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## DISCRETION, DELEGATION, AND DEFINING IN THE CONSTITUTION'S LAW OF NATIONS CLAUSE

*Eugene Kontorovich*

**ABSTRACT**—Never in the nation's history has the scope and meaning of Congress's power to "define and punish . . . Offences against the Law of Nations" mattered as much. The once-obscure power has in recent years been exercised in broad and controversial ways, ranging from the Alien Tort Statute (ATS) to military commission trials in Guantanamo Bay. Yet it has not yet been recognized that these issues both involve the Offenses Clause and indeed raise common constitutional questions. First, can Congress "define" offenses that clearly already exist in international law, or does it have discretion to codify debatable or even nonexistent international law norms? Second, what happens to this discretion when it delegates the power to a coordinate branch?

This Article shows that the Offenses Clause allows Congress only to "define"—to specify the elements and incidents of—offenses already created by customary international law. It does not allow Congress to create entirely new offenses independent of preexisting international law. At the same time, the Framers understood international law to be vague and intertwined with foreign policy considerations. Thus, courts reviewing congressional definitions should give them considerable deference. Moreover, whatever discretion Congress has in defining offenses disappears when it broadly delegates that power to another branch, as it has in the ATS. The Supreme Court suggested a similar standard for ATS causes of action in *Sosa v. Alvarez-Machain*. Appreciating the role of delegation in the ATS shows that the limits on offenses that can be litigated under the statute have a constitutional dimension.

The Article develops the original understanding of the Offenses Clause—particularly important given the lack of any judicial decisions on it in the nation's first century. It draws on previously unexplored sources, such as early cases about the meaning of the "define" power in the cognate context of "piracy and felonies," legislation by early Congresses, and discussions by Framers like Madison and others.

**AUTHOR**—Professor, Northwestern University School of Law. Versions of this Article were presented at the Harvard–Duke Foreign Relations Workshop, Princeton University, and a symposium on the Alien Tort Statute organized by Northwestern's Searle Center. The author thanks Brad Clark, Samuel Estreicher, Phillip Hamburger, Tom Lee, John McGinnis, and Keith Whittington for their comments.

INTRODUCTION.....	1676
I. LIMITS ON THE POWER TO “DEFINE”.....	1685
A. <i>Possible Positions</i> .....	1685
B. <i>Continued Relevance of the Offenses Clause</i> .....	1687
II. THE ORIGINAL MEANING OF THE OFFENSES CLAUSE .....	1690
A. <i>The Articles of Confederation</i> .....	1692
B. <i>The Constitutional Convention</i> .....	1698
C. <i>Text and Context</i> .....	1703
D. <i>Early Congresses</i> .....	1707
E. <i>Summary</i> .....	1717
III. THE COURTS AND DEFINING OFFENSES .....	1718
A. <i>Define Power Applied to Other Parts of the Same Section</i> .....	1719
B. <i>Counterfeiting: Arjona</i> .....	1725
C. <i>Protecting Ambassadors and Embassies</i> .....	1733
D. <i>Military Commissions</i> .....	1734
E. <i>Summary</i> .....	1739
IV. DELEGATION: WHO DEFINES? .....	1739
A. <i>Discretion and Defining</i> .....	1741
B. <i>Delegation and Defining</i> .....	1743
C. <i>Sosa on Steroids</i> .....	1747
CONCLUSION.....	1750

INTRODUCTION

Never in the nation’s history—at least not since the Neutrality and Alien Acts debacles of the 1790s—has the scope and meaning of Congress’s power to “define and punish . . . Offences against the Law of Nations”<sup>1</sup> mattered as much. The once-obscure and seldom-used power<sup>2</sup> has in recent years been exercised in controversial ways, ranging from civil human rights litigation under the Alien Tort Statute (ATS), to military commission trials in Guantanamo Bay, to the historic prosecutions being conducted against Somali pirates in federal courts. Yet it has not been recognized that these issues all raise similar constitutional questions under the Offenses Clause.

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<sup>1</sup> U.S. CONST. art. I, § 8, cl. 10. This Article will refer to this as the “Offenses Clause,” and the entire provision in which it is found as the “Define and Punish Clause,” or “Clause Ten.”

<sup>2</sup> See J. Andrew Kent, *Congress’s Under-Appreciated Power to Define and Punish Offenses Against the Law of Nations*, 85 TEX. L. REV. 843, 847 (2007) (“Among Congress’s powers, there is probably none less understood or subject to such widely varying interpretations . . .”); Peter J. Spiro, *Foreign Relations Federalism*, 70 U. COLO. L. REV. 1223, 1273 n.185 (1999) (describing the Clause as “obscure”).

This Article sketches the limits of Congress's power to define offenses. Furthermore, it examines the reach of the power when Congress delegates authority to define offenses to other branches. The former analysis has significance for the current military commission litigation, where the defendants argue that the crimes they are charged with fall outside international law and thus Congress's define power. The delegation issue has even greater implications for the ATS. In the statute's interpretation by the Supreme Court in *Sosa v. Alvarez-Machain*, the power of federal courts to define international law causes of action themselves was the central issue.<sup>3</sup> The Supreme Court is poised to significantly revisit the ATS in *Kiobel v. Royal Dutch Petroleum Co.*, an effort that should be informed by an awareness of the constitutional backdrop to the statute.<sup>4</sup>

The Offenses Clause's new relevance comes in the wake of unprecedented, yet unheralded, developments in Offenses Clause jurisprudence. *Hamdan v. Rumsfeld*<sup>5</sup> was the first case ever to find the government exceeded its Offenses Clause powers.<sup>6</sup> This historic aspect of the case has been overlooked (including by the Supreme Court itself), perhaps because the case was mostly noted for its more newsworthy rebuke of the Bush Administration's Guantanamo policies.<sup>7</sup> Yet since *Hamdan*, the Offenses power has played a central role in the ongoing proceedings before the military commissions.<sup>8</sup>

*Hamdan*'s military commission and ATS litigation cases raise the same two questions about the scope of the Offenses power.<sup>9</sup> First, can Congress "define" only offenses that clearly already exist in international law, or does it also have discretion to codify debatable, embryonic, or even nonexistent norms? Second, what happens to whatever discretion Congress has to "define . . . Offences" when it delegates that power to a coordinate branch? This Article will explore both of these questions.

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<sup>3</sup> 542 U.S. 692 (2004).

<sup>4</sup> 621 F.3d 111 (2d Cir. 2010), *cert granted*, 132 S. Ct. 472 (2011).

<sup>5</sup> 548 U.S. 557, 611–12 (2006) (Stevens, J., plurality opinion) (holding that "conspiracy" to commit war crimes is not a violation of international law and thus could not be punished under the exercise of the Offenses Clause).

<sup>6</sup> See Charles D. Siegal, *Deference and Its Dangers: Congress' Power to "Define . . . Offenses Against the Law of Nations,"* 21 VAND. J. TRANSNAT'L L. 865, 880 (1988) (noting that no Offenses power measure has ever been judicially invalidated).

<sup>7</sup> See, e.g., Linda Greenhouse, *Justices, 5–3, Broadly Reject Bush Plan to Try Detainees*, N.Y. TIMES, June 30, 2006, at A1 ("The decision was such a sweeping and categorical defeat for the administration that it left human rights lawyers who have pressed this and other cases on behalf of Guantánamo detainees almost speechless with surprise and delight . . .").

<sup>8</sup> See *infra* note 315 and accompanying text.

<sup>9</sup> These questions have also been raised in the ongoing Somali piracy prosecutions, which involve a related provision in Clause Ten, the power to define "piracies . . . on the high seas." See, e.g., *United States v. Hasan*, 747 F. Supp. 2d 599, 624 (E.D. Va. 2010) (holding that the definition of piracy under the statute "could only keep pace with, and not force, international consensus").

The commonality of the Offenses Clause questions presented by military commissions and the ATS has not been generally recognized. Yet both situations involve what courts have treated as delegated exercises of the Offenses power.<sup>10</sup> The military commissions in *Hamdan* exercised the Offenses power and various war powers,<sup>11</sup> and Congress explicitly invoked its Offenses Clause authority in subsequently enacting the Military Commissions Act (MCA), which defined some of the offenses rejected in *Hamdan*.<sup>12</sup> Though there is no legislative history for the ATS, courts have generally regarded it as Offenses Clause legislation<sup>13</sup> since the statute directly borrows the constitutional language.<sup>14</sup> As it happens, the Offenses

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<sup>10</sup> To be sure, in the ATS, the delegation of the power to define the law of nations is to the courts for civil suits, while in military commissions the delegation is to the Executive for criminal proceedings.

<sup>11</sup> See *Ex parte Quirin*, 317 U.S. 1, 28, 30 (1942) (holding that the military commissions were authorized by Article 15 of the Articles of War, in which Congress “exercised its authority to define and punish offenses against the law of nations”); see also *United States v. Hamdan*, 548 U.S. 557, 592 & n.22 (2006) (identifying sources of legislative authority for Guantanamo as the “substantially identical” successor provision to Article 15); Stephen I. Vladeck, 4 J. NAT’L SEC. L. & POL’Y 295, 323, 329 (2010) (showing how *Hamdan* left undisturbed *Quirin*’s identification of the Offenses Clause as the Article I basis for commissions).

<sup>12</sup> See Military Commissions Act of 2009 (MCA), Pub. L. No. 111-84, 123 Stat. 2190, 2574–614 (codified at 10 U.S.C. §§ 948–950); Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified as amended in scattered sections of 10, 18, and 28 U.S.C.). In the appeal of *Hamdan*’s military commission conviction, the Government significantly changed its characterization of the constitutional basis for the provisions punishing material support of terrorism. The Offenses Clause was claimed as “an additional basis” for the law, Brief for the United States at 47–48, *Hamdan v. United States*, No. 11-1257 (D.C. Cir. Jan. 17, 2012), 2012 WL 136259, at \*47–48, with the principal reliance placed on the “power to punish offenses traditionally tried before military commissions pursuant the [sic] U.S. common law of war,” a part of the penumbra of war powers, Jens David Ohlin, *Conspiracy and the New Hamdan Argument*, OPINIO JURIS (Feb. 16, 2012, 3:05 PM), <http://opiniojuris.org/2012/02/16/conspiracy-and-the-new-hamdan-argument> (“In the past, it was widely assumed that Congressional enactment of the Military Commissions Act was based on [the Government’s] constitutional power to define and punish violations against the law of nations.”).

<sup>13</sup> See *Eastman Kodak Co. v. Kavlin*, 978 F. Supp. 1078, 1090 (S.D. Fla. 1997) (“[The ATS] presumably is based upon Congress’ power . . . to ‘define and punish . . . Offenses against the Law of Nations.’”). The seminal ATS case cited the Offenses Clause as a “possible” basis for the ATS, but did not decide the issue. *Filartiga v. Pena-Irala*, 630 F.2d 876, 887 (2d Cir. 1980); see also Edward T. Swaine, *The Constitutionality of International Delegations*, 104 COLUM. L. REV. 1492, 1528–29 (2004).

<sup>14</sup> The constitutional authority for the ATS ultimately depends on whether the statute is substantive or jurisdictional, a point left murky by the Supreme Court’s decision in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). See *infra* text accompanying notes 37–39. Both parties to the suit framed the ATS as an exercise of the Offenses power. See Brief of Petitioner at 8, *Sosa*, 542 U.S. 692 (No. 03-339), 2004 WL 162761, at \*8; Brief for the United States as Respondent Supporting Petitioner at 8, *Sosa*, 542 U.S. 692 (No. 03-339), 2004 WL 182581, at \*8. However, the Supreme Court in *Sosa* did not conclusively identify the source of constitutional authority. See *Sosa*, 542 U.S. at 717. The plurality opinion could be read to indirectly point to Article III alienage jurisdiction as a constitutional basis. *Id.* The opinion briefly discusses the preconstitutional concerns about the lack of a clear national power to deal with violations of international law and mentions Article III’s alien diversity provisions, but not the Offenses Clause, as the Framers’ response. *Id.* at 716–17. Still, most of the Founding Era background that the plurality discusses is widely regarded as inspiring the Offenses Clause. See *infra* Part II.A.1.

Clause has cross-cutting political implications for the MCA and the ATS. A narrow Offenses power would limit military commissions, to the delight of those on the left, but would also constrain ATS litigation, a *bête noir* of the right.<sup>15</sup>

Determining the existence and content of international norms should presumably be similar for all exercises of the Offenses power, whether the ATS or the MCA.<sup>16</sup> Yet it does not always play out this way. Many scholars take a broad view of corporate and aiding and abetting liability for international law violations under the ATS, despite the lack of judicial precedents.<sup>17</sup> Yet scholars did not take a similarly generous view of

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Had the Court found the statute purely jurisdictional, Article III would be a logical basis, and it would be hard to understand the ATS as Offenses legislation (though it would help account for the omission of the ATS from lists of offenses laws by early commentators). But since the Court held that the statute created or authorized causes of action and allowed new ones to be recognized, Article III could hardly suffice. *Sosa*, 542 U.S. at 724–25. Since courts have continued to treat the ATS as fundamentally substantive in the wake of *Sosa*, the Offenses Clause remains the natural Article I basis for the authority to do so.

<sup>15</sup> Both the confusion about the nature of the Offenses power and its complex political implications are illustrated by amicus briefs submitted by scholars in two different cases. In an amicus brief in support of the Violence Against Women Act, some scholars argued for a broad understanding of the power. Some of the same amici argued for a narrow view of the Offenses Clause in a subsequent brief dealing with offenses established by Guantanamo military commissions. (The author of this Article was among the amici in the latter brief.) The positions are not necessarily contradictory but are clearly in tension. *Compare* Brief Amici Curiae on Behalf of International Law Scholars and Human Rights Experts in Support of Petitioners at 19–20, *Brzonkala v. Morrison*, 529 U.S. 598 (2000) (Nos. 99-0005, 99-0029), 1999 WL 1037253, at \*19–20 (arguing that Congress can “define” conduct that is not a “direct [violation] of the law of nations” but is simply something that “the United States is required to prevent under international law”), *with* Brief of Constitutional Law Scholars as Amici Curiae Supporting the Petitioner’s Constitutional Arguments at 21, *Hamdan*, No. 11-1257 (D.C. Cir. Nov. 22, 2011), 2011 WL 5871046, at \*21 (“Congress’ power under the Offenses Clause is limited to imposing sanctions on existing violations of international law, and does not include the power to create new international law norms. As a result, Congress had no power under the Offenses Clause to create a military commission to prosecute Salim Ahmed Hamdan for offenses that were not violations of existing norms of international law.”).

<sup>16</sup> This Article takes no position on whether these laws exercise the Offenses power. Both certainly have other constitutional roots, which in many ways provide a more natural basis for the respective legislation. This Article treats military commission and alien tort cases as Offenses power issues because that is how courts and commentators have approached them. Even if one or both of these statutes were not an exercise of the Offenses power, general notions of comity and predictability in statutory interpretation would suggest that federal courts go about identifying the content of international norms (at least absent a specific definition by Congress) using the same process and standards across statutes that incorporate international law, such as the military justice statute implicated in *Hamdan*, the ATS, or the federal piracy statute.

<sup>17</sup> *See, e.g.*, Brief of Amici Curiae Center for Constitutional Rights, International Human Rights Organizations and International Law Experts in Support of Petitioners at 5–6, *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491 (U.S. July 13, 2011), 2011 WL 2743195, at \*5–6; Brief of Amici Curiae International Law Scholars in Support of Petitioners at 17–35, *Kiobel*, No. 10-1491 (U.S. Dec. 21, 2011), 2011 WL 6780141, at \*17–35. Some of the scholars who argue that international law supports corporate liability did file amicus briefs in *Hamdan*’s support, though on other issues. *See* Brief of Amici

conspiracy or material support for terrorism as a basis for war crimes liability in the *Hamdan* proceedings. In *Hamdan*, numerous academic amici argued that there was no precedent in international law for the conspiracy charges, but this group of amici did not join the briefs arguing against corporate liability in the ATS cases.<sup>18</sup> The Nuremberg Trials provide an excellent example of the different standards applied to similar bits of international legal evidence. The tribunals did have a conspiracy charge, yet legal scholars argued in *Hamdan* that this was not enough of a precedent to find that such a theory of liability existed in international law.<sup>19</sup> On the other hand, Nuremberg did not have corporate liability, yet in ATS cases, scholars write that this does not mean the Nazi war crimes trials do not support the existence of such a theory.<sup>20</sup> In short, the tribunals' decisions are said to support ATS corporate liability (despite being formally silent on the matter) but not MCA conspiracy, despite allowing such charges.

While there has been a recent uptick in academic interest in the long-neglected Offenses Clause,<sup>21</sup> the analysis of the Clause's substantive scope has largely consisted of passing comments in work devoted to other questions, such as who can be punished,<sup>22</sup> how individuals can be punished,<sup>23</sup> and where individuals can be punished.<sup>24</sup> These discussions

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Curiae Professors of Legal History Barbara Aronstein Black et al. in Support of Petitioners at 16–23, *Kiobel*, No. 10-1491 (U.S. Dec. 21, 2011), 2011 WL 6813563, at \*16–23.

<sup>18</sup> Amicus Curiae Brief of Specialists in Conspiracy and International Law in Support of Petitioner (Conspiracy—Not a Triable Offense) at 2–3, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (No. 05-184), 2006 WL 53979, at \*2–3; Brief of Amicus Curiae Center for Constitutional Rights in Support of Petitioner at 3–5 & n.5, *Hamdan v. United States*, No. 11-1257 (D.C. Cir. Nov. 22, 2011), 2011 WL 5871045, at \*3–5 & n.5 (arguing that conviction under Military Commissions Act should be thrown out because the offenses defined by Congress do not violate international law).

<sup>19</sup> See Brief of Amici Curiae Professors Allison Marston Danner and Jenny S. Martinez in Support of Petitioner-Appellee Salim Ahmed Hamdan and Affirmance of the Decision of the District Court at 12–19, *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005) (No. 04-5393), 2004 WL 3050179, at \*12–19.

<sup>20</sup> See Brief of Amici Curiae Nuremberg Scholars Omer Bartov et al. in Support of Petitioners at 3–4, *Kiobel v. Royal Dutch Petroleum Co.*, Nos. 10-1491, 11-88 (U.S. Dec. 21, 2011), 2011 WL 6813570, at \*3–4.

<sup>21</sup> This Article is a sequel to an earlier piece on the other half of the Define and Punish Clause, the piracy and felonies power. See Eugene Kontorovich, *The “Define and Punish” Clause and the Limits of Universal Jurisdiction*, 103 NW. U. L. REV. 149 (2009) [hereinafter Kontorovich, *Define and Punish*].

<sup>22</sup> See Kent, *supra* note 2, at 852 (arguing that the Clause authorizes Congress to take measures against sovereigns as well as private individuals).

<sup>23</sup> See Beth Stephens, *Federalism and Foreign Affairs: Congress’s Power to “Define and Punish . . . Offenses Against the Law of Nations,”* 42 WM. & MARY L. REV. 447, 454 (2000) (arguing that the Offenses Clause allows for civil, not just criminal, legislation and authorizes Congress to act in areas of traditional state concern). *But see* Michael T. Morley, Note, *The Law of Nations and the Offenses Clause of the Constitution: A Defense of Federalism*, 112 YALE L.J. 109, 113 (2002).

<sup>24</sup> See Zephyr Rain Teachout, Note, *Defining and Punishing Abroad: Constitutional Limits on the Extraterritorial Reach of the Offenses Clause*, 48 DUKE L.J. 1305, 1331 (1999) (arguing that “the reach of the Offenses Clause [should] be limited by the jurisdictional principles of customary international law”).

have only cursorily addressed the fundamental questions of what constitutes “defining” and what constitutes “offenses.”<sup>25</sup>

One can sketch two polar positions about the scope of the Offenses power. In the maximalist view, the Offenses Clause gives Congress broad latitude in identifying putative international norms to incorporate into domestic law.<sup>26</sup> This latitude could, in practice, be limitless. As one district court speculated, Congress could “arguably” use the Offenses power to regulate any conduct that is “recognized by *at least some members of the international community* as being offenses against the law of nations.”<sup>27</sup> Others take the opposite view that Congress is strictly limited to specifying the elements of clearly established international law offenses.<sup>28</sup> The second question—what happens when Congress delegates the defining—has almost entirely escaped attention, although most significant exercises of the Offenses power involve wholesale delegation.<sup>29</sup>

This Article provides the first comprehensive analysis of the substantive scope of the Offenses Clause. It considers a variety of significant originalist evidence missing from earlier scholarship, especially

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<sup>25</sup> *But see* Siegal, *supra* note 6; Howard S. Fredman, Comment, *The Offenses Clause: Congress’ International Penal Power*, 8 COLUM. J. TRANSNAT’L L. 279 (1969); Note, *The Offences Clause After Sosa v. Alvarez-Machain*, 118 HARV. L. REV. 2378 (2005).

<sup>26</sup> *See* Stephens, *supra* note 23, at 545 (“[I]n deciding what falls within the reach of the Clause, Congress’s decisions are entitled to significant deference from the judiciary.”); Note, *supra* note 25, at 2394 (arguing that the “fluid, self-reinforcing character of modern customary international law and the role Congress has in shaping international law” requires that Congress not be confined to defining clearly established offenses); *see also* Curtis A. Bradley, *Universal Jurisdiction and U.S. Law*, 2001 U. CHI. LEGAL F. 323, 335 & n.51 (suggesting that while “Congress presumably does not have unlimited power to declare something a violation of the law of nations,” the courts will give it considerable flexibility); Michael Stokes Paulsen, *The Constitutional Power to Interpret International Law*, 118 YALE L.J. 1762, 1808–10 (2009) (arguing that the “Clause confers on Congress a very broad range of interpretive judgment to say what international law is”).

<sup>27</sup> *United States v. Bin Laden*, 92 F. Supp. 2d 189, 220 (S.D.N.Y. 2000) (dictum) (emphasis added).

<sup>28</sup> *See* Siegal, *supra* note 6, at 879 (arguing that it would “extend the clause too far to permit Congress to use it to define offenses without a clear international law basis”); Stephens, *supra* note 23, at 474 (“The debates at the Constitutional Convention made clear that Congress would have the power to punish only actual violations of the law of nations, not to create new offenses.”); *see also* Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT’L L. 1, 13 (2006) (“International law plays a robust role in [the Offenses Clause] context, supplying the substantive rule against which Congress’s constitutional authority is measured.”); Eugene Kontorovich, *Beyond the Article I Horizon: Congress’s Enumerated Powers and Universal Jurisdiction over Drug Crimes*, 93 MINN. L. REV. 1191, 1219–23 (2009) [hereinafter Kontorovich, *Beyond Article I*]; Jules Lobel, *The Rise and Decline of the Neutrality Act: Sovereignty and Congressional War Powers in United States Foreign Policy*, 24 HARV. INT’L L.J. 1, 16 n.86 (1983) (“[I]t would seem unlikely that the Convention meant to give Congress the power to make new international law” or to go “beyond the law of nations at the time,” and thus the “more sensible reading is that . . . the use of the term ‘define’ was necessary to provide Congress with the power to give sufficient precision to a rule of nations so as to make it adequate for criminal prosecution.”).

<sup>29</sup> *But see* Note, *supra* note 25, at 2397–98 (suggesting courts have less power to define offenses than Congress does because of foreign policy implications).

textual and contextual comparisons of the define power to analogous constitutional powers, a comprehensive examination of *all* of the Offenses Clause legislation passed by early Congresses, and post-ratification views of such luminaries as James Madison and Daniel Webster. The Article examines how the authority to “define” was understood in relation to the other two powers in Clause Ten to which it applies (piracies and high seas felonies), both at the Convention and in the early Republic. Finally, the Article addresses the implications of Congress delegating the define power to another branch, as it has in all of the currently controversial uses of the power.

While the Article focuses primarily on textual/structural and originalist indicators of meaning, the conclusions do not depend on fidelity to any particular interpretive approach. Interpretation of the Offenses Clause is originalist almost by default—there is only one major Supreme Court case on the issue, written a century after the adoption of the Constitution and with a rather elliptical discussion of the fundamental constitutional questions.<sup>30</sup>

The Article’s conclusions about the scope of Congress’s powers are mixed. The originalist evidence strongly supports the view that Congress can define only offenses that already exist in international law. Unlike other grants of power in Article I, Section Eight, the Offenses power is backward looking, allowing Congress to codify offenses already established in international law rather than participating in what international lawyers call “the progressive development” of international norms. However, congressional definitions should receive a fair degree of deference from the courts when, as will often be the case, the existence or details of the underlying international norms are substantially unclear.

These two conclusions are in tension but are not contradictory. Congress gets its margin of error or discretion, not because the define power is a creative one, but because of the inherent vagueness and indeterminacy of international law and the leeway the political branches generally command in their conduct of foreign relations. Congress cannot codify made-up international law, but what is real is unusually subjective in this area.

The most contentious exercises of the Offenses power involve no actual definition provided by Congress, but rather a wholesale delegation to other branches. Here the conclusions of the Article are stronger.<sup>31</sup> First, the breadth of the delegation in the ATS is troubling. The statute leaves it to the courts, without any statutory guidance, to identify and adopt causes of

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<sup>30</sup> *United States v. Arjona*, 120 U.S. 479 (1887) (holding that statute criminalizing foreign banknotes was a legitimate exercise of the Offenses power); *see infra* Part III.A.

<sup>31</sup> The two principal constitutional questions this Article explores are conceptually distinct: the delegation analysis does not depend on accepting the conclusions about the overall scope of defining offenses.



action for torts in “violation of the law of nations,” a scope which echoes the Article I grant itself.<sup>32</sup> Such a broad delegation requires a clear limiting principle, and restricting definable offenses to those clearly established in international law serves this function. Moreover, none of the possible reasons for giving judicial deference to *congressional* definitions apply when it is the other branches doing the defining in the first place.

A few more words should be said here about the ATS, the statute for which the analysis in this Article may have the most relevance, given the wide-ranging discretion courts exercise under it to define diverse putative international law violations. Adopted by the First Congress as part of the Judiciary Act and then ignored for 190 years, the ATS gives district courts “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.”<sup>33</sup> In 1980, the Second Circuit, in *Filartiga v. Pena-Irala*, reanimated the statute as a tool for international human rights litigation in U.S. federal courts.<sup>34</sup> *Filartiga* inspired a significant debate that centered on which of the ATS’s two phrases should govern the statute’s reach. Some argued, as the ATS’s first phrase suggests, that the statute is purely jurisdictional.<sup>35</sup> Others focused on the second half, which seems to provide a substantive cause of action for violations of the law of nations, or at least recognize such causes as they had already existed in common law.<sup>36</sup> The Supreme Court addressed that matter in *Sosa v. Alvarez-Machain*, which confusingly adopted a hybrid of the substantive and jurisdictional views.<sup>37</sup> According to *Sosa*, the statute allows courts to craft causes of action, not for any “violations of the law of nations,” but only for a “modest set of actions.”<sup>38</sup> These would include the three offenses incorporated into common law in 1790 and, additionally, a limited set of new customary international law offenses that had an equally “definite content and

<sup>32</sup> For a discussion of possible limits built into the ATS, see *infra* note 354 and accompanying text.

<sup>33</sup> 28 U.S.C. § 1350 (2006). Most scholars assume “the law of nations” referred to by the ATS (and the Offenses Clause) to be synonymous with what is today known as customary international law. *But see* Morley, *supra* note 23, at 113 (arguing that the “law of nations” refers to natural law concepts that “exclude[] wholly domestic conduct that does not have a direct effect on foreign nations or nationals”).

<sup>34</sup> 630 F.2d 876, 889–90 (2d Cir. 1980).

<sup>35</sup> William R. Casto, *The Federal Courts’ Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 479–80 (1986).

<sup>36</sup> See, e.g., William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the “Originalists,”* 19 HASTINGS INT’L & COMP. L. REV. 221, 237 (1996); see also *Sosa v. Alvarez-Machain*, 542 U.S. 692, 718–19 (2004) (noting the “considerable scholarly attention” devoted to the question of what, if any, causes of action the ATS created).

<sup>37</sup> See Eugene Kontorovich, *Implementing Sosa v. Alvarez-Machain: What Piracy Reveals About the Limits of the Alien Tort Statute*, 80 NOTRE DAME L. REV. 111, 118, 122 (2004) [hereinafter Kontorovich, *Implementing Sosa*] (observing that, “[l]ike Santa Clause, the Court’s opinion brought something for everyone,” managing to endorse at least three out of four competing theories of the statute’s scope).

<sup>38</sup> *Sosa*, 542 U.S. at 720.

[universal] acceptance among civilized nations” as the historical benchmarks.<sup>39</sup> Not surprisingly, *Sosa* did little to settle the ATS controversy. Courts and commentators now debate whether the *Sosa* standard is supposed to be restrictive or permissive.<sup>40</sup> Did the opinion, as the Court promised, leave only a narrow opening for judicially fashioned causes of action, or was it “hardly . . . a recipe for [judicial] restraint”?<sup>41</sup> Would it, for example, allow for causes of action for less pedigreed international offenses, like environmental degradation or child labor?

This Article shows that a strong version of the standard articulated in *Sosa*—limiting ATS causes of action to the most universally agreed-upon norms with elements clearly defined in the law of nations—is not only an internal requirement of the ATS but also an external one, imposed by the Constitution itself. However, *Sosa* described its insistence on caution and vigilance as derived from mere legislative intent and prudential considerations. This Article shows how this same conclusion follows from the nature of the Offenses power when Congress fails to define but rather delegates its powers to the courts without any intelligible principle to guide their discretion. The constitutional source for limiting ATS actions is important in that it raises the stakes. Courts risk exceeding the federal government’s constitutional powers when they recognize offenses not extremely well-established, and universally and clearly defined in international law. Determining whether particular causes of action that have been recognized in ATS suits have clear support and precedent in international law, similar to what was required in *Hamdan*, would require a detailed analysis beyond the scope of this Article. However, several cases have recognized causes of action with little or no precedent in international justice.<sup>42</sup>

Part I lays the groundwork by outlining the questions about the meaning of the Offenses Clause that will be discussed and some possible positions that have been suggested, as well as explaining why the Offenses Clause still matters in an age of nearly unlimited Article I powers. Part II seeks answers to these questions in the original meaning of the Clause, as revealed by its historical background, drafting history, the actions of early

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<sup>39</sup> *Id.* at 715, 732.

<sup>40</sup> Compare Kontorovich, *Implementing Sosa*, *supra* note 37, at 156 (arguing that *Sosa*’s historical test implicates criteria that most modern customary international law norms fail to satisfy), with 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) (noting that in *Alvarez-Machain*, the court “repudiate[d] the revisionist view of international law according to which ATS human rights actions were intrinsically illegitimate”), and Beth Stephens, *Sosa v. Alvarez-Machain: “The Door Is Still Ajar” for Human Rights Litigation in U.S. Courts*, 70 BROOK. L. REV. 533, 535 (2005) (describing *Sosa* as supporting prior human rights litigation under ATS).

<sup>41</sup> *Sosa*, 542 U.S. at 729; *id.* at 748 (Scalia, J., concurring in part and concurring in the judgment).

<sup>42</sup> See *infra* notes 364–70 and accompanying text (listing questionable offenses recognized in ATS suits).

Congresses, and other tools. Part II begins by explaining why even those not normally interested in the textual or original meaning of the Constitution would be interested in the original meaning of the Offenses Clause and develops this meaning. Part III goes on to examine the few times the Supreme Court has addressed the question of limits to the Offenses power. The first and primary of these cases came 100 years after ratification, and the approach the Court took is at some odds with the understanding of the Clause developed in Part II. Part III shows how, while the Court's initial encounters with the Offenses Clause showed considerable deference to defined offenses, *Hamdan* took a markedly different approach, rejecting a defined offense for inconsistency with what it saw as objective international law. Part IV addresses the distinct issue of delegated defining, which helps explain how *Hamdan*'s rigorous inquiry is consistent both with earlier cases and the original meaning. It shows that open-ended delegations of the Offenses power are problematic given the policies behind the Clause, as well as general nondelegation principles. Even if Congress gets some leeway in its substantive definitions of offenses, this discretion does not apply to nonlegislative "definitions." This final Part briefly touches on implications for major questions in ATS litigation, such as the range of permissible causes of action and the permissibility of corporate liability.

#### I. LIMITS ON THE POWER TO "DEFINE"

Discussions of the Offenses Clause often conflate a variety of issues concerning its scope. This Part first carefully identifies four separate but related questions and the range of answers that have been suggested. The second section then explains why any of this matters—how there can still be legislation that could not be parked in some other Article I location. Those interested in skipping the preliminaries are encouraged to proceed directly to Part II.

##### A. Possible Positions

Because possible limits on the Offenses power have generally been discussed only in passing, there is some confusion about the possible issues involved, and several separate but related questions often get conflated. There are two main issues addressed in this Article (each of which consists of two subissues)—how broadly can Congress regulate via the Offenses Clause, and how should courts approach congressional exercises or delegations of this power? As one commentator recently put it, the unresolved Offenses Clause questions are: "[H]ow much leeway does its 'define' power give to Congress [to legislate new norms] and what type of scrutiny will the courts give to its definitions?"<sup>43</sup> The first question—about

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<sup>43</sup> Detlev F. Vagts, *Military Commissions: Constitutional Limits on Their Role in the War on Terror*, 102 AM. J. INT'L L. 573, 585 (2008).

the substantive scope of the power—has two subparts, which can be thought of as the Clause’s domain and range. The first is what we will call the “define” question—what is the precise nature of this power, as distinguished from more obviously plenary powers like the ones to “make” laws or “regulate” a field? Both narrow and broad understandings have been mooted by scholars in the past few years. In the narrow view, the “power . . . might extend only to the definition, rather than the creation, of such offenses,” and thus can only be used to codify crimes over which there is a clear “international consensus.”<sup>44</sup> This understanding of what conduct can be regulated under the Offenses power sounds very much like the Court’s test for what conduct can be reached by the judiciary through the ATS. The opposite view was recently sketched by Michael Stokes Paulsen: “Congress is not constrained in the exercise of its Law of Nations Clause legislative power by ‘customary’ international understandings of customary international law. Congress’s views can be broader, narrower, or simply different.”<sup>45</sup> In the first model, international law provides a limited inventory of norms from which Congress can pick, with some adaptations and domestications, presumably. In the second model, Congress can develop or willfully interpret international practices, and not just passively receive them.

The second subquestion goes to what “Offences against the Law of Nations” refers to. Is it a narrow body of rules that have over time attained the universal assent of nations, or is it any matter that could conceivably be governed by such rules? This question is not entirely distinct or empirically separable from the prior one because the define power is fungible with “Offences”: Congress’s power under the Clause is a product of the robustness of its define power and the scope of the category of “Offences.” For example, if (to take an extreme position) any tort relating to foreign affairs can be an “Offence,” then it would be nearly impossible for Congress to adopt a definition that is out of bounds, regardless of how narrow the define power, and vice versa. As to the scope of “Offences,” the narrowest answer is that it refers to specific prohibitions established in international law that apply to individual conduct.

“Offences,” however, can and sometimes has been taken to refer to increasingly broad concentric circles of regulatory power. This would allow the Offenses power to be used to:

regulat[e] the conduct of individuals not [only] when that conduct violates customary international law by itself, but when the conduct could impinge on interests either required to be protected by international law (including

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<sup>44</sup> *Id.*

<sup>45</sup> Paulsen, *supra* note 26, at 1809–10.

treaties), recognized as important by international law, or, at the least, related to the foreign affairs of the United States.<sup>46</sup>

One version of this broader position that bears particular note because it has gained some credence in the courts is that “Offences” refers to conduct that may not be an internationally recognized crime on the part of the actor, but which gives rise to legal responsibility for redress by the United States.

Turning to the courts, two separate questions arise. The first is the classic one of how much deference they owe to a congressional determination that something is an offense under the law of nations.<sup>47</sup> This is the basic question of the appropriate standard of judicial review for the exercise of various constitutional powers. Again, here there is a range of views—from treating definitions as political questions to treating them no differently from any other question of law that courts can review *de novo*. In most recent Offenses Clause kerfuffles, there has been no legislative definition to defer to—Congress has delegated broadly to the courts. Thus, the second question about the Offenses Clause in the courts is what kind of latitude do they have in “defining” offenses? The answer to this question depends partly on the answer to the prior question about the extent of Congress’s permissible creativity—presumably the courts could have no more discretion in establishing offenses than Congress does.

### B. Continued Relevance of the Offenses Clause

One might wonder whether the outer limits of the Offenses power have become moot as a result of the expansion of other Article I powers, such as the Commerce Clause. The classic commentators saw the Offenses power as significantly overlapping with the foreign commerce and war powers because breaches of international law by or against Americans can substantially affect dealings with other nations.<sup>48</sup> Indeed, there has rarely been an explicit exercise of the Offenses power that might not have been sustained under some other legislative power.<sup>49</sup> Yet the most controversial

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<sup>46</sup> Kent, *supra* note 2, at 863 (footnotes omitted).

<sup>47</sup> See Paulsen, *supra* note 26, at 1776, 1808 (suggesting Congress has the last word on its “definitions” of offenses).

<sup>48</sup> See 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1160, at 57 (Boston, Hilliard, Gray, & Co. 1833) (stating that “[i]t is obvious, that this power has an intimate connexion and relation with the power to regulate commerce and intercourse with foreign nations” as well as war powers); 1 ST. GEORGE TUCKER, BLACKSTONE’S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA app. at 268–69 (Philadelphia, William Young Birch & Abraham Small 1803) (noting overlap between foreign commerce, war, and Offenses powers).

<sup>49</sup> See *infra* notes 165–99, 259–62 and accompanying text. When Congress has explicitly invoked the Offenses power in recent decades it usually did so, perhaps inaptly and certainly redundantly, for statutes implementing treaties to which the United States is party. See, e.g., War Crimes Act of 1996, Pub. L. No. 104-192, § 2(a), 110 Stat. 2104, 2104 (codifying certain violations of the Geneva

uses of the Offenses Clause today—the ATS and the terrorism crimes of the MCA—do have significant applications for which the Offenses Clause could be the only possible Article I basis.<sup>50</sup>

The Foreign Commerce Clause is perhaps the broadest grant of authority over international matters, especially given the expansive post-New Deal interpretation of the Interstate Commerce Clause. The former Clause is an obvious first place to look for an Article I backstop for dubious Offenses Clause legislation. Yet despite the required involvement of aliens as plaintiffs, some ATS cases involve conduct that falls outside of foreign commerce.

For one, ATS offenses could involve acts that are essentially crimes or torts, which may not be “commerce” and cannot, without more, be regulated under the commerce powers.<sup>51</sup> Secondly, the ATS has been widely applied to conduct with no U.S. nexus whatsoever<sup>52</sup> (unlike the MCA).<sup>53</sup> This application goes beyond the scope of the Foreign Commerce Clause as well. The Supreme Court’s sweeping interpretations of the

Conventions); Torture Victim Protection Act of 1991, Pub. L. No. 102-256, § 2, 106 Stat. 73, 73 (1992) (codifying Convention Against Torture).

<sup>50</sup> This discussion leaves aside any possible inherent Commander in Chief authority the President may have for convening commissions and defining the conduct they prosecute.

<sup>51</sup> Cf. *United States v. Morrison*, 529 U.S. 598, 627 (2000) (holding that federal civil remedies for violence against women cannot be regulated under the Interstate Commerce Clause). In practice, many or most ATS suits today involve the extraterritorial operations of large multinational corporations, not the wrongs of private individuals. Most corporations are either based in the United States or have extensive enough contacts for personal jurisdiction. Thus, these cases could easily fall within the foreign commerce power. See generally Julian G. Ku, *The Third Wave: The Alien Tort Statute and the War on Terrorism*, 19 EMORY INT’L L. REV. 105, 109–10 (2005) (describing the increase in ATS lawsuits against corporations in the mid-1990s).

<sup>52</sup> Indeed, *Filartiga v. Pena-Irala*, which launched modern ATS litigation, involved only Paraguayans and conduct only in Paraguay. 630 F.2d 876, 878 (2d Cir. 1980); see Donald Francis Donovan & Anthea Roberts, *The Emerging Recognition of Universal Civil Jurisdiction*, 100 AM. J. INT’L L. 142, 146 (2006). Recent human rights suits continue to use the ATS because until recently, no other country allowed for universal jurisdiction provision. See *id.* at 149; Eugene Kontorovich, *Precedent-Setting Dutch Civil Universal Juris. Case, VOLOKH CONSPIRACY* (Mar. 28, 2012, 11:38 AM), <http://volokh.com/2012/03/28/precedent-setting-dutch-civil-universal-juris-case> (discussing landmark Dutch case allowing universal jurisdiction suits for torture and the implications for the ATS cases before the Supreme Court).

<sup>53</sup> The jurisdiction of commissions only extends to forces hostile to the United States. However, the controversial “material support for terrorism” crime of the MCA is borrowed from an ordinary federal crime of the same name, which does not require a U.S. nexus. See 18 U.S.C. § 2339B(a)(1), (d)(1)(C) (2006); *Almog v. Arab Bank, PLC*, 471 F. Supp. 2d 257, 294 (E.D.N.Y. 2007) (“Congress expressed that it was enacting its prohibition on material support to foreign terrorist organizations pursuant to its power . . . to ‘define and punish . . . Offenses against the Law of Nations’ and thus appears to have recognized that providing material support to a foreign terrorist organization is a violation of the law of nations.”). This is also a controversial exercise of the Offenses Clause, as federal courts have found that there is no international consensus on the offense of terrorism. See *United States v. Yousef*, 327 F.3d 56, 106 (2d Cir. 2003) (finding no “international consensus on the definition of terrorism or even its proscription”).

interstate commerce power have not been paralleled in its foreign commerce power jurisprudence. While the former allows regulation of commerce “among” states, the latter applies only to commerce of the United States “with” a foreign state.<sup>54</sup> At a minimum, the Foreign Commerce Clause requires extraterritorial conduct by foreigners to have some direct nexus with the United States.<sup>55</sup> Any other interpretation would incongruously give Congress—which has limited domestic legislative powers—global regulatory *carte blanche*.

Even Alexander Hamilton, the leading advocate of expansive federal power, argued that the foreign commerce power requires some American involvement in the regulated conduct:

Congress . . . may regulate, by law, our own trade and that which foreigners come to carry on with us; but they cannot regulate the trade which we may go to carry on *in foreign* countries . . . . This must depend on the will and regulations of those countries; and, consequently, it is the province of the power of treaty to establish the rules of commercial intercourse *between* foreign nations and the United States. The legislative may regulate our own trade, but treaty only can regulate the national trade between our own and another country.<sup>56</sup>

If, as Hamilton thought, the foreign commerce power could not reach trade conducted by Americans in foreign countries, the notion that entirely foreign trade fell within the power would be absurd. Thus, much ATS litigation—all universal jurisdiction cases and those cases that involve local crimes—would, in the absence of a treaty establishing jurisdiction,<sup>57</sup> depend solely on the Offenses Clause.<sup>58</sup> With the military commissions, the

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<sup>54</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>55</sup> See Anthony J. Colangelo, *The Foreign Commerce Clause*, 96 VA. L. REV. 949, 954, 970–71 (2010). For example, Congress can clearly punish someone who travels from the United States to a foreign country to engage in sex tourism. But Congress cannot directly legislate against foreign sex tourism by punishing, should they subsequently enter the United States, those who engage in it without having traveled from the United States. Thus, a Briton who travels to Thailand for sex tourism and later visits America cannot be constitutionally punished for the Thai activity, while an American resident can. *See id.* at 994–1003.

<sup>56</sup> ALEXANDER HAMILTON, *Camillus No. XXXVI*, reprinted in 7 THE WORKS OF ALEXANDER HAMILTON 501, 507–08 (John C. Hamilton ed., 1851).

<sup>57</sup> Even for conduct that violates international law, the Offenses Clause, at most, only authorizes federal courts to exercise universal jurisdiction over crimes that have this status in international law. *See generally* Kontorovich, *Define and Punish*, *supra* note 21 (detailing the limits of universal jurisdiction under the Offenses Clause). In other words, the Offenses Clause requires that both the substantive and the universal jurisdictional status of the crime be drawn from the law of nations. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 761–62 (2004) (Breyer, J., concurring in part and concurring in the judgment).

<sup>58</sup> The Treaty and Offenses Clauses separately address the two primary sources of international law. This dichotomy suggests that the Offenses Clause becomes relevant only when the United States is not party to a treaty that would authorize the relevant legislation. If there is a treaty, the question becomes whether it is self-executing or has been implemented by Congress. Judicial use of unratified or unlegislated treaties to establish ATS offenses thus seems problematic; though, to be sure, treaties can

Offenses Clause may be less crucial, as much of its powers could be necessary and proper to the regulation of the armed forces or Congress's general war powers.<sup>59</sup> However, the federal criminal counterpart to the commissions' terrorist crimes may also have to depend on the Offenses Clause if it were applied to conduct with no U.S. nexus.

## II. THE ORIGINAL MEANING OF THE OFFENSES CLAUSE

This Part seeks to explain the scope of the Offenses power by examining the original meaning of the provision. This is not because of any commitment to originalism, and none is assumed on the reader's part. To be sure, the relevance of the text and the original meaning of a constitutional provision is common ground to all major schools of constitutional interpretation.<sup>60</sup> The Supreme Court focuses heavily on original sources in any discussion of a constitutional provision, particularly one that is otherwise poorly understood.<sup>61</sup>

For the Offenses Clause, originalism is the principal tool available. The first Offenses Clause case was decided 100 years after the Constitution's adoption in 1788,<sup>62</sup> and the next case nearly 60 years after that.<sup>63</sup> These cases took no note whatsoever of any original sources, in a way that would be surprising to modern jurists. As a result, the Court's interpretation significantly departed from the Clause's history and purpose, without any justifications given for this approach. Rather, the Supreme Court, in its first and foremost Offenses Clause case, seemed to think it was writing on a blank slate.<sup>64</sup> Thus, with the Offenses Clause, the original meaning has not been foreclosed by a continuous path of jurisprudential development or a

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be evidence of custom under the Offenses Clause. *See, e.g.,* Abdullahi v. Pfizer, Inc., 562 F.3d 163, 181 n.11 (2d Cir. 2009); *see also* Kent, *supra* note 2, at 863 n.75 (criticizing Congress's conflation of treaty-based and law of nations offenses in recent amendments to the Foreign Corrupt Practices Act). *See generally* David H. Moore, Medellín, *the Alien Tort Statute, and the Domestic Status of International Law*, 50 VA. J. INT'L L. 485, 495 (2010) (arguing that the Supreme Court's endorsement of the doctrine of non-self-execution "thin[s] the evidence available to plaintiffs seeking to recover under the ATS for violations of [customary international law]").

<sup>59</sup> *See* Hirota v. MacArthur, 338 U.S. 197, 207–08 (1948) (Douglas, J., concurring) (discussing the overlapping authority between Congress's power to authorize commissions for war crimes under its Offenses power, as it had done in *Quirin*, and the President's separate Commander in Chief powers to create such commissions for other offenses); *Ex parte Quirin*, 317 U.S. 1, 30 (1942) (identifying military commissions as arising under the power to regulate the military); *see also* Vladeck, *supra* note 11; Ingrid Wuerth, *The Captures Clause*, 76 U. CHI. L. REV. 1683 (2009) (exploring the original history of the Clause).

<sup>60</sup> *Cf.* Kent, *supra* note 2, at 857–61 (discussing the examination of the original meaning of the Law of Nations Clause).

<sup>61</sup> *See, e.g.,* Alden v. Maine, 527 U.S. 706, 716–27 (1999) (looking to "original understanding" of Article III and the Eleventh Amendment).

<sup>62</sup> United States v. Arjona, 120 U.S. 479 (1887).

<sup>63</sup> *See Quirin*, 317 U.S. 1.

<sup>64</sup> *See Arjona*, 120 U.S. 479.



multitude of contemporary precedents, as some have argued is true of other important Article I powers.<sup>65</sup>

Originalism itself comes in many strands, such as original intent (focusing on the goals of the drafters) and the now more widely accepted original public meaning (focusing on the understanding of the general public at the time of ratification).<sup>66</sup> Different brands of originalism place greater emphasis on different kinds of evidence; for the former, the debates at the Constitutional Convention are central, for the latter, dictionaries play a prominent role. Yet the different schools mostly vary in the weight they attach to these different sources rather than whether they regard them as relevant. Thus, the post-ratification views of Framers may be strong evidence of what they thought in Philadelphia, but they are also evidence of how an informed citizen might read the provision. Conversely, dictionaries are a powerful tool for illuminating public meaning, but given that, they are also relevant to the drafters' intent.

Because the search for original meaning in this Article is pragmatic, not programmatic, all strains of originalist evidence are reviewed. For ease of exposition, the materials are examined chronologically, not in order of evidentiary importance. We begin with the circumstances and policies that led to the inclusion of the Offenses Clause in the Constitution.<sup>67</sup> This Part proceeds to examine the drafting history at the Philadelphia Convention. The drafting history is mostly important to original intent or expectations, as the proceedings in Philadelphia were secret at the time of ratification. Yet it is also an important source for original public meaning, as it explicitly shows the meanings at least some listeners attached to various nuances in the terms used.<sup>68</sup> Perhaps most importantly in this case, the central considerations that drove the word choice at the Convention were publicized by Madison at various points in the ratification process.<sup>69</sup>

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<sup>65</sup> See, e.g., John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 NW. U. L. REV. 803, 852–53 (2009) (citing post-New Deal Commerce Clause jurisprudence as an example).

<sup>66</sup> See Lawrence B. Solum, *Semantic Originalism* 13–19 (Ill. Pub. Law & Legal Theory Research Papers Series, Working Paper No. 07-24, 2008), available at <http://ssrn.com/abstract=1120244> (describing modern history of originalist approaches).

<sup>67</sup> The background circumstances and problems with the Confederation to which the Philadelphia Convention responded were part of the context within which both the drafters and their audience would understand the plain meaning of their words. See *id.* at 52–54.

<sup>68</sup> Original public meaning does not, to be sure, involve either summing or sampling contemporaneous audiences. It is better understood as what a reasonable man would take the semantic meaning of the words to be. See *id.* at 51. Open discussions of the point in question by presumably reasonable men is certainly informative to recreating the hypothetical reasonable man.

<sup>69</sup> See THE FEDERALIST NO. 42 (James Madison) (explaining that the defining power is needed because of the vagueness and indeterminacy of the bodies of law to be defined); James Madison in the Virginia Convention (June 20, 1788), in 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 331, 332 (Max Farrand ed., rev. ed. 1966) [hereinafter Farrand].

The Part goes on to examine sources crucial to understanding the original public meaning, including the scant mentions of the provision in the state ratification debates. More can be learned about the original semantic meaning from dictionaries and parallel constitutional provisions. Finally, this Part will examine the legislation adopted by early Congresses that could have been justified as an exercise of its Offenses Clause power. Congress used the Offenses power to enforce only the most well-established crimes of the times and rejected using it to implement otherwise attractive proposals to regulate conduct that was on the cusp of international culpability.

#### A. *The Articles of Confederation*

The Articles of Confederation did not contain any reference to offenses against the law of nations.<sup>70</sup> However, the nation immediately felt the need for a federal power to deal with violations of international law. Compliance with international law was a particular concern for the new country because it needed to establish its legitimacy and could ill afford reprisals or renewed war. The international law violations foremost on the Framers' minds were the oppression of foreign creditors and property owners (particularly British ones) by state governments, and violence against foreigners and foreign officials.<sup>71</sup>

1. *Responses to Offenses in the 1780s.*—The former concerns were addressed in the Constitution by the foreign commerce power and the Supremacy Clause's reference to treaties (most saliently, the Treaty of Peace with Britain). Violence against foreigners in the United States was a direct violation of well-established customary international norms, which had been adopted into the common law of England. However, concerns about the nation's ability to respond to such violations were crystallized in a minor, but at the time sensational, assault on François Barbé-Marbois, the French minister, in Philadelphia in 1784.<sup>72</sup> The incident led to considerable discussion about the enforcement of international law in the new nation.<sup>73</sup> The Articles of Confederation gave Congress no power to deal with such violations, and so the response to the assault was left to Pennsylvania state

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<sup>70</sup> The Articles did, however, give Congress exclusive power to “appoint[] courts for the trial of piracies and felonies committed on the high seas.” ARTICLES OF CONFEDERATION of 1781, art IX, para. 1.

<sup>71</sup> Mob violence against British nationals was a particular problem. See Anthony J. Bellia Jr. & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. CHI. L. REV. 445, 501–02 (2011).

<sup>72</sup> Few if any constitutional provisions are so directly attributed to a particular incident as the Offenses Clause. See Siegal, *supra* note 6, at 874; Stephens, *supra* note 23, at 466–68; Fredman, *supra* note 25, at 287–88.

<sup>73</sup> Another incident involving an attempted arrest of a member of the Dutch minister's staff in 1787 also caused concern. See Bellia & Clark, *supra* note 71, at 467.

courts.<sup>74</sup> The Commonwealth's legal system worked well—the offender was convicted and sentenced to jail—and there was no indication that the Pennsylvania courts were xenophobic.<sup>75</sup> However, it was noted with some concern that when French leaders raised the Marbois issue with federal officials, the former were surprised to learn the matter was out of the latter's control.<sup>76</sup>

Some American statesmen worried that there were no particular provisions in state law for protecting diplomats or otherwise incorporating international law.<sup>77</sup> In the wake of the Marbois incident, Pennsylvania and Virginia passed legislation extending special protection for foreign ministers.<sup>78</sup> But leaders in other states worried that similar incidents might not be as fairly resolved elsewhere. As Madison wrote to James Monroe in 1784:

Nothing seems to be more difficult under our new Governments than to impress on the attention of our Legislatures a due sense of those duties which spring from our relations to foreign nations. Several of us have been labouring much of late in the G[eneral] Assembly here to provide for a case with which we are every day threaten'd by the eagerness of our disorderly Citizens for . . . Spanish blood.<sup>79</sup>

Yet well before the Marbois episode, Congress understood the weakness of the Articles with regard to offenses against the law of nations.<sup>80</sup> A 1781 report to Congress by a committee comprised of Edmond Randolph, James Duane, and John Witherspoon expressed concern that foreign relations difficulties might arise because state law did not “sufficiently” provide “regular and adequate punishment . . . against the transgressor.”<sup>81</sup> The report recommended that states pass laws to ensure the punishment of the three major international crimes that were incorporated into English common law.<sup>82</sup> The report also suggested that since violations

<sup>74</sup> See *Respublica v. De Longchamps*, 1 U.S. (1 Dall.) 111, 113 (Pa. 1784).

<sup>75</sup> See Alfred Rosenthal, *The Marbois-Longchamps Affair*, 63 PA. MAG. OF HIST. & BIOGRAPHY 294, 298–99 (1939).

<sup>76</sup> *Cf. id.* at 300 (“It has never been easy for other powers to understand the nature of our federal system.”).

<sup>77</sup> While the Pennsylvania high court found that the law of nations “form[ed] a part of the municipal law of Pennsylvania,” *Longchamps*, 1 U.S. at 114 (emphasis omitted), the concern was that other states could conclude otherwise, see *Kent*, *supra* note 2, at 880 & n.177.

<sup>78</sup> See Rosenthal, *supra* note 75, at 299.

<sup>79</sup> Letter from James Madison to James Monroe (Nov. 27, 1784), in 2 THE WRITINGS OF JAMES MADISON 91, 93 (Gaillard Hunt ed., 1901).

<sup>80</sup> *Cf. Kent*, *supra* note 2, at 874–80 (criticizing the conventional account that casts the Marbois affair as being a direct cause of the Offenses Clause).

<sup>81</sup> 21 JOURNALS OF CONGRESS 1136 (1781).

<sup>82</sup> See *id.* These included two of the three international crimes that had been incorporated into British common law, assaults on ambassadors and violations of safe conducts. The third, piracy, was already within Congress's jurisdiction under the Articles of Confederation under Article IX.

of less “obvious” law of nations offenses might also endanger public safety, states should empower their courts to “decide on offences against the law of nations, not contained in the foregoing enumeration.”<sup>83</sup> Additionally, the report suggested an avenue for civil redress, recommending that states “authorise suits . . . for damages” by “injured” foreigners.<sup>84</sup> Only one state—Connecticut—appears to have adopted the kind of measures called for by the committee’s report.<sup>85</sup> Yet the 1781 report clearly foreshadowed the Constitution’s Offenses Clause, which would simply give to Congress the powers that it had previously depended on the states to exercise.

Given that the 1781 report left much of “the power to decide on offences” to courts, one might wonder why the Constitution gave the power to Congress; any scheme of legislation would address only the “most obvious” offenses.<sup>86</sup> The answer probably lies in the more limited powers of the Article III judiciary as compared to state courts. Given the general common law jurisdiction of state courts, a criminal jurisdiction coextensive with customary international law would not be troubling. But, at the time, there was great controversy about the existence of federal criminal common law powers.<sup>87</sup>

2. *State Responsibility for Offenses in the Eighteenth Century.*—An appreciation of some features of the late eighteenth-century views of the law of nations is helpful to better understand the Framers’ concern about a lack of central authority to address international offenses. This history will also help to clarify what the Offenses Clause means given subsequent changes in the law of nations. Under the law of nations as expounded by the eminent publicists of the eighteenth century, such as Emmerich de Vattel, nations could be held responsible for the injuries caused by their subjects to foreigners or powers.<sup>88</sup> One of these offenses for which a nation could be held responsible was quite broad: violence or insult to a foreigner. If a citizen committed such an offense and the United States did not provide redress, the aggrieved state could, under the law of nations at the time,

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<sup>83</sup> *Id.* at 1137.

<sup>84</sup> *Id.*

<sup>85</sup> *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 716 (2004). South Carolina also adopted a narrower statute focusing on protecting foreign ministers. Kent, *supra* note 2, at 881 & n.180.

<sup>86</sup> 21 JOURNALS OF CONGRESS at 1137.

<sup>87</sup> Washington’s Neutrality Declaration, for example, assumed that crimes against the law of nations, at least where they threatened United States security, could be prosecuted in federal court under federal common law. *See* Kent, *supra* note 2, at 862 n.74. Yet the one effort to do so revealed strong opposition to the notion of federal common law crimes. *See id.* The 1871 report has also been understood as accepting that the class of punishable offenses could change over time. *See* Stephens, *supra* note 23, at 454. Although this may be true, it is not inconsistent with a static division of authority between state legislatures and courts over obvious and nonobvious offenses.

<sup>88</sup> *See Bellia & Clark*, *supra* note 71, at 471–77.

justify reprisals or even war.<sup>89</sup> However, the actions required to disassociate a nation from responsibility for individuals' acts did not have to amount to full-blown prosecution of the offending individual. The United States could fulfill its responsibilities by providing criminal punishment if the act took place within U.S. jurisdiction, extradition if requested and the offense were committed abroad, or compensation, apologies, and similar diplomatic satisfaction.<sup>90</sup>

The notion of state responsibility for offenses by individuals presumes some primary conduct that, when committed by individuals, can trigger vicarious responsibility. That is, while the law of nations could broadly be said to have made states responsible for the offenses against foreigners, it still left open the question of what kind of injuries and offenses. The law of nations treated an action as an offense only when nations tolerated certain salient, intentional wrongs—"to plunder, and [maltreat] foreigners" or to invade neighboring countries.<sup>91</sup> Thus, while neither torts of negligence nor violations of foreigners' contractual rights, for example, would amount to offenses by individuals, the United States could still be held accountable for them.

3. *Implications for Theories of the Offenses Power.*—One broad theory of the Offenses power interprets it as encompassing anything that triggers the international legal responsibility of the United States, or, even more broadly, anything that could lead to reprisal by a foreign nation, even if it does not arise from an individual's direct violation of international law.<sup>92</sup> However, the 1780s background to the Clause does not support such a broad reading of "Offenses." Recall that there were two main international concerns in the 1780s—unfairness to British creditors and landowners and violence against foreigners.<sup>93</sup>

The Framers responded to the concerns about foreigners' property and contract rights with the treaty and interstate and foreign commerce powers. Indeed, foreign reactions to the Constitution were heavily focused on its implications for American compliance with the law of nations. Yet the Framers hardly mentioned the Offenses Clause, with their attention

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<sup>89</sup> See *id.* at 476. It is crucial to note that two elements combined here: primary conduct by individuals that international law regarded as wrongful and the concept of "state responsibility" for that conduct. These two elements need not go together. One could have wrongful conduct without state responsibility (if the conduct occurred abroad). One could also have state responsibility without any individual offense, such as accidental damage caused by a government vessel.

<sup>90</sup> See *id.* at 474.

<sup>91</sup> 2 EMERICH DE Vattel, *THE LAW OF NATIONS: OR, PRINCIPLES OF THE LAW OF NATURE; APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS* § 78, at 226 (1st Am. ed., Samuel Campbell 1796).

<sup>92</sup> See *United States v. Arjona*, 120 U.S. 479, 483 (1887). For example, even if an individual does not violate international criminal law by picketing a foreign embassy, the United States may run afoul of its international obligations if it allows such activity.

<sup>93</sup> See *supra* note 71 and accompanying text.

focusing instead on various federal powers to control commercial matters.<sup>94</sup> This suggests the Offenses Clause was not regarded as a broad source of power against conduct obnoxious to other nations.<sup>95</sup>

The 1781 committee report—the precursor to the Offenses Clause—focused on the more sporadic problem of individual (and tortious) conduct, rather than economic harassment. This focus suggests the function of the Offenses power was not to respond to any acts that would violate U.S. duties to other nations, such as discriminatory state property laws; that was the job of the Treaty and Commerce Clauses. Rather, it dealt with a subset of international wrongs—those that involved criminal or tortious acts by individuals, which then triggered the legal responsibility of the United States. When the First Congress exercised the Offenses power, it was only over discrete individual delicts, themselves defined in the law of nations.<sup>96</sup> Subsequent early Congresses avoided using the Offenses power as a general means of suppressing conduct vexatious to other countries. The original purpose of federal punishment for offenses was to avoid the United States being held internationally responsible for the offenses of individuals, not to regulate private conduct that did not itself violate the law of nations but could cause international difficulties for the government.

Professor Beth Stephens has argued that the Offenses Clause allows “Congress to regulate matters governed by international law.”<sup>97</sup> This authorization would cover a far broader set of issues than those for which the United States would be held accountable. Indeed, such matters might not involve the United States at all, such as the treatment of foreigners by other countries.<sup>98</sup> This position is hard to square with the 1780s background of the Offenses Clause. The committee report summed up the purpose of Offenses legislation: safeguarding the “public faith and safety” of the United States,<sup>99</sup> that is, punishing breaches by individuals where doing so would be seen as the United States’ duty. This says nothing about purely permissive legislation within the broad ambit of the law of nations. In all

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<sup>94</sup> See Daniel Hulsebosch, *Being Seen Like a State: The American Constitution and Its International Audiences at the Founding* (Feb. 2012) (unpublished manuscript) (on file with author).

<sup>95</sup> See David M. Golove and Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 932, 999–1000 (2010) (describing the Offenses Clause as “a minor provision” within the context of the Framers’ goal of allowing the nation to comply with international law and fulfill its international obligations).

<sup>96</sup> The Randolph proposal in the 1781 committee report recommended that the creation of a cause of action by the United States to recover “compensation to *the United States* for damage sustained by them from an injury done to a foreign power by a citizen.” 21 JOURNALS OF CONGRESS 1137 (1781) (emphasis added). This suggests the Offenses power was concerned with matters within the international legal responsibility of the United States, so long as they arose from individuals’ violations of the law of nations (“injuries”), not simply when not remedied by the United States.

<sup>97</sup> Stephens, *supra* note 23, at 525.

<sup>98</sup> See *id.* at 461.

<sup>99</sup> 21 JOURNALS OF CONGRESS at 1137.

cases contemplated by the Framers, the violations had to directly involve the United States.<sup>100</sup> Because the United States could not be held accountable for the conduct of other nations, the purposes of the Offenses Clause fall far short of including universal jurisdiction over crimes with no U.S. nexus or any other conduct for which the United States does not bear international legal responsibility.<sup>101</sup>

Professor Stephens's broad view of offenses seems premised on the notion that the law of nations in 1789 dealt with only a few matters but has since expanded (as the Framers understood it might) to address a variety of issues distinct from individual misconduct; the scope of the Offenses Clause should expand concomitantly, she argues.<sup>102</sup> Yet the law of nations in 1789 also concerned itself with many domestic issues in natural law terms—what would today be known as “soft law”—that were more sweeping than any modern human rights convention. As James Wilson wrote in 1791, “Opinions concerning the extent of the law of nations have not been less defective and inadequate . . . . A very important branch of this law—that containing the duties which a nation owes itself—seems to have escaped their attention.”<sup>103</sup> He went on to catalog a variety of reflexive duties, including “know[ing] itself,” that stem from the law of nations.<sup>104</sup>

Wilson, like many other Framers, drew many of his views on international law from Emmerich de Vattel's *Law of Nations*, which considered, as a matter of natural law, every aspect of municipal law.<sup>105</sup> While there might have been *in some sense* a law of nations duty to “know oneself,” to “love and to deserve honest fame,” or to “avoid ostentation,” the violation of such a duty was not the kind of “Offence” the Constitution contemplates. The background to the Clause suggests that from the vastness of the law of nations, constitutional offenses would include only a subset of international norms—those norms for which, if violated, the United States could be held liable by a foreign nation. In other words, the purpose of “Offences” was limited to violations of duties to other nations.

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<sup>100</sup> See Bellia & Clark, *supra* note 71, at 450–51 (arguing that the 1780s context also suggests that the ATS was only intended to reach international law offenses committed by Americans or in United States territory).

<sup>101</sup> Professors Bellia and Clark have reached similar conclusions about the scope of the “law of nations” in the ATS. See Bellia & Clark, *supra* note 71, at 451–53. This further underscores this Article's thesis that since the ATS is one of the principal pieces of Offenses legislation and the statute directly incorporates the constitutional language, many of the limits on the ATS will come directly from the Offenses Clause.

<sup>102</sup> See Stephens, *supra* note 23, at 454.

<sup>103</sup> James Wilson, *Of the Law of Nations, Lecture on Law* (1791), reprinted in 3 *THE FOUNDERS' CONSTITUTION* 70, 72 (Philip B. Kurland & Ralph Lerner eds., 1987) [hereinafter *THE FOUNDERS' CONSTITUTION*].

<sup>104</sup> *Id.* at 73.

<sup>105</sup> See 1 *VATTEL*, *supra* note 91, § 18, at 64 (“Since then a nation is obliged [by the law of nations] to preserve itself, it has a right to every thing necessary for its preservation.”). Obviously, the law of nature and of nations could conflict with the U.S. Constitution on these broad points.

On the other hand, the background to the Offenses Clause suggests that Congress's definitions of offenses be given considerable leeway. For one, the Confederation Era concerns about foreign reprisals suggest it is less important whether the purported offense actually exists in international custom than if at least some foreign nations believe it exists. For avoiding reprisals against the United States by aggrieved countries, whether the offending conduct objectively constitutes an offense is not the central issue. Such a focus would counsel for some discretion in defining by Congress, as it would have to take into account how other nations interpret the law of nations, whether such interpretations are sincere, and so forth. Moreover, the 1781 committee report recommended that states deal with nonobvious offenses. If they are not obvious, then presumably there might be some disagreement as to whether they are offenses at all. If the Offenses Clause gives Congress the power the report had urged states to exercise, this would suggest such disagreements would be decided in Congress's favor. While this does not necessarily mean Congress could define offenses willy-nilly, it might suggest less emphasis on demonstrable state practice in establishing an offense.

### *B. The Constitutional Convention*

The entire Define and Punish Clause received only a cursory discussion at the Federal Convention, and only one brief exchange was devoted specifically to the offenses against the law of nations.<sup>106</sup> The first version of the section appeared in a draft in the Committee of Detail, which authorized Congress:

6. To provide tribunals and punishment for mere offences against the law of nations.
7. To declare the law of piracy, felonies and captures on the high seas, and captures on land.<sup>107</sup>

Here, the law of nations offenses got their own section, with maritime crimes and military measures grouped together in the subsequent one.<sup>108</sup> The committee draft notably gave no particular lawmaking power over offenses to Congress, but rather only contemplates the creation of courts.<sup>109</sup>

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<sup>106</sup> See Stephens, *supra* note 23, at 474–75.

<sup>107</sup> 2 Farrand, *supra* note 69, at 143; see also Kent, *supra* note 2, at 898 (discussing possible interpretations of the Committee's draft).

<sup>108</sup> The draft was written by Randolph, and it transfers to the federal level the recommendation of his 1781 congressional report, which had called for "a tribunal in each State . . . to decide on offences against the law of nations." 21 JOURNALS OF CONGRESS 1137 (1781).

<sup>109</sup> This followed the Articles of Confederation, which gave Congress the power of "appointing courts for the trial of piracies and felonies committed on the high seas, and establishing courts for receiving and determining finally appeals in all cases of capture." ARTICLES OF CONFEDERATION OF 1781, art. IX, para 1. Interestingly, the "declare the law" power in the first draft is applied to the offenses



Presumably, the drafters entertained the notion that such offenses might be punished to some extent as federal common law crimes, as George Washington subsequently sought to do in his Neutrality Proclamation.<sup>110</sup>

The committee ultimately took another route, perhaps due to misgivings about common law crimes. It reported a text that gave Congress the power “to declare the Law and Punishment of Piracies and Felonies committed on the high Seas, and the Punishment of counterfeiting the [Coin] [and] [of the U.S. &] of Offenses against the Law of Nations.”<sup>111</sup> Congress, rather than the courts, was given the primary role in establishing offenses. It bears noting that for counterfeiting and international crimes, Congress would only declare the “punishment” rather than the “law and punishment.”

After some debate in relation to piracies and felonies, “define and punish” was substituted for “declare the law and punishment of” at Madison and Randolph’s motion.<sup>112</sup> Madison offered several reasons for the change. First, felony “is vague.”<sup>113</sup> Different jurisdictions had different understandings of what constituted a felony. Congress must create a binding rule. Madison may have acted with an overabundance of caution; it is not clear that the change from declare to define made any real difference. For example, the next clause in Article I starts with “Declare (War),” and it is not understood to mean simply to specify and give legal recognition to an existing state of war; it can create such war as well.<sup>114</sup>

One brief exchange at the Convention focused further on the meaning of “define” in the Clause.<sup>115</sup> Not content with the change from “declare” to “define,” Gouverneur Morris suggested using “designate” instead, because “define” was “limited to the preexisting meaning” of a crime.<sup>116</sup> Yet “others” at the Convention rejected the suggestion; they explained that

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for which Congress could previously only establish courts, but not to the newly created jurisdiction over international law offenses.

<sup>110</sup> See *infra* notes 165–67 and accompanying text.

<sup>111</sup> 2 Farrand, *supra* note 69, at 168.

<sup>112</sup> *Id.* at 315–16.

<sup>113</sup> *Id.* at 316 (“[F]elony at common law is vague.”).

<sup>114</sup> Justice Story thought the gist of the provision was substantially the same under either wording, though it seems he had only a vague understanding of the debates. See 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES bk. III, § 1162, at 88 (photo. reprint 1994) (Melville M. Bigelow ed., Boston, Little, Brown, & Co., 5th ed. 1891) [hereinafter STORY] (discussing the “indeterminate” meaning of felony). The terms “declare” and “define” were also used interchangeably in the debate over the treason provision. See *infra* notes 133–39.

<sup>115</sup> No article on the scope of the Offenses power mentions this exchange, probably because it was made at a point when the define power still only applied to high seas crimes. See, e.g., Stephens, *supra* note 23, at 474 (“The debates at the Constitutional Convention made clear that Congress would have the power to punish only actual violations of the law of nations, not to create new offenses.”).

<sup>116</sup> 2 Farrand, *supra* note 69, at 316.

“define” was “applicable to the *creating of offences* also, and therefore suited the case both of felonies & of piracies.”<sup>117</sup>

At first glance, this may suggest that “define” was understood by the Framers as involving a creative power rather than a purely expository one. In fact, it suggests the opposite. Recall that, at the time, the term did not apply to offenses against the law of nations, but only to piracy and felonies on the high seas. Piracy was itself an offense defined by the law of nations.<sup>118</sup> The response to Morris was that *creating* new crimes would only be appropriate for felonies, but not piracies.<sup>119</sup> Congress could not make new piracies, the response seemed to assume, because piracy is a closed set in the law of nations<sup>120</sup> whereas felony is a more flexible one. Thus, this exchange shows that Congress could not ignore external law of nations concepts through the define power. An even narrower reading of this discussion would be that “creating” offenses may simply mean establishing them through legislation as opposed to relying on their enforcement and definition through common law.<sup>121</sup> At this point, Oliver Ellsworth proposed making “define and punish” apply equally to all four categories in the Clause, including law of nations offenses.<sup>122</sup> The suggestion was unanimously adopted.<sup>123</sup>

The only specific discussion of offenses occurred nearly a month later when delegates considered yet another revised version of the Clause. The exchange in question is important because it leads directly to the final version of the Clause:<sup>124</sup>

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<sup>117</sup> *Id.* (emphasis added).

<sup>118</sup> Cf. 4 WILLIAM BLACKSTONE, COMMENTARIES \*71 (“[T]he crime of *piracy* . . . is an offence against the universal law of society . . .”).

<sup>119</sup> See STORY, *supra* note 114, § 1160, at 87 (“[T]he power is not merely to define and punish piracies, but *felonies* . . .; and, on this account, the power to define, as well as to punish, is peculiarly appropriate.”).

<sup>120</sup> See WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 107 (photo. reprint 2003) (Philadelphia, Philip H. Nicklin, 2d ed. 1829) (“It does not seem to have been necessary to define the crime of piracy. There is no act on which the universal sense of nations has been so fully and distinctly expressed, as there is no act which is so universally punished.”); STORY, *supra* note 114, § 1159, at 86 (“If the clause of the Constitution had been confined to piracies, there would not have been any necessity of conferring the power to define the crime . . . [F]or piracy is perfectly well-known and understood in the law of nations, though it is often found defined in mere municipal codes.”).

<sup>121</sup> St. George Tucker treated all three terms—create, define, and declare—as synonymous, writing, “[T]here is a power granted to congress to *create* and to define and punish offences, whenever it may be *necessary* and *proper* to do so . . . still it appears indispensably necessary, that congress should first *create*, (that is, define and declare the punishment of,) every such offence, before it can have existence as such . . .” St. George Tucker, *Of the Cognizance of Crimes and Misdemeanors*, reprinted in VIEW OF THE CONSTITUTION OF THE UNITED STATES WITH SELECTED WRITINGS 395, 399 (Clyde N. Wilson ed., Liberty Fund 1999) [hereinafter Tucker, *Cognizance*].

<sup>122</sup> See 2 Farrand, *supra* note 69, at 316.

<sup>123</sup> See *id.* That is, to take out “and punish” before “counterfeiting.”

<sup>124</sup> Counterfeiting had been moved to its own provision. U.S. CONST. art. I, § 8, cl. 6.

To define & punish piracies and felonies on the high seas, and “punish” offences against the law of nations.

Mr. Govr. Morris moved to strike out “punish” before the words “offences agst. the law of nations[,]” so as to let these be *definable* as well as punishable, by virtue of the preceding member of the sentence.

Mr. Wilson hoped the alteration would by no means be made. To pretend to *define* the law of nations which depended on the authority of all the Civilized Nations of the World, would have a look of arrogance[] that would make us ridiculous.

Mr. Govr[:] The word *define* is proper when applied to *offences* in this case; the law of []nations[] being often too vague and deficient to be a rule.

On the question to strike out the word “punish” []it passed in the affirmative[.]<sup>125</sup>

The reasoning for having “define” apply to “the law of nations” is the same as for felonies: the vagueness of the underlying law.<sup>126</sup> The spirit of the discussion seemed to be that felonies and the law of nations refer to a broad body of law whose precise components, elements, and penalties are not set in stone. Congress could statutorily provide the requisite specificity.

Note that no one took issue with Wilson’s point that the law of nations exists beyond the definition of any one country; this point seems to have been generally accepted. As Justice Iredell instructed a grand jury a few years later: “Even the Legislature cannot rightfully controul [the law of nations] . . . .”<sup>127</sup> This all echoed an earlier statement by Lord Mansfield that an Act of Parliament “did not intend to alter, nor can alter the law of nations.”<sup>128</sup> Under the Constitution, Congress can act *contrary* to international law in pursuance of its other powers. But the specific power to

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<sup>125</sup> 2 Farrand, *supra* note 69, at 614–15 (footnote omitted). Apparently, Morris had accepted the reassurances about the appropriateness of the verb “define.”

<sup>126</sup> See JAMES KENT, 1 COMMENTARIES ON AMERICAN LAW 2 (photo. reprint 1984) (New York, O. Halsted 1826) (“[T]he precepts of [the law of nations] are not defined in every case with perfect precision, and . . . it is often very difficult to ascertain . . . its precise injunctions and extent . . .”).

<sup>127</sup> *James Iredell’s Charge to the Grand Jury of the Circuit Court for the District of South Carolina*, GAZETTE OF THE UNITED STATES (May 12, 1794), reprinted in 2 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, at 467 (Maeva Marcus ed., 1988) [hereinafter DOCUMENTARY HISTORY].

<sup>128</sup> *Heathfield v. Chilton*, (1767) 98 Eng. Rep. 50, 50 (K.B.). Wilson echoed Mansfield almost word for word in a grand jury instruction, suggesting that he had been aware of *Heathfield* at the Convention and that he thought the Constitution had not mooted the view he had expressed at the Convention. See *James Wilson’s Charge to the Grand Jury of the Circuit Court for the Dist. of Virginia* (May 23, 1791), reprinted in 2 DOCUMENTARY HISTORY, *supra* note 127, at 166, 179 (observing that “no state or states can . . . alter or abrogate the law of nations”).

enforce the law of nations would be understood as needing to be consistent with an externally determined body of law.<sup>129</sup>

Morris did not deny that individual nations cannot make international law. It seems fairly clear from his comments that the purpose of the drafters in making offenses definable was not to allow Congress to innovate international law or participate in what today would be called its “progressive development.” Rather, the Convention wanted to allow Congress to choose which international norms to incorporate and to flesh them out enough that they could stand as criminal charges. Thus, Morris stresses that “define” is “proper as applied to offenses,” as opposed to the law of nations generally. This echoes all of the concerns about federal criminal common law, only magnified by the even greater vagueness of international law compared to common law.<sup>130</sup>

The Offenses Clause played even less of a role in the ratifying process than at the Philadelphia Convention. To the extent it was mentioned, it was to illustrate the narrowness of federal criminal powers. As James Iredell, soon to be one of the first Justices of the Supreme Court, put it:

They have power to define and punish piracies and felonies committed on the high seas, and offences against the law of nations. They have no power to define any other crime whatever.<sup>131</sup>

These views assume that the law of nations served as an external limit on Congress’s define power. Iredell implied that Congress cannot define any

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<sup>129</sup> One might think there is a difference between a constitutional power to “define . . . the law of nations” and an attempt to actually tinker with the law of nations itself—what Wilson seemed concerned with. Incorporated into the Constitution, the law of nations is no longer a body of rules for the conduct of countries but an enumerated legislative power. When Congress uses this power, the law of nations per se is unaffected unless the particular statute itself infringes or limits rights under the law of nations. Thus, to the extent the power is used or misused solely as a basis for regulating internal matters, the law of nations could be thought to be untouched, just as a suspension of habeas would not be thought to affect the availability of the writ in Britain.

<sup>130</sup> See *supra* note 87 and accompanying text; *infra* note 325 and accompanying text.

<sup>131</sup> Statement of James Iredell (July 29, 1788), in 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 219 (photo. reprint 1941) (Jonathan Elliot ed., Philadelphia, J.B. Lippincott Co., 2d ed. 1891) [hereinafter ELLIOT’S DEBATES]; see also Statement of George Nicholas (June 17, 1788), in 3 ELLIOT’S DEBATES, *supra*, at 451 (“Congress have [sic] power to define and punish piracies and felonies committed on the high seas, and offences against the laws of nations; but they cannot define or prescribe the punishment of any other crime whatever, without violating the Constitution.”). *But see* Cincinnatus I: To James Wilson, Esq., N.Y. JOURNAL, Nov. 1, 1787, reprinted in 13 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 531–32 (John P. Kaminski & Gaspare J. Saladino eds., 1981) (“[C]an any one even think that does not comprehend a power to define and declare all publications from the press against the conduct of government, in making treaties, or in any other foreign transactions, an offense against the law of nations?”). The language of the Constitution’s supporters would soon be echoed by Thomas Jefferson’s broadside against the Alien and Sedition Acts. See Kentucky Resolution of 1798 and 1799 § 2, 4 ELLIOT’S DEBATES, *supra*, at 540.

“crime whatever” as an offense but only those made such by the consent of the nations of the world. It also assumes that the scope of the “Offences” category is not broad enough to include all or even most potentially criminal conduct.

### C. Text and Context

Moving past the history of the Offenses Clause, this section will look to the text and semantic sources to understand how much discretion is implied in the power to define. First, this section will look to dictionaries available at the time of ratification, and then it will look to other provisions of the Constitution using similar language.<sup>132</sup>

*1. Operative Verbs in Other Constitutional Provisions.*—The term “define” does not appear elsewhere in the Constitution. The closest analog is the Treason Clause—itself one of the only other provisions specifically authorizing criminal lawmaking. The treason provision gives Congress the power to “declare the Punishment” of the crime.<sup>133</sup> (This echoes the draft language of Clause Ten—to “declare the law and punishment.”) The Constitution itself spells out the elements of treason; this is why it does not give Congress the power to define as well as punish.<sup>134</sup>

At the Convention, treason was discussed in the very next session after the debate on the difference between “declare,” “designate,” and “define” in Clause Ten. Article III’s treason provision was repeatedly described as defining the offense.<sup>135</sup> The first clause of Article III, Section Three was understood as performing a defining function explicitly analogous to the one left for Congress with regards to offenses.<sup>136</sup> The Treason Clause was clearly defining against the background of an established common law

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<sup>132</sup> See Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 756, 788–91 (1999) (explaining interpretive technique “using the Constitution as its own dictionary”).

<sup>133</sup> U.S. CONST. art. III, § 3, cl. 2. Similarly, the Counterfeiting Clause, which was spun off from the Define and Punish provision, gives Congress the narrower sounding power to “provide for the Punishment of” that crime. *Id.* art. I, § 8, cl. 6.

<sup>134</sup> *Id.* art. III, § 3, cl. 1. Madison opposed having the Constitution itself provide a definition, preferring to leave it to Congress: “[I]t was inconvenient to bar a discretion which experience might enlighten, and which might be applied to good purposes as well as be abused.” 2 FARRAND, *supra* note 69, at 345. Others warned of the dangers of leaving it undefined to avoid “abusive prosecutions”: “This is the crime with respect to which a jealousy is of the most importance, and accordingly it is defined with great plainness and accuracy . . .” James Iredell, Marcus, Answers to Mr. Mason’s Objections to the New Constitution (1788), *reprinted in* 1 THE FOUNDERS’ CONSTITUTION, *supra* note 103, at 465, 466.

<sup>135</sup> 2 FARRAND, *supra* note 69, at 345–46. Echoing the Offenses Clause, Madison wanted the words “against the United States” in the provision to make clear that states did not have “a concurrent power so far as to define & punish treason.” *Id.* at 346 (emphasis omitted).

<sup>136</sup> See Alexander James Dallas, *Features of Mr. Jay’s Treaty* (1795), *reprinted in* George M. Dallas, LIFE AND WRITINGS OF ALEXANDER JAMES DALLAS app. at 160, 193 (Philadelphia, J.B. Lippincott & Co. 1871) (contrasting the Offenses Clause as giving Congress a “right to define” with the Treason Clause’s “actual definition” (emphasis omitted)).

crime and existing British statutes, whose meaning it clarified and adapted to U.S. circumstances. The Constitution's defining of treason did not break new ground. This suggests Congress's definitions must also work within the parameters of clearly established international delicts. On the other hand, the reason for defining treason in the Constitution was to avoid broad and abusive definitions by Congress or the courts. Unjust and "inaccurate" expansions of treason were also described as "definitions."<sup>137</sup> Yet even here, one sees an awareness by the Framers that an inaccurate defining of crimes could be a means to oppress the citizen. This might suggest that where the defining power is given in reference to an external standard, it was understood to be strictly limited to that standard.

In discussing treason, the delegates used the words "declare" and "define" interchangeably to refer to the specification of conduct that constitutes an offense.<sup>138</sup> The word "declare" was repeatedly described as dealing with the power to define and punish the crime. This gives further support to the notion that the various verbs suggested for use in Clause Ten did not have distinct meanings, and little should be read into the choice of one over the other.<sup>139</sup>

The define Offenses power can also be contrasted with the verbs used for other Article I, Section Eight powers. In areas where Congress has plenary or broad regulatory powers, it is allowed to "make" laws or to "regulate."<sup>140</sup> Yet it is not given power to "make" offenses over the law of nations—these can only be made by nations of the world—only to "define" them.<sup>141</sup> All other Article I powers give Congress full authority to take whatever measures it thinks necessary and proper in the relevant area, so long as they are consistent with the rest of the Constitution.<sup>142</sup> Thus, the range of substantive policies Congress can adopt under the Offenses Clause

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<sup>137</sup> James Wilson, Speech in the Pennsylvania Ratifying Convention (Dec. 7, 1787), 2 ELLIOT'S DEBATES, *supra* note 131, at 486, 487–88 ("If we have recourse to the history of the different governments that have hitherto subsisted, we shall find that a very great part of their tyranny over the people has arisen from the extension of the definition of treason.").

<sup>138</sup> 2 Farrand, *supra* note 69, at 345–50; *see also* James Madison, Debates in the Federal Convention of 1787, 5 ELLIOT'S DEBATES, *supra* note 131, at 447–48.

<sup>139</sup> "Declare" is also one of Congress's war powers, the nature of which has been much debated. In this context, Justice Story cautioned against reading these constitutional verbs out of their context and pointed out that different verbs may really convey identical powers. For example, the power to "declare" war could mean simply "to proclaim, or publish," but this would be an absurd reading. 1 STORY, *supra* note 114, § 428, at 327. Instead, "[a] power to declare war is a power to make . . . to give life . . . to the thing itself." *Id.*

<sup>140</sup> See, for example, U.S. CONST. art. I, § 8, cl. 3 (providing for power to regulate commerce); *id.* cl. 11 ("make Rules concerning Captures"); *id.* cl. 14 ("make Rules for . . . the land and naval Forces"); and most significantly, *id.* cl. 18 ("[t]o make all Laws which shall be necessary and proper").

<sup>141</sup> *See* Military Commissions, 11 Op. Att'y Gen. 297, 299 (1865) ("To *define* is to give the limits or precise meaning of a word or thing in being; to make is to call into being. Congress has power to *define*, not to make, the laws of nations . . .").

<sup>142</sup> *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 323–24 (1819).

appears to be exogenously delimited in a way that sets it apart from other Article I powers.

To be sure, international customary law will require elaboration by Congress because it is vague and incompletely specified. It does not “partake of the prolixity of a legal code,” as Marshall would say of the Constitution,<sup>143</sup> and thus requires legislative specification. Even well-defined international offenses often leave a myriad of details to be filled in by national courts—rules of secondary liability, attempt and impossibility, evidence, statutes of limitation, and so forth.<sup>144</sup> When international law is silent as to these second-order questions, Congress can act freely.<sup>145</sup> But Congress’s role is to choose primary norms and fill in interstitial questions or uncertainties, not to establish new grounds of culpability beyond what exists in international law.<sup>146</sup>

2. *Dictionaries and Contemporaneous Usage.*—Consulting late eighteenth-century dictionaries can help us understand how constitutional terms would have been understood by a contemporary audience. Such tomes are standard tools of originalist interpretation. There is great postmodern irony in using them to define “define.” The dictionaries do not definitively define “define”—at least the definitions do not clearly resolve questions about the constitutional power. The primary meaning of “define” seems to weakly favor the narrow view of the power. According to the lexicons, defining is not a creative act; to define something is to narrow it rather than to expand it.<sup>147</sup>

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<sup>143</sup> *Id.* at 407 (discussing the Constitution).

<sup>144</sup> Similarly, many federal causes of action have similar details undefined because of the burden of determining these policies for each statute. *See* 42 U.S.C. § 1983 (2006) (providing a cause of action for violations of civil rights under color of state law). In such cases, a federal court may fashion its own rule or look to state law for rules of decision. In such cases, the federal court does not create the offense but may give it definition. *See* *Wilson v. Garcia*, 471 U.S. 261, 266 (1985) (adopting state tort statute of limitations for § 1983 cases).

<sup>145</sup> Thus, shortly after ratification, Chief Justice Thomas McKean of the Pennsylvania Supreme Court—a leading member of the Pennsylvania Ratifying Convention and signer of the Declaration of Independence—upheld a Pennsylvania statute providing for juries in cases involving captured naval prizes, contrary to the practice of “most nations.” *Ross v. Rittenhouse*, 2 U.S. (2 Dall.) 160, 162 (Pa. 1792). Such incidental details as the mode of proof were properly filled in by national laws: “[T]he law of nations, or of nature and reason, is in arbitrary states enforced by the royal power, in others, by the municipal law of the country; which latter may, I conceive, facilitate or improve the execution of its decisions, by any means they shall think best, provided the great universal law remains unaltered.” *Id.* (third and fourth emphases added).

<sup>146</sup> This definition appears to have been endorsed by the Supreme Court in 1820 in a case about defining piracy. *See* *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 159 (1820) (noting that “define” could mean the “express enumeration of all the particulars included in that term”).

<sup>147</sup> SAMUEL JOHNSON, *DICTIONARY OF THE ENGLISH LANGUAGE* (London, Harrison & Co. 1786) (“[t]o give the definition; to explain a thing by its qualities and circumstances,” or, secondarily, “to circumscribe; to mark the limit; to bound”); WILLIAM PERRY, *THE ROYAL STANDARD ENGLISH DICTIONARY* 188 (1st Am. ed. 1788) (“to explain; mark out; decide, determine”); THOMAS SHERIDAN, *A*

Contemporaneous legal usage of the term in the ratification process confirms the point.<sup>148</sup> “Define” usually means to explicate a preexisting meaning, though perhaps not without some license.<sup>149</sup> Thus, in grand jury instructions in 1791, Justice James Iredell described the define power as one to “expound” in greater detail preexisting international law.<sup>150</sup> Similarly, in describing the first Crimes Act, James Wilson observed that the crimes of piracy, murder, manslaughter, perjury, and so forth were neither defined nor described. That is, the law simply names these crimes. Thus, “define” here means not to create a particular crime or criminalize particular conduct, but to enumerate the elements and other details of the offense. Moreover, Wilson explained that courts “must refer to some *pre-existing* law for their definition,” namely, the common law.<sup>151</sup> This shows that define relates to existing meanings, not the creation of new ones. Moreover, while Wilson was discussing the interpretation of a statute, presumably the term “piracy” in the Constitution, which gave rise to the respective statutory term, would be interpreted the same way. “Define” was most often used in the ratification discussions to describe the powers of the federal government under the Constitution and was used in the sense of limiting and narrowing defined powers rather than general ones.<sup>152</sup> The defining of Congress’s power was synonymous with the limiting of it. But if the law of nations could be expanded rather than limited by defining, the act of defining would lose its principal political virtue of contracting the scope of political authority. In another context, the first non-Indian treaty submitted to the Senate was a consular convention with France purporting to “define[] and establish[] the [f]unctions and [p]rivileges of their respective [c]onsuls.”<sup>153</sup> Consular relations already existed between the

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COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 1789) (“to explain a thing by its qualities; to circumscribe, to mark the limit” or, secondarily, “to determine, to decide”).

<sup>148</sup> To be sure, “define” is an extremely common word, and this Article does not pretend to have surveyed all of its contemporaneous usages. Naturally, its most common meaning was to give the definition of something, like a dictionary.

<sup>149</sup> See THE FEDERALIST NO. 22, at 123 (Alexander Hamilton) (E.H. Scott ed., 1898) (“Laws are a dead letter, without courts to expound and define their true meaning and operation.”).

<sup>150</sup> See *James Iredell’s Charge to the Grand Jury of the Circuit Court for the District of New Jersey* (Apr. 2, 1793), in 2 DOCUMENTARY HISTORY, *supra* note 127, at 348, 355 (observing that the “Offences” Congress is authorized to punish are “materially the same in every Country,” with only the practical application specified by Congress).

<sup>151</sup> *James Wilson’s Charge to the Grand Jury in the Circuit for the District of Virginia* (May 23, 1791), in 2 DOCUMENTARY HISTORY, *supra* note 127, at 166, 176.

<sup>152</sup> See, e.g., 4 ELLIOT’S DEBATES, *supra* note 131, at 64, 140, 220.

<sup>153</sup> Convention Defining and Establishing the Functions and Privileges of Consuls and Vice Consuls, U.S.-Fr., Nov. 14, 1788, 8 Stat. 106. An earlier draft of the Convention apparently used the language “determining and fixing” instead of “defining and establishing,” though the change appears to be immaterial. See Report of Secretary Jay, Respecting French and American Consuls (July 4, 1786), in 1 THE DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES OF AMERICA 304, 305 (Washington, D.C., Francis Preston Blair 1833).



nations by virtue of an earlier treaty; the new one specified and elaborated their rights and functions.<sup>154</sup>

#### D. Early Congresses

In the first decade of the Republic, Congress passed several laws that might have implicated the Offenses power.<sup>155</sup> Such “liquidation” of the Constitution’s meaning gains additional traction (and not only for originalists) when unopposed by contrary judicial opinion. Yet several factors complicate this inquiry, or limit what can be learned from it. To begin with, Congress generally did not articulate the Article I basis of these laws, or at least left no record of such discussions. Second, the most far-reaching of these enactments never received judicial construction. So for those acts that do not specifically invoke the law of nations, whether they fall under the Offenses Clause has largely been a matter of *ex post* conjecture. Naturally this conjecture is itself colored by one’s understanding of the scope of the Offenses power. Finally, determining whether a particular law represents a broad or narrow understanding of the Offenses Clause involves a complex historical inquiry of evaluating the law against the law of nations as it stood, or was understood, in the 1790s.

Given the difficulty of pinning down the parameters of contemporary international law, the historical inquiry is even more difficult. Still, it appears that Congress only exercised the Offenses power over the most clearly and universally established law of nations offenses. In one or two instances in the early Republic, the Offenses Clause was invoked, in passing, as a constitutional support for controversial legislation in situations where the regulated conduct did not clearly run afoul of the law of nations. In these cases, the Offenses claim was resisted and ultimately abandoned.

*1. The First Congress: Common Law Crimes and Alien Torts.*—In the first criminal code, the Crimes Act of 1790, Congress included the three law of nations offenses that had been incorporated into the common law<sup>156</sup>:

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<sup>154</sup> Emory R. Johnson, *The Early History of the United States Consular Service, 1776–1792*, 13 POL. SCI. Q. 19, 25 (1898). One of the objections the United States had to earlier drafts was that it would have given consuls protections they did not currently enjoy under the law of nations. *Id.* at 38.

<sup>155</sup> The actions of early Congresses, and the First Congress in particular, have long been regarded as “contemporaneous and weighty evidence of [the Constitution’s] true meaning.” *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 297 (1888); *see also* *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 420 (1821) (Marshall, C.J.) (dictum). *But see* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 138 (1803). Yet many public-meaning originalists would not give much significance to post-ratification actions by Congress. Certainly their actions do not provide an *exhaustive* illustration of the meaning of constitutional terms. Under the Offenses Clause, much of the legislation passed by early Congresses is entirely uncontroversial. As shall be seen, the central question about the controversial parts are whether they were thought to be exercises of the Offenses power at all, that is, whether they could be used as *any kind* of originalist evidence.

<sup>156</sup> *See* *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724 (2006).

piracy,<sup>157</sup> lawsuits against ambassadors and other foreign officials,<sup>158</sup> and violations of safe conducts and physical violence against ambassadors.<sup>159</sup> The latter two laws explicitly invoked “the law of nations”<sup>160</sup> and dealt with well-established offenses.<sup>161</sup> The criminalized offenses were ones that both triggered individual liability and at the same time gave rise to international legal responsibility on the part of the United States.<sup>162</sup> The nature of the “definition” was to specify the scope of protection and liability in more detail than would be found in international law.<sup>163</sup> Thus where the “definition” differed from the law of nations—such as the detailed exceptions to the protection of foreign officials’ domestic servants—it was to limit the scope of the law. The ambassador and safe conduct crimes resulted in few recorded prosecutions, none of which brought into question the scope of the define power.<sup>164</sup>

2. *The Neutrality Act.*—The Neutrality Act arose out of a controversial proclamation by George Washington in 1793. His Administration wanted to keep the United States out of the war between France and Britain. The law of nations placed limits on the kind of support neutral nations could provide to belligerents. The declaration announced that the United States would adhere to the restrictions and pledged to take measures against Americans who aided one of the belligerents, thereby potentially drawing the United States into the conflict.<sup>165</sup>

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<sup>157</sup> An Act for the Punishment of Certain Crimes Against the United States, ch. 9, § 8, 1 Stat. 112, 113 (1790) [hereinafter Crimes Act of 1790].

<sup>158</sup> *Id.* §§ 25–27. The Act declared all legal process against the persons null and void, and that the attorneys and others involved in such litigation “shall be deemed violators of the laws of nations, and disturbers of the public repose, and imprisoned not exceeding three years.” *Id.* § 26. Its constitutionality was assumed by the court in *Finzer v. Barry*, 798 F.2d 1450 (D.C. Cir. 1986), *aff’d in part, rev’d in part sub nom.* Boos v. Barry, 485 U.S. 312 (1988).

<sup>159</sup> Crimes Act of 1790 § 28 (providing punishment if “any person shall violate any safe-conduct or passport duly obtained and issued under the authority of the United States, or shall assault, strike, wound, imprison, or in any other manner infract the law of nations, by offering violence to the person of an ambassador or other public minister”).

<sup>160</sup> The piracy provision was amended in 1819 to do so as well.

<sup>161</sup> See Bellia & Clark, *supra* note 71, at 513–14. The provisions relating to ambassadors essentially recapitulated Queen Anne’s Diplomatic Privilege Act of 1708. See Fredman, *supra* note 25, at 293.

<sup>162</sup> See Bellia & Clark, *supra* note 71, at 514.

<sup>163</sup> *United States v. Benner*, 24 F. Cas. 1084, 1086 (C.C.E.D. Pa. 1830) (No. 14,568) (upholding the statutory limitation of offenses against ambassadors to those recognized by the President).

<sup>164</sup> See *United States v. Ortega*, 24 U.S. (11 Wheat.) 467, 468–69 (1826) (holding that prosecution for assault on an ambassador does not fall within the original jurisdiction of the Supreme Court); *Benner*, 24 F. Cas. at 1086 (citing other cases); see also Fredman, *supra* note 25, at 296.

<sup>165</sup> Proclamation of Neutrality by George Washington (Dec. 3, 1793), in 1 AMERICAN STATE PAPERS: FOREIGN RELATIONS 140 (Walter Lowrie & Matthew St. Clair Clarke eds., Washington, Gales & Seaton 1833) [hereinafter AMERICAN STATE PAPERS]:

I do hereby also make known, that whosoever of the citizens of the United States shall render himself liable to punishment or forfeiture under the law of nations, by committing, aiding, or abetting hostilities against any of the said Powers . . . will not receive the protection of the United

The proclamation led to a pamphlet debate between Hamilton and Madison, focusing on the Executive's power over foreign relations.<sup>166</sup> The one prosecution instituted pursuant to the proclamation gave rise to a complex debate on the existence of federal common law crimes and ultimately ended in acquittal despite a powerful jury charge from Justice Wilson.<sup>167</sup>

The regulations promulgated by President Washington (like the subsequent Neutrality Act) covered a wide range of conduct, from actually making war on neutral countries to fitting out foreign privateers and warships in U.S. ports to service by Americans on such privateers. Congress shortly passed a law, at Washington's request, called the Neutrality Act, criminalizing the kind of filibustering described in the declaration and removing any concerns about separation of powers.<sup>168</sup>

Whether the law was an exercise of the Offenses power goes to the heart of differing conceptions of the Clause. International law did not prohibit private citizens from carrying contraband to belligerents, nor did it bar the service of a third-country national on belligerent privateers.<sup>169</sup> Some of the Act's provisions were designed to avoid potential foreign entanglements entirely, rather than maintain a legal nonbelligerency. However, the theory behind the Neutrality Proclamation was that "[i]t is not sufficient . . . that a neutral should withdraw its protection from those who commit, aid, or abet hostilities against belligerents; to preserve its neutrality, the United States must also prosecute and punish them . . ." <sup>170</sup> Thus, while an American did not directly violate the law of nations by

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States . . . ; and further, that I have given instructions to those officers, to whom it belongs, to cause prosecutions to be instituted against all persons, who shall, within the cognizance of the courts of the United States, violate the law of nations, with respect to the Powers at war . . .

<sup>166</sup> The exchange came to be known as the Pacificus–Helvidius debates. Madison (Helvidius) argued that because the Constitution commits the power to decide whether to wage war to Congress, the President cannot unilaterally decide on a policy of peace. ALEXANDER HAMILTON & JAMES MADISON, *THE PACIFICUS–HELVIDIUS DEBATES OF 1793–1794: TOWARD THE COMPLETION OF THE AMERICAN FOUNDING 70* (Morton J. Frisch ed., 2007). Hamilton (Pacificus) explained that until Congress declared war, peace was its policy, which Washington was simply trying to preserve. *Id.* at 13–14.

<sup>167</sup> See *Henfield's Case*, 11 F. Cas. 1099, 1119–22 (C.C.D. Pa. 1793) (No. 6360).

<sup>168</sup> Robert J. Reinstein, *Executive Power and the Law of Nations in the Washington Administration*, 46 U. RICH. L. REV. 373, 440–41 & n.341 (2012).

<sup>169</sup> *Id.* at 430. Indeed, privateering under a writ of marquee from a recognized belligerent was, as a matter of international law, entirely legal for the individuals involved; this is what distinguished it from piracy. While nations restricted the service of their subjects on foreign men-of-war, this was seen as a matter of national foreign policy, and not the enforcement of a specific law of nations norm. See Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation*, 45 HARV. INT'L L.J. 183, 211–14 (2004).

<sup>170</sup> Reinstein, *supra* note 168, at 438 (discussing Justice Jay's grand jury charge in *Henfield's Case*).

serving on a privateer, the United States had a duty under international law, the argument went, to prevent violations of its neutrality.<sup>171</sup>

President Washington's policy in the Neutrality Proclamation was heavily informed by Vattel's discussion of the duties of neutrals as established by the law of nations.<sup>172</sup> Yet because the criminalized conduct did not necessarily violate the law of nations in and of itself, it would give an expansive cast to "Offences" if Congress followed a similar rationale in its legislation. (The Declaration itself was an exercise of some Article II powers.)<sup>173</sup>

While Washington may have seen himself as enforcing the law of nations, it is far from clear that Congress intended to exercise the Offenses power in passing the Neutrality Act.<sup>174</sup> It did not describe the law as Offenses legislation when it was passed; the characterization was first made only a century later.<sup>175</sup> Unlike the earlier Offenses legislation, the Neutrality Act makes no reference to international law. Thus the relevant question about the Neutrality Act is not what it teaches about the scope of the Offenses power, but whether it has *anything* to teach about it.<sup>176</sup>

The strongest evidence that the Act was understood as an Offenses Clause measure is that President Washington repeatedly invoked the law of nations in his proclamation, and it was frequently mentioned in *Henfield's Case*. The Act was designed to provide a subsequent statutory basis for the

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<sup>171</sup> *Id.* at 438–39. Justice Wilson saw Henfield's violation of the law of nations as being interchangeable with the "injury to the nation" from potentially costing it its neutrality, as defined by the law of nations. *Henfield's Case*, 11 F. Cas. at 1116.

<sup>172</sup> See Reinstein, *supra* note 168, at 440 ("The Washington administration acted on the belief that by prosecuting Henfield and others it was fulfilling its duty to follow the obligations of the law of nations as expounded by Vattel . . .").

<sup>173</sup> See *id.* at 441 (arguing the Declaration was an exercise of the Take Care Clause, as the law of nations was part of the common law).

<sup>174</sup> See MICHAEL D. RAMSEY, *THE CONSTITUTION'S TEXT IN FOREIGN AFFAIRS* 207 (2007) (observing that the Act "go[es] beyond anything the law of nations required at the time"); *Report of the Committee on Foreign Affairs* (July 26, 1866), reprinted in *THE COUNTER CASE OF GREAT BRITAIN AS LAID BEFORE THE TRIBUNAL OF ARBITRATION, CONVENEED AT GENEVA* 678 (1872) ("The Act of 1794 was not passed in pursuance of the provisions of the Constitution making it the duty of Congress to punish offenses against the law of nations. [It applied to conduct] not [criminalized] in previous legislation of this or other nations, but mainly created by the act itself."). *But see* Reinstein, *supra* note 168, at 443 (arguing that the Act was an Offenses Clause measure).

<sup>175</sup> The notion of the Neutrality Proclamation as an offenses law seems to have been popularized by *United States v. Arjona*, 120 U.S. 479, 488 (1887). See also RAMSEY, *supra* note 174, at 207; Kent, *supra* note 2, at 861–62 (discussing the U.S. Supreme Court's recognition of both uses of the Law of Nations Clause).

<sup>176</sup> The Neutrality Act has been amended several times since its original enactment, most recently in 1948. International law today clearly does not bar private assistance to belligerents by nationals of a neutral state, nor does it make such assistance a valid *casus belli*. Thus, it would be hard to understand the basis for the continued validity of the law if it were Offenses Clause legislation unless one accepts a very broad understanding of the power.

proclamation and prosecutions under it.<sup>177</sup> This argument can be turned around: the repeated reference to offenses against the law of nations are nowhere to be found in the Act, perhaps because Congress understood there were no such offenses involved.<sup>178</sup> Of course, the necessary and proper power applies in full to Offenses legislation. Those parts of the Act that did not deal with genuine violations of neutrality may have been seen as closely related enough that they would be the start of a slippery slope, leading to genuine violations.

Alternatively, the Act could more readily be understood as an exercise of Congress's war powers, or as supporting and "carrying into effect the President's power to set foreign policy (in this case, to declare neutrality)."<sup>179</sup> Indeed, both sides in the constitutional debate over the declaration saw the issues as relating primarily to the war powers; both agreed that private citizens making war on neutral states threatened the effective exercise of Congress's power to pick wars.<sup>180</sup> The question was whether the President's declaration suffered from the same objection.<sup>181</sup> Madison never complained that Washington had exercised Congress's Article I power over *offenses*.<sup>182</sup> One could see the Pacificus–Helvidius debate as a more general one about which branch has primacy in the setting of foreign policy. The treaty power was also implicated in the law—though treaties were, for various reasons, not mentioned in the proclamation.<sup>183</sup> Both the proclamation and the subsequent law were widely explained as

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<sup>177</sup> Similarly, when Washington came to Congress to ask for legislation to back his policy, he said congressional action was needed "where the penalties on violations of the law of nations may have been indistinctly marked, or are inadequate." George Washington, Speech Delivered to the Senate and House of Representatives (Dec. 3, 1793), in 1 AMERICAN STATE PAPERS, *supra* note 165, at 22.

<sup>178</sup> Having approved the declaration, the Administration found it difficult to determine what the relevant offenses actually were, leading to Secretary of State Jefferson's famous unanswered request for an advisory opinion from the Supreme Court. Thomas Jefferson, Letter to the Chief Justice and Judges of the Supreme Court of the United States (July 18, 1793), in 7 THE WORKS OF THOMAS JEFFERSON 451 (Paul Leicester Ford ed., New York, Knickerbocker Press, federal ed. 1904).

<sup>179</sup> See RAMSEY, *supra* note 174, at 207.

<sup>180</sup> This is how the Neutrality Act would continue to be understood in its subsequent incarnations. See, e.g., James Buchanan, A Message to the Senate of the United States (Jan. 7, 1858), in 7 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 2999 (New York, Bureau of National Literature, Inc. 1897) ("[Private citizens making war] is a usurpation of the war-making power, which belongs alone to Congress . . .").

<sup>181</sup> Madison's argument that Washington had intruded on Congress's declare war power reflects a surprisingly broad "dormant" conception of the relevant authority. The Supreme Court held 150 years later that the war powers continue after the conclusion of hostilities to allow for dealing with demobilization and similar issues. See *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 141–42 (1948). Madison's nominally "strict" construction would have the power also available *before* a war is declared, which would mean the power was always on.

<sup>182</sup> See DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD 1789–1801, at 178–79 (1997) (noting that Madison had failed to make "the strongest argument" against the declaration—assuming that Madison saw it as an attempt to exercise the define Offenses power).

<sup>183</sup> See Lobel, *supra* note 28, at 15–17; Reinstein, *supra* note 168, at 431–33.

necessary to fulfill obligations in treaties—the Treaty of Peace with Britain and, especially, the Treaty of Amity with France.<sup>184</sup> Indeed, many references in the neutrality debates to the “law of nations” could have meant treaties, which were themselves part of the law of nations.<sup>185</sup>

Further pursuing the policy of avoiding provocation with other sovereigns, early Congresses also passed laws criminalizing a variety of ordinary offenses by Americans against Indians in Indian country. Such crimes would not violate international law, as the United States was not responsible for the conduct of its nationals outside its jurisdiction. The measures, like the others discussed in this Part, were designed to prevent Americans from triggering war with Indian tribes and thus implicated the war and foreign policy powers.<sup>186</sup>

3. *The Alien Acts.*—The infamous Alien Acts of 1798 are not generally thought to be an exercise of the Offenses power, yet they provided the occasion for the only explicit discussion of the scope of the define power in the early Republic. Again motivated by fears of an imminent war with France and ongoing French intrigues in the United States, the Federalist-dominated Congress passed a relatively uncontroversial Alien Enemies Act (AEA), allowing the president to expel nationals of hostile countries in time of war.<sup>187</sup> While there were ongoing hostilities with France and a concern that full-fledged war might develop, France was not yet officially a hostile power, and thus French citizens in the United States were not yet “enemy aliens.” Yet the Federalists feared that French residents were already hatching conspiracies against the United States.<sup>188</sup> Congress wanted to act against such plots before a formal declaration of war, so it passed a second act—this time with only Federalist

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<sup>184</sup> See Reinstein, *supra* note 168, at 432. In presenting his proclamation to Congress, Washington explained: “In this posture of affairs, both new and delicate, I resolved to adopt general rules, which should conform to the treaties, and assert the privileges, of the United States.” George Washington, Speech Delivered to the Senate and House of Representatives (Dec. 3, 1793), in 1 AMERICAN STATE PAPERS, *supra* note 165, at 21.

<sup>185</sup> The law of nations was both an umbrella term for international law of all kinds, as well as the more specific kind produced through custom as opposed to treaty.

<sup>186</sup> The law was actually called “[a]n Act . . . to preserve Peace on the Frontiers.” Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1, 24–25 & n.85 (2010) (arguing that these laws were an exercise of the Indian commerce power and thus support a broad reading of “commerce” throughout the Commerce Clauses). At the time, no one suggested that these laws exercised either the Indian commerce or the Offenses power. Their functional similarity to the Neutrality Act suggests that the Indian laws should be understood as treaty or war power measures. This interpretation does raise the question of the limits on Congress’s ability to ban conduct that, because it is vexatious to a foreign power, could lead to war. Direct assaults on foreigners, as in the Neutrality and Indian Trafficking laws, seem well within the safe zone.

<sup>187</sup> An Act Respecting Alien Enemies, ch. 66, 2 Stat. 577 (1798) (codified at 50 U.S.C. §§ 21–24 (2006)).

<sup>188</sup> See Speech of Mr. Charles Pinckney (May 20, 1788), in 4 ELLIOT’S DEBATES, *supra* note 131, at 333, 334–35.

support—which gave the president the power to also expel neutral aliens that “he shall judge dangerous to the peace and safety of the United States.”<sup>189</sup>

The Alien “Friends” Act, as the second of the two alien laws was known, and the contemporaneous Sedition Act were extraordinarily controversial. The Virginia and Kentucky legislatures passed resolutions proclaiming the laws unconstitutional and void—an early exercise in nullification that was controversial in its own right. As an Article I basis for the Alien Act, Congress put its principal reliance on the “power of war and peace” (as with the Neutrality Act).<sup>190</sup> However, at least some Republicans had supported the Alien Enemies Act as, inter alia, an exercise of the Offenses power.<sup>191</sup> So in the subsequent debates over the Virginia resolves, Federalists argued—very much in the alternative—that the Alien “Friends” Act also fell within Congress’s law of nations power.<sup>192</sup> To be sure, the Offenses Clause justification was a sideshow in the debate over the constitutionality of the Alien Act. The Virginia resolves were sent to other states for approbation; no state joined in. Indeed, several legislatures returned the resolves with statements supporting the constitutionality of the Act. These answers uniformly justified the statute on something like war powers or related national defense arguments, making no mention of law of nations offenses.<sup>193</sup>

In the wake of the failure of the Virginia resolves to find support from other states, their author, James Madison, drafted another resolution for the Virginia legislature, more fully setting out the theory of the earlier resolve. The Report of 1800 considered every potential issue in the debates over the Alien and Sedition Acts. It is also considered one of the last great

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<sup>189</sup> An Act Concerning Aliens, ch. 58, 1 Stat. 570 (1798). Because the Alien Act expired in two years, and was of course not renewed by the incoming Republican legislature in 1800, it never received judicial review.

<sup>190</sup> Report of Congress on the Alien and Sedition Laws (1799), in 4 ELLIOT’S DEBATES, *supra* note 131, at 441.

<sup>191</sup> Andrew Lenner, *Separate Spheres: Republican Constitutionalism in the Federalist Era*, 41 AM. J. LEGAL HIST. 250, 267 (1997).

<sup>192</sup> *Id.* at 271. The argument seems more rhetorical than serious; supporters of the Alien “Friends” Act put forth a laundry list of Article I grounds, several manifestly not serious. See *Madison’s Report on the Virginia Resolutions*, 4 ELLIOT’S DEBATES, *supra* note 131, at 546, 558 (considering whether laws could be seen as exercises of *marque* and *reprisal* power).

<sup>193</sup> See, e.g., Answer of the Massachusetts State Senate (Feb. 9, 1799), 4 ELLIOT’S DEBATES, *supra* note 131, at 533, 534–35:

The legislature of Massachusetts . . . do explicitly declare, that they consider the acts of Congress, commonly called “the Alien and Sedition Acts,” not only constitutional, but expedient and necessary . . . That Congress, having been especially intrusted by the people with the general defence of the nation, had not only the right, but were bound, to protect it against internal as well as external foes: That the United States, at the time of passing the *Act concerning Aliens*, were threatened with actual invasion; had been driven, by the unjust and ambitious conduct of the French government, into warlike preparations, expensive and burdensome; and had then, within the bosom of the country, thousands of aliens, who, we doubt not, were ready to coöperate in any external attack.

constitutional statements of Founding Era interpretation. Inter alia, Madison responded to the claim that the Alien Act was part of the Offenses power. He argued that Congress exceeded its power to define because expelling neutral aliens goes beyond the law of nations:

It is said, further, that, by the law and practice of nations, aliens may be removed, at discretion, for offences against the law of nations; that Congress are authorized to define and punish such offences; and that to be dangerous to the peace of society is, in aliens, one of those offences.

The distinction between alien enemies and alien friends is a clear and conclusive answer to this argument. Alien enemies are under the law of nations, and liable to be punished for offences against it. Alien friends, except in the single case of public ministers, are under the municipal law, and must be tried and punished according to that law only.

. . . .

. . . Under this view of the subject, the act of Congress for the removal of alien enemies, being conformable to the law of nations, is justified by the Constitution; and the “act” for the removal of alien friends, being repugnant to the constitutional principles of municipal law, is unjustifiable.<sup>194</sup>

Madison maintained that Congress’s use of the define Offenses power is strictly limited by international law and can be reviewed against that standard. If international law makes being an enemy alien an offense, Congress cannot expand the definition. The Federalists, on the other hand, claimed that the distinction made by the law of nations is based on “dangerousness” of aliens, not their formal allegiance. In other words, the Federalists contested the content of international law, not Congress’s power to define. No one suggested congressional ability to create novel offenses, though the Federalists did seem to suggest the borders of a recognized offense can be stretched to catch similarly harmful conduct.

Some scholars have wondered why, if international law authorizes the removal of enemy aliens, this would have anything to do with them committing an offense, or why removal would be a punishment.<sup>195</sup> Vattel, for example, says that enemy nationals in one’s territory can be treated as enemies, but gives no suggestion that their presence violates international law.<sup>196</sup> Thus, even the invocation of the Clause for the Alien Enemies Act could suggest a fairly capacious understanding of the provision that allows not just for the punishment of actual violations of international law by individuals, but of any conduct that either carries international law implications for the United States or that may be regulated under international law.

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<sup>194</sup> *Madison’s Report on the Virginia Resolutions*, 4 ELLIOT’S DEBATES, *supra* note 131, at 546, 556–57.

<sup>195</sup> See Lenner, *supra* note 191, at 271.

<sup>196</sup> 3 VATTEL, *supra* note 91, § 63, at 386.



Madison was aware of this problem and sought to address it. He noted that “referring the alien act to the power of Congress to define and *punish* offences against the law of nations” requires “that the act is of a *penal*, not merely of a preventive operation,” and that it punish an offense.<sup>197</sup> He goes on to argue that the offense is committed by the enemy nation by the very fact that it is at war with the United States.<sup>198</sup> That nation is punished, *inter alia*, by expelling its nationals, since nations cannot be directly dealt with through judicial process.

Thus, two things emerge quite clearly about Madison. First, he took a very narrow view of Congress’s ability to create novel offenses, even by stretching the definitions of existing ones. Second, he clearly saw the Offenses power as a punitive one, and not a general tool of foreign relations. Finally, he appeared to believe that, while the scope of the define power was limited, “Offences” included action that is not individually wrongful. In any case, the attempt to square the Alien Enemies Act with the Offenses Clause was forced, as the Offenses Clause was quite peripheral to the debate over the laws, which were generally seen as an exercise of war powers.<sup>199</sup>

While the Supreme Court would, a century later, use the Neutrality Acts as a model for a sweepingly broad reading of the Offenses Clause,<sup>200</sup> it does not seem as though it had previously been understood as Offenses legislation at all, at least not in its entirety. In particular, early commentators like Story, Rawle, and Kent did not mention the famous and controversial law in their discussion of Congress’s exercises of the constitutional power.<sup>201</sup>

4. *International Slave Trade.*—Congress’s last encounter with the Offenses power in the early Republic resulted in it *not* adopting a measure

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<sup>197</sup> *Madison’s Report on the Virginia Resolutions*, 4 ELLIOT’S DEBATES, *supra* note 131, at 546, 556.

<sup>198</sup> *Id.* at 556–57. Presumably the “offense” consisted of creating a *casus belli*, which would be a violation of the law of nations or of making illegal war against the United States. In Vattel’s treatise, the assumption was that war was a consequence of one nation violating international law. *See* VATTEL, *supra* note 91, §§ 26–28, 41, at 375 (“When an offensive war has for its object the punishment of a nation, like every other war, it is to be founded on right and necessity. 1. On right; an injury must have been actually received.”). Anthony Colangelo has recently argued that the Offenses Clause allows for the “punishment” of states as well as people, which fits nicely with Madison’s argument for the constitutionality of the Enemy Aliens Act. *See, e.g.*, Kent, *supra* note 2.

<sup>199</sup> The Offenses Clause was only enlisted in support of the AEA as a distant “back-up.” *See* RAWLE, *supra* note 120, at 100 (“In the case of alien enemies, the . . . right of sending them away, is an incident to the right of carrying on public war. It is not mentioned in the Constitution, but it properly appertains to those who are to conduct the war.”); *supra* notes 192–93 and accompanying text. War powers were a quite natural fit since someone became an “enemy” as a consequence of a declaration of war.

<sup>200</sup> *United States v. Arjona*, 120 U.S. 479 (1887); *see infra* Part III.A.

<sup>201</sup> They also make no mention of the Alien Acts.

that would purport to extend the international criminalization of piracy to the slave trade because it would involve defining beyond what the law of nations at that point permitted.<sup>202</sup> Early in the nineteenth century, Congress took aggressive action to shut down the transatlantic slave trade. A series of statutes provided severe punishments for American vessels involved in the trade.<sup>203</sup> However, the trade simply shifted to other flags. Many in the United States and Britain came to believe that the slave trade could only be abolished by making it an offense against the law of nations, like piracy. Yet when Congress passed its most draconian law against the slave trade in 1820, it made clear that while it wanted to label it as an international crime akin to piracy—which would allow for the prosecution of offenders regardless of their nationality—it could not do so until international law, as created by the nations of the world as a whole, caught up with this position. Congressional reports specifically tied the inability to regulate the transatlantic slave trade as a piracy or felony to the limitations of the define and punish power.<sup>204</sup> As Charles Fenton Mercer, the chairman of the House committee for the abolition of the slave trade, wrote, “[T]he Constitutional power of the Government has already been exercised in defining the crime of piracy . . . .”<sup>205</sup> Until the practice of nations caught up with the enlightened Anglo-American view, “any exercise of the authority of Congress, to define and punish this crime” could only be done through the more flexible high seas felonies power, not the piracies and Offenses powers.<sup>206</sup>

Notably, the Administration and other observers agreed with Congress’s limited interpretation of its powers. And the narrow interpretation worked principally to let foreign slave traders off while American ones could be punished by death. Finally, Congress would not have been without *some* sources to cite if it wanted to label the slave trade as a violation of the law of nations. A series of international summits had condemned the trade and called for its abolition, and Britain had labeled it piracy.<sup>207</sup> Just a few years later, Justice Story would famously conclude, based on general principles of natural law and morality, that the slave trade

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<sup>202</sup> A fuller account of this episode can be found in Kontorovich, *Define and Punish*, *supra* note 21, at 194–98.

<sup>203</sup> Act of Mar. 2, 1807, ch. 22, 2 Stat. 426 (prohibiting the importation of slaves after January 1, 1808); Act of May 15, 1820, ch. 113, §§ 4–5, 3 Stat. 600, 600–01.

<sup>204</sup> For a fuller discussion of this episode, see Kontorovich, *Define and Punish*, *supra* note 21, at 194–96.

<sup>205</sup> 36 ANNALS OF CONG. 2210 (1820).

<sup>206</sup> *Id.*

<sup>207</sup> See Eugene Kontorovich, *The Constitutionality of International Courts: The Forgotten Precedent of Slave-Trade Tribunals*, 158 U. PA. L. REV. 39, 61–62 (2009) [hereinafter Kontorovich, *International Courts*].

was a violation of the law of nations,<sup>208</sup> only to be overruled by Justice Marshall.<sup>209</sup> Thus, in 1820, a congressional definition of the slave trade as a violation of international law would have been ahead of any international consensus but at least somewhat colorable. It would not have had to make the offense out of whole cloth, only to promote some cases and conventions beyond the weight they could reasonably bear. Congress made clear that while it could contribute to the progressive development of international norms, it could not do so through the define and punish power itself. That power was reserved for things that had quite clearly been recognized and treated as international offenses by other countries.

#### *E. Summary*

The originalist evidence is too thin to be decisive and is not entirely unidirectional. On the whole, it supports the narrow, constrained version of the Offenses power. The purposes and historical background of “Offenses,” its limited role in the ratification processes, and the language itself tend to suggest a limited scope to the definitions of “defining” and “offenses.” At the Convention, the central notion behind the define powers was to require that, before anyone be punished for violating international law norms, Congress act to bring certainty to preexisting but vague customary norms. The Offenses power was thought of and grouped with a few rather narrow criminal powers, all of which dealt with well-established wrongful conduct. Furthermore, the term “define” has a narrower meaning than those used to confer the plenary regulatory powers of Congress.

More decisively, the define power also pertained to piracy and high seas felonies, and in both those contexts was understood to be limited by the external legal content of those terms. The define power could be no broader than the category to be defined. Given the lack of early judicial precedent, or even extensive discussions, of the offenses provisions, the high seas cases are perhaps the strongest available evidence about the contemporaneous meaning of the define power. It shows that Congress cannot define two plus two to be four or murder plus high seas to be piracy.

In a case involving the piracy power, the Supreme Court echoed the earlier views of Marshall and Wilson that only “real” piracies can be defined as such. Similarly, in cases about felonies, the Court made clear that Congress’s definitions had to fit within some objective external definition both of felonies and of the high seas.

The actions of the early Congresses are more equivocal. They largely limited themselves to the most generally agreed-upon offenses, but this does not disprove their potential power to have acted more aggressively. In

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<sup>208</sup> *United States v. La Jeune Eugenie*, 26 F. Cas. 832, 848–51 (C.C.D. Mass. 1822) (No. 15,551) (Story, J.).

<sup>209</sup> *The Antelope*, 23 U.S. (10 Wheat.) 66, 122–23 (1825).

the Alien Act controversy, Madison resisted the notion that Congress could establish offenses outside the clear core of the law of nations, and his position apparently received no rejoinder.<sup>210</sup> However, the significance of this can be limited because the offenses issue was quite peripheral to the constitutional debate. The Neutrality Acts can be read as advancing a broad notion of “Offences” as any acts that would create legal responsibility to foreign countries, or perhaps even political responsibility, on the part of the United States. Yet it is not clear whether Congress considered the measure an exercise of the Offenses power at all. One might note a tension between the Neutrality Act and the Alien Act. In the latter, it seems to have been agreed that being an enemy alien could be a status punishable as an offense. Yet under the U.S.-responsibility theory of offenses, enemy aliens would be entirely outside the scope, as their actions would never be attributed to the United States.

Yet a narrow notion of “define” does not mean a lack of deference to such definitions once made. Here, the particular character of international custom plays the decisive role.<sup>211</sup> As Morris stressed at the Convention, the content of international custom is nebulous and changing. It cannot be determined by reference to any precise set of materials, to say nothing of materials in English.<sup>212</sup> Thus, considerable deference is appropriate, not because the Offenses Clause is any kind of special or plenary power, but because the vagueness of the law of nations itself makes it difficult to determine if Congress has strayed beyond its Article I authorization. In this zone of vagueness, Congress’s decisions should not be easily second-guessed. Yet occasionally, international law is quite precise—such as about what constitutes piracy.<sup>213</sup> If deference to Offenses legislation is a function of the inherent vagueness of international law, it would be inappropriate cases where international law has developed a clear, narrow, and undisputed definition.<sup>214</sup>

### III. THE COURTS AND DEFINING OFFENSES

In the Constitution’s first century, the federal courts never considered the meaning or scope of the Offenses power and have rarely done so since. Moreover, even in the cases that have addressed the power, the offenses discussions are often secondary to the other, clearer Article I powers, and

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<sup>210</sup> See *supra* text accompanying note 194.

<sup>211</sup> See generally Eugene Kontorovich, *Inefficient Customs in International Law*, 48 WM. & MARY L. REV. 859 (2006) (discussing the development of custom in international law).

<sup>212</sup> *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 163 n.a (1820) (surveying treaties in several different languages).

<sup>213</sup> See *id.*

<sup>214</sup> See *United States v. Furlong*, 18 U.S. (5 Wheat.) 184 (1820).

were perhaps not necessary to the decision.<sup>215</sup> Thus, this Part begins by examining judicial construction of “define and punish” in the other contexts where they have been applied—piracies and felonies on the high seas. These powers also have raised the question of whether Congress can define things as “piracies” or “felonies” that go beyond the generally understood common or international law meaning of these terms. Unlike with offenses, courts dealt with these questions in the first decades of the Constitution, and the definition of piracies enjoyed the attention of some of the nation’s leading jurists. These cases support a narrow understanding of “define and punish” as it applies to all the terms that follow it.

The Offenses power itself had only recently come into focus as the sole Article I authority for any laws. An initial review of the few Offenses Clause cases suggests anarchy. Courts have applied greatly varying standards of review to Offenses legislation. Yet two things emerge clearly from the cases. First, the courts have always at least gone through the motions of measuring legislative definitions against the external standard of international law—Congress does not have *carte blanche*.<sup>216</sup> Secondly, while the courts have been largely deferential to definitions, that discretion turns into strict scrutiny when Congress delegates the defining to another branch.

#### A. *Define Power Applied to Other Parts of the Same Section*

The term “define” is not used in the Constitution except in the Define and Punish Clause. However, an informative but surprisingly overlooked source for understanding the power with respect to offenses can be found in the application of “define” to other parts of the same clause. Presumably, the word “define” transitively conveys the same power in regard to all three kinds of crimes in the section.<sup>217</sup> This provides a significant source of evidence for the scope of “define” in relation to offenses. While courts have never ruled on the validity of congressional defining with respect to offenses, there are several important decisions on these questions

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<sup>215</sup> Cf. Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953 (2005) (arguing that multiple alternate holdings are not dicta).

<sup>216</sup> See *Smith*, 18 U.S. (5 Wheat.) at 163–81 (examining whether a statute criminalizing “piracy” properly defines the crime of piracy and holding that the statutory offense was piracy “as defined by the law of nations, so as to be punishable under the act of Congress”).

<sup>217</sup> The Supreme Court itself has cited *United States v. Smith*, 18 U.S. (5 Wheat.) 153, a case about the defining of piracy, in cases about the Offenses power. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004). Compare Saikrishna Prakash, *Our Three Commerce Clauses and the Presumption of Intrasentence Uniformity*, 55 ARK. L. REV. 1149 (2003) (defending an interpretation of intrasentence uniformity for applying “regulate Commerce” to the three components of the commerce power), with Adrian Vermeule, *Three Commerce Clauses? No Problem*, 55 ARK. L. REV. 1175 (2003) (arguing that different standards for different parts of the commerce power would not be objectionable). The presumption of a single meaning for “define” would be stronger than for a single meaning for “Commerce” because Commerce is repeated three times in different configurations (“with” foreign nations and Indian tribes but “among” states), whereas “define” appears in the provision once and is applied transitively to three subjects.

concerning piracies and felonies, some from the constitutional luminaries of the early Republic.

1. *Limits on Definitions of Piracy.*—The Supreme Court dealt directly with the limits on defining in relation to piracy, which itself is a part of the law of nations.<sup>218</sup> If Congress can define the latter without restriction, one would think it can also do so with the former: The greater power includes the lesser.<sup>219</sup> In the first Crimes Act, Congress punished piracy as understood in the law of nations: robbery on the high seas.<sup>220</sup> Yet the same provision identified conduct beyond piracy and seemed to extend universal jurisdiction to other conduct—most saliently murder—that in almost all views would not be international piracy. Soon after the Act was passed, Justice James Wilson, in a series of grand jury charges, expressed great doubt that Congress could define certain conduct as a piracy if it would not fall within the international legal definition.<sup>221</sup> John Marshall expanded upon these doubts in his historic speech in the John Robbins affair, arguing Congress could not define things as piracies if they did not have that status in international law.<sup>222</sup> It bears noting that this was not Congress calling apples anchovies; there was some authority, though thin, for the notion that any kind of unauthorized private attacks on the high seas would be piracy.<sup>223</sup>

The Supreme Court did not have an opportunity to decide the question for twenty years, but when it did, it embraced Marshall's earlier, narrow approach to the Offenses Clause. In *United States v. Furlong*, the Court insisted that Congress cannot punish murder as piracy when the offense would not be recognized as such by international law<sup>224</sup>: “[T]he law declares murder to be *piracy*. These are things so essentially different in their nature,

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<sup>218</sup> See James Madison in the Virginia Convention (June 20, 1788), in 3 Farrand, *supra* note 69, at 332. “Piracy” was singled out from “Offences” not because the define power applies differently to it, but to make clear that Congress could not apply its unique universal jurisdiction status to law of nations violations. Kontorovich, *Define and Punish*, *supra* note 21.

<sup>219</sup> One might think the define power would be narrower as applied to piracy because that particular crime had a singular, well-known definition, as Justice Story noted in *Smith*. 18 U.S. (5 Wheat.) at 156. This is unlike law of nations offenses in general, which were “vague.” 2 Farrand, *supra* note 69, at 614–15. Yet this begs the question why Congress was given the power to define it. Moreover, Clause Ten speaks of “Piracies,” suggesting things could be added to the list. U.S. CONST. art. I, § 8, cl. 10.

<sup>220</sup> See *Smith*, 18 U.S. (5 Wheat.) at 158 (citing the First Crimes Act of 1790).

<sup>221</sup> See *James Wilson’s Charge to the Grand Jury of the Circuit Court for the District of Virginia* (May 23, 1791), reprinted in 2 DOCUMENTARY HISTORY, *supra* note 127, at 178; see also Kontorovich, *Define and Punish*, *supra* note 21, at 176–78.

<sup>222</sup> See 10 ANNALS OF CONG. 607 (1800); see also Kontorovich, *Define and Punish*, *supra* note 21, at 184.

<sup>223</sup> See Kontorovich, *Define and Punish*, *supra* note 21, at 177–78, 180 (describing views of Justice Iredell and Attorney General Lee that murder was included in the law of nations concept of piracy).

<sup>224</sup> *United States v. Furlong*, 18 U.S. (5 Wheat.) 184, 198 (1820).

that not even the omnipotence of legislative power can confound or identify them.”<sup>225</sup>

*Furlong* involved a murder on a foreign vessel, and thus could not be reached through the broader felonies power. Though the plain language of the statute seemed to apply to such a case, the Court read it artificially narrowly, holding that Congress only meant to punish murder on U.S. vessels where this could be done by defining it as a felony, not a piracy. Yet the decision was manifestly motivated by constitutional concerns. Allowing murder to be defined as piracy would exceed “the punishing power of Congress.”<sup>226</sup> The Court understood the define power narrowly both as a textual matter—defining implies fidelity to the real world—and based on a broader concern about conferring on Congress a power that would in effect be limitless: “If by calling murder *piracy*, it might assert a jurisdiction over that offence committed by a foreigner in a foreign vessel, *what offence might not be brought within their power by the same device?*”<sup>227</sup>

The same concerns would obviously apply *a fortiori* to offenses against the law of nations. If by calling things an offense against the law of nations Congress could punish such conduct without a foreign or interstate commerce nexus, there would be no real limit on Congress’s legislative powers. Indeed, if the define power is not limited by preexisting international law, it would surely be Congress’s broadest, most far-reaching Article I power. It would be exceedingly odd that such a vast grant of authority over individuals, unchecked by any limiting principle, would exist in the Constitution, or that it would have gone unnoted at the convention and ratification debates.

2. *Limits on Definitions for High Seas Felonies.*—The provision for felonies on the high seas uses two terms created by external bodies of law. “Felony” is a concept originally from British common law, while the “high seas” also comes from the law of nations.<sup>228</sup> Thus, like “offenses,” both terms raise the question of whether Congress can define outside the bounds created by the external body of law to which these terms refer. Though the issue has received little attention, several important early authorities regarded “Felony” as an external limitation on the kind of crimes Congress could define.

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<sup>225</sup> *Id.*

<sup>226</sup> *Id.* at 197.

<sup>227</sup> *Id.* at 198 (emphasis added).

<sup>228</sup> There is some question as to whether the “high seas” is used in its international legal sense as referring to waters free for international navigation, or perhaps as another British legal concept, referring to the jurisdiction of the maritime and admiralty courts. See Statement of Mr. Webster on the Judiciary (Jan. 10, 1825), in 4 ELLIOT’S DEBATES, *supra* note 131, at 478 (raising the question of “[w]hether the Constitution uses the term ‘high seas’ in its strictly technical sense, or in a sense more enlarged”); 3 Farrand, *supra* note 69, at 332 (noting that “Felony” comes from British law and “Piracy” from the law of nations, but not mentioning the external source of “high seas”).

The 1800 case of *The Ulysses* was the first time the scope of the felonies power received judicial treatment. The issue was whether Congress could punish a misdemeanor under the felonies power. The case attracted a great deal of attention at the time because of its sensational facts—involving the rebellion of a ship’s crew against a sadistic and erratic captain—and “the most eminent counsel of that day were engaged on either side.”<sup>229</sup> One of the defense lawyers, Theophilus Parsons, argued that the charged offense of “confining the captain of a vessel” was not a felony and thus could not be constitutionally punished by Congress. In arguing in the presence of the jury that the law exceeded Congress’s constitutional power, he played up his history as an early and wholehearted Federalist<sup>230</sup>:

This prosecution is founded on a law of congress, but I do not fear the accusation of want of attachment to the federal government by asserting, that the clause of the act, on which the indictment is founded, is unconstitutional. I have been accused of the wish to elevate that power on the ruins of the state government. This I disavow.

....

... Is the offence, with which the defendants stand charged, felony? ... [Parsons argues that it is not.] Congress has power, by the constitution, to define and punish all piracies and felonies on the high seas. If this offence is neither piracy nor felony, congress had no jurisdiction, and therefore this clause is unconstitutional.<sup>231</sup>

The U.S. Attorney, Harrison Gray Otis,<sup>232</sup> did not dispute this basic proposition, but rather argued that the conduct was indeed felonious. At one point, Otis seemed to suggest that Congress could make something a felony by calling it such (similar to the broad view of the Offenses power):

This question [of whether the offense was a felony] called forth much learning and ingenuity. The etymology of the word was investigated. It was further suggested by Mr. Otis, that congress having power to define and punish felonies on the high seas, it was to be supposed, that when legislating on this offence, they were legislating on a felony.

Mr. Parsons[:] That is, because congress is legislating on an offence, it is felony. It is a pernicious doctrine.<sup>233</sup>

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<sup>229</sup> *The Ulysses*, 24 F. Cas. 515, 516 (C.C.D. Mass. 1800) (No. 14,330). It should be noted that the case has never been cited by other decisions.

<sup>230</sup> See *Ulysses*, 24 F. Cas. at 517; THEOPHILUS PARSONS, MEMOIR OF THEOPHILUS PARSONS, CHIEF JUSTICE OF THE SUPREME JUDICIAL COURT OF MASSACHUSETTS 103, 132 (Boston, Ticknor & Fields 1859).

<sup>231</sup> *Ulysses*, 24 F. Cas. at 517. Parsons had been a major figure in the Massachusetts Ratifying Convention for the federal constitution and was an author of one of the original proposals for a Bill of Rights. See PARSONS, *supra* note 230, at 55, 65–70.

<sup>232</sup> Otis was a former U.S. Representative, future senator, and nephew of Framers James Otis.

<sup>233</sup> *Ulysses*, 24 F. Cas. at 518.



At this point, the court cut Otis off, noting that it “thought this doctrine strained.”<sup>234</sup> The court’s ruling rejected Otis’s broad assertion of congressional power.<sup>235</sup> It ruled that the crime was not a felony but rather a misdemeanor and thus could not constitutionally be punished by Congress under Clause Ten.<sup>236</sup> This provides fairly good evidence for a narrow conception of the define power by judges in the early Republic.<sup>237</sup>

If anything, one would think that the define power might be broader when applied to felonies than to international law concepts in Clause Ten. “Felony” is internal to the American legal system. Unlike the law of nations, it is not largely determined by forces apart from and outside the United States. “Felony” does come from common law, but Congress can also pass laws in derogation of the common law. Otis’s implicit understanding that Congress can “upgrade” offenses to felonies can only be resisted through great formalism.

Several prominent early jurists also understood the define power as being limited by felonies. In 1825, Daniel Webster said in a speech before the House of Representatives:

Many things are directed to be punished, in the act of 1800, on the high seas, which are neither piracies nor felonies, although the Constitution . . . *restricts it* to piracies and felonies, which would infer that the Constitution was then held to grant larger power by the other clause [concerning Admiralty jurisdiction].<sup>238</sup>

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<sup>234</sup> *Id.* at 518–19. At this point, it is not clear whether the strained doctrine is Otis’s “pernicious doctrine” or Parsons’s description of it.

<sup>235</sup> *Id.* at 519. The bench consisted of William Cushing, formerly the vice president of Massachusetts’s constitutional Ratifying Convention and one of the first Supreme Court justices, and John Lowell (progenitor of the illustrious Boston Lowells), a district and later chief circuit judge who had played an important role in drafting the 1779 Massachusetts constitution and served in various political and judicial roles under the Continental Congress.

<sup>236</sup> *Id.* This did not help the defendants much, as the court ruled that misdemeanors could be reached through the foreign commerce power. *Id.* (“They thought, however, that the clause in the law, on which the indictment was found, was not unconstitutional, because in the enumeration of the powers of congress, they are to take care of foreign commerce, and to pass all laws necessary for that purpose.”). In the given case, the vessel itself was directly engaged in foreign commerce. For other high seas misdemeanors, the admiralty jurisdiction could provide the necessary constitutional authority. *See* Statement of Mr. Webster on the Judiciary (Jan. 10, 1825), in 4 ELLIOT’S DEBATES, *supra* note 131, at 478–79.

<sup>237</sup> The same question arose in a circuit court case forty-three years later, but the court was apparently unaware of *The Ulysses*. *See* United States v. Crawford, 25 F. Cas. 692, 693–94 (C.C.S.D.N.Y. 1843) (No. 14,890) (noting, incorrectly, that “there is no express adjudication on this subject”). *Crawford* was also a case of shipboard rebellion. The misdemeanor argument was again raised. The court responded that since the First Congress, many federal high seas criminal statutes applied to what would have been misdemeanors at common law, and it would hardly be appropriate to find them all unconstitutional without direction from the Supreme Court. *Id.* The court neglected to consider the other Article I bases for those laws.

<sup>238</sup> Statement of Mr. Webster on the Judiciary (Jan. 10, 1825), in 4 ELLIOT’S DEBATES, *supra* note 131, at 479 (emphasis added).

Similarly, in that same year, in one of the few direct statements on the meaning of the define power made by early commentators, William Rawle suggested that the word was “introduced to authorize congress to qualify and reduce the acts” that in English common law constituted a felony.<sup>239</sup> Rawle saw the define power as absolutely limited by an external body of law (the common law), and the point of the define power would be to let Congress selectively codify and incorporate it. While the policy considerations for rejecting common law felonies may be stronger than for rejecting law of nations offenses, Rawle still saw “define” as a word of limitation and selection, not of creation and expansion. As these important early interpreters understood it, the define and punish power imposed rigid limits on Congress, determined by preexisting legal categories, which the legislature could not simply write its way around.

Whether Congress could expand the international legal definition of “high seas” is an even more obscure question with almost no consideration. This may be because of uncertainty during the Founding Era regarding precisely what waters the high seas referred to,<sup>240</sup> or because Congress’s implied admiralty power has been interpreted to apply even outside the high seas, and thus makes the precise limits of the latter less relevant. If one adopted a broad view of the define power, Congress could define a local pond or a deep pool to be the high seas. However, the Supreme Court has suggested that regardless of congressional definitions, the felonies power only applies on the high seas as objectively understood.<sup>241</sup> Recently, the federal government has begun applying the anti-drug trafficking laws inside foreign territorial waters. Though courts had previously described the relevant statutes as exercises of the felonies power, its application beyond the high seas has led them to recast it as Offenses Clause legislation.<sup>242</sup> Though the international crime argument is quite strained,<sup>243</sup> it is noteworthy that this was preferred to allowing a broad notion of defining the “high seas,” as the latter is much more precisely defined in the contemporary law of nations.

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<sup>239</sup> RAWLE, *supra* note 120, at 107.

<sup>240</sup> Common questions involved river mouths, bays, and the like. *See, e.g.*, *Montgomery v. Henry*, 1 U.S. (1 Dall.) 49, 49–50 (1780) (“There has been great debate as to what is meant by *high seas*.”).

<sup>241</sup> *See United States v. Flores*, 289 U.S. 137, 155–56 (1933) (assuming the felonies power could not apply beyond the high seas, but holding that the admiralty power was not limited to high seas). The assumption that any congressional power over U.S. vessels in foreign waters would stem from the admiralty rather than the felonies power dates back much earlier. *See Kontorovich, Beyond Article I, supra* note 28, at 1235 (showing how both parties in an 1820 case apparently agreed that the felonies power could not reach beyond the high seas as generally understood).

<sup>242</sup> *United States v. Bellaizac-Hurtado*, 779 F. Supp. 2d 1344, 1349, 1352–53 (S.D. Fla. 2011).

<sup>243</sup> *See Kontorovich, Beyond Article I, supra* note 28, at 1224–26 (demonstrating that drug trafficking is not an international law offense).

### B. Counterfeiting: *Arjona*

The Supreme Court’s first encounter with the Offenses Clause—and its last major statement for more than half a century—came in *United States v. Arjona*,<sup>244</sup> which involved an 1884 statute criminalizing the counterfeiting of foreign currency and corporate securities. *Arjona* remains the leading Offenses Clause case, mostly for lack of competition.<sup>245</sup> The case sets out a broader conception of offenses and a more deferential approach to defining than suggested by the original meaning, which the opinion does not engage.

*I. Background.*—*Arjona* came in the wake of the Legal Tender Cases, which upheld the issuance of paper money in peacetime and reflect concern about the vulnerability of such instruments.<sup>246</sup> The law protecting foreign currency and corporate securities had been introduced in Congress just a few years earlier, in 1882.<sup>247</sup> The measure was urged by the State Department,<sup>248</sup> which had been petitioned for years by South American countries complaining that the United States had become “a harbor for these gangs of counterfeiters.”<sup>249</sup> While it was easy to see how such a law would be a good idea, further consideration in the Judiciary Committee revealed significant doubts about the Article I basis for the statute under the Counterfeiting Clause. In a report, the Committee explained that the Offenses Clause was “the only other clause of the Constitution under which the power asserted by the bill [could] be claimed.”<sup>250</sup>

The Committee proceeded to set forth a broad vision of the Offenses power that justified the law. It recognized that an individual violates the law of nations by counterfeiting foreign currency. The committee went further,

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<sup>244</sup> 120 U.S. 479 (1887).

<sup>245</sup> *Hamdan v. Rumsfeld* may be at least as important an Offenses Clause precedent, but because its ruling on the Offenses Clause was implicit, it has not yet attained the same influence. 548 U.S. 557 (2006).

<sup>246</sup> See *Juilliard v. Greenman*, 110 U.S. 421 (1884); *Knox v. Lee*, 79 U.S. (12 Wall.) 457 (1871).

<sup>247</sup> See *47th Congress—First Session*, BALT. SUN, Jan. 28, 1882, at 4 (reporting on introduction of counterfeiting bill). Similar legislation had been proposed a few years earlier. See *Forty-Fifth Congress—Third Session*, BALT. SUN, Jan. 23, 1879, at 4.

<sup>248</sup> H.R. REP. NO. 47-1835 (1882) (“[C]omity between nations should impel us to enact some such legislation.”).

<sup>249</sup> 2 JOHN RANDOLPH TUCKER, *THE CONSTITUTION OF THE UNITED STATES: A CRITICAL DISCUSSION OF ITS GENESIS, DEVELOPMENT, AND INTERPRETATION* § 279 (Henry St. George Tucker ed., Chicago, Callaghan & Co. 1899) [hereinafter TUCKER, *CRITICAL DISCUSSION*].

<sup>250</sup> H.R. REP. NO. 48-1329, at 1 (1884). This assertion is surprising and is explored further *infra* Part III.B.4. The Committee’s concern may have been motivated by *United States v. Marigold*, which took a rigidly literal approach to the Counterfeiting Clause. 50 U.S. (9 How.) 560 (1850). While the Court suggested it would be plausible to read the Counterfeiting Clause as also extending to the importation or circulation of previously counterfeited U.S. currency (as opposed to actually making it), it ultimately rested on the coining power. *Id.* at 568 (holding that it would not be “necessary or regular to seek the foundation of the offence of circulating spurious coin, or for the origin of the right to punish that offence [in the Counterfeiting Clause]” because counterfeit connotes fabrication, not importation).

claiming that the Offenses Clause covers any conduct that could seriously damage the foreign relations of the United States:

It seems to your committee to be clear that the Constitution vests in Congress power to define and punish as offenses against the law of nations, everything which is done by a citizen of the United States hostile to the peaceful relations between them and foreign nations, or which is contrary to the integrity of the foreign country in its essential sovereignty, or which would disturb its peace and security. Such an act done directly by the Government of the United States would be a legitimate cause of complaint, and unless redressed, of war. It is the duty of the Government to prevent any act . . . which would produce the same effect . . . .<sup>251</sup>

In other words, the question is not whether the conduct is treated as criminal in international law, but whether it “offends” other nations in the colloquial sense. The apparently odd test of whether such an act would be an offense if done by the government refers to a passage in Vattel that a nation “makes [an] act its own” if it “approves and ratifies the act committed by a citizen.”<sup>252</sup>

Though the Framers did see the Offenses Clause as a way of dealing with injuries to aliens and foreign states for which the country as a whole would be held responsible, it is highly uncertain whether they meant it to cover any and all such conduct. The Committee did not discuss originalist sources, instead relying primarily on logical and structural inferences for its view. The federal government is entrusted by the Constitution with the principal powers of foreign relations. And the federal government will be held accountable by other nations for all harms emanating from its jurisdiction, whether they are treated as criminal by the law of nations or not. Surely that national authority must have some means of preventing such wrongs within its jurisdiction—and the Offenses power seemed like a good fit.<sup>253</sup>

The Committee briefly suggested a longstanding precedent—extradition—in support of its broad interpretation of the Offenses power.<sup>254</sup> Like the foreign counterfeiting law, extradition of felons is also designed to keep the United States from becoming a haven for criminals against foreign countries. But while extradition involves international law issues, it had never been thought to be an exercise of Offenses power. To the contrary, it had almost always been done in pursuance of particular treaty provisions.<sup>255</sup>

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<sup>251</sup> H.R. REP. NO. 48-1329, at 2.

<sup>252</sup> *Id.* at 3 (quoting 2 VATTEL, *supra* note 91, § 74).

<sup>253</sup> *Id.* at 4.

<sup>254</sup> *Id.* at 3.

<sup>255</sup> The case relied on by the committee makes this clear. *See* *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 569 (1840). The precise constitutional pedigree of extradition—what allows the rendition of a citizen upon relatively slight proof and without any benefit of a jury—remains mysterious. *See generally*

In the subsequent litigation, the Government also invoked an additional precedent, that of neutrality from the early Republic, which also has an uncertain Offenses Clause pedigree.<sup>256</sup>

The Government's argument before the Supreme Court in *Arjona* largely built on the justifications in the Committee report, with a few elaborations. It suggested another precedent—the Neutrality Act of 1794.<sup>257</sup> This example, unlike extradition, was invoked by the Court—the only precedent it mentioned.<sup>258</sup> Neutrality was, like the counterfeiting law, designed to prevent citizens from annoying or provoking hostilities with foreign nations. The Attorney General asserted that neutrality law was premised on the Offenses Clause.<sup>259</sup> Yet it is not clear that the Neutrality Laws, before *Arjona*, were ever regarded as exercises of the Offenses power. Congress did not expressly pass the Neutrality Act as Offenses legislation, and several other constitutional powers were more prominently invoked, notably the treaty and war powers.<sup>260</sup> Indeed, since the counterfeiting act was also justified, at least rhetorically, as aimed at preventing wars,<sup>261</sup> one would think it too could be justified under the war power.<sup>262</sup>

2. *Arjona on "Offences"*.—Two features of the Supreme Court's opinion demand attention. It gave broad scope to congressional definitions of offenses, requiring no state practice or much else to justify a putative norm that fell within the scope of "Offences." Further, it gave the concept of offenses a broad scope, including conduct that implicates the

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Kontorovich, *International Courts*, supra note 207, at 109–10 (discussing how extradition was also suggested in the 1860s as a precedent for submitting Americans for trial before international courts).

<sup>256</sup> See *supra* text accompanying notes 165–85.

<sup>257</sup> Brief for Plaintiff at 19–20, *United States v. Arjona*, 120 U.S. 479 (1887) (No. 86-1100). It was not explained why the Neutrality Acts were so obviously offenses laws, and this is not how they had been generally understood in the intervening century. See H.R. REP. NO. 39-100, at 2 (1866):

The act of 1794 was not passed in pursuance of the provisions of the Constitution making it the duty of Congress to punish offences against the laws of nations. It was entitled, "An act to punish offences against the laws of the United States;" offences not found in previous legislation of this or other nations, but mainly created by the act itself.

<sup>258</sup> *United States v. Arjona*, 120 U.S. 479, 488 (1887). It played an even greater role in the earlier ruling in *United States v. White*, 27 F. 200, 202 (1886):

Our statutes are full of laws designed to prevent wrongs done by our citizens to foreign nations, or citizens thereof; some punish the forming of insurrectionary expeditions here with a view of invading foreign nations, and thus tend to preserve the peace and harmony between nations.

<sup>259</sup> Brief for Plaintiff at 19–20, *Arjona*, 120 U.S. 479 (No. 86-1100).

<sup>260</sup> See *supra* notes 173–85 and accompanying text.

<sup>261</sup> H.R. REP. NO. 48-1329, at 2 (1884); Brief for Plaintiff at 15, *Arjona* 120 U.S. 479 (No. 86-1100).

<sup>262</sup> Perhaps Congress thought that the "dormant war power" justification for the Neutrality Act had never been too convincing or realized, as the Court would conclude, that the threat of a counterfeiting war was a bit far-fetched. See *Arjona*, 120 U.S. at 487 (noting that unchecked counterfeiting "may not, perhaps, furnish sufficient cause for war, but it would certainly give just ground of complaint").

international legal obligations of the United States, even if it does not constitute an individual violation of international law.

The national government is . . . made responsible to foreign nations for all violations by the United States of their international obligations, and because of this, Congress is expressly authorized “to define and punish . . . offences against the law of nations.”

The law of nations requires every national government to use “due diligence” to prevent a wrong being done within its own dominion to another nation with which it is at peace, or to the people thereof; and because of this the obligation of one nation to punish those who within its own jurisdiction counterfeit the money of another nation has long been recognized.<sup>263</sup>

The Court did not consider any of the originalist evidence about the purposes of the Clause. It is surely true that the motivation for the provision was to allow the United States to satisfy its international legal obligations. The question would be whether this power goes beyond punishing those who actually violate the law of nations. Yet if some conduct triggers national responsibility but not individual culpability, there would be a gap in federal power to ensure compliance with national obligations and avoid reprisal. The Court found no justification for such a gap:

A right secured by the law of nations to a nation . . . is one the United States as the representatives of this nation are bound to protect. Consequently, a law which is necessary and proper to afford this protection is one that Congress may enact, because it is one that is needed to carry into execution a power conferred by the Constitution on the Government of the United States exclusively. There is no authority in the United States to require the passage and enforcement of such a law by the states. Therefore the United States must have the power to pass it and enforce it themselves, or be unable to perform a duty which they may owe to another nation . . .<sup>264</sup>

The Court’s opinion echoes a passage, quoted in the Attorney General’s brief,<sup>265</sup> from Story’s *Commentaries*, which contains what seems the first appearance of the broad view of the Offenses power:<sup>266</sup>

As the United States are responsible to foreign governments for all violations of the law of nations, and as the welfare of the Union is essentially connected with the conduct of our citizens in regard to foreign nations, congress ought to possess the power to define and punish all such offences, which may interrupt our intercourse and harmony with, and our duties to them.<sup>267</sup>

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<sup>263</sup> *Id.* at 483–84 (citation omitted).

<sup>264</sup> *Id.* at 487.

<sup>265</sup> Brief for Plaintiff at 13, *Arjona*, 120 U.S. 479 (No. 86-1100).

<sup>266</sup> See Fredman, *supra* note 25, at 291.

<sup>267</sup> STORY, *supra* note 48, § 1160, at 57–58.

Story does not explain this position, but it may not require so much explanation. First, unlike in the Attorney General's subsequent rephrasing, Story here describes this power as only extending to offenses that harm foreign relations—as opposed to any conduct that disturbs international harmony. Second, in the sentence immediately preceding, Story speaks of the Offenses power as intertwined with the foreign commerce and war powers, and the provocative passage quoted by the Attorney General seems to refer generally to the sum total of these powers.<sup>268</sup> In other words, the quoted passage describes the sum of the powers conveyed by these several provisions, not the particular power of the Offenses Clause. The narrow understanding of the quoted language is confirmed by the fact that Story wrote or participated in *Furlong* and *Smith*, important early cases that strongly implied that Congress could not define as piracy that which was not treated as such in international law.

*Arjona* goes well beyond international crimes, extending to any domestic conduct that could vex or offend foreign powers.<sup>269</sup> This covers all conceivable conduct, including things not tortious at all. For example, refusal to rent premises to a country or criticisms of its government in judicial opinions could all threaten good relations. Yet one thing that seems clear from the originalist materials is that the Offenses power is limited to offenses already established in the law of nations. Even if Congress can define them broadly or in advance of consensus, there would still be some preexisting, limited universe of punishable offenses. In the broadest *Arjona* formulation, it is solely the reaction of the foreign country, not the nature of the conduct, that allows for Offenses legislation.

The Court's broad conception of offenses seems strained. Vattel and similar authorities distinguish between offenses by individuals and offenses by nations of the kind the Court focuses on in *Arjona*. According to Vattel, a country does not violate the law of nations whenever its nationals injure foreigners. Only when the country implicitly ratifies the conduct—by failing to compensate the victim, make diplomatic amends, or extradite or punish the perpetrator—does an offense occur. Other wrongs (piracy, assaults on ambassadors) are immediately offenses. The Constitution authorizes Congress to *punish* offenses, which seems to assume that the violations have already been consummated. This understanding does not

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<sup>268</sup> For these propositions, Story relied on St. George Tucker's commentary on Blackstone. *Id.* § 1160, at 57 n.1. Tucker describes "offences" as primarily including the Blackstone troika and uses this juncture to point out the "very guarded manner in which congress are vested [by the Constitution] with authority to legislate upon the subject of crimes." TUCKER, *supra* note 48, at 269. He does not mention the Neutrality Act as an example of Offenses legislation. All this seems quite inconsistent with *Arjona*'s effort to cast Story's views as presaging its holding.

<sup>269</sup> See TUCKER, CRITICAL DISCUSSION, *supra* note 249, § 279, at 575 (interpreting *Arjona* as holding—correctly in Tucker's view—that an infringement of the "rights of other nations" amounts to the same thing as a violation of the law of nations for purposes of the Offenses Clause).

permit Congress to *deter* or *prevent* nonexistent offenses.<sup>270</sup> Finally, if the principal offender is the United States, it is also hard to understand how the federal government can punish itself.

3. *Arjona on "Defining"*.—To properly understand *Arjona*, it is crucial to understand the narrowness of the issues argued on appeal. The defendants did not take issue with the Government's broad characterization of the Offenses power as applying to conduct for which the Government is legally responsible, nor did they choose to contest the offenses status of counterfeiting foreign currency. Instead, they argued on the narrowest—and seemingly safest—grounds: that international law only required governments to act against counterfeiting of foreign currency but not foreign private securities.<sup>271</sup> The latter does not involve the proprietary interests of foreign states and is simply a private tort. The argument seems solid; the relevant passages in Vattel refer only to public issues. Moreover, no cases can be found in which someone was punished for counterfeiting private securities as an offense against the law of nations.

To be sure, such counterfeiting can be offensive to the foreign nation and can even provoke a war. But so can a wide variety of other conduct, such as libelous newspaper articles or even the control of resources abroad by one's nationals. While every offense against the law of nations may be a *casus belli*, not every *casus belli* is an offense against the law of nations.

There appears to have been no international practice treating securities forgery as an offense against the law of nations. Yet the Court accepted this definition based solely on logic and not on any analysis of existing international sources. Counterfeiting foreign securities implicates the same policies as counterfeiting foreign currency, which the defendant (and Vattel, the only source cited by the Court) agreed was a real offense. It seems odd that Vattel's highly normative work could be taken as a guide to international custom 150 years later. Thus, *Arjona's* approach represents perhaps the greatest possible degree of deference to Congress: little or no external corroboration or precedent is required to support a definition so long as the conduct is somewhat related to conduct that in the view of at least some authorities is governed by international law. Indeed, considering counterfeiting foreign securities a definable offense simply because it implicates the same policies as actual offenses comes close to allowing Congress to make rather than take the law of nations.

In fairness, the Court's approach may not have been quite as cavalier as the opinion itself suggests. The briefs referred to a wider array of sources. While the Attorney General cited Vattel primarily and most extensively, he also marshaled contemporary authorities such as Francis

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<sup>270</sup> This is not to say that prophylaxis may not be a necessary and proper means of carrying out the power, especially if subsequent remedies would be inadequate.

<sup>271</sup> Brief for Defendant at 7, *United States v. Arjona*, 120 U.S. 479 (1887) (No. 86-1100).



Wharton and the draft international legal code by David Dudley Field.<sup>272</sup> The Government also cited at some length the laws of numerous other countries that punish foreign currency counterfeiting (though without any showing that they treat these as international offenses or punish them out of international obligation).<sup>273</sup> Thus, while the Court illustrated its opinion simply through Vattel, it may have just picked out the authority it found most decisive, though this would not have been sufficient to establish the point.

4. *Alternate Constitutional Grounds.*—It is not clear why the enforcement gap the Court feared would exist. Even under the doctrines of Vattel that the Court cited, individual conduct only gets imputed to the sovereign if the sovereign implicitly endorses the conduct by not punishing, extraditing, paying restitution, or otherwise making amends. Thus, until the United States fails to make diplomatic amends, one is quite far from an “offense” even in the loose usage of the Court. And the punishment of individuals is not essential to avoiding national responsibility. Moreover, other legislative powers are available to address such concerns, in particular, the Foreign Commerce Clause, which the Framers saw as being equally important to ensuring that private or state actors did not embroil the nation in diplomatic difficulties.

A puzzling aspect of *Arjona* is that both Congress and the Court thought the Offenses power was the only possible Article I basis for the law. They read all other congressional powers narrowly but construed offenses broadly. The reluctance to invoke more directly relevant Article I powers stemmed from the explicit power over counterfeiting U.S. currency, which was thought to rule out such a power with respect to foreign currency through *expressio unius*.<sup>274</sup> Yet the Court itself noted that a principal reason for punishing counterfeiters of foreign currency is to protect U.S. money from similar treatment abroad.<sup>275</sup> Thus, one might think it could be a necessary and proper adjunct to the Counterfeiting Clause.

Today, the measure would be easily justified as a regulation of foreign commerce—which printing currency certainly affects. One might think that in an era of narrower notions of commerce, people were unsure whether the

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<sup>272</sup> See Brief for Plaintiff at 11, 17, *Arjona*, 120 U.S. 479 (No. 86-1100).

<sup>273</sup> *Id.* at 15–17.

<sup>274</sup> At the Constitutional Convention, during the discussion of the counterfeiting provision, someone suggested foreign currency be included as well. The suggestion was not acted on. See Fredman, *supra* note 25, at 294 & n.60 (noting that this episode was never discussed in any of the cases interpreting the 1884 Act). This could suggest the Framers thought it implicit in the counterfeiting power, or perhaps some other one.

<sup>275</sup> *Arjona*, 120 U.S. at 486–87 (“But if the United States can require [other countries to prohibit counterfeiting U.S. paper] of another, that other may require it of them, because international obligations are of necessity reciprocal in their nature.”).

mere manufacture of such currency was enough to fall within the Clause.<sup>276</sup> Yet the Court specifically referred to foreign notes as “form[ing] part of the foreign commerce of the country,”<sup>277</sup> and it discussed the great effect such counterfeiting can have on U.S. economic relations with other countries.<sup>278</sup> Indeed, the Court began its discussion by invoking the Foreign Commerce Clause, the Declare War Clause, the federal treaty power, and other powers over foreign relations, including the Offenses Clause.<sup>279</sup> All these, taken together, show that “[t]he national government is . . . made responsible to foreign nations for all violations by the United States of their international obligations, and because of this, Congress is expressly authorized ‘to define and punish . . . offences against the law of nations.’”<sup>280</sup> The recitation of all these powers suggests a penumbra-type argument, one of general federal foreign relations powers. Thus, it is not the Offenses Clause itself that is doing the work, but the sum total of federal powers in the international realm (similarly, this is one of the explanations for the Neutrality Acts).<sup>281</sup> In effect, the Court said that the law falls under the Offenses Clause because it involves foreign commerce. It used an Offenses Clause label for Foreign Commerce reasoning. The implicit existence of other overlapping Article I grounds may account for the Court’s casual treatment of the Offenses issues.

5. *“Offences” and Changes in the Law of Nations.*—*Arjona*’s approach was very heavily influenced by Vattel’s expansive notion of state responsibility, which could potentially make a wide array of individual conduct an international offense on the part of the perpetrator’s country. This suggests that *Arjona*’s holding may have little significance for understanding the Offenses Clause today. One aspect of the Clause on which there is broad agreement is that the law of nations is not locked in to 1789, but expands or contracts to track developments in international law.<sup>282</sup> The need for adaptability was already suggested in Congress’s 1781 report.<sup>283</sup> This is the only sensible reading of the provision; it would hardly help avoid international retaliation to allow Congress to deal with antiquated offenses but not the ones nations actually care about today. Just

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<sup>276</sup> See, e.g., *United States v. E. C. Knight Co.*, 156 U.S. 1 (1895) (holding that the manufacture of sugar by a national monopolist could not be regulated under Commerce Clause).

<sup>277</sup> *Arjona*, 120 U.S. at 487 (discussing how foreign notes are “brought here in the course of our commerce with foreign nations, or sent here from abroad for sale in the money markets of this country”).

<sup>278</sup> *Id.* at 484–85.

<sup>279</sup> *Id.* at 483.

<sup>280</sup> *Id.*

<sup>281</sup> Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 *YALE L.J.* 231, 353 n.538 (2001).

<sup>282</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724–25 (2004) (holding that the ATS allows for causes of action “based on the present-day law of nations”).

<sup>283</sup> See 21 *JOURNALS OF CONGRESS* 1136 (1781).

as the particular substantive content of offenses is not set in stone, neither are the background rules, like state responsibility. The law of state responsibility has become murky in the twentieth century, but it seems likely that the kind of blanket vicarious liability described by Vattel no longer applies. A state will not even have international legal responsibility if it takes no corrective measures whatsoever.<sup>284</sup> Today, ordinary crimes against foreigners that constituted most of the offenses of concern to the Framers would not be thought of as raising any questions of international law or state responsibility.

Finally, it bears noting that despite the wide breadth of *Arjona*'s conception of offenses, it is also surprisingly underinclusive. Indeed, both the ATS and military commissions may fall outside the *Arjona* model of offenses. Rather than seeing the Offenses Clause as being about individual violations of international criminal law, *Arjona* sees it as being about punishing conduct by Americans to prevent it from being attributed to the United States and thus causing foreign relations problems. Yet the military commissions punish crimes by foreigners *against* Americans abroad. Certainly other nations could not take offense if the United States is lenient in prosecuting those who injure it. Furthermore, many ATS cases are about offenses involving foreigners abroad, which may actually be violations of international law and may even be universally cognizable but in no way trigger the responsibility of the United States.

### C. Protecting Ambassadors and Embassies

Some discussion of the Offenses Clause and its historic backdrop occurred in *Boos v. Barry*,<sup>285</sup> which some scholars believe gives broad scope to the Clause.<sup>286</sup> However, the case did not actually involve any question about the extent of the define Offenses power. Rather, it involved a narrow and modest use of the power in its most well-established function: diplomatic protection.

The case involved a statute prohibiting picketing and protests within 500 feet of embassies in Washington, D.C.<sup>287</sup> The statute's validity as an exercise of Congress's powers over the federal district,<sup>288</sup> and additionally, as an exercise of the Offenses Clause, had been established by the D.C.

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<sup>284</sup> See *Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries*, 53 U.N. GAOR Supp. No. 10, reprinted in [2001] 2 Y.B. Int'l L. Comm'n 38, U.N. Doc. A/56/10 (2001) ("[T]he conduct of private persons is not as such attributable to the State.").

<sup>285</sup> 485 U.S. 312 (1988); see also *Finzer v. Barry*, 798 F.2d 1450, 1455 (D.C. Cir. 1986) (Bork, J.), *aff'd in part, rev'd in part sub nom.* *Boos v. Barry*, 485 U.S. 312 (1988) (discussing how the Offenses Clause was created to ensure the United States could meet its international law obligations).

<sup>286</sup> See *Stephens*, *supra* note 23, at 477.

<sup>287</sup> *Boos*, 485 U.S. at 315.

<sup>288</sup> See U.S. CONST. art. I, § 8, cl. 17.

Circuit a half century earlier in *Frend v. United States*.<sup>289</sup> In that decision, the D.C. Circuit focused on the fact that Congress had discussed the measure as implementing international law obligations.<sup>290</sup> *Frend* did little more than *Arjona* to measure the law against the law of nations. It simply cited Vattel and the Harvard Research Draft on the immunity question.<sup>291</sup> But unlike the law in *Arjona*, it was not a close question: the immunity of ambassadors had provided much of the original motivation for the Offenses Clause.<sup>292</sup> There was no suggestion that the norm had disappeared since the Founding.<sup>293</sup> The necessary and proper power would allow for the broader protection afforded by the protest ban, on the theory that protests outside a foreign legation can easily escalate to manifest violations, like violence.

The only question considered by the Supreme Court in *Boos* was whether the statute—whose Article I pedigree was assumed—violated the First Amendment.<sup>294</sup> While *Boos* discussed the importance of the Offenses power at some length, the Court’s attention to the Clause was not to define its scope, but rather to suggest the magnitude of the governmental interest that must be balanced against the First Amendment’s protection of speech. Nonetheless, the Court ultimately found the picketing restriction unconstitutional, not because Congress exceeded its Offenses authority, but because all Article I powers (like the treaty power) do not authorize overriding individuals’ constitutional rights.<sup>295</sup>

#### D. Military Commissions

After *Arjona*, the Court’s next exploration of the Offenses Clause came seventy years later, during the Second World War, in a pair of cases involving the war crimes trials before military commissions, convened by the Commander in Chief.<sup>296</sup> Congress had authorized such commissions as a supplement to courts martial and limited their jurisdiction to offenses under “the law of war,” generally thought to be a “branch” of the law of nations.<sup>297</sup>

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<sup>289</sup> 100 F.2d 691, 692 (D.C. Cir. 1938).

<sup>290</sup> *Id.* at 693.

<sup>291</sup> *Id.* at 693 & nn.2–3. The Harvard Research Draft specifically mentioned a duty to “protect the premises occupied or used by a mission . . . against any invasion or other act tending to disturb the peace or dignity of the mission.” *Draft Convention on Diplomatic Privileges and Immunities*, 26 AM. J. INT’L L. 15, 50 (Supp. 1932).

<sup>292</sup> *See Boos*, 485 U.S. at 323–24.

<sup>293</sup> The First Congress had barred assaults, as well as suits and arrests against foreign ministers. *See Crimes Act of 1790*, ch. 9, §§ 25–26, 1 Stat. 112, 118.

<sup>294</sup> *Boos*, 485 U.S. at 317–18.

<sup>295</sup> *Id.* at 324, 329.

<sup>296</sup> *See, e.g., Ex parte Quirin*, 317 U.S. 1, 18–19 (1942) (considering whether the charged offenses against the law of war were in fact violations of the law of war).

<sup>297</sup> *Id.* at 29.

1. *World War II Crimes.*—In *Ex parte Quirin*, the now-famous case of the German saboteurs who landed on Long Island, the Court held that Congress’s authority to create these commissions comes from the Offenses Clause. The jurisdiction of such tribunals thus only extends to offenses “which, according to the rules and precepts of the law of nations, and more particularly the law of war, are cognizable by such tribunals.”<sup>298</sup> Though seemingly continuing *Arjona*’s deferential approach, the commission cases are in several ways in tension with *Arjona*.

While *Arjona* read the Offenses Clause quite broadly, the military commissions would not seem to meet *Arjona*’s test for Offenses legislation. If the Offenses Clause extends to “all violations by the United States of their international obligations,” or any injury to foreigners for which the United States may be held responsible,<sup>299</sup> it is hard to understand how it could extend to crimes by foreigners *against* Americans or third-party nations. Surely no foreign nation could have a grievance if the United States chose not to punish such crimes. Similarly, *Arjona*’s broad formulation might oddly exclude most modern human rights crimes, such as torture of a country’s own citizens. While these are offenses that individuals personally commit, they do not implicate the foreign relations of the United States in the way *Arjona* described because the norms are fundamentally nonreciprocal. Other nations are not likely to torture their own citizens in retaliation for the United States doing the same.

In reviewing the commission cases, the Supreme Court held that Congress could not arbitrarily define offenses against international laws of war (in *Quirin* the crime was unlawful belligerency).<sup>300</sup> But the Court recognized that the parameters of international law could be vague. Whether an offense fell within the law of war might be in dispute, with varied state practice and scholarly opinion. In such cases, they would fall within the Offenses power only if they are “recognized by *our* courts as violations of the law of war . . . .”<sup>301</sup> And to that end, the Court launched into an eight-page examination of whether the laws of war recognized such an offense, delving deeply into U.S. practice in other wars, British War Office manuals, relevant treaties, and treatises in several languages.<sup>302</sup> While the Court did not look too much at foreign practice, the extent of the analysis is quite notable given that there was no real debate that spies and saboteurs violated the laws of war.

*Quirin*’s close examination of such an uncontroversial offense might suggest a significant role for courts in testing definitions of offenses against

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<sup>298</sup> *Id.* at 28.

<sup>299</sup> *United States v. Arjona*, 120 U.S. 479, 483 (1887).

<sup>300</sup> *Quirin*, 317 U.S. at 29 (“We must therefore first inquire whether any of the acts charged is an offense against the law of war . . . .”).

<sup>301</sup> *Id.* (emphasis added).

<sup>302</sup> *Id.* at 30–37.

objective external law. This is a fundamentally different attitude from *Arjona*'s deference. However, *Quirin* did not involve any definition of war crimes triable by military commissions to the Commander in Chief.<sup>303</sup> *Quirin* reaffirmed the constitutionality of such a delegation by Congress, noting as precedent similar delegations: the piracy statute in *United States v. Smith*, and, significantly for our purposes, the Alien Tort Statute.<sup>304</sup> Thus, *Quirin* shows that whatever deference is due to congressional definitions, the definitions of the other branches will be reviewed for conformity to the objective law of nations.

Despite *Quirin*'s serious inquiry into whether the charged offense constituted a violation of international law, another military commission case decided shortly after the war showed that whatever the formal level of deference, the content of international law is often indeterminate enough to give the courts a great deal of discretion to recognize an offense. *In re Yamashita* involved a Japanese general charged with negligently failing to prevent his troops from committing atrocities.<sup>305</sup> In explaining its reasoning, the Court insisted that it "do[es] not make the laws of war," but rather only follows them.<sup>306</sup> However, it confirmed the charge of the military commission, which had sentenced the defendant to death for violating an affirmative duty to exercise effective control over troops in combat.<sup>307</sup> While this was a much more novel charge, the Court upheld it with some general and not quite on-point citations to the Hague Conventions. Two of the eight participating Justices dissented and powerfully pointed out these weaknesses:

The recorded annals of warfare and the established principles of international law afford not the slightest precedent for such a charge. This indictment in effect permitted the military commission to make the crime whatever it willed, . . . a practice reminiscent of that pursued in certain less respected nations in recent years.

. . . .

The Court's reliance upon vague and indefinite references in . . . the Hague Conventions and the Geneva Red Cross Convention is misplaced.

. . . .

The Government [also] claims that the principle that commanders in the field are bound to control their troops has been applied so as to impose liability

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<sup>303</sup> *Id.* at 28–29 (“Congress . . . has not itself undertaken to codify that branch of international law or to mark its precise boundaries, or to enumerate or define by statute all the acts which that law condemns.”).

<sup>304</sup> *Id.* at 29–30 & n.6.

<sup>305</sup> 327 U.S. 1, 13–14 (1946).

<sup>306</sup> *Id.* at 16.

<sup>307</sup> *Id.* at 17–18.

on the United States in international arbitrations. The difference between arbitrating property rights and charging an individual with a crime against the laws of war is too obvious to require elaboration.<sup>308</sup>

In retrospect it may seem that the charges against General Yamashita were a vengeful innovation. Again, the Court in *Yamashita* gives Congress a very free hand in defining so long as the conduct is of the general kind that international law might regulate (i.e., the responsibility of military officials for the crimes of their subordinates).

2. *The Guantanamo Cases.*—Most recently, in *Hamdan v. Rumsfeld*, the Court considered whether a military commission created by presidential order could try an enemy combatant for conspiracy to commit war crimes.<sup>309</sup> Following *Quirin*, the Court concluded that the commissions were an exercise of the Offenses power and thus could only have authority to try war crimes recognized under international law. Yet the *Hamdan* plurality opinion took a far less deferential approach than *Arjona*. Indeed, it adopted a high bar for accepting international offenses: “*the precedent must be plain and unambiguous.*”<sup>310</sup> *Hamdan*’s standard is reminiscent of *Sosa*’s test for customary norms.

This seems to represent a significant reversal in the Court’s approach to testing crimes under the Offenses Clause. Indeed, it echoes the dissent in *Yamashita* and the arguments of Arjona’s counsel, both of whom argued that something could hardly be a law of nations offense if no one had ever been prosecuted for it under the law of nations (as opposed to various municipal laws). This position suggests that to be defined as an offense, it had to already be one, and the proof for that is at least some history of punishment of the conduct *as an offense* against the law of nations.

The plurality carefully considered whether conspiracy was generally recognized as a violation of the laws of war, looking closely at U.S. practice, international tribunals, and treaties.<sup>311</sup> For example, while *Quirin* had involved a conspiracy charge, the Court discounted that precedent because the ruling had not specifically addressed the charge. Finding no direct precedents, the *Hamdan* plurality held the offense was not a war crime in international law. This is striking because the substantive conduct Hamdan was accused of could easily have been a law of war violation, but the plurality looked only to the specific name of the charged offense. As will be seen in Part IV, the much tougher review conducted in *Hamdan* can be attributed to the delegation of Define Clause authority to the military

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<sup>308</sup> *Id.* at 28, 36, 39 (Murphy, J., dissenting) (citations omitted).

<sup>309</sup> 548 U.S. 557, 602–03 (2006).

<sup>310</sup> *Id.* at 602 (emphasis added); *see also* Vladeck, *supra* note 11, at 331.

<sup>311</sup> *See Hamdan*, 548 U.S. at 601–12.

commissions. As the Court noted, “The elements of this conspiracy charge have been defined not by Congress but by the President.”<sup>312</sup>

In response to *Hamdan*, Congress passed the Military Commissions Act of 2006, which defined “conspiracy” as an offense against the law of nations.<sup>313</sup> A further revision of the statute during the Obama Administration kept this language.<sup>314</sup> Congress apparently understood *Hamdan* as objecting to the delegation of defining authority, and not the identification of conspiracy to commit war crimes as a punishable offense per se. Otherwise, reenacting an offense identical to one that the Supreme Court had just said does not amount to an offense would be the most direct disregard for judicial authority, a congressional negation of judicial review.

Subsequent proceedings in the military commissions have focused heavily on whether the terrorism crimes defined by the MCA exceed Congress’s Offenses power.<sup>315</sup> The commissions have adopted a rather broad view of Congress’s power to define offenses. However, this was based not only on the Offenses Clause itself, but also on the particular discretion the government gets in the area of war—with the war powers providing an entirely separate Article I basis for the law—and foreign relations. (One might ask whether this discretion would always attach to offenses laws, which inherently involve foreign relations matters.)<sup>316</sup>

Even with this broad notion of the Offenses power, the commissions surveyed international law quite intensively before upholding the MCA. The commission opinion in *Hamdan* spent fourteen pages reviewing the criminalization of analogous conduct in international treaties and, of even greater importance, in numerous international and foreign courts.<sup>317</sup> Thus, even with a specific congressional definition, the commissions have sought concrete international precedent for treating the defined conduct as an offense against the law of nations. One basic test of whether an offense

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<sup>312</sup> *Id.* at 598 n.30. *Hamdan*’s tough approach to offenses may have been additionally motivated by the particular context. The define power in *Hamdan* was used to justify a criminal trial before a non-Article III court without the benefit of a jury. The Court may have been tempted to limit Congress’s discretion more stringently in that context, consistent with the wariness about common law crimes embodied in the define power. *See* Vladeck, *supra* note 11, at 337–38.

<sup>313</sup> Military Commissions Act of 2006, 10 U.S.C. § 950v(b)(28).

<sup>314</sup> *See* Military Commissions Act of 2009, Pub. L. No. 111-84, 123 Stat. 2190.

<sup>315</sup> *See* *United States v. Hamdan*, 801 F. Supp. 2d 1247, 1269–70 (C.M.R. 2011) (holding that the Offenses Clause does not require “international . . . unanimity” in the definition of a norm for Congress to define war crimes, but rather gives Congress broad discretion); Ruling on Defense Motion to Dismiss Charge One for Failure to State an Offense and for Lack of Subject Matter Jurisdiction at 3–4, *United States v. Khadr*, No. AE 87, D-008 (Apr. 21, 2008) (holding that Congress had a “reasonable basis” to define murder as an international crime in violation of the law of war, and that this “was not a decision to create a new crime”).

<sup>316</sup> *See Hamdan*, 801 F. Supp. 2d at 1264–66.

<sup>317</sup> *Id.* at 1279–92.



exists in the law of nations is whether anyone has been punished for it outside of the U.S. law in question.

#### *E. Summary*

The Supreme Court has rarely construed the scope of the Offenses power. *Arjona* presents a broad vision of the power as potentially extending to any acts for which the United States would be held accountable by other nations, even if they were not international crimes in themselves. It is far from clear that such broad language was necessary in the case, and it is surprising that the Court went so far in its first encounter with the Clause—the law could have been justified under a variety of other powers. Moreover, *Arjona* provided little originalist support for its position, pointing only to the Neutrality Act, which as a post-ratification measure is not ideal support. Moreover, *Arjona* failed to confront the significant corpus of evidence suggesting that neutrality was not about offenses at all. The casualness of its broad holding greatly weakens its weight.

Since *Arjona*, the Court has treated the Offenses power as more rigidly limiting punishable offenses. This is not surprising given that subsequent cases involved enemies tried in military tribunals. While their actions could easily have been law of nations crimes for the individual committing them, they did not implicate the responsibility of the United States, having been committed by foreign forces abroad or directly against U.S. forces. The commissions cases themselves do not necessarily depend on the Offenses Clause, having deep constitutional roots in various legislative and executive war powers. Thus, one might conclude that the Supreme Court's Offenses jurisprudence has been sporadic, inconsistent, and not well developed. Given that, it would be hard to conclude that the case law has in any way reshaped the Offenses Clause from what it was at the Founding. Inquiries into its meaning must thus focus on the evidence developed in Part II.

#### IV. DELEGATION: WHO DEFINES?

Part III revealed some tension between the deferential approach of the principal Offenses Clause case, *Arjona*, and the much higher level of scrutiny in *Hamdan*. *Arjona* found no need for specific precedents to uphold a legislative definition. On the other hand, in *Hamdan*, the Court required a strict congruence with objectively ascertainable international law, indeed, the existence of a “plain and unambiguous” precedent for the offense. This Part shows that regardless of whether *Arjona*'s analysis can be questioned, the apparent inconsistency between the two cases is justified by major differences in the measures under review. In *Arjona*, Congress explicitly purported to define an international law offense. In *Hamdan*, the charged offense had not been defined by statute but by a military commission. Thus, *Hamdan* presents a question crucial for ATS

jurisprudence—what happens to the Offenses power when Congress legislates regarding offenses without defining them?

Whatever the precise contours of Congress’s power, it did not actually define any in the ATS or the statute that had authorized the military commissions in *Hamdan*.<sup>318</sup> Indeed, the *Hamdan* plurality opinion noted that Congress itself had not directly established the conspiracy crime involved in that case.<sup>319</sup> The relevant statutes do not specify the content of—or even identify by name—any law of nations norms. (In a milder version of this, the federal piracy law bans “piracy as defined by the law of nations” but does not explain what this consists of.)<sup>320</sup> These laws leave all of the defining to the courts or to the Executive Branch, respectively.<sup>321</sup>

These provisions raise questions about whether any special deference owed to congressional definitions persists when Congress delegates the defining to other branches. However, the delegation question is analytically distinct from the questions about the substantive scope of the Clause pursued in Parts II and III. One need not accept the analysis of Congress’s Offenses power developed herein for the purposes of this Part. Whatever the scope of Congress’s Offenses powers, their delegation can obviously be no broader. That is, if the Offenses Clause strictly limits Congress to well-established international norms, other branches can go no further when delegated the power. Yet the delegated power can be narrower—even if Congress has special discretion in defining, this leeway may not be transferable.

This Part will show that even assuming Congress has significant discretion in defining offenses, this discretion disappears when it fails to provide any definition but rather leaves the determination of international offenses to other branches. Two sets of reasons support this position. The first set involves the policies behind the Define Offenses Clause itself, including providing codified and clear regulations in place of the vagaries of international law and allowing the foreign relations aspects of international law to be given due regard. The second set of reasons involves the policies behind the so-called nondelegation doctrine.<sup>322</sup> The ATS represents extraordinarily broad delegation of legislative powers. If such delegation is not limited by some intelligible principle, but instead further broadened by a notion of discretion—the idea that there is no standard

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<sup>318</sup> See *Eastman Kodak Co. v. Kavlin*, 978 F. Supp. 1078, 1090 (S.D. Fla. 1997) (“[A]lthough the constitutional text permits Congress to ‘define and punish,’ the ATCA punishes, but does not define.”).

<sup>319</sup> *Hamdan v. Rumsfeld*, 548 U.S. 557, 601–02 (2006).

<sup>320</sup> 18 U.S.C. § 1651 (2006).

<sup>321</sup> See Swaine, *supra* note 13, at 1528–29 (discussing the ATS as a delegation of Offenses power that raises issues common to all delegations).

<sup>322</sup> This nondelegation discussion is based on the twentieth-century delegation jurisprudence rather than an originalist analysis. While restrictions on delegation may have originalist support, the point here is to show how restrictions on judicial definition are consistent with, and mandated by, even the relatively relaxed modern separation of powers doctrines.

against which a definition can be measured—it would go far beyond anything permitted even under the rather forgiving, modern separation of powers doctrine.

#### A. Discretion and Defining

1. *The Concern over Common Law Crimes.*—Recall that under the system proposed by Congress under the Articles of Confederation, state legislatures would define law of nations offenses.<sup>323</sup> The Randolph report called for legislation because of the need for immediate action and for clarity about the United States’ ability to deal with its international obligations. However, the Randolph plan left the state courts, which exercised general common law powers, with a significant residual role in defining offenses. This arrangement was not surprising. The law of nations was seen as part of the common law; several international law offenses were already enforced through the common law in England.<sup>324</sup>

In preliminary drafts of the Constitution, the Offenses power involved only “punishment” of offenses, with the definition presumably being left to the courts. Yet Congress was given the explicit power to define because of the perceived vagueness of international customary norms. Such uncertainty would be bad for defendants and for the national interest. The “vagueness” of the law of nations was seen as raising the kinds of problems related to common law crimes. (Similarly, Clause Ten gives Congress the define power over maritime felonies rather than giving such criminal common law powers directly to the courts, even though they retained civil common lawmaking powers in admiralty.) Indeed, all of Congress’s explicit criminal powers—treason, counterfeiting, and Clause Ten offenses—were specified because of doubts about the existence of a federal criminal common law. Thus, the vagueness concern that led to the define power can be better understood in light of the problems with common law crimes.

The problems with common law crimes are twofold: the first involving individual rights and the second involving structural concerns. Individual rights concerns focus on notice and due process. Given the scope of the common law—and of modern international law—it would be hard for potential defendants to know in advance the rules that govern their conduct. However, the structural concerns about federal common law were even more salient in the Founding Era.

Since the scope of the common law potentially extended to anything, the ability to fashion common law offenses would give federal courts jurisdiction beyond the limits clearly marked by Congress.<sup>325</sup> Courts could

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<sup>323</sup> See *supra* notes 81–84 and accompanying text.

<sup>324</sup> 4 WILLIAM BLACKSTONE, COMMENTARIES \*68–71.

<sup>325</sup> See *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 33 (1812) (holding common law crimes unconstitutional).

give themselves jurisdiction by creating new causes of action. Worse yet, such jurisdiction could exceed not only the powers Congress had given, but also those it *could* give. In other words, the scope of common law crimes could exceed the scope of Article I legislative authority. The law of nations was regarded as part of the common law. Thus, the mischief that could result from allowing federal judges to create common law crimes could equally result from federal (common law) international crimes. The former was denounced by the Supreme Court as giving the federal judiciary an authority “much more extended—in its nature very indefinite—applicable to a great variety of subjects . . . and with regard to which there exists no definite criterion . . . .”<sup>326</sup> This of course is the same vagueness shared by “Offences” that led to the addition of the define power at the Convention.

St. George Tucker’s commentary took an extremely narrow view of permissible delegation under the Offenses Clause, which highlighted how concerns about federal common law crimes meant that courts could not “define” themselves. He asked rhetorically:

Let us suppose again that congress having defined the offence of piracy, had omitted to declare the punishment; could the federal courts have supplied this omission by pronouncing such a sentence as they might suppose the crime deserved? Again, let us suppose that congress may have omitted altogether to define or to declare the punishment of any other offence committed upon the high seas; will it be contended that the federal courts could in any such case punish the offender, however atrocious his offence . . . ?<sup>327</sup>

Tucker’s first example shows that a mere grant of jurisdiction would not be enough to give federal courts legislative power over offenses, even though such a grant could be read as implicit delegation. The ATS is closer to the second example—where Congress “omitted altogether to define” international offenses.<sup>328</sup> To be sure, the ATS is not a criminal statute. The Offenses Clause’s punishing power encompasses civil liability.<sup>329</sup> Yet when it comes to Congress’s ability to define offenses, it would be odd and incongruous to vary its scope depending on whether criminal or civil penalties were applied since the Offenses Clause itself does not distinguish between criminal and civil actions.<sup>330</sup> The central requirement of defining comes from the Constitution, although the need for such definition may be particularly acute in criminal matters. Thus, the limits on judicially created offenses related to common law crimes apply even in the case of the ATS.

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<sup>326</sup> *Id.*

<sup>327</sup> Tucker, *Cognizance*, *supra* note 121, at 398–99.

<sup>328</sup> The fact that Tucker does not mention the ATS as an example of such a statute could suggest that he did not see it as creating causes of action but simply conferring jurisdiction, the position ultimately sort of rejected in *Sosa*.

<sup>329</sup> See Stephens, *supra* note 23, at 504–08.

<sup>330</sup> See *id.* at 508–09. That is to say, the power to define applies equally to all kinds of offenses.

2. *Foreign Policy Concerns.*—Choosing what norms to recognize as customary international law implicates America’s obligations to other countries and raises a variety of foreign relations and diplomatic questions. The positions taken by the United States on the content of international law will in turn shape the external development of that law in ways that bind the United States. Thus, defining offenses can involve high questions of statecraft. The vagueness of international law is relevant here too. The law of nations is much more intertwined with politics than most of the common law; one need not take the extreme position that there is no international law to concede that international legal determinations have a sizable political component.

The vagueness of international law leaves an unusual degree of room for politically guided judgments. The Framers understood that there was a difference between “existing law of nations”<sup>331</sup> and “novelties or pretensions of equivocal validity.”<sup>332</sup> These considerations explain why the Offenses power is given, in the first instance, to Congress, despite the judiciary’s presumptive role of saying “what the law is.”<sup>333</sup> Congress’s involvement in foreign relations gives it both special expertise and additional authority.

If “define” means Congress must adhere rigidly to external international law, obviously it cannot give the courts more creative power than it itself constitutionally possesses. Yet if “define” implies that the courts must give Congress’s definitions some deference, this is incoherent when the define power is delegated. What would it mean for courts to give deference to their own definitions? That would not be deference but simply agreeing with oneself.

All of this suggests that delegated exercises of the Offenses power must hew more closely to well-established, objective international law than Congress would. Whatever latitude the define power gives Congress, it does not support any deference to definitions provided by other branches exercising a delegated power. Indeed, of the two other branches, the courts, not being involved in the formulation and conduct of foreign policy, should enjoy the least deference.

## B. Delegation and Defining.

1. *The Supreme Court on Delegated “Defining.”*—The seminal Supreme Court case *United States v. Smith* upheld some delegation of the parallel power to define piracy, but also suggested limits on such

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<sup>331</sup> Letter from John Jay to Edmund Randolph (Nov. 19, 1794), in 4 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 137, 142–43 (Henry P. Johnston ed., New York, G.P. Putnam’s Sons 1893) (distinguishing between the “existing law of nations” and other norms).

<sup>332</sup> HAMILTON, *Camillus No. XXXI*, supra note 56, at 462.

<sup>333</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

delegations.<sup>334</sup> *Smith* involved a statute proscribing the death penalty for those convicted of “piracy, as defined by the law of nations.”<sup>335</sup> The defendant argued that Congress had failed to exercise its power to define piracy. The defendant maintained that because the Constitution gives Congress the power to define and punish piracy, it cannot simply punish without defining. A statute that simply creates a crime of “piracy,” the same term used in the Constitution, does not define, it just recapitulates.

The Court rejected the argument as applied to piracy. But the reasoning suggests that argument would have been valid for “felonies” and “offences against the law of nations.” Justice Story distinguished piracy, which had a specific and well-established definition with well-known elements, from the broader categories of felonies and offenses. Echoing the discussions at the Constitutional Convention, he suggested that the congressional exercise of the define power with respect to piracy was unnecessary because everyone knew what piracy meant<sup>336</sup>: “Congress may as well define by using a term of a *known and determinate* meaning, as by an express enumeration of all the particulars included in that term.”<sup>337</sup> Indeed, piracy stands out from the Clause Ten enumeration as the only specified crime, rather than a category of crimes.<sup>338</sup> Story maintained that the real purpose of the define power was in relation to felonies on the high seas and “offences against the law of nations”:

Offences . . . cannot, with any accuracy, be said to be completely ascertained and defined in any public code recognised by the common consent of nations. In respect, therefore, as well to felonies on the high seas as to offences against the law of nations, there is a peculiar fitness in giving the power to define as well as to punish . . . .<sup>339</sup>

Thus, *Smith* suggests that unlike with piracy, claims of inadequate definition (improper delegation) could be valid against a statute that purported to exercise the felonies or Offenses power but did no more to define than reflexively refer to the law of nations. Certainly the law of nations, unlike piracy, is far from self-defining; this was the rationale for giving Congress the define power in the first place. And today’s customary

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<sup>334</sup> The Court rejected the argument “that Congress is bound to define, in terms, the offence of piracy, and is not at liberty to leave it to be ascertained by judicial interpretation.” *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 158 (1820).

<sup>335</sup> *Id.* at 157.

<sup>336</sup> *Id.* at 158, 160–61 (“[T]he definition of piracies might have been left without inconvenience to the law of nations . . . . [T]he crime of piracy is defined by the law of nations with reasonable certainty . . . . There is scarcely a writer on the law of nations, who does not allude to piracy as a crime of a settled and determinate nature . . .”).

<sup>337</sup> *Id.* at 159 (emphasis added).

<sup>338</sup> This does not mean the power to define piracy was an empty one. It could involve subsidiary issues like secondary liability and affirmative defenses.

<sup>339</sup> *Smith*, 18 U.S. (5 Wheat.) at 159.

international law is far broader and messier still.<sup>340</sup> On this point, the dissenting Justice Livingstone agreed<sup>341</sup> and spelled it out more clearly:

By the same clause of the constitution, Congress have power to punish offences against the law of nations, and yet it would hardly be deemed a fair and legitimate execution of this authority, to declare, that all offences against the law of nations, without defining any one of them, should be punished with death.<sup>342</sup>

The ATS is precisely the kind of statute described by Justice Livingston.<sup>343</sup> To be sure, *Smith* was a criminal case with capital punishment mandated for the offense—a point stressed by the dissent.<sup>344</sup> In this context, an open delegation to the courts would magnify concerns associated with statutory vagueness and common law crimes.<sup>345</sup> The Court's recent narrow reading of a delegated defining to military commissions also involved high-stakes punitive proceedings.<sup>346</sup> The ATS, which provides only civil remedies, does not raise these concerns. Yet the nondelegation doctrine applies in full to civil laws, and *Smith*'s argument is at bottom a nondelegation one.

2. *The Modern (Weak) Nondelegation Doctrine.*—The delegation of legislative power to the branches that will interpret and administer the law is inevitable. In the twentieth century, as regulatory aims became increasingly complex and fact dependent, Congress delegated rulemaking powers increasingly broadly. And these very broad delegations of other Article I powers have been sustained by the Supreme Court.<sup>347</sup> Famously, no statute has been struck down on delegation grounds since the New Deal,<sup>348</sup> leading many commentators to doubt the vitality of the nondelegation doctrine. Yet the Court has in recent years reaffirmed the existence of a rather relaxed nondelegation rule. Congress can delegate so

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<sup>340</sup> As one court put it in an ATS case, international law “means many things to many people.” *Eastman Kodak Co. v. Kavlin*, 978 F. Supp. 1078, 1090 (S.D. Fla. 1997).

<sup>341</sup> Indeed, the difference between the majority and the dissent in *Smith* is that the latter did not think piracy could be distinguished enough from the broader category of offenses, while the majority, though apparently agreeing that a blanket delegation of power to define offenses would be problematic, thought that this did not apply to piracy, which was a self-contained offense.

<sup>342</sup> *Smith*, 18 U.S. (5 Wheat.) at 183 (Livingston, J., dissenting).

<sup>343</sup> It is noteworthy that Justice Livingston did not mention the ATS, suggesting he may not have seen it as delegating any power to create causes of action.

<sup>344</sup> *Smith*, 18 U.S. (5 Wheat.) at 164, 183 (Livingston, J., dissenting).

<sup>345</sup> While the vagueness doctrine is a product of modern jurisprudence, *Smith* was decided at a time when the debate over federal common law crimes was still fresh. *See United States v. Hudson*, 11 U.S. (7 Cranch) 32 (1812).

<sup>346</sup> *See* Vladeck, *supra* note 11 (suggesting that discretion to define offenses should be narrower in the criminal context).

<sup>347</sup> *See* Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1723 (2002).

<sup>348</sup> *Id.*

long as it provides an “intelligible principle” to guide the agent’s discretion.<sup>349</sup> The intelligible principle is a nucleus of policy determination that at least determines the basic direction of further action, establishes some parameters that give the ultimate regulation the imprimatur of the legislature, and distinguishes the law from a pure handover of power.<sup>350</sup> Such an intelligible principle could be simply a “broad general directive[,]” a “general policy . . . and the boundaries of this delegated authority.”<sup>351</sup>

The ATS lacks any intelligible principle to cabin the courts’ discretion. The nondelegation doctrine is weak because the Supreme Court has held that it does not take much congressional guidance to constitute an intelligible principle.<sup>352</sup> At the height of post-New Deal jurisprudence, even an instruction to be “fair” or “reasonable” could suffice.<sup>353</sup> Yet the ATS does not have even this fig leaf guidance. Indeed, the ATS represents the broadest delegation of Offenses Clause powers, apparently encompassing all law of nations violations, provided the lawsuit is brought in tort.<sup>354</sup> (The ATS speaks of “violations” of the law of nations rather than “offenses,” but it does not appear to have been argued that the former is a narrower term.) The authority of military commissions may be narrower, as it extends only to offenses traditionally recognized by the laws of war, a subset of the law of nations.

In the ATS, the subject matter of the delegation is as broad as the Offenses Clause itself. It is as if Congress had passed a law telling the judiciary to “regulate commerce” or the Executive to “declare war.” The only limits (aliens, torts) are jurisdictional, not substantive; there is no policy determination at all in the statute. Congress has not specified any particular offenses or even kinds of offenses, let alone their elements, that can serve as a basis for liability under the statute. Rather, Congress has left all of the defining to the judiciary.

3. *The Sosa Standard as the ATS’s “Intelligible Principle”.*—All of these problems could have been avoided if the Supreme Court in *Sosa* had interpreted the ATS, as the defendants urged, as a purely jurisdictional statute.<sup>355</sup> Yet while *Sosa* sets up the ATS as a serious delegation problem, it

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<sup>349</sup> J. W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928).

<sup>350</sup> See *id.* at 406.

<sup>351</sup> *Mistretta v. United States*, 488 U.S. 361, 372–73 (1989).

<sup>352</sup> See Douglas H. Ginsburg & Steven Menashi, *Nondelegation and the Unitary Executive*, 12 U. PA. J. CONST. L. 251, 258 (2010).

<sup>353</sup> *Mistretta*, 488 U.S. at 373–74, 378.

<sup>354</sup> While courts and commentators generally treat “tort” as simply referring to civil remedies, Bellia and Clark see the “tort” as carving out a very specific subset of international law norms, and thus narrowly limiting courts’ discretion. See Bellia & Clark, *supra* note 71, at 518 (arguing that the historical context of the ATS suggests that “tort” referred “only [to] intentional acts of force or violence by US citizens against alien friends”).

<sup>355</sup> See *supra* text accompanying notes 37–40.



also provides the solution by providing a narrowing construction of the statute that saves it from the dangers of overdelegation—a typical tactic of modern courts.<sup>356</sup> And aside from nondelegation concerns, even statutes that explicitly parallel a constitutional provision can be interpreted more narrowly when Congress’s policy intentions are unclear.<sup>357</sup> *Sosa* interprets the ATS’s delegation as being much narrower than all offenses. Rather, the *Sosa* Court emphasized that federal courts can only entertain ATS suits for a subset of international norms: “[F]ederal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when [the statute] was enacted.”<sup>358</sup>

In requiring offenses to be definite and comparable to the three historic models, *Sosa* provides the kind of intelligible standard that saves a statute from nondelegation problems. Indeed, *Sosa* specifically framed its warning about recognizing novel causes of action as being about the scope of Congress’s implicit common law delegation to the Court. As the Court put it, “We have *no congressional mandate* to seek out and define new and debatable violations of the law of nations . . . .”<sup>359</sup> Of course, as we have seen, Congress may not have been able to give the courts such a mandate even if it wanted to because such a delegation would exceed the constitutional limits of the Offenses power.

### C. *Sosa on Steroids*

1. *The Offenses Clause as a Limit on ATS Causes of Action.*—It should now be clear that *Sosa*’s requirement of “definite” norms echoes the “define” aspect that Congress failed to provide. In effect, *Sosa* stated that courts cannot define their own offenses under the ATS in the absence of congressional definitions.<sup>360</sup> They can only take those offenses that are predefined in international law. It is thus instructive that in calling for definite norms, *Sosa* specifically cites *Smith*—a case about the constitutional limits of the define power—to illustrate the specificity with which ATS causes of action must be defined in international law.<sup>361</sup> After

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<sup>356</sup> See John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 224.

<sup>357</sup> See *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 631–33 (1818); *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806).

<sup>358</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004). Since then, scholars and courts have divided on whether this standard was supposed to raise the bar for ATS lawsuits or to justify prior permissive practice. See *supra* text accompanying notes 40–41.

<sup>359</sup> *Sosa*, 542 U.S. at 728 (emphasis added).

<sup>360</sup> This is not reading more into *Sosa* than could have been there: the issue of the separation of powers under the Offenses Clause had been argued to the Court. See Brief for the United States as Respondent Supporting Petitioner at 32–36, *Sosa*, 542 U.S. 692 (No. 03-339) (describing the assertion of private rights of action under the ATCA as usurping Congress’s define and punish authority).

<sup>361</sup> See *Sosa*, 542 U.S. at 732.

all, *Smith* said that piracy was uniquely so self-defined that it alone could be punished by the courts without any further definition by Congress. The status and definition of piracy was not just something some scholars and legal sources indicated, but one on which there was universal agreement. Had there been less than that, Congress's delegation of defining authority to the courts may well have been inadequate.

*Sosa* nominally bases its conclusions on a reconstruction of the intent of the First Congress in enacting the statute. This Part has shown that *Sosa*'s standard is independent of presumed legislative intent: it is mandated by the Offenses Clause and nondelegation concepts. The constitutional underpinnings of *Sosa*'s rule mean that refusing to recognize fuzzy, emerging, or not universally accepted offenses is more than an implementation of congressional intent or a prudent policy. Rather, *Sosa*'s caution may be the kind of caution courts must exercise when there is a danger of construing a statute in a way that would raise constitutional concerns.<sup>362</sup>

Recall that the three common law offenses were not the only ones the First Congress could imagine.<sup>363</sup> The congressional report of 1781 recommended that state legislatures pass laws against the three offenses identified in *Sosa*, with the state courts left to deal with the very real but less obvious ones. Thus, under the Articles of Confederation, state courts could do some defining themselves.

Moreover, the "definite" norms set up as a standard in *Sosa* were the very same ones that the First Congress itself used the Offenses power to criminalize, thus providing a legislative definition. By establishing an intelligible principle equated to the classic common law offenses of the 1780s rather than ones that courts might from time to time recognize and define, *Sosa* may read any substantial judicial defining role out of the ATS. None of these offenses would have required courts to define an offense that had not been already defined by Congress. That is, the norms *Sosa* referred to were the ones that were legislatively defined as crimes, to which the ATS could provide a civil supplement. This matches the model for supplemental civil remedies suggested by the Randolph report.

2. *Implications for ATS Cases.*—This Part has shown that regardless of what Congress's power is under the Offenses Clause, the courts themselves can define only those offenses most clearly established in international law when delegated the power by Congress. (If this sounds like the *Sosa* test for ATS actions, it is, but with a constitutional

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<sup>362</sup> See, e.g., *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.").

<sup>363</sup> See *supra* notes 81–87 and accompanying text.

dimension.) The ATS represents such a delegation, but it lacks a substantive limiting principle. *Sosa* suggests such a principle. While *Sosa* is, at its core, a statutory interpretation case, the interpretation was necessary to avoid serious constitutional difficulties.

This has potentially significant implications for ATS suits. These suits have invoked an increasingly broad set of international norms of increasing nonobviousness and indefiniteness. When the suitability of a cause of action under the *Sosa* standard is questionable, doubts must be resolved in favor of caution. This is because the question of definiteness implicates not just the Court's recent interpretation of the ATS, but also the limits on federal legislative authority and the separation of powers.

A full analysis of whether any particular norm is as definite and universal as piracy or assaults on ambassadors is beyond the scope of this Article. Yet the Court has given a template for analyzing these issues, most recently in *Hamdan*. To satisfy the Offenses Clause, an offense defined solely by the courts would have to meet the same kind of searching scrutiny given the conspiracy charge in *Hamdan*. It would have to be shown, to begin with, that the same conduct has in fact been punished by other nations or international tribunals as an offense against the law of nations. Finally, one might briefly suggest recent ATS cases that have sustained causes of action for violations of purported international laws that may be "novelties or pretensions of equivocal validity."<sup>364</sup> These include the alleged international offenses of child labor,<sup>365</sup> forced labor,<sup>366</sup> cruel and degrading treatment,<sup>367</sup> pharmaceutical testing,<sup>368</sup> sex tourism,<sup>369</sup> and apartheid.<sup>370</sup> Such cases often fail to identify a single judicial precedent for liability.

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<sup>364</sup> See *supra* note 332.

<sup>365</sup> Compare *Roe v. Bridgestone Corp.*, 492 F. Supp. 2d 988, 1021–22 (S.D. Ind. 2007) (holding that "paid labor of very young children in these heavy and hazardous jobs" in violation of international labor standards was actionable under the ATS), with *Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013, 1022–24 (7th Cir. 2011) (Posner, J.) (holding that court is unable to "distill a crisp rule" from international conventions on individual liability, and noting lack of "concrete evidence" on imposition of liability by other nations).

<sup>366</sup> See *Doe v. Nestle, S.A.*, 748 F. Supp. 2d 1057, 1074 (C.D. Cal. 2010).

<sup>367</sup> See *id.* at 1077 (noting that courts treat cruel, inhuman, and degrading treatment as an actionable ATS offense despite disagreement as to what constitutes such treatment).

<sup>368</sup> See *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 174–82 (2d Cir. 2009) (holding that involuntary medical testing constituted a definite and universal violation).

<sup>369</sup> See *M.C. v. Bianchi*, 782 F. Supp. 2d 127, 132–33 (E.D. Pa. 2011) (holding that sexual assault against minors by a private individual in the context of sex tourism gives rise to an ATS cause of action).

<sup>370</sup> See *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 748 (9th Cir. 2011) ("We assume, without deciding, that a claim akin to apartheid would be cognizable under the ATS . . ."); *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 260 (2d Cir. 2007) (vacating the dismissal of ATS claims for aiding and abetting apartheid); *In re S. African Apartheid Litig.*, 617 F. Supp. 2d 228, 246 (S.D.N.Y. 2009). Despite efforts to criminalize apartheid and give it legal status in the United States, a treaty to that effect has not received the assent of the vast majority of nations, including the United States. See

Perhaps the most active issues in ATS litigation involve not the substantive definition of the crime, but second-order questions.<sup>371</sup> The most contentious of these go to the scope of secondary liability<sup>372</sup>—issues involving corporate liability<sup>373</sup> and liability for aiding and abetting.<sup>374</sup> Yet answering these questions first requires determining where to look. In one view, only the primary conduct—the elements of the offense—comes from international law; all subsidiary questions would be decided by federal common law or some other noninternational source, as in *Bivens* cases.<sup>375</sup> In the other view, at least all matters required to establish liability (like the possibility of corporate culpability) are determined by international law. Under a broader version of this position, all questions, even those posterior to liability like punitive damages, derive from international law.

The analysis of this Article does not answer these questions. It shows that these are not simply questions about the ATS—rather, they potentially implicate the Offenses Clause. If the ATS does require courts to take these definitions from international law, the Offenses Clause would presumably require the same clarity and definiteness for “secondary principles” which in effect determine liability as for norms of primary conduct. For it is the existence of liability that is characteristic of offenses, and those offenses that are against “the law of nations” are primarily for Congress to define.

#### CONCLUSION

As Congress increasingly legislates under the Offenses Clause, understanding the limits of that power has become more important than

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RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 reporters’ note 1 (1987), note; United Nations Treaty Collection, Status of Treaties, International Convention on the Suppression and Punishment of the Crime of Apartheid, <http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-7.en.pdf> (last visited Sept. 9, 2012). It has been criminalized in the charter of the International Criminal Court, though subsequent to the conduct involved in the ATS litigation. See Rome Statute of the International Criminal Court art. 7(j), July 17, 1998, 2187 U.N.T.S. 90, 93.

<sup>371</sup> Ingrid Wuerth, *The Alien Tort Statute and Federal Common Law: A New Approach*, 85 NOTRE DAME L. REV. 1931, 1931–32 (2010).

<sup>372</sup> See, e.g., *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 257–59 (2d Cir. 2009); *Khulumani*, 504 F.3d at 288 (Hall, J., concurring).

<sup>373</sup> See *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 129 (2d Cir. 2010), *cert granted*, 132 S. Ct. 472 (2011); Julian G. Ku, *The Curious Case of Corporate Liability Under the Alien Tort Statute: A Flawed System of Judicial Lawmaking*, 51 VA. J. INT’L L. 353 (2011).

<sup>374</sup> See, e.g., *Sarei*, 671 F.3d at 765–66 (holding that international law establishes aiding and abetting liability for war crimes).

<sup>375</sup> See, e.g., Wuerth, *supra* note 371 at 1933–34. Yet, it seems clear that in ATS cases, at least some issues aside from the prima facie elements of the crime must be governed by international law, such as the question of universal jurisdiction. See *supra* note 57. Moreover, saying that subsidiary questions should be decided by federal common law does not rule out borrowing from the law of nations in making the common law rule, which would again force a court to confront definitional questions. Indeed, this may make sense for reasons of international comity and to prevent forum shopping.

ever. Yet there is little understanding of how broad a power the Constitution grants with the word “define” or what amounts to “offenses.” This Article has examined the available evidence as to the Clause’s meaning, drawn from an examination of the purposes and precursors of the Clause, its path through the Convention and subsequent treatment by early Congresses, the views of those few Framers and early jurists who addressed the matter, and early judicial interpretations of the cognate “define . . . Piracies and Felonies committed on the high Seas.” These sources, while thinner than for most constitutional provisions, suggest that exercises of the power cannot be appreciably broader than established international law offenses. Congress cannot legislate beyond a reasonable interpretation of international law. Furthermore, “Offences” does not refer to any conduct with international legal, or even merely diplomatic, effects. Rather, it refers to conduct that international law deems individually wrongful.

The Offenses power presumes Congress will define the offenses it makes actionable. Yet it has repeatedly delegated authority to the courts to identify and define offenses within certain broad categories, such as war crimes or torts. Such delegations are not inherently illegitimate. Yet when the courts go about defining such offenses, they can certainly not exercise more creativity than Congress could have if it had done the defining. Thus, if Congress can only define existing offenses, the courts can only define some subset, such as very well-accepted offenses with noncontroversial definitions. Even if Congress has broader discretion than suggested in this Article, the delegated define power of the courts will have to be narrower to avoid separation of powers concerns. This conclusion echoes the standard the *Sosa* Court laid down for ATS offenses but gives it constitutional resonance.

Finally, it would be naïve to suggest that any understanding of the Offenses power would often be outcome determinative. A narrow view of the Offenses power simply shifts the debate to whether the purported norm truly exists in international law. Definiteness and concreteness are hard to quantify. Because international offenses never come with internationally issued certificates of authenticity,<sup>376</sup> even if the Offenses Clause were understood to only allow the creation of most well-established offenses, there will often be room to argue that the norm in question is well-established.

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<sup>376</sup> Crimes created by treaty may be an exception, but those can be legislated under the treaty power.

