. TOMLINS went on to detail rules that applied to an "alien" "while living under the English government" and to an "alien" who is the subject of an enemy king "if he lives here . . . ." Neither clarification would have been necessary if "alien" required residency.

Berry, however, turns the import of these statements on its head, claiming that Tomlins' use of the phrases "while living under the English government" and "under the idea that he has the King's license for staying" qualified Tomlins' definition. Berry, *supra* note 9, at 357. It did not. Tomlins stated that "an *Alien* (that is, one born out of the King's dominions, and whose father was not a British subject) while living under the English Government, may obtain money, goods and personal property. . . ." TOMLINS at 13. The actual definition is in the parenthetical, and the clause "while living" simply referred to the rights an alien had *in those particular circumstances*. Similarly, the "under the idea" clause explicitly referred to the situation where the alien "lives here." The need for these qualifications confirms rather than refutes the fact that "aliens" did not need to be English residents.

26. RICHARD BURN & JOHN BURN, 1 A NEW LAW DICTIONARY: INTENDED FOR GENERAL USE, AS WELL AS FOR GENTLEMEN OF THE PROFESSION 30 (1792) *cited by* Berry, *supra* note 9, at 358-59. This source went on to note that "If an Englishman living beyond sea marries a wife there," the child was an heir "notwithstanding that the wife was an alien." BURN & BURN, at 31. This clearly

Viner, Cunningham, Cowell, Blount's *Nomo-Lexikon* and Giles Jacob's *New Law Dictionary* all defined "alien" as "one born in a strange country."[27]

Chapter 10 of the first book of Blackstone's *Commentaries*, titled "Of the People, whether Alien, Denizen, or Native," begins with a definition of "alien":

> The first and most obvious division of the people is into aliens and natural-born subjects. Natural-born subjects are such as are born within the dominions of the crown of England, that is, within the ligeance, or as it is generally called, the allegiance of the king; and aliens, such as are born out of it.[28]

Thus, from the outset, Blackstone made clear that one's status as an alien was a function of birthplace, rather than a function of both

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referred to a woman living abroad.

27. CHARLES VINER, 2 ABRIDGMENT OF LAW AND EQUITY OF THE LAW OF ENGLAND 262 (2d ed. 1790), *cited by* Berry, *supra* note 9, at 344-47 ("one born in a strange country, under the obedience of a strange prince or country"); TIMOTHY CUNNINGHAM, 1 A NEW AND COMPLETE LAW-DICTIONARY, OR, GENERAL ABRIDGMENT OF THE LAW, *tit. "Alien"* (3d ed. 1783) (unpaginated), *cited by* Berry, *supra* note 9, at 347-50 ("one born out of the ligeance of the King" and "one born in a strange country and never here enfranchised"); JOHN COWELL, THE INTERPRETER OF WORDS AND TERMS, *tit. "Alien"* (1701) (unpaginated), *cited by* Berry, *supra* note 9, at 352 ("one born in a strange country, and never here infranchised"); THOMAS BLOUNT, NOMO-LEXIKON: A LAW DICTIONARY, *tit. "Alien"* (2d ed. 1691) (unpaginated), *cited by* Berry, *supra* note 9, at 362-64 ("one born in a strange country", "a stranger never here enfranchised"); GILES JACOB, A NEW LAW-DICTIONARY: CONTAINING THE INTERPRETATION AND DEFINITION OF WORDS AND TERMS USED IN THE LAW (10th ed. 1782) (unpaginated), *cited by* Berry, *supra* note 9, at 350-52 ("One born in a strange country, out of the allegiance of the king.").

VINER, CUNNINGHAM, COWELL, and JACOB'S NEW LAW DICTIONARY also detailed rules that arose if an alien came into England, thus confirming that current residence was not required. *See* VINER at 262, 265; CUNNINGHAM ("if an alien comes into England, and has issue two sons, those two sons are indigenas") (unpaginated); COWELL ("if one born out of the King's allegiance, come and dwell in *England*, his Children begotten here, are not *Aliens*") (unpaginated) (emphasis in original); JACOB'S (citing rules that applied in certain situations in which "an alien enemy comes here") (unpaginated). Moreover, Viner, like Burn, noted that where "[a]n Englishman passed the sea and married a female alien . . .her issue shall inherit." VINER at 261; *accord* CUNNINGHAM (unpaginated) ("If an English merchant goes beyond the sea, and takes an alien wife, the issue shall inherit him"). Cunningham also noted that "[i]f an alien has issue by an Englishwoman out of the King's ligeance, the issue shall be alien." (unpaginated).

28. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 354, ch. 10 (1765-1769).

birthplace and residence, as Berry claims.[29] In short, the dictionaries and commentaries of the time consistently defined "alien" in terms of place of birth and did not require residency.[30]

Berry also claims Vattel supports his argument that "alien" had a narrower definition than "foreigner",[31] but Vattel equated those terms in the very passage from Section 112 that Berry cites. Noting "with how little justice" certain states claim "the effects left there by a *foreigner* at his death," Vattel observed that this practice was founded on escheatage, "by which foreigners are excluded from all inheritances in the state, either with respect to the goods of a citizen or to those of an *alien*."[32] Moreover, Sections 114 "Immovable Property Possessed by an Alien" and 115 "Marriages of Aliens" also used the terms "foreigner" and "alien"

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29. In the same chapter, Blackstone asserted that "[l]ocal allegiance is such as is due from an alien, or stranger born, for so long time as he continues within the king's dominion and protection; and it ceases, the instant such stranger transfers himself from this kingdom to another." *Id.* at 358. Berry claims that in this passage, "Blackstone stops referring to the 'alien' as such" once he leaves the king's dominion, and instead refers to him as a "stranger" or "foreigner." Berry, *supra* note 9, at 342. But the first clause equated "alien" and "stranger born." Moreover, later in this same paragraph, Blackstone made the same point using only the word "alien": "as the prince affords his protection to an alien, only during his residence in this realm, the allegiance of an alien is confined (in point of time) to the duration of such his residence." BLACKSTONE, *supra* note 28, ch. 10, at 358. This suggests that an "alien" owed no allegiance once he left the realm, even though according to Berry, he would no longer be an alien.

Since, in this chapter, Blackstone was "consider[ing] such persons as fall under the denomination of the people," *id.* at 354, it is conceivable that the chapter only referred to individuals residing within the Kingdom. If that is the case, these passages are simply inapposite; they do not imply than an alien *must be* a resident, but merely suggest that some of the "people" are citizens and others aliens, *i.e.* foreign born.

30. It would have been exceedingly simple to include such a condition if one was required. Indeed, Rastell's *Les Termes de la Ley*, arguably contained such a restriction, defining "alien" as "a *subject* born out of the ligeance of our King." JOHN RASTELL, LES TERMES DE LA LEY, *tit. "Alien"* (1685) (unpaginated), *cited by* Berry, *supra* note 9, at 360-61 (emphasis added). The absence of similar language in other definitions strongly suggests that, if Rastell's definition meant that *only* a subject could be an alien, that definition was an outlier. Moreover, as Berry notes, this source was not mentioned in any of the House or Senate Journals. Berry, *supra* note 9, at 360 n.319. Thus, Rastell's single definition cannot overcome the overwhelming weight of authority contrary to Berry's argument.

31. Berry, *supra* note 9, at 366-67.

32. E. DE VATTEL, THE LAW OF NATIONS; OR PRINCIPLES OF THE LAW OF NATURE: APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS 68, 69 (1787).

interchangeably.[33] Thus, Vattel further undermines Berry's argument that these terms had different meanings according to their common 18th Century usage.

Notwithstanding the fact that contemporary definitions of "alien" did not require residency, Berry makes two primary arguments. First, Berry notes that some of the definitions stated that an alien is not "here enfranchised,"[34] and claims that this implies that an alien needed to be "here," residing within the realm.[35] Nothing in these definitions suggests as much. "[H]ere" referred not to where the alien was residing, but to where he did not have enfranchisement rights.[36] Since the definitions said nothing about residency, their plain meaning is that a foreign born person was an alien, regardless of where he resided, unless he had been enfranchised. If residency were required, these definitions would have needed to say something like: a stranger born, *who currently resides here but* is not here enfranchised.[37]

Second, Berry attempts to divine a residency requirement by referring to the sources' discussion of the rules that apply to

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33. E. DE VATTEL, THE LAW OF NATIONS; OR PRINCIPLES OF THE LAW OF NATURE: APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS 68, 69 (1758); E. DE VATTEL, THE LAW OF NATIONS; OR PRINCIPLES OF THE LAW OF NATURE: APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS 274, 275 (1787); E. DE VATTEL, THE LAW OF NATIONS; OR PRINCIPLES OF THE LAW OF NATURE: APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS 68, 69 (1792).

34. BLOUNT'S GLOSSOGRAPHIA defined "alien" as: "[a] foreigner, a stranger born, and not here enfranchised." *Supra* note 24, at 18. CUNNINGHAM, COWELL and BLOUNT'S NOMO-LEXIKON each stated that an alien is "one born in a strange country" and "never here enfranchised." *Supra* note 27.

35. *See* Berry, *supra* note 9, at 348-49, 353, 363-64.

36. CUNNINGHAM and COWELL each defined "enfranchise" as "to make free, to incorporate a man into a society or body-politick." TIMOTHY CUNNINGHAM, 1 A NEW AND COMPLETE LAW-DICTIONARY, OR, GENERAL ABRIDGMENT OF THE LAW, *tit. "Enfranchise"* (1764) (unpaginated); COWELL, *supra* note 27, *tit. "Enfranchise"* (1701) (unpaginated). "[A]n alien that is enfranchised by the King's Charter and enabled in all respects almost to do as the King's native subjects do" is a "denizen." COWELL, *tit. "Denizen."*

37. It is possible that only a resident could be enfranchised, but that would simply mean a person was an alien until he *both* lived in the realm and was enfranchised. This definition, however, would not remotely suggest that a person who did not live in the realm could not be an alien. *See* 1 BOUVIER'S LAW DICTIONARY 70, 420 (1839) (defining "alien" as "one born out of the jurisdiction of the United States, who has not since been naturalized" and "foreigners" as "[a]liens, persons born in another country than the United States, who have not been naturalized").

aliens.[38] But these discussions in fact show that "alien" was understood to include foreigners living abroad.[39] Moreover, it does not follow that because a source described certain laws that applied to aliens residing within the realm, *all* aliens must have resided within the realm.[40] Most laws that address persons of foreign birth would have no reason to concern foreigners living abroad,[41] (though this is not the case with the ATS itself).[42] More generally, Berry misapprehends the nature of a dictionary; law dictionaries *define* words, they do not leave relevant aspects of the definition for the reader to deduce by implication. If being an alien required residency, the definitions would have included this requirement.

THE ORIGINAL UNDERSTANDING OF THE ATS

Berry's restrictive interpretation cannot be reconciled with the fact that it was understood from the time Congress passed the ATS that the statute recognized claims by non-residents arising abroad. For example, in 1795, United States Attorney General Bradford issued an opinion concerning a breach of neutrality by American citizens who abetted the French in attacking a British colony in Sierra Leone, while the United States was at peace with Britain.[43] Bradford concluded that "there can be no doubt that the company or individuals who have been injured by these acts of hostility have a remedy by a *civil* suit" under the ATS.[44] The Bradford opinion

38. *See* Berry, *supra* note 9, at 344-64.

39. *Supra* notes 23, 25-27.

40. Berry, for example, concludes that because VINER'S ABRIDGEMENT noted that aliens lose their lease rights when they leave the realm, they must reside in the realm. Berry, *supra* note 9, at 346, citing VINER'S ABRIDGEMENT at 257.

41. *But see Monty Python's Flying Circus*, Series 2, Episode 2, British Broadcasting Corp. (1970) (Man In Bowler Hat: "To boost the British economy I'd tax all foreigners living abroad.")

42. *See* "THE ORIGINAL UNDERSTANDING OF THE ATS" and "THE ORIGINAL PURPOSES OF THE ATS" *infra*.

43. Breach of Neutrality, 1 Op. Att'y Gen. 57 (1795); *see also* Casto, *supra* note 7, at 502-03 (attackers plundered the colony for two weeks).

44. 1 Op. Att'y Gen. at 59 (emphasis in original). The hostile acts occurred at least in part, if not wholly on land, *id.* at 58, and while Bradford believed that only acts at sea could be criminally prosecuted in the United States, he was clear that the ATS provided a civil remedy for all of the acts of hostility in question. *Id.* at 58-59. Indeed, *Sosa* expressly recognized that Bradford's opinion "made it clear that a federal court was open for the prosecution of a tort action growing out of the episode" and that Bradford's misgivings related only to the possibility

was relied upon by the Supreme Court in *Sosa*.[45] Berry does not cite the Attorney General's opinion, which was written just six years after the enactment of the ATS.

An early district court decision applying the ATS further suggests that the law was not understood to require a plaintiff to reside in the United States. In *Bolchos v. Darrel*, which was decided only a few years after the ATS was passed, the court upheld jurisdiction to hear a complaint by a French sea captain who filed suit for restitution of slaves that he seized when he captured a Spanish ship outside the United States, during a war between Spain and France.[46] The court found that it had admiralty jurisdiction to hear the case, but concluded that even if it did not, it would have had jurisdiction under the ATS.[47] The court recognized that the French privateer would have been able to bring suit for a violation of the law of nations, without reference to whether or not he resided in the United States. In *Sosa*, the Supreme Court upheld the interpretation of the ATS by the court in *Bolchos*.[48]

Moreover, as *Sosa* recognized, Congress contemplated suits for

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of extending U.S. *criminal* jurisdiction. *See Sosa*, 542 U.S. at 721; 1 Op. Att'y Gen. at 59.

45. *See Sosa*, 542 U.S. at 721.

46. *Bolchos v. Darrel*, 3 F. Cas. 810 (D.S. Car. 1795). Berry does not cite *Bolchos*.

47. *Id*. at 810 ("Besides [admiralty jurisdiction], as the 9th section of the judiciary act of congress gives this court concurrent jurisdiction with the state courts and circuit court of the United States where an alien sues for a tort, in violation of the law of nations, or a treaty of the United States, I dismiss all doubt [of jurisdiction] upon this point."). Section Nine of the Judiciary Act is, of course, what has now become known as the ATS. *See* 28 U.S.C. §1350; The Judiciary Act of 1789, § 9.

48. *Sosa*, 542 U.S. at 721 ("In *Bolchos v. Darrel*, 3 F. Cas. 810 (No. 1,607) (D.S.Car. 1795), the District Court's doubt about admiralty jurisdiction over a suit for damages brought by a French privateer against the mortgagee of a British slave ship was assuaged by assuming that the ATS was a jurisdictional basis for the court's action.")

Berry claims that another early case, *Moxon v. The Fanny*, provides evidence that the ATS does not address "the plights of parties who may never come anywhere near the United States." Berry, *supra* note 9, at 325-26 n.58, *citing Moxon v. The Fanny*, 17 F. Cas. 942 (D.Pa. 1793). There, the owners of a British ship, who were presumably aliens residing abroad, brought claims for its seizure in United States waters by a French privateer, who brought the ship to Philadelphia. *Moxon*, 17 F. Cas. at 942. Contrary to Berry's claim, the residency of the plaintiff was not a ground for dismissal. The court held that the ATS did not provide jurisdiction because the suit sought a return of property and thus was not "for a tort only." *Id.*, 17 F. Cas. at 947-48.

at least three types of violations when it passed the ATS: offenses against ambassadors, violations of safe conducts, and actions arising out of prize captures and piracy.[49] Berry's limited reading of the word "alien" does not make sense with respect to any of these categories of offenses.

First, "[u]ppermost in the legislative mind appears to have been offenses against ambassadors."[50] In the so-called "Marbois incident" of 1784, a Frenchman assaulted a French diplomat in Philadelphia; another similar incident occurred during the Convention itself.[51] In both instances, the Continental Congress was essentially powerless to act despite the potential impact on foreign relations, and the framers of both the Constitution and the First Judiciary Act sought to remedy the national government's impotence by vesting federal courts with jurisdiction over such claims.[52] Congress would not have drawn a distinction between a foreign diplomat here on a short visit from one who was a resident.[53] That is, Congress would not have thought to preclude a diplomat who suffered an assault in breach of diplomatic inviolability while visiting the United States from suing in federal court, and instead to require that diplomat to rely on a state court action.[54]

Second, Congress "probably understood" violations of safe conducts to be actionable.[55] One protected by a safe conduct need not be a "resident" but could be a transient or need not enter the country at all.[56] If, as Berry claims, only resident aliens could bring

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49. *Sosa*, 542 U.S. at 720, *citing* An Act for the Punishment of Certain Crimes Against the United States, 1 Stat. 113-114, 118 (1790).

50. *Id.*

51. *Id.* at 716-717.

52. *Id.*

53. In fact, Berry suggests that *all* ambassadors would be considered foreigners and "would not be considered 'alien'". Berry, *supra* note 9, at 368. Thus, under Berry's conception, *no* ambassador could ever bring an ATS claim.

54. Indeed, if a United States citizen harmed a foreign diplomat abroad, state courts would presumably have heard any resulting tort action under the transitory tort doctrine. *See* discussion of transitory tort doctrine *infra*. Again, the Framers would not have wished to preclude this type of claim from federal court.

55. *Sosa*, 542 U.S. at 720, *citing* An Act for the Punishment of Certain Crimes against the United States, 1 Stat. 118, (1790).

56. Lee, *supra* note 7, at 872-73, *citing* 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 68–69 (1769) and EMMERICH DE VATTEL, THE LAW OF NATIONS OR PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS

suit, most forms of safe conduct violations would not have been cognizable under the ATS.

Last, piracy and prize claims are among the paradigmatic ATS claims that would have been recognized at the time of the law's passage.[57] Because these claims often arose on the high seas, and were typically committed against non-residents engaged in maritime commerce, it is exceptionally unlikely that the law would have been understood to apply only where the victim happened to be living in the United States. More likely, the law would have been understood to open the federal courts to any alien victim of piracy, if the *pirate* could be found within the United States.

Indeed, Berry ignores the fact that then, as now, civil tort actions were considered transitory. The tortfeasor owed an obligation to the victim that could be enforced wherever the tortfeasor was found, even if the tort was committed in another country.[58] Thus, *Filártiga* expressly rejected the argument that the

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(Northampton, Massachusetts, Simeon Butler 4th Am. ed. 1820) bk. 3, ch. XVII, § 268, at 479–80 (1758) (violations of safe conducts could occur abroad); *id.* at 874 (an express safe-conduct entitled the bearer to safe passage to, within, and out of a foreign land pursuant to an agreement between his sovereign and the host sovereign); *id.*, *quoting* Definitive Treaty of Peace, U.S.-Gr. Brit., art. V, Sept. 3, 1783, 8 Stat. 80 (1783 Treaty of Paris with Great Britain, which ended the Revolutionary War, created specific implied safe conduct for "persons of any . . . description" by granting right to go to the United States, and remain twelve months, "unmolested in their endeavors to obtain the restitution" confiscated property); *id.* at 875-79 (describing U.S. treaties that granted a variety of specific implied safe conducts without requiring residency); *id.* at 831, 837, 872, 874-75, 879 (English law dating back to Magna Carta extended general implied safe conduct to all merchants going out of, coming into, and staying and going through England; such safe conduct would have applied in the United States during times of peace between the United States and Great Britain and similar safe conduct would have applied to Spanish merchants).

57. *Sosa*, 542 U.S. at 721.

58. *See Mostyn v. Fabrigas*, 1 Cowp. 161 (K.B. 1774), *cited in McKenna v. Fisk*, 42 U.S. 241, 248–49 (1843) (collecting cases); *Taxier v. Sweet,* 2 U.S. 81, 84, 85 (S. Ct. Pa. 1766) (affirming jurisdiction over case regarding seizure of ship on the high seas, where plaintiff argued transitory actions are triable anywhere); *see also Watts v. Thomas*, 5 Ky. (2 Bibb) 458 (1811); *Burnham v. Superior Court*, 495 U.S. 604, 610-11 (1990) (plurality) *citing Mostyn* and *Cartwright v. Pettus*, 22 Eng. Rep. 916 (Ch. 1675) (English common-law practice sometimes allowed 'transitory' actions, arising out of events outside the country); The Federalist No. 82 (Alexander Hamilton) ("The judiciary power of every government looks beyond its own local or municipal laws, and in civil cases lays hold of all subjects of litigation between parties within its jurisdiction, though the causes of dispute are relative to the laws of the most distant part of the globe."). Indeed, Oliver Ellsworth, the author of the ATS, previously applied the transitory tort doctrine in 1786, as a state court judge. *See Stoddard v. Bird*,

ATS does not apply to claims arising abroad, finding that, from the nation's inception to today, common-law courts have regularly adjudicated transitory tort claims arising outside of their jurisdictions.[59]

Sosa confirmed that the ATS "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."[60] At that time, no clear distinction was drawn between the law of nations and the common law. Indeed, the law of nations was considered to be part of the common law.[61] Courts routinely applied the law of nations in civil cases, as a matter of general common law,[62] and issued civil remedies to enforce that law.[63] Thus, the Framers understood that a tort in violation of the law of nations would be "cognizable at common law just as any other tort would be."[64] They would have had no reason not to apply the transitory tort doctrine in ATS cases.[65]

THE ORIGINAL PURPOSES OF THE ATS

Berry wonders why the First Congress would extend the right to sue to individuals with no connection to the United States.[66] In fact, the reasons are clear, and limiting the ATS to claims by U.S. residents manifestly conflicts with the statute's original purposes.

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1 Kirby 65, 68 (Conn. 1786); *see also* Berry, *supra* note 9, at 327-336 (asserting that Ellsworth wrote the first draft using the word "forreigner" and was on the committee that approved revisions to the Judiciary Act, including the revision from "forreigner" to "alien").

59. *See Filartiga*, 630 F.2d at 885 (collecting authorities).

60. *Sosa*, 542 U.S. at 724. *Sosa* also expressly endorsed *Filártiga*. *Id.* at 724-25.

61. Bradley, *supra* note 7, at 595.

62. *See* Brief of Professors of Federal Jurisdiction and Legal History as Amici Curiae in Support of Respondents in *Sosa v. Alvarez-Machain* ["Legal Historians' Brief"], 2003 U.S. Briefs 339, *reprinted in* 28 HASTINGS INT'L & COMP. L. REV. 99, 108–109 (2004).

63. Bradley, *supra* note 7, at 595.

64. Dodge, *Historical Origins*, *supra* note 7, at 234.

65. Under Berry's conception, the transitory tort doctrine would be limited under the ATS to those rare cases where a plaintiff is a resident but the tort occurred overseas, even though it would not have been so limited under the common law.

66. Berry, *supra* note 9, at 380.

As the Supreme Court recognized in *Sosa*, Congress's decision to afford aliens ATS jurisdiction was animated by concern that the United States was failing to provide a uniform forum for redress of crimes against ambassadors and the international law of neutrality, and was a facet of the United States' efforts to prove its credibility as a new nation.[67] The *Sosa* Court, in contemplating the purpose of the ATS, noted the unease at the time of the Founding regarding the Continental Congress's general incapacity to punish violations of the law of nations, and that this was "intensified" by the assaults against two foreign diplomats.[68]

The ATS was designed to respond to "[t]he Framers' overarching concern that control over international affairs be vested in the new national government to safeguard the standing of the United States among the nations of the world."[69] The Framers were partially motivated by a fear that state courts, which already had jurisdiction over such suits, could not be trusted to give aliens a fair hearing and might come to divergent conclusions about the content of the law of nations.[70] Accordingly, the First Congress wanted to open the federal courts to foreigners' tort claims that, when unaddressed or mishandled in state court, might give rise to international diplomatic friction.[71] Given these aims, the First Congress would have been unlikely to limit ATS jurisdiction to

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67. *Sosa*, 542 U.S. at 715–19; *see also* Dodge, *Historical Origins*, *supra* note 7, at 229–30.

68. *Sosa*, 542 U.S. at 716–17; *accord Filartiga*, 630 F.2d at 886 (noting that Continental Congress' inability to punish violations of the laws of nations was "one of the principal defects of the Confederation that our Constitution was intended to remedy").

69. *Filartiga*, 630 F.2d at 885.

70. *See, e.g.*, Dodge, *Historical Origins*, *supra* note 7, at 235–36; *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 784 (D.C. Cir. 1984) (Edwards, J., concurring) (citing Federalist 80). In Federalist 80, for example, Alexander Hamilton expressed concerns over having cases involving "citizens of other countries" heard in state courts. The Federalist No. 80 (Alexander Hamilton). He argued that a federal forum was necessary because "[t]he Union will undoubtedly be answerable to foreign powers" if foreign citizens were to suffer "denial or perversion of justice by the sentences of courts." *Id*. Since "the peace of the WHOLE ought not to be left at the disposal of a PART" and "the responsibility for an injury ought ever to be accompanied with the faculty of preventing it," Hamilton advocated that "the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned." *Id*.

71. *See Tel-Oren*, 726 F.2d at 782 (Edwards, J., concurring); Randall, *supra* note 7, at 21.

resident aliens when state courts were not so limited.[72]

Indeed, the Framers' concerns regarding the inadequacy of the Continental Congress extended to its inability to provide for certain types of claims by non-residents; precisely the kinds of claims that Berry's reading would exclude. In a November 1781 resolution, the Continental Congress urged the states (it had no power to command them) to allow suits for violations of the law of nations.[73] *Sosa* specifically referenced this resolution as an

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72. Berry asserts that "[t]he importance of *The Federalist Papers* to the drafters of the Judiciary Act of 1789 is undisputed." Berry, *supra* note 9, at 368. Yet, his thesis is at odds with Federalist 80, which explicitly reflects the concerns underlying the ATS. After asserting, in Federalist 80, that federal courts ought to have jurisdiction over *all* cases involving "citizens of other countries," Hamilton further noted that "[a] distinction may perhaps be imagined between cases arising upon treaties and the laws of nations and those which may stand merely on the footing of the municipal law. The former kind may be supposed proper for the federal jurisdiction, the latter for that of the States." The Federalist No. 80 (Alexander Hamilton). Hamilton objected to the distinction, arguing that an unjust decision against a foreign citizen would be problematic regardless of whether the case arose under municipal law, and that most such cases "involve national questions." *Id*. Critically, however, Hamilton saw "cases arising upon treaties and the laws of nations" to be at the core of those for which federal jurisdiction was required, and indeed assumed this to be non-controversial. *Id.* Nowhere, does he suggest that such jurisdiction should be limited to residents.

The First Judiciary Act did not provide the full scope of jurisdiction Hamilton advocated. *Tel-Oren*, 726 F.2d at 784 (Edwards, J., concurring). For example, alienage jurisdiction was limited by a $500 amount-in-controversy requirement, *id.*; indeed, this requirement would have precluded most tort cases at the time. Casto, *supra* note 7, at 497, 497 n.168. Moreover, Article III itself did not grant alienage jurisdiction to suits between aliens, *Mossman v. Higginson*, 4 U.S. 12, 14 (1800), which would have precluded suit arising out of the Marbois affair. Dodge, *Historical Origins*, *supra* note 7 at 236, n.106. Hamilton's apparently non-controversial concern that cases involving the law of nations be heard in federal court likely animated the framing of the ATS. *See Tel-Oren*, 726 F.2d at 784 (Edwards, J., concurring). Yet, under Berry's conception, the ATS only partially addressed that concern. Indeed, Berry asserts that *most* of the cases Hamilton was worried about would not involve "aliens" as Berry defines it, but instead would involve either non-resident foreigners, sovereigns or ambassadors (whom he claims would not be considered "aliens"). Berry, *supra* note 9, at 368. Thus, Berry is making the strange claim that although Hamilton suggested that a consensus existed that federal courts should have jurisdiction over *all* cases involving treaties and the laws of nations, including those involving non-residents, the framers of the ATS nonetheless excluded most potential plaintiffs, thereby creating a law with very little utility in addressing the problem at hand.

73. *See* 21 J. OF THE CONT'L CONG., 1774—1789, 1136–37 (Worthington C. Ford et al. eds., 34 vols. Washington, D.C.: Government Printing Office, 1904—37).

example both of the Continental Congress's lack of power with respect to claims arising from the law of nations, and of its effort to do what it could to signal its commitment to enforce the law of nations despite that lack of power.[74] In particular, the 1781 resolution "show[s] that a private remedy was thought necessary for diplomatic offenses under the law of nations."[75] Critically, the resolution contemplated that claims would arise from acts against aliens abroad, since it advocated suits for "acts of hostility against such as are in amity, league or truce with the United States, *or who are within the same*, under a general implied safe conduct."[76] The disjunctive language makes clear that "acts of hostility" could occur outside the United States, and this is exactly the kind of claim that later came to be the subject of the Bradford opinion.[77]

As the *Sosa* Court noted, concern over the inadequate vindication of the law of nations persisted through the Constitutional Convention and animated the passage of the ATS.[78] Berry's argument, however, requires one to accept the unlikely conclusion that although the Framers were troubled by the Continental Congress's inability to make the 1781 Resolution binding law, they adopted a far narrower conception of actionable claims in passing its progeny, the ATS.

More generally, the Framers sought to discharge the new nation's legal and moral "duty to propagate and enforce those international law rules that directly regulated individual conduct."[79] The United States owed this duty to the community of nations, not merely to a particular nation whose citizen sought to file a claim.[80] Part of this duty was to ensure that "[i]ndividuals who flouted international law would find no quarter in the United States."[81] This is consistent with the Framers' understanding of the transitory nature of torts, and antithetical to Berry's thesis.

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74. *Sosa*, 542 U.S. at 716.

75. *Id*. at 724.

76. 21 J. OF THE CONT'L CONG. at 1136–37 (emphasis added).

77. Breach of Neutrality, 1 Op. Att'y Gen. 57 (1795). Moreover, as noted in footnote 56, *supra*, an alien need not be a resident to be protected by a general implied safe conduct. The resolution also asked states to permit suits for treaty violations, and law of nations violations "not contained in the foregoing enumeration." 21 J. OF THE CONT'L CONG. at 1136–37.

78. *Sosa*, 542 U.S. at 716-18.

79. Burley, *supra* note 7, at 475.

80. *Id.* at 484–88, 493.

81. *Id.* at 487.

The use of the ATS by non-resident aliens accords with the Framers' interests in providing redress in federal court for transitory torts involving the law of nations and in upholding international law. Those concerns would be subverted if the ATS allowed those who violated international law abroad or against non-residents to find immunity in the United States or if the statute left victims with resort only to state courts. Berry's position, however, would disadvantage aliens' claims arising under the law of nations vis-à-vis their state law claims—thus "treat[ing] torts in violation of the law of nations less favorably than other torts,"[82]—and frustrating the aims of the First Congress.

ALIENAGE JURISDICTION

To understand the original meaning of the word "alien" within the ATS, it is helpful to consider early uses of the word in similar contexts. An explicit definition of the term "alien" is missing from early Supreme Court cases. The application of various statutes and the use of the word "alien" in court decisions, however, shows that residency was not a prerequisite to a party being considered an "alien", and that non-citizens residing outside the United States have always been considered "aliens" by U.S. courts.

The word "alien" in the Judiciary Act of 1789 was found not only in the ATS in Section 9, but also in Sections 11, 12 and 13.[83] Most notably, Section 11 granted jurisdiction in cases where one party was an "alien."[84] Thus, if Berry were correct that the word "alien" excluded non-residents, then Section 11 would not authorize federal courts to hear claims between a citizen and a non-resident alien.

Berry speculates, without citing any legislative history, and without examining how courts subsequently applied Section 11, that the authors of this provision intended precisely this limitation, and sought to allow only suits involving resident foreigners.[85] Berry, however, concedes that under his interpretation, Section 11 did not create jurisdiction over suits involving non-resident aliens

82. Legal Historians' Brief, *supra* note 62, at 110.

83. The Judiciary Act of 1789, §§ 11, 12, 13.

84. The Judiciary Act of 1789, § 11 (granting federal courts jurisdiction over civil claims where the amount in controversy was at least five hundred dollars and "the United States are plaintiffs, or petitioners; or an *alien is a party*, or the suit is between a citizen of the State where the suit is brought, and a citizen of another State") (emphasis added).

85. Berry, *supra* note 9, at 377-78.

even though Article III permits such jurisdiction.[86] Berry errs in suggesting that Section 11 created less jurisdiction than Article III allows. After reviewing the origins of alienage jurisdiction, the Supreme Court held the opposite: "the First Congress granted federal courts the alienage jurisdiction authorized in the Constitution."[87] Thus, Section 11 *did* create the judicial power to hear claims involving non-residents that Article III allows. In so doing, it simply used the term "alien" synonymously with Article III's use of the term "foreign citizen."

Indeed, the Supreme Court recognized Section 11 jurisdiction in cases where the "alien" party did not reside within the United States. For example, in *Gracie v. Palmer*,[88] the defendant sought dismissal, asserting that the plaintiff could not meet the separate venue requirement of Section 11 because he did not aver that the defendant was an inhabitant of, or was found within, the district in which the suit had been filed.[89] The Court rejected that argument,

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86. *Id*. at 378; U.S. Const. art. III, §2, cl.1 (allowing jurisdiction over cases "between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.").

87. *J.P. Morgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd.,* 536 U.S. 88, 95 (2002) ("[S]tate courts were notoriously frosty to British creditors trying to collect debts from American citizens" in violation of the 1783 Treaty of Paris, and "the proponents of the Constitution . . . made it quite clear that the elimination or amelioration of difficulties with credit was the principal reason for having the alienage and diversity jurisdictions, and that it was one of the most important reasons for a federal judiciary.") (quoting Wythe Holt, *"To Establish Justice": Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L.J. 1421, 1473 (1990)). Many of these creditors, of course, were in Britain. *See* Holt, at 1432-33, 1436, 1439, 1449. Moreover, part of what motivated the Framers of Article III and the drafters of the First Judiciary Act to offer a federal forum to foreigners was to increase investment *from* Britain and other countries into the United States. *See J.P. Morgan Chase Bank*, 536 U.S. at 95; Kevin R. Johnson, *Why Alienage Jurisdiction? Historical Foundations and Modern Justifications For Federal Jurisdiction Over Disputes Involving Noncitizens,* 21 YALE J. INT'L. L. 1, 20 (1996). Given the critical importance of protecting foreign creditors in the framing of the Constitution, and the fact that many of the Framers were also members of the First Congress, it is hardly surprising that the drafters of the First Judiciary Act were motivated to ensure that foreign citizens, particularly creditors and investors, had access to federal courts. *Id.* at 18; *see also* Holt, at 1458. The drafters of the Act would not have sought to bar non-resident aliens from alienage jurisdiction.

88. *Gracie v. Palmer*, 21 U.S. 699 (U.S. 1823).

89. *Id.* The venue requirement of Section 11 states: "no civil suit shall be brought before [a circuit or district court] against an inhabitant of the United States, by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ." The

finding this defense was a privilege of the defendant.[90] Thus, "it was sufficient [under Section 11] if the Court appeared to have jurisdiction by the citizenship or alienage of the parties."[91] The Court upheld federal jurisdiction even though the plaintiff, Palmer, was a *non-resident* alien.[92] Likewise, in *Jones v. McMasters*,[93] the Court upheld Section 11 alienage jurisdiction based on the finding that the plaintiff, who lived in Mexico, was an alien.[94]

While Berry posits that the definition of "alien" was *limited* to residents, in fact, if any ambiguity existed at all, it related to whether "alien" *excluded* residents. In 1833, in *Breedlove v. Nicolet*,[95] the Supreme Court held that a resident was an alien for purposes of alienage jurisdiction, noting: "[i]f originally aliens, they did not cease to be so, or lose their right to sue in the federal court, by a residence in Louisiana. Neither the constitution nor acts of [C]ongress require that aliens should reside abroad to entitle them to sue in the courts of the United States."[96] Clearly, the Court understood that non-resident foreign citizens were "aliens."

The Supreme Court's decision in *Mossman v. Higginson* is also instructive.[97] There, the Court held that while Section 11 permits jurisdiction where "an alien is a party," it must be applied in a manner consistent with Article III alienage jurisdiction. Article III requires that the suit involve a foreigner and a citizen, and therefore does not confer jurisdiction over suits between aliens.[98] In so doing, the Court appears to have used the words "alien" and

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Judiciary Act of 1789, § 11.

90. *Id.*

91. *Id.*

92. *Id.* The plaintiffs Palmer and others were described to be aliens because they were subjects of Great Britain. *See id.* Although Justice Marshall did not discuss the residency of the plaintiffs, a prior opinion suggested that Palmer was a merchant in Calcutta. *Gracie v. Palmer,* 21 U.S. 605, 630 (1823); *see also* Index to the Colonial Secretary's Papers, 1788-1825, *available at* http://colsec.records.nsw.gov.au/indexes/colsec/p/F43c_pa-04.htm#TopOfPage; Bell's Weekly Messenger, No.1779, Sunday, May 2, 1830, *available at* http://www.londonancestor.com/bells/b1779-palmer.htm.

93. *Jones v. McMasters*, 61 U.S. 8, 20 (U.S. 1858).

94. *Id.* at 20.

95. 32 U.S. 413 (1833).

96. *Id.*, at 431-32.

97. 4 U.S. 12 (1800).

98. *Id*., at 14.

"foreigner[]" interchangeably.[99] Moreover, the Court held that it lacked jurisdiction because the suit did not identify the defendants as citizens of the United States.[100] The case, however, identified the plaintiff as a "British merchant" and noted that his suit described himself as a "subject of Great Britain".[101] There is no indication he was a resident of the United States.[102] If Section 11 required residency in order to qualify a party as an alien, it appears that the plaintiff did not adequately allege it, and the Court would have had no reason to consider whether Section 11 was unconstitutional if applied to a suit between two non-citizens.[103]

The meaning of "alien" was further clarified in a later Supreme Court case, *In re Hohorst*.[104] There, in interpreting a subsequent version of Section 11, the Court considered the original Section 11 of the First Judiciary Act. The Court concluded that since the venue provision of Section 11 of the 1789 law "was [limited] by

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98. *Id.* at 14 ("[B]ut as the legislative power of conferring jurisdiction on the federal Courts, is, in this respect, confined to suits *between citizens and foreigners*, we must so expound the terms of the law, as to meet the case, 'where, indeed, an alien is one party,' but a citizen is the other.") Article III uses the term "foreign . . . Citizens or Subjects," which *Mossman* referred to as "foreigners." *Id.*

99. *Id.* at 12, 14.

101. *Id.* at 12.

102. *Id.*

103. The Court issued this opinion during Ellsworth's tenure as Chief Justice. This raises questions about Berry's assertion that Ellsworth, one of the primary drafters of the Judiciary Act of 1789 and the ATS, deliberately approved the word "alien" to limit the ATS's application to resident non-citizens. Berry, *supra* note 9, at 327-336. Berry also argues that since *Mossman* requires at least one party to be a U.S. citizen, ATS jurisdiction is impermissible where both parties are foreigners. *Id.* at 325-326. *Mossman*, however, referred only to cases brought within Section 11 of the Judiciary Act, which contained the clause granting federal alienage jurisdiction. *See Mossman,* 4 U.S. at 14 ("[T]he legislative power of conferring jurisdiction on the federal Courts, is, *in this respect*, confined to suits between citizens and foreigners . . . . Neither the Constitution nor the act of Congress regards on this point the subject of the suit, but the parties.") (emphasis added). The case has nothing to do with Article III federal question jurisdiction. *Sosa* held that at least certain norms of customary international law are federal common law, 542 U.S. at 714, 725, 729-30, thereby creating federal question jurisdiction. Fletcher, *supra* note 7, at 664-65 (*Sosa* "necessarily implies that the federal common law of customary international law is jurisdiction conferring."); *see also* Dodge, *Constitutionality of the Alien Tort Statute*, *supra* note 7, at 701-711 (stating that the law of nations was considered jurisdiction conferring under Article III at the time of drafting the ATS).

104. 150 U.S. 653, 654 (U.S. 1893).

express words to inhabitants of the United States, [] it is therefore inapplicable to an alien or to a foreign corporation."[105] The finding that "inhabitants" were not "aliens" under the First Judiciary Act directly contradicts Berry's claim that an "alien" by definition could *only* be an inhabitant of the United States.

In addition to the alienage cases cited above, there were several other early Supreme Court and circuit cases involving "aliens" where the person in question was not residing in the United States. These cases further suggest that, at the time Congress enacted the Judiciary Act of 1789, the meaning of "alien" did not require residency.[106] Also of note is an opinion by then-Justice Ellsworth. In *Hamilton v. Eaton*, Ellsworth, sitting as Circuit Justice, stated that although "[d]ebts contracted to an *alien* are not extinguished by the intervention of a war with his nation," "[h]is remedy is suspended while the war lasts, because it would be dangerous to *admit* him into the country."[107] Thus, Ellsworth understood, at least in 1796, that "alien" included persons located outside the United States. There is no evidence that his 1796 understanding was idiosyncratic, or that the common usage of the term "alien" changed sometime shortly after 1789.[108]

THE 1875 REVISION TO FEDERAL ALIENAGE JURISDICTION

In the Act of March 3, 1875, the provision of the Judiciary Act granting federal alienage jurisdiction was amended, and the clause granting jurisdiction where "an alien is a party" was replaced with

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105. *Id.* at 661.

106. *See, e.g.*, *Lambert's Lessee v. Paine*, 7 U.S. 97 (1805) (Johnson, J.) (noting of decedent that "[h]e knew that his heir at law was an alien" where the jury had found that the heir "has never resided in any of the United States of America"); *Martin v. Hunter's Lessee*, 14 U.S. 304, 370 (1816) (Johnson, J.) ("The defendant, who was at that time an alien, had now become confirmed in his rights under that treaty," when the "alien" in question "always resided in England."); *Inglis v. The Trustees of the Sailor's Snug Harbour*, 28 U.S. 99, 121, 126-27 (1830) ("[A] person born here, who left the country before the declaration of independence and never returned here, became thereby an alien," disabled from inheriting land).

107. *Hamilton v. Eaton*, 11 F. Cas. 336, 339 (C.C.D.N.C. 1796) (emphasis added).

108. Unless Ellsworth's own understanding of the word "alien" had changed, this indicates that he at least would not have viewed the House's change of the word "foreigner" to "alien" in the ATS as a substantive one designed to exclude non-residents. According to Berry, Ellsworth was in charge of the Senate committee responsible for evaluating the House version and reporting back to the Senate. Berry, *supra* note 9, at 336.

language allowing suits between "citizens of a State and foreign . . . citizens, or subjects."[109] This was not a substantive change. Instead, it brought the text of the Judiciary Act into conformity with cases like *Mossman*, which had held that it would be unconstitutional for federal courts to exercise alienage jurisdiction over suits between two aliens.[110]

Although this is an obvious rationale for the amendment, Berry fails to address it. Instead, he speculates that the change was made to expand jurisdiction to include non-resident foreigners, and thus to create the full measure of alienage jurisdiction Article III allows.[111] In advancing this argument, however, Berry provides no evidence that Congress had this purpose in mind. Indeed, there would have been no reason for Congress to do so. As discussed above, the Supreme Court had already interpreted the word "alien" within the alienage jurisdiction provision that existed before 1875 to include non-residents. Thus, the substitution of "alien" with "foreign . . . citizens, or subjects" did not alter the scope of the statute's application.[112]

Moreover, like the Supreme Court, Congress in 1875 did not read the word "alien" to exclude non-residents. On the same day Congress revised the grant of federal alienage jurisdiction, it also

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109. An Act to Determine the Jurisdiction of Circuit Courts of the United States, and to Regulate the Removal of Causes from State courts, and for Other Purposes, 43rd Cong., 18, pt. 3 Stat. 470, c. 137 § 1 (2d Sess. 1875).

In the years surrounding the 1875 Act, two additional versions of the federal alienage provision drafted by Presidentially Appointed Commissioners and approved by Congress as a part of the consolidated Revised Statutes of the United States (hereinafter the Revised Statutes) used the word "alien" in this section. Revised Statutes of the United States, Second Edition, 43rd Cong., 18, pt. 1 Stat. 110, Tit. XIII, Sec. 629 (1st Sess. 1873-74); Revised Statutes of the United States, First Edition, 43rd Cong., 18, pt. 1 Stat. 109, Tit. XIII, Sec. 629 (1st Sess. 1873-74). These Revised Statutes were not approved by Congress until 1877, after the 1875 Act, and they reference the 1875 Act, but because the Revised Statutes only summarize the laws in force by 1873, the 1875 law superseded the Revised Statutes.

110. Johnson, *supra* note 87, at 21.

111. Berry, *supra* note 9, at 379. Berry incorrectly cites the 1911 revision and codification of the Judiciary Act as the iteration in which "alien" was removed from the law granting federal alienage jurisdiction. *Id.* This revision actually occurred in the 1875 Act.

112. Berry is correct that there were no Congressional Hearings (that could be found) discussing the removal of the word "alien," in either 1875 or 1911. Contrary to Berry's conclusions, however, the lack of any hearings further suggests that Congress did not consider itself to be substantively expanding federal jurisdiction in the 1875 amendments.

amended the immigration laws, and in so doing made clear that it understood the term "aliens" to include persons who were not residing in the United States.[113] Subsequently, the Supreme Court, in applying the new alienage jurisdiction formulation, used the term "alien" as a synonym for "foreign citizen," in a manner that made clear that "alien" referred to persons living abroad.[114]

Berry speculates that the fact that Congress did not also remove the word "alien" from the ATS when it amended the alienage provision indicates that it intended "alien" in the ATS to exclude non-residents, unlike "foreign . . . citizens, or subjects."[115] But as noted, Congress, in 1875, did not understand "alien" to exclude non-residents.

Nor, contrary to Berry's suggestion,[116] did subsequent Congresses believe that the ATS applied only to resident foreigners. The legislative history of the 1911 revision and

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113. An Act Supplementary to the Acts in Relation to Immigration, 43rd Cong., 8, pt. 3 Stat. 477, c. 141 § 5 (2d. Sess. 1875) ("That it shall be unlawful for aliens of the following classes to immigrate into the United States, namely, persons who are undergoing a sentence for conviction in their own country . . . it shall be unlawful, without his permission, for any alien to leave any such vessel arriving in the United States from a foreign country until the inspection shall have been had and the result certified as herein provided; and at no time thereafter shall any alien certified by the inspecting officer as being of either of the classes whose immigration is forbidden by this section, be allowed to land in the United States.").

114. In *Hohorst*, the defendant was a German corporation that was doing business in New York City and that was sued in the Southern District of New York. 150 U.S. at 654. The Court considered the extent to which jurisdiction over controversies "between citizens of a state and foreign states, citizens or subjects" was affected by the provision prohibiting suit to be brought against "any person . . . in any other district than that whereof he is an inhabitant." *Id.* at 559-60. The Court held that this provision did not apply "to a suit brought by a citizen of one . . . state[] against an alien." *Id.* at 660. This was so because the provision "evidently look[s] to those persons, and those persons only, who are inhabitants of some district within the United States." *Id.* The Court further noted that plaintiffs would be unable to bring suit against "aliens" if the plaintiff is required to sue in the district where the alien resides. *Id.* ("To construe the provision as applicable to all suits between a citizen and an alien would leave the courts of the United States open to aliens against citizens, and close them to citizens against aliens.") Accordingly, the Court found, an "alien" could be sued by a citizen "in any district in which valid service can be made upon the defendant." *Id.* at 662. Thus, the Court used the term "alien" and "foreign citizen" interchangeably, and more importantly, understood that a person who was *not* an inhabitant of the United States was an "alien."

115. Berry, *supra* note 9, at 379.

116. *Id.*

codification of the ATS is instructive on this point.[117] The Congressional Committee Report to the 61st Congress cited *In re Ah Fong* in support of encoding the ATS in the Act of March 3, 1911.[118] *Ah Fong* was decided by the Circuit Court for the District of California in 1874, regarding the detention of a Chinese national denied entry into the United States, who claimed that her detention violated a treaty between the United States and China.[119] Circuit Court Justice Field upheld the plaintiff's right to seek release in federal court.[120] The plaintiff was in the custody of the coroner, and when she first brought a state *habeas* suit contesting her detention, she was detained on the ship on which she had arrived to the United States. She had never resided in the United States, was denied entry into the United States, and yet was repeatedly referred to as an "alien" by the court.[121]

The Committee's reliance on *Ah Fong* suggests that it understood non-resident foreigners to be "aliens" that have the right to bring suit in federal court under the ATS. This is yet another example of Congress's consistent understanding of "aliens" as including non-residents.

CONCLUSION

The ATS as originally understood applied both to residents and non-residents of the United States. This is clear from the manner in which the term was defined in contemporary sources, the early application of the law and other provisions of the First Judiciary Act, and the purposes for which the ATS was enacted. Berry's contrary argument simply does not comport with the historical record.

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117. The only revision in 1911 was a change in punctuation, *i.e.*, moving a comma and removing the quotes from around the word "only". The Revised Statutes grant federal jurisdiction over "all suits brought by an alien for a tort 'only' in violation of the law of nations, or of a treaty of the United States, Revised Statutes of the United States, Second Edition, 43rd Cong., 18, pt. 1 Stat. 96, Tit. XIII, Sec. 563 (1st Sess. 1873-74), and the 1911 revision granted federal jurisdiction over "all suits brought by an alien for a tort only, in violation of the laws of nations or of a treaty of the United States," Act of Mar. 3, 1911, c. 231, § 24, par. 17, 36 Stat. 1093 (1911).

118. S. Rep. Serial Set No. 61-5585, Sess. No. 61-4, at 54 (1910).

119. *In re Ah Fong*, 1 F. Cas. 213-214 (C.C.D. Cal. 1874).

120. *Id.* (emphasis added).

121. *Id.* at 214-15, 219.