

October 2000

## Federalism and Foreign Affairs: Congress's Power to "Define and Punish...Offenses Against the Law of Nations"

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# FEDERALISM AND FOREIGN AFFAIRS: CONGRESS'S POWER TO "DEFINE AND PUNISH . . . OFFENSES AGAINST THE LAW OF NATIONS"

BETH STEPHENS\*\*

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\* U.S. CONST. art. I, § 8, cl. 10.

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## INTRODUCTION

The Tenth Clause of Article I, Section 8 of the Constitution grants to Congress the power "[t]o define and punish . . . Offenses against the Law of Nations . . . ."<sup>1</sup> Rarely cited by the Supreme Court, relied upon in only a handful of cases, the Offenses Clause has been the subject of minimal scholarly commentary, with no analysis of its full significance. Yet the long-ignored Clause lies at the heart of the dispute over federalism and foreign affairs and is central to a hotly debated constitutional issue: the federal government's authority, pursuant to the foreign affairs power, to regulate areas traditionally governed by the states.

Properly understood, the Offenses Clause grants Congress exceptional powers to incorporate international law into federal law, even when such norms infringe upon areas otherwise regulated by the states. The failure to understand the broad authority contained in the Offenses Clause, and its role in the battle over federalism and foreign affairs, has hampered full understanding of the federal government's foreign affairs powers. The Offenses Clause provides heretofore unrecognized support for a broad interpretation of that power, support rooted not in the structural implications of the Constitution, but in a specific, enumerated constitutional power.

Although federal dominance over foreign affairs has long been an accepted pillar of our constitutional structure, tensions about the source and extent of that power have been ever present. These disputes have a new significance today, when the nature of international relations has changed dramatically. Contacts among nations are no longer dominated by trade, diplomacy, and war, and

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1. U.S. CONST. art. I, § 8, cl. 10 [hereinafter Offenses Clause]. The full text of Clause 10 grants Congress the power "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations."

I have modernized the spelling of "offence" to "offense" throughout. I also use the modern term "international law" as a synonym for the "law of nations." Known as the "law of nations" in the eighteenth century, "[n]owadays, the terms *the law of nations* and *international law* are used interchangeably." MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 1 (1988); see also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES pt. I, ch. 2, introductory note at 41 (1987) [hereinafter RESTATEMENT (THIRD)] (discussing the "the law of nations, later referred to as international law").

are no longer conducted by governments and merchants along well-defined paths. Individuals, local governments, and nations now communicate directly and almost instantaneously across international borders. Increased interactions have led to increased interdependence, and to the recognition that the internal policies of one nation impact directly on its immediate neighbors, its region, and even the world. In a striking response to the international concern about domestic actions, the world community has developed detailed norms prohibiting international human rights violations committed by government officials within their own national borders and against their own citizens. Over the past decade, violations of such rights have led to international criminal prosecutions,<sup>2</sup> as well as to wars such as the recent military action in Kosovo.<sup>3</sup>

This expansion of the terrain governed by international law and of the range of players participating directly in foreign relations poses a challenge to our interpretation of the foreign affairs power. Several scholars have argued in recent articles that federal authority to implement international law obligations is subject to limits imposed by federalism, and that the federal government should not maintain exclusive constitutional power over the implementation of international law, given the evolution of that law to regulate formerly domestic matters. Peter Spiro and Curtis Bradley, for example, both stress the fading distinction between domestic and foreign affairs. Spiro argues that the doctrine of

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2. In the first criminal prosecutions for international crimes since World War II, international tribunals were established by the U.N. Security Council to prosecute war crimes and crimes against humanity committed in the former Yugoslavia and Rwanda. See S.C. Res. 955, U.N. SCOR, 49th Sess., 3453 mtg., U.N. Doc. S/RES/955 (1994), *reprinted in* 33 I.L.M. 1598 (establishing a tribunal for Rwanda); S.C. Res. 827, U.N. SCOR, 48th Sess., 3217 mtg., Doc. S/RES/827 (1993), *reprinted in* 32 I.L.M. 1203 (establishing a tribunal for the former Yugoslavia). A treaty establishing a permanent International Criminal Court is now open for signature and ratification, to take effect when ratified by 60 nations. See Rome Statute of the International Criminal Court, *adopted* July 17, 1998, art. 126, 37 I.L.M. 999.

3. See Joint Statement on Kosovo, 35 WEEKLY COMP. PRES. DOC. 711 (Apr. 23, 1999) (describing the military action against the Federal Republic of Yugoslavia as aimed at ending ethnic cleansing and other violence and protecting "universal human rights and freedoms" in Kosovo); Address to the Nation on Airstrikes Against Serbian Targets in the Federal Republic of Yugoslavia (Serbia and Montenegro), 35 WEEKLY COMP. PRES. DOC. 516, 516-17 (Mar. 24, 1999) (describing air strikes as a "moral imperative," aimed, in part, to halt Serb attacks "on a largely defenseless people").

exclusive federal control over foreign affairs "was once appropriate, even imperative, but is fast becoming obsolete" in the face of increasing state and local government activities in the international arena.<sup>4</sup> Bradley criticizes what he calls "foreign affairs exceptionalism," and urges the application of "the usual constitutional restraints" to federal foreign affairs decisions.<sup>5</sup> He concludes that federal foreign affairs powers should be subject to the limitations imposed by the states' primary responsibility for domestic affairs—even where domestic actions implicate foreign policy concerns.<sup>6</sup>

Questions about the viability of an exclusively federal foreign affairs powers are heightened by the Supreme Court's revived emphasis on states' rights. In a rapid series of cases over the past several years, the Court has limited Congress's power to legislate pursuant to both the Commerce Clause and the Fourteenth Amendment,<sup>7</sup> and has redefined structural limits on the federal power to impose mandates on the state governments.<sup>8</sup> These

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4. Peter J. Spiro, *Foreign Relations Federalism*, 70 U. COLO. L. REV. 1223, 1225 (1999). He insists that state and local governments are capable of interacting directly with foreign nations and of playing an important role on the international stage. See *id.*

5. Curtis A. Bradley, Breard, *Our Dualist Constitution, and the Internationalist Conception*, 51 STAN. L. REV. 529, 539 n.51, 555-56 (1999) [hereinafter Bradley, *Breard*] (decrying "foreign affairs exceptionalism," defined as "the view that the usual constitutional restraints on the federal government's exercise of power do not apply in the area of foreign affairs"). Bradley argues that separate standards for review of domestic and foreign affairs are unfounded because the sharp distinction between them that existed in prior centuries has now faded. See Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 461 (1998) [hereinafter Bradley, *The Treaty Power*]; see also Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1622-23 (1997) (noting that "the category of foreign relations" now includes "matters traditionally regulated by states in which the states have a genuine interest"); G. Edward White, *Observations on the Turning of Foreign Affairs Jurisprudence*, 70 U. COLO. L. REV. 1109, 1114-16, 1123 (1999) (predicting that the sharp separation between domestic and foreign affairs will fade, given that foreign affairs are no longer limited to the "international geopolitical relations of the United States").

6. See Bradley, *The Treaty Power*, *supra* note 5, at 460-61.

7. See *United States v. Morrison*, 120 S. Ct. 1740, 1754, 1758-59 (2000) (Commerce Clause and Fourteenth Amendment); *City of Boerne v. Flores*, 521 U.S. 507, 516-29 (1997) (Fourteenth Amendment); *United States v. Lopez*, 514 U.S. 549, 558-59 (1995) (Commerce Clause).

8. See *Alden v. Maine*, 527 U.S. 706, 754 (1999) (holding that the federal government cannot, under Article I, abrogate states' immunity from suits in their own courts); *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 672-75 (1999) (limiting federal authority, under the Fourteenth Amendment, to abrogate states' immunity

federalism decisions have the potential to alter the definition of state sovereignty within the federalist paradigm. This shift in the constitutional landscape has given rise to additional doubts about the future of the federal foreign affairs power, where federal efforts to enforce international obligations intrude into areas otherwise left to state control.<sup>9</sup>

The Offenses Clause, the only reference to international law in the Constitution, sheds important light on the scope of the foreign affairs powers of Congress and of the federal government in general. An analysis of the Clause supports the conclusion that the framers delegated extraordinary foreign affairs powers to Congress, far broader than those granted on the domestic front. In this sense, the framers understood foreign affairs to be different from other issues facing the nation, justifying exceptional federal powers in order to centralize and regularize our interactions with the rest of the world. In addition, the Offenses Clause provides strong constitutional support for a wide range of congressional actions heretofore based on less specific constitutional powers. Finally, an understanding of the context in which the Clause was adopted and the concerns that it addressed undercuts claims that international law, or even foreign affairs, should be limited to the kinds of international problems confronting the framers in the eighteenth century. To the contrary, the framers understood that the law of nations would evolve in ways that they could not control or predict; to read limits into the federal government's ability to respond to evolving notions of international law would frustrate the purpose of the foreign affairs power in general, as well as the Offenses Clause itself.

To consider an example to which I will return later in this Article, much of the international community considers the execution of defendants who committed their crimes as juveniles to

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in federal court); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 634-39 (1999) (same); *Printz v. United States*, 521 U.S. 898, 933 (1997) (prohibiting federal government from commandeering states to administer federal programs).

9. Bradley argues that the Supreme Court's recent decisions regarding unconstitutional interference with states' rights "at least raise the question of whether similar restrictions might apply in the area of foreign affairs." Curtis A. Bradley, *A New American Foreign Affairs Law?*, 70 U. COLO. L. REV. 1089, 1100 (1999) [hereinafter Bradley, *New Foreign Affairs Law*]; see Bradley, *The Treaty Power*, *supra* note 5, at 399-40.

violate international law.<sup>10</sup> The United States has declined to join the near consensus on this issue, refusing to be bound by the customary international law prohibition of capital punishment of juveniles, or to ratify a provision in an international treaty that incorporates this norm. If the President and Congress changed their view as to this rule, indicating that they accepted the customary norm, the international community would view the prohibition as binding upon the United States. Could Congress then enact legislation prohibiting state executions of convicted killers who committed their crimes as juveniles, or would such a statute intrude upon state powers in violation of the Constitution?

Congress's constitutional power to act on this issue could be based on the implied incorporation of international law into federal common law, or on powers implied from the very structure of our government: the federal government controls our relations with foreign States,<sup>11</sup> including the implementation of international law within this country. The Offenses Clause, however, offers a far more direct constitutional source for congressional authority to implement an international law obligation. By its terms, the Clause authorizes Congress to define violations of international law and impose sanctions for those violations. In barring the juvenile death penalty, Congress would be defining capital punishment under such conditions as a violation of international law, and declaring it a federal offense to act in conflict with the international norm.

The dearth of interest in the Offenses Clause, and the failure to recognize its relevance to the federalism and foreign affairs debate or to the particular question posed here, is largely a result of the unexamined assumption that the Clause is limited to the power to define *crimes* and to impose *criminal* sanctions. The few commentators to analyze the Clause in depth have assumed, without discussion, that it is limited to penal sanctions.<sup>12</sup> The

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10. See *infra* notes 417-26 and accompanying text (discussing the juvenile death penalty).

11. I capitalize "State" throughout to refer to a sovereign nation, while "state" refers to one of the U.S. states.

12. 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, 866-67 (1988) (describing the Clause as "permitting Congress to define violations of customary international law as domestic crimes") (emphasis added); Howard S. Fredman, Comment, *The Offenses Clause: Congress' International Penal Power,* 8 COLUM. J. TRANSNAT'L L. 279



Supreme Court has never addressed this question, and the handful of cases in which the Court has relied on the Offenses Clause all concern criminal statutes such as laws penalizing piracy or war crimes.<sup>13</sup> Congress itself, however, has twice cited the Offenses Clause in support of the much broader power to regulate civil liability in cases touching upon international law: Congressional reports cite the Clause as support for the authority to determine when foreign sovereigns can be sued in U.S. courts,<sup>14</sup> and for the power to create civil liability for certain international human rights violations.<sup>15</sup>

A close examination of the text of the Offenses Clause, the historical context in which it was drafted, and the constitutional structure of which it is a key part, demonstrates that the Clause was not—and should not be—limited to criminal prosecutions. As used in the Offenses Clause, “offenses” encompasses all violations of international law, regardless of whether criminal or civil sanctions apply, and the power to “define and punish” includes the power to impose civil or criminal regulations and sanctions. Moreover, the constitutional language is not limited to the particular international law norms existing at the time the Constitution was ratified, or to any categories indicated by the types of violations recognized in the eighteenth century, but rather evolves over time as international law continues to develop. Properly understood, the Clause authorizes broad congressional regulation of all activities governed by modern international law. The decision to grant Congress this power to address both criminal and civil violations of that law, as it evolved, reflected a strong commitment to the enforcement of international law and a firm

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(1969) (reflecting this assumption in the title); Zephyr Rain Teachout, Note, *Defining and Punishing Abroad: Constitutional Limits on the Extraterritorial Reach of the Offenses Clause*, 48 DUKE L.J. 1305, 1310-14, 1316, 1320, 1324, 1326, 1331 (1999) (limiting discussion to international jurisdictional rules applicable to crimes); see also *infra* notes 22-45 and accompanying text (examining the dispute over the breadth of the Offenses Clause).

13. See *infra* notes 112-19 and accompanying text.

14. See H.R. REP. NO. 94-1487, at 12 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6610-11 (listing the Offenses Clause as one basis of congressional constitutional authority to enact the Foreign Sovereign Immunities Act); S. REP. NO. 94-1310, at 12 (1976) (same).

15. See S. REP. NO. 102-249, at 5-6 (1991) (listing Offenses Clause as one basis of Congress's power to enact the Torture Victim Protection Act).

decision to place control over its implementation in the hands of the federal government.

Recognition that the Offenses Clause authorizes civil as well as criminal liabilities also sheds new light on the debate about the constitutional foundation of the Alien Tort Claims Act (ATCA),<sup>16</sup> a statute that has been applied to authorize civil litigation for human rights violations.<sup>17</sup> The language of the ATCA reflects the concerns underlying the Offenses Clause, suggesting both that the Clause was seen by the founding generation as applying to civil litigation and that it provided constitutional authorization for the statute. This strong foundation puts to rest questions about the constitutionality of the statute.

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As an initial effort to understand the import of a long-ignored constitutional provision,<sup>18</sup> much of this Article focuses on the likely significance of the Clause to the generation who drafted, ratified, and struggled to implement the Constitution—a group of actors to whom I refer collectively as the “framers.”<sup>19</sup> I consciously define my efforts as a search for the significance of the Offenses Clause to encompass several distinct objectives: the “meaning” of the language at the time it was drafted; the “intent” of those who chose those particular words at the Constitutional Convention; and the “understanding” of the Clause by “the Constitution’s original readers”—the “citizens, polemicists, and state convention delegates”

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16. 28 U.S.C. § 1350 (1994).

17. See *infra* notes 301-20 and accompanying text.

18. With lawyers-as-historians under scathing attack, I emphasize that this is primarily a work of legal scholarship, reviewing a large body of legal material and more limited historical sources, in order to reach thoroughly modern legal conclusions as to the powers afforded to Congress by the Offenses Clause. See, e.g., Martin S. Flaherty, *History “Lite” in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 525 (1995) (“[C]onstitutional discourse is replete with historical assertions that are at best deeply problematic and at worst, howlers.”); John C. Yoo, *Clio at War: The Misuse of History in the War Powers Debate*, 70 U. COLO. L. REV. 1169, 1169-70 (1999) (summarizing criticism of the methodology of “law office history” and “the use of history in foreign affairs scholarship”).

19. Not to be confused with “the Framers,” the smaller group of men who actually drafted the Constitution, although they, of course, were key players in my broader group of “framers.”

who participated in the ratification process.<sup>20</sup> None of these can be isolated and defined with precision in any constitutional study; less so here, where the historical record contains only a few scattered references to the actual language of the Clause. On the bright side, however, the record is replete with comments about the broader topics to which the Clause refers: the relationship of international legal standards to domestic law, and the blurred line between civil and criminal offenses and the sanctions appropriate for each. Of course, the participants at the Constitutional Convention and state ratifying conventions, as well as their contemporaries, held a "bewildering array" of views about the document they drafted and eventually adopted.<sup>21</sup> The available history can, at best, identify a range of views, rather than firm definitions.

My focus on the framers does not imply that I view their intentions as definitive, but rather that the likely original understandings of the Clause, to the extent that we can uncover them, serve as a point of departure for a project aimed at understanding its modern-day import. I undertake two interrelated enterprises in this Article, asking first what the framers might have understood and intended, and then exploring what that signifies for us today. My goals are to articulate a coherent interpretation of the Offenses Clause, and to examine the issue of federalism and the foreign affairs power in light of this new understanding of the Clause.

With these goals and caveats in mind, I begin in Part I with an overview of the modern dispute about the breadth of the Offenses Clause, as reflected in the sparse case law, commentary, and congressional references to the long-overlooked constitutional provision. To understand the likely significance of the Clause to the framers, Part II starts with a review of the commitments to international law and international obligations that played a key role in the decision to redraft the terms of the Confederation and to design a government capable of enforcing the law of nations. The record of the drafting and ratification debates reflects the

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20. Jack N. Rakove, *Fidelity Through History (Or To It)*, 65 *FORDHAM L. REV.* 1587, 1594-95 (1997).

21. See JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 6 (1996).

widespread understanding that the best means to achieve that goal was to vest control over foreign affairs in the federal government. I then examine the adoption of the Offenses Clause, the only constitutional provision to actually mention the law of nations. The scant information available about the Clause indicates that it represented one means of implementing the framers' often-expressed commitment to federal enforcement of international law.

Part III analyzes the minimal case law applying the Offenses Clause in the ensuing two centuries. Although brief, the record nevertheless indicates that the Clause is capable of a broad application—one that supports the special role of foreign affairs within our constitutional structure.

In Part IV, I address the fundamental dispute about whether the Clause authorizes civil responses to violations of international law, or is limited to criminal penalties. I frame the question by exploring the meaning of "offenses against the law of nations" in the late eighteenth century, demonstrating that such offenses encompassed a broad range of infractions calling for an equally broad range of civil and criminal remedies. I then analyze the language of the Clause, refuting the unsupported assumption that the use of the terms "offenses" and "punish" limit the Clause to criminal prosecutions. Next, I analyze the broad powers granted to Congress under an accurate understanding of the Offenses Clause. Applying this interpretation to a historical constitutional puzzle, the origins of the ATCA, I show that the framers themselves understood the full implications of the Offenses Clause.

Finally, I examine the Offenses Clause in its constitutional context in Part V. The Clause has fallen into relative neglect because Congress has legislated on international law issues through several other powers, and because of the mistaken view that the Clause is limited to criminal offenses. An understanding of the breadth of the Offenses Clause, however, provides a more accurate view of the foreign affairs powers of Congress, and of the federal government overall. Moreover, linking Congress's control over international law to a specific constitutional provision responds to federalism concerns raised in recent articles. Applying the reinvigorated Offenses Clause to modern constitutional debate, I conclude that the Constitution, through the Offenses Clause,

authorizes Congress to implement this country's international law obligations, even when such obligations require regulation of areas otherwise delegated to the control of the states.

Challenges to the scope of the foreign affairs powers come during an unprecedented explosion of international interaction and interdependence. Ironically, a narrow view of the foreign affairs power, based on a misguided application of federalism principles, threatens to pull the United States away from universal application of international law norms at the same time that economic, political, and social concerns increase the need for uniform enforcement of those norms in our interactions with individuals, corporations, and governments around the world. Fortunately, our Constitution anticipated the likelihood of dramatic changes in the scope of international law and granted our federal government the powers necessary to lead the nation into the interconnected world we inhabit today.

### I. THE MODERN DISPUTE OVER THE MEANING OF THE OFFENSES CLAUSE

The sparse academic commentary on the Offenses Clause generally has assumed without discussion that the provision applies only to impose criminal penalties. The only two articles devoted entirely to the Clause, both student comments, assume that it is limited to penal powers.<sup>22</sup> A third article, with a substantial section detailing the history of the Clause, states the crimes-only assumption in its first paragraph, describing the Clause as "permitting Congress to define violations of customary international law as domestic *crimes*."<sup>23</sup> Prior to 1993, I have uncovered only one reference to the question of whether the Clause is limited to criminal sanctions: one sentence of a 1944 law review article in

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22. One, a 1969 student comment, reflects the assumption in its title, "The Offenses Clause: Congress' International *Penal* Power." Fredman, *supra* note 12 (emphasis added). The second limits its analysis throughout to international criminal law. See Teachout, *supra* note 12.

23. Siegal, *supra* note 12, at 867 (emphasis added). Quincy Wright discussed the broad meaning of "offenses against the law of nations" in a 1945 article concluding that the Offenses Clause provides constitutional authorization for U.S. trials of war criminals. See Quincy Wright, *War Criminals*, 39 AM. J. INT'L L. 257, 261, 279-82 (1945).

which the author concludes emphatically, but with virtually no discussion, that the Clause "relates wholly to acts of a criminal nature."<sup>24</sup> One 1993 article does argue that the Clause authorizes noncriminal regulation, with a brief discussion focused on the use of the word "define" in the Clause.<sup>25</sup> In addition, a handful of law review articles have noted the issue in passing, but have not attempted to analyze the issue in context, or to review the history of the Clause, its likely meaning at the time of the framing of the Constitution, or Supreme Court cases applying the Clause.<sup>26</sup>

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24. Charles Pergler, *Constitutional Recognition of International Law*, 30 VA. L. REV. 318, 325 (1944). Pergler gave two reasons for his conclusion. First, he pointed to the placement of the Offenses Clause in the same provision as the power to define piracy and felonies on the high seas. *See id.* For a discussion of this argument, see *infra* notes 292-96 and accompanying text. Second, he relied on the use of the word "offense" to refer to a felony or misdemeanor in an obscure Kentucky statute. Offense was indeed frequently used to refer to crimes, but was also often used in a much broader sense; the fact that "offense" is limited to "crime" in one particular state statute is irrelevant to the understanding of the constitutional language. *See infra* notes 194-227 and accompanying text.

25. As stated by Posner and Spiro, the Offenses Clause includes the power to define civil offenses and to prohibit certain conduct:

The Framers . . . viewed Congress's authority to "define" and "punish" offenses against the law of nations as separate powers. Congress could define offenses without necessarily proscribing criminal penalties for them. This power to declare "civil" offenses or simply prohibit conduct violating international law provides Congress with the flexibility to deal with various types of offenses against international law. While such acts as piracy and hijacking are natural candidates for criminal sanctions, violations of international law by state governments require more sensitive treatment. In this context, simple prohibitions are more appropriate than criminal penalties but no less consistent with the Offenses Clause authority.

Michael H. Posner & Peter J. Spiro, *Adding Teeth to United States Ratification of the Covenant on Civil and Political Rights: The International Human Rights Conformity Act of 1993*, 42 DEPAUL L. REV. 1209, 1224-25 (1993).

26. *See, e.g.*, Harold Hongju Koh, *Bringing International Law Home*, 35 HOUS. L. REV. 623, 665-66 & n.211 (1998) (stating without discussion that the Offenses Clause provides support for the Torture Victim Protection Act); Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1831 n.40, 1843-44 n.105 (1998) [hereinafter Koh, *Is International Law State Law?*] (concluding without discussion that several civil and criminal statutes rest upon the Offenses Clause); Donald J. Kochan, Note, *Constitutional Structure as a Limitation on the Scope of the "Law of Nations" in the Alien Tort Claims Act*, 31 CORNELL INT'L L.J. 153, 180 n.161 (1998) (stating in a footnote that he takes no position on the question of whether the Offenses Clause is limited to defining criminal offenses); *see also* Yoav Gery, Note, *The Torture Victim Protection Act: Raising Issues of Legitimacy*, 26 GEO. WASH. J. INT'L L. & ECON. 597, 597-98 (1993) (quoting concerns about the civil application of the Offenses Clause raised in Senate hearings and by dissenting Senators).

The basic criminal power deriving from the Clause is undisputed. The Supreme Court has relied on the Offenses Clause in a handful of cases, upholding congressional power to criminalize counterfeiting of foreign securities,<sup>27</sup> war crimes,<sup>28</sup> and conduct threatening foreign diplomats in the United States.<sup>29</sup> In addition, the Supreme Court has several times described the Offenses Clause as one of the few explicit penal powers granted to Congress, making the point that the inclusion of *explicit* penal powers did not negate the existence of analogous *implicit* powers.<sup>30</sup> In the first such reference, Chief Justice Marshall wove a discussion of the Offenses Clause into his famous explication of the broad reach of the "necessary and proper" clause in *McCulloch v. Maryland*.<sup>31</sup> The Constitution, Marshall noted, expressly authorized Congress to punish counterfeiting, piracy, felonies on the high seas, and offenses against the law of nations.<sup>32</sup> However, "[a]ll admit" that the United States has the power to punish any violation of its laws through the penal code.<sup>33</sup> The existence of the express grant of authority did not negate the existence of the broader, implicit right to enforce the law through the imposition of penal sanctions, even though such a power was, strictly speaking, not "necessary" to the exercise of the related constitutional powers.<sup>34</sup>

Although the Court has not relied on the penal power granted by the Offenses Clause, Congress has cited the Clause in support of its authority to define *civil* claims. In enacting the Foreign Sovereign Immunities Act (FSIA),<sup>35</sup> Congress relied on several Article I powers, including the power to define offenses against the law of

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27. See *United States v. Arjona*, 120 U.S. 479, 483-87 (1887).

28. See *Madsen v. Kinsella*, 343 U.S. 341, 355 n.22 (1952); *Hirota v. MacArthur*, 338 U.S. 197, 199-215 (1948) (Douglas, J., concurring); *In re Yamashita*, 327 U.S. 1, 7 (1946); *Ex parte Quirin*, 317 U.S. 1, 28 (1942).

29. See *Boos v. Barry*, 485 U.S. 312, 316, 323 (1988).

30. See *McGrain v. Daugherty*, 273 U.S. 135, 169 (1927); *Logan v. United States*, 144 U.S. 263, 283 (1892); *United States v. Hall*, 98 U.S. 343, 345-46 (1878); *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 535-36 (1870); *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 233 (1821); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 416-17 (1819).

31. 17 U.S. (4 Wheat.) at 416-17.

32. See *id.*

33. See *id.* at 416.

34. See *id.* at 417-18.

35. 28 U.S.C. §§ 1330, 1602-11 (1994).

nations.<sup>36</sup> The FSIA provides for federal court jurisdiction over all claims against sovereign States, details the procedures applying to such cases, and lists the circumstances in which the States' sovereign immunity is waived. In upholding the constitutionality of the FSIA, the Supreme Court has twice noted, without comment, congressional reliance on the Offenses Clause as a constitutional basis for this civil statute.<sup>37</sup>

The Offenses Clause has also been cited by Congress as authority for the enactment of the Torture Victim Protection Act (TVPA).<sup>38</sup> The TVPA creates a federal civil cause of action for damages for torture and extrajudicial execution.<sup>39</sup> The Senate report accompanying the statute relied on two sources for its constitutional power to enact the statute. The report first cited Congress's power to confer jurisdiction on U.S. courts to recognize claims arising under international law,<sup>40</sup> noting in a footnote that cases under the TVPA "raise legal issues—such as interpretations of international law—that are matters of Federal common law and within the particular expertise of Federal courts."<sup>41</sup>

Second, the report stated: "Congress' ability to enact this legislation also drives from article I, section 8 of the Constitution, which authorizes Congress 'to define and punish . . . Offenses against the Laws of Nations.'"<sup>42</sup> In Senate testimony, however, representatives of the Bush administration challenged this interpretation of the Offenses Clause:

The reference in the constitutional text to "punish[ing] Piracies and Felonies . . . and Offenses" suggests that the Founders

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36. See H.R. REP. NO. 94-1487, at 12 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6610-11 (listing the Offenses Clause as one basis of congressional constitutional authority to enact the FSIA); S. REP. NO. 94-1310, at 12 (1976) (same).

37. See *Argentine Republic v. Amerasia Shipping Corp.*, 488 U.S. 428, 436 (1989); *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 493 n.19 (1983).

38. 28 U.S.C. § 1350 note (1994); see S. REP. NO. 102-249, at 5-6 (1991) (listing the Offenses Clause as one basis of constitutional authority for enactment of TVPA). The TVPA, enacted in 1991 as a note to the ATCA, creates causes of action for official torture and extrajudicial execution.

39. See 28 U.S.C. § 1350 note at § 2(a).

40. See S. REP. NO. 102-249, at 5-6.

41. *Id.* at 6 n.6.

42. *Id.* at 5-6 (alteration in original).



intended that Congress use this power to define crimes. It is a difficult and unresolved question, therefore, whether that power extends to creating a civil cause of action in this country for disputes that have no factual nexus with the United States or its citizens.<sup>43</sup>

The administration's argument was quoted by two Senators in a minority report suggesting that the legislation "possibly exceeds Congress' constitutional authority."<sup>44</sup> The Senators continued, "In short, we simply do not agree with the contention in the majority views that Congress 'clearly has authority to create a private right of action for torture and extrajudicial killings committed abroad.' . . . We must concur with the Department of Justice's reservations about the constitutionality of this statute."<sup>45</sup>

The question of the scope of the Offenses Clause, therefore, was posed at the time of the passage of the TVPA in 1992. It is undisputed that the Offenses Clause authorizes Congress to enact criminal statutes penalizing conduct that violates the law of nations. The broader meaning of the Clause, however, becomes clear from an analysis of its place within the constitutional structure and the meaning of its language at the time of the framing.

## II. AT THE CONSTITUTIONAL CONVENTION

The dearth of attention given to the Offenses Clause over the past 200 years contrasts sharply with the weight given to the issues it addresses by the framers. Although the Clause triggered little recorded debate or discussion at the Constitutional Convention or at the ratification assemblies, this relative silence reflected general unanimity about the importance of the powers conferred on the national government, rather than disinterest. To the contrary, the need for a central government capable of holding accountable those responsible for violations of international law was a main impetus

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43. *Torture Victim Protection Act of 1989: Hearings on S. 1629 and H.R. 1662 Before the Subcomm. on Immigration and Refugee Affairs of the Senate Judiciary Comm.*, 101st Cong., 13-14 (1990) (prepared statement of John O. McGinnis, Department of Justice) (alteration in original).

44. S. REP. NO. 102-249, at 13 (Minority Views of Messrs. Simpson and Grassley).

45. *Id.* at 14.

to the framing of the Constitution. The Offenses Clause assigned exactly that power to the federal government. The Clause cannot be understood without reviewing the assumptions about international law, federalism, and foreign affairs of those who adopted it. As has been well documented, the framers consistently expressed a strong commitment to a federal government that would regulate domestic enforcement of international law norms. Given the paucity of language in the Constitution expressing this commitment, it is likely that the Offenses Clause was intended to play a major role in enabling the federal government to enforce compliance with the nation's international law obligations.

#### A. *The Binding Importance of the Law of Nations*

The Constitution was written by a prepositivist generation who believed that unwritten laws were binding on nations and individuals alike. They viewed these fundamental, binding rules as founded upon "maxims and customs . . . of higher antiquity than memory or history can reach."<sup>46</sup> As sources for these rules, the framers and their peers looked to both reason and morality, finding no inherent conflict between the two.<sup>47</sup> Basic notions of the rights and obligations of governments and individuals were understood to be "distilled from reason and justice through the social and governmental compacts."<sup>48</sup>

The law of nations was one component of this common law, binding upon nations and their citizens, and regulating virtually all interactions between the governments and citizens of different States. As defined by Blackstone,

The law of nations is a system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world; in order to decide all disputes, to regulate all ceremonies and civilities, and to insure the observance of justice and good faith, in that intercourse which

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46. 1 WILLIAM BLACKSTONE, COMMENTARIES \*67.

47. See Jules Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 VA. L. REV. 1071, 1078-83 (1985) (describing the framers' reliance on both natural law, founded in morality, and common law, based in reason).

48. BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 77 (1992).

must frequently occur between two or more independent states, and the individuals belonging to each.<sup>49</sup>

Such intercourse included "mercantile questions, such as bills of exchange and the like," "all marine causes, relating to freight, average, demurrage, insurances, bottomry, and others of a similar nature," the "law-merchant" and "disputes relating to prizes, to shipwrecks, to hostages, and ransom bills," along with safe-conducts, passports, the rights of ambassadors and their employees, and piracy.<sup>50</sup> The law of nations thus governed commerce as well as diplomacy, business as well as war.

In the absence of treaties or other agreements, this enormous area of international interaction was to be governed by the unwritten law, equally available to and equally binding upon all nations of the world.<sup>51</sup> Moreover, as the law of all nations, no one State could tamper with or amend its content. "Whence, as this law is immutable, and the obligations that arise from it necessary and indispensable, nations can neither make any changes in it by their conventions, dispense with it in their own conduct, nor reciprocally release each other from the observance of it."<sup>52</sup> By obtaining its independence, the United States became bound by this existing body of laws. "The law of nations, although not specially adopted by the constitution or any municipal act, is essentially a part of the law of the land. Its obligation commences and runs with the existence of a nation . . . ."<sup>53</sup>

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49. 4 BLACKSTONE, *supra* note 46, at \*66.

50. *Id.* at \*67-73.

51. See E. DE VATTEL, *THE LAW OF NATIONS* vii (Joseph Chitty ed., new ed., Philadelphia, T. & J.W. Johnson & Co. 1876) (1758).

52. *Id.* at lviii.

53. 1 Op. Att'y Gen. 26, 27 (1792) (Edmund Randolph). In the words of the first Chief Justice John Jay, echoing those of Attorney General Randolph, "[T]he *United States* had, by taking a place among the nations of the earth, become amenable to the laws of nations." *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 474 (1793).

The framers repeatedly stated that the law of nations was part of the law of the United States. See Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 VAND. L. REV. 819, 825-28 (1989) (quoting Alexander Hamilton, James Madison, and Charles Lee, among others). Leaders at the time of independence "believed that the attainment of independence obligated the United States to receive and to follow the law of nations [and] viewed adherence to international law as a concomitant to sovereignty." Lobel, *supra* note 47, at 1084; see Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461, 484 (1989). Chief Justice Marshall concurred, stating:

### *B. Crafting a Government Capable of Enforcing the Law of Nations*

During the difficult years between the Declaration of Independence and the ratification of the Constitution, the leaders of the struggling Confederation were deeply concerned about ensuring enforcement of international law obligations.<sup>54</sup> These concerns reflected, in part, the deep-seated belief that international law, or the law of nations, was a key component of the common law, binding on all nations.<sup>55</sup> Enforcement of international law norms was, after all, a moral obligation.<sup>56</sup> A less altruistic motivation also spurred the framers' interest in obeying the mandates of international law: violations of the laws of nations gave cause for war—a danger very much on the minds of the framers as they drafted the Constitution in the military shadow of the more powerful nations of Europe. The new nation was struggling mightily to protect itself in a world in which warfare was a chief means of resolving disputes.<sup>57</sup> To avoid giving offense through violations of

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"[T]he Court is bound by the law of nations which is a part of the law of the land." *The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815). For a detailed analysis of late-eighteenth-century views of the law of nations, see Jay, *supra*, at 821-28.

54. See Lobel, *supra* note 47, at 1084.

55. See Jay, *supra* note 53, at 825-28.

56. James Wilson emphasized the religious underpinnings of the law of nations: "The law of nations, as well as the law of nature, is of obligation indispensable: the law of nations, as well as the law of nature, is of origin divine . . . Universal, indispensable, and unchangeable is the obligation of both." James Wilson, *Of the Law of Nations, Lectures on Law* (1790-91), in 1 *THE WORKS OF JAMES WILSON* 130, 133 (James DeWitt Andrews ed., Chicago, Callaghan and Co. 1896). "[I]n free states, the law of nations is the law of the people; I mean that, as the law of nature, in other words, as the will of nature's God, it is indispensably binding upon the people, in whom the sovereign power resides . . ." *Id.* at 136.

Given the moral underpinnings of common law precepts, obedience to their mandates constituted a moral duty. "The Framers sought to uphold the law of nations as a moral imperative—a matter of national honor." Burley, *supra* note 53, at 482; see also *id.* at 475 (stating that the framers understood the United States to have a "duty to propagate and enforce" international law).

57. See Anthony D'Amato, *The Alien Tort Statute and the Founding of the Constitution*, 82 AM. J. INT'L L. 62, 64 (1988) (noting that, in the eighteenth century, the "plight of individual citizens in foreign countries, and not territorial ambitions, was the major excuse for war"); Jay, *supra* note 53, at 821, 839-40 (stating that "America was, after all, a weak power with an unproven government, operating in a world in which warfare was a common form of dispute resolution and a principal element of the international aspirations motivating

commonly accepted norms of international behavior constituted a prudent course of behavior. In addition, given that the law of nations provided the rules governing international commerce, adherence to its norms promoted the economic growth of the new nation.<sup>58</sup>

Unfortunately, however, the weak national government had little ability to prevent or redress such offenses by the states, given its limited powers. A series of crises triggered by the states' refusal to enforce international law lent urgency to the search for a means to enforce the law of nations. Both the French and Dutch governments threatened reprisals after states refused to prosecute individuals who had attacked their diplomats, in violation of the customary norms that protected emissaries representing their nations abroad. In one such incident, a French diplomat, Mr. Marbois, was assaulted by a fellow Frenchman, an attack that sent shock waves through the fledgling government and triggered an international uproar.<sup>59</sup> Key figures in the national government discussed the case at length,<sup>60</sup> but the federal government had no authority to institute a criminal proceeding itself, or to force the state to do so. The Continental Congress could do no more than explain to Marbois that, given the "nature of a federal union," the federal government had no power to act on his behalf.<sup>61</sup> Several years later, a similar international scandal erupted when local New York police entered the home of the Dutch ambassador in an attempt to arrest an employee.<sup>62</sup>

Perhaps even more problematic, the states refused to enforce treaties between the federal government and foreign States. The

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many nations").

58. See Douglas J. Sylvester, *International Law as Sword or Shield? Early American Foreign Policy and the Law of Nations*, 32 N.Y.U. J. INT'L L. & POL. 1 (1999) (arguing that economic concerns, not military security, spurred adherence to international law during the late eighteenth century).

59. See William R. Casto, *The Federal Courts' Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 491-94 (1986); William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists,"* 19 HASTINGS INT'L & COMP. L. REV. 221, 229-30 (1996).

60. See Casto, *supra* note 59, at 492-93 n.143 (counting dozens of references to Marbois in the private correspondence of U.S. public figures).

61. 28 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 314 (John C. Fitzpatrick ed., U.S. Gov't. Printing Office 1933), *quoted in* Dodge, *supra* note 59, at 229-30.

62. See Casto, *supra* note 59, at 494; Dodge, *supra* note 59, at 230.

treaty ending the war with Great Britain pledged that debts to British creditors would be paid.<sup>63</sup> In practice, however, the state courts repeatedly blocked efforts to collect such debts, and Great Britain repeatedly threatened to take reprisals, endangering the security of the new nation.<sup>64</sup>

Responsibility for these international violations and the repercussions they provoked fell upon the national government, despite its structural inability to enforce either treaties or the unwritten law of nations. This problem was much-discussed by the framers, and several expressed their frustration and concern about the failure to assign the national government the power necessary to meet its international law obligations. As Edmund Randolph stated in 1787, "the law of nations is unprovided with sanctions in many cases, which deeply affect public dignity and public justice."<sup>65</sup> Randolph complained that the Confederation might be "doomed to be plunged into war, from its wretched impotency to check offenses against this law."<sup>66</sup> John Jay also complained that the federal government had no jurisdiction over cases implicating international law obligations.<sup>67</sup>

Concerns about implementing international law were indeed uppermost on the minds of the framers when they gathered in Philadelphia. Addressing an early session of the Constitutional Convention, Edmund Randolph pointed to the central government's inability to sanction violations of treaties and the law of nations as one of the chief failings of the Confederation.<sup>68</sup> Randolph argued

63. Article 4 of the Definitive Treaty of Peace between Great Britain and the United States stated that "Creditors on either Side shall meet with no lawful Impediment to the Recovery of the full Value in Sterling Money of all bona fide Debts heretofore contracted." Definitive Treaty of Peace, Sept. 3, 1783, U.S.-Gr. Brit., 8 Stat. 80, *reprinted in* 2 TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA 151, 154 (Hunter Miller ed., 1931).

64. See *Dunlop v. Ball*, 6 U.S. (2 Cranch) 180, 184 (1804) (reversing circuit court decision blocking payment of a debt owed to a British citizen and stating that prior to 1793, "it was the general understanding of the inhabitants [of Virginia] that British debts could not be recovered"; Dodge, *supra* note 59, at 236, 254.

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

66. *Id.*

67. See 34 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 111 (Roscoe R. Hill ed., U.S. Gov't Printing Office 1937), *quoted in* Dodge, *supra* note 59, at 230.

68. See 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 19 (Max Farrand ed., 1937) [hereinafter Farrand] (Madison's Notes, May 29, 1787). Rakove has emphasized the

that the Confederation failed to provide security against foreign wars, because Congress "could not cause infractions of treaties or of the law of nations, to be punished," as a result of which, the states "might by their conduct provoke war without controul [sic]."<sup>69</sup>

Recognizing the need to guarantee the federal government power to enforce international law, the framers sought a structure that would assign the central government control over foreign affairs. As Madison commented later: "The federal Constitution forms a happy combination in this respect; the great and aggregate interests being referred to the national, the local and particular to the State legislatures."<sup>70</sup> The Constitution implemented this allocation of powers both through positive grants of authority to the national government, and by barring the states from participating in particular foreign affairs issues.<sup>71</sup>

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centrality of this concern:

[B]efore 1787 it was the inability of the existing Continental Congress to frame and implement adequate foreign policies that evoked the most telling criticisms of the "imbecility" of the Articles of Confederation. Well into 1786 most efforts to amend the Articles were designed primarily to enable Congress to act effectively in the one area—the realm of foreign relations—where its responsibility was presumably least subject to question.

Jack N. Rakove, *Making Foreign Policy—The View from 1787*, in *FOREIGN POLICY AND THE CONSTITUTION* 1, 2 (Robert A. Goldwin & Robert A. Licht eds., 1990).

69. Edwin D. Dickinson, *The Law of Nations as Part of the National Law of the United States*, 101 U. PA. L. REV. 26, 36 (1952) (quoting 1 Farrand, *supra* note 68, at 19).

70. THE FEDERALIST No. 10, at 60 (James Madison) (Prometheus Books 2000); see David P. Currie, *The Constitution in Congress: The Third Congress, 1793-1795*, 63 U. CHI. L. REV. 1, 9-10 (1996) (noting the "widespread conviction that foreign relations was meant to be essentially a federal matter").

71. The Constitution grants Congress the authority to "regulate Commerce with foreign Nations," "establish [a] uniform Rule of Naturalization," "define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations," "declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water," and "repel Invasions," U.S. CONST. art. I, § 8, while the President is to serve as "Commander in Chief of the Army and Navy of the United States," *id.* art. II, § 2, appoint ambassadors subject to Senate approval, *see id.*, and "receive Ambassadors and other public Ministers," *id.* § 3.

The states, however, are prohibited from entering into "any Treaty, Alliance, or Confederation," granting "Letters of Marque and Reprisal," or, without the consent of Congress, "lay[ing] any Duty of Tonnage, keep[ing] Troops, or Ships of War in time of Peace, enter[ing] into any Agreement or Compact with another State, or with a foreign Power, or engag[ing] in War, unless actually invaded, or in such imminent Danger as will not admit of delay." *Id.* art. I, § 10.

The Supreme Court has read these enumerated grants and prohibitions as reflective of a broader scheme intended to vest foreign affairs power exclusively in the federal government. As the Court stated in 1840: "Every part of [the Constitution] shows that our whole foreign intercourse was intended to be committed to the hands of the general government. . . . It was one of the main objects of the Constitution to make us, so far as regarded our foreign relations, one people, and one nation."<sup>72</sup> Over 100 years later, the Court again referred to the overall scheme of the Constitution as reflective of federal foreign affairs supremacy, pointing to the "[v]arious constitutional and statutory provisions . . . reflecting a concern for uniformity in this country's dealings with foreign nations and indicating a desire to give matters of international significance to the jurisdiction of federal institutions."<sup>73</sup> One of the provisions cited by the Court was the Offenses Clause.

### *C. Adoption of the Offenses Clause*

Two resolutions of the Continental Congress presaged the wording of the Offenses Clause. In 1781, Congress appointed a committee "to prepare a recommendation to the states to enact laws for punishing infractions of the laws of nations."<sup>74</sup> The committee report began by reciting the scope of the problem, listing several complaints. First, the state criminal justice systems did not address "offenses against the law of nations."<sup>75</sup> Second, a foreign government might hold the United States responsible for a violation of the law of nations committed by a U.S. citizen, if the transgressor had not been subjected to "regular and adequate punishment."<sup>76</sup> And finally, where individuals had been harmed by a violation of the law of nations, "the author of those injuries should compensate the damage out of his private fortune."<sup>77</sup>

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72. *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 575 (1840).

73. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 n.25 (1964).

74. Edmund Randolph et al., Report to Congress (1781), reprinted in 3 *THE FOUNDERS' CONSTITUTION* 66 (Philip B. Kurland & Ralph Lerner eds., 1987). Edmund Randolph, James Duane and John Witherspoon submitted the committee report. See *id.*

75. *Id.*

76. *Id.*

77. *Id.*



With these problems as a backdrop, the congressional resolution listed several recommendations to the state legislatures. First, the states were asked to "provide expeditious, exemplary and adequate punishment" for a list of the "most obvious" international law violations, including violations of safe conducts or passports; "acts of hostility" against those "in amity, league or truce with the United States"; infractions of diplomatic immunities; and infractions of treaties and conventions.<sup>78</sup> Next, the states were urged to establish a tribunal to "decide on offenses against the law of nations, not contained in the foregoing enumeration . . . ."<sup>79</sup> Finally, the resolution recommended that the states "authorise suits to be instituted for damages by the party injured, and for compensation to the United States for damage sustained by them from an injury done to a foreign power by a citizen."<sup>80</sup> Noteworthy in this resolution is its mix of remedies: criminal sanctions for violations of international law, as well as lawsuits for damages to the party injured and to the U.S. government. Moreover, the resolution incorporated an open-ended list of offenses against the law of nations. States were urged to punish all violations of the law of nations—not only the list of the "most obvious," but any and all other such violations as well.

Only one state response has been reported: a 1782 Connecticut law that both criminalized offenses against the law of nations and afforded a civil tort remedy for injuries to foreign states or their citizens.<sup>81</sup> Criminal penalties were imposed for a list of specific violations—much as in the congressional resolution—as well as for "any other Infractions or Violations of or Offenses against the

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78. *Id.*

79. *Id.*

80. *Id.* at 66-67.

81. See 4 THE PUBLIC RECORDS OF THE STATE OF CONNECTICUT FOR THE YEAR 1782, at 156-57 (1942) [hereinafter PUBLIC RECORDS]; William R. Casto, *Correspondence*, 83 AM. J. INT'L L. 901, 902-03 (1989) [hereinafter Casto, *Correspondence*]. The Connecticut statute was drafted by Oliver Ellsworth who later, as a member of Congress, drafted the ATCA, 28 U.S.C. § 1350 (1994), providing federal jurisdiction over torts "in violation of the law of nations." See Casto, *supra*, at 901-02; *infra* notes 303-20 and accompanying text (discussing the ATCA). Ellsworth played a key role in the drafting of the Constitution and the First Judiciary Act, and also served as the nation's Chief Justice from 1796-1800. See WILLIAM R. CASTO, THE SUPREME COURT IN THE EARLY REPUBLIC: THE CHIEF JUSTICESHIPS OF JOHN JAY AND OLIVER ELLSWORTH 27-53 (1995).

known received and established Laws of Civilized Nations."<sup>82</sup> The claim for damages, however, extended even further, providing a remedy against:

any . . . Persons whatsoever [for] any Injury . . . to any foreign Power or to the Subjects thereof, either in Their Persons or Property, by means whereof any Damage shall or may any ways arise happen or accrue either to any such foreign Power, to the said United States, to this State or to any particular Person  
 . . . .<sup>83</sup>

Thus, Connecticut followed the lead of the Continental Congress in linking criminal sanctions and civil tort remedies for violations of international law.

In 1785, Congress again recommended that the states provide penalties for violations of the law of nations.<sup>84</sup> The response apparently continued to be less than overwhelming: Edmund Randolph complained in 1787 that the failure to punish and deter violations of the law of nations threatened to plunge the nation into war.<sup>85</sup>

As discussed above, this concern with preventing and punishing violations of international law was one of the moving forces behind the effort to reformulate the national government. Randolph listed as one of the chief defects of the Confederation its inability to "cause infractions of treaties or of the law of nations, to be punished."<sup>86</sup> Complaining that most of the states failed to punish violations of international law, Randolph stated: "If the rights of an ambassador be invaded by any citizen it is only in a few States that any laws exist to punish the offender."<sup>87</sup> He submitted to the Constitutional Convention a proposal that included the legislative power "[t]o provide tribunals and punishment for mere offenses against the law

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82. 4 PUBLIC RECORDS, *supra* note 81, at 157, quoted in Casto, *Correspondence*, *supra* note 81, at 903.

83. 4 PUBLIC RECORDS, *supra* note 81, at 157.

84. See 29 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 654-55 (John C. Fitzpatrick ed., U.S. Gov't Printing Office 1933), cited in Siegal, *supra* note 12, at 874.

85. See *supra* text accompanying note 68.

86. 1 Farrand, *supra* note 68, at 19 (Madison's notes, May 29, 1787).

87. 1 *id.* at 25 (McHenry's notes, May 29, 1787).

of nations.”<sup>88</sup> This language appeared in the Committee of Detail’s report in combination with provisions relating to piracy and counterfeiting:

The Legislature of the United States shall have the power to . . . declare the law and punishment of piracies and felonies committed on the high seas, and the punishment of counterfeiting the coin of the United States, and of offenses against the law of nations . . . .<sup>89</sup>

The initial debate on the Clause focused on the provisions relating to piracy, felonies on the high seas, and counterfeiting, with no mention of the Offenses Clause. The word “punishment” was deleted, only to be replaced with “punish” after a debate in which both Mason and Wilson noted that the provision would authorize enactment of criminal or penal provisions regarding piracy and felonies.<sup>90</sup>

The delegates proceeded to discuss the need to “define” felonies committed at sea.<sup>91</sup> Ellsworth suggested slight modifications of the Clause that brought it close to its final language, granting the legislature the power

to define and punish piracies and felonies committed on the high seas, counterfeiting the securities and current coin of the U. States, and offenses agst. the law of Nations.<sup>92</sup>

Farrand’s records of this debate contain no mention of offenses against the law of nations while these changes were being debated.

The Committee on Style originally included a virtually identical version of the Clause,<sup>93</sup> but later pulled the provision on

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88. 2 *id.* at 143 (Committee of Detail, Outline in Randolph’s handwriting).

89. 2 *id.* at 181-82 (Madison’s notes, Aug. 6, 1787).

90. See 2 *id.* at 315 (Madison’s notes, Aug. 17, 1787). Two other delegates also raised concerns about limiting the provision relating to counterfeiting to *coins* and to the currency of the United States. See 2 *id.*

91. See 2 *id.* at 316.

92. 2 *id.*

93. The report of the Committee of Style and Arrangement granted the legislature the power “[t]o define and punish piracies and felonies committed on the high seas, to punish the counterfeiting of the securities, and current coin of the United States, and offenses against the law of nations.” 2 *id.* at 570.

counterfeiting into its own clause, leaving the Offenses Clause much as it appears in the final draft of the Constitution:

The Congress . . . shall have power . . . To define and punish piracies and felonies committed on the high seas, and punish offenses against the law of nations.<sup>94</sup>

This language, with the distinction between the power to “define and punish” piracy and felonies on the high seas, but only “punish” offenses against the law of nations, produced the only substantive debate on the offenses section of the Clause. Morris moved to strike the word “punish” before “offenses agst. the law of nations,” so that the laws would “be *definable* as well as punishable, by virtue of the preceding member of the sentence.”<sup>95</sup> Wilson argued against the change, stating: “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.”<sup>96</sup> Morris replied by suggesting that “define” was intended to suggest the need to provide detail, not to *create* offenses where none had previously existed: “The word *define* is proper when applied to *offenses* in this case; the law of nations being often too vague and deficient to be a rule.”<sup>97</sup> The change was accepted by a vote of six to five, and the Clause adopted as it now stands, granting Congress the power “to define and punish Piracies and Felonies committed on the high Seas, and offenses against the law of nations.”<sup>98</sup>

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94. 2 *id.* at 594-95 (Committee of Style and Arrangement). It is unclear from the convention records how “punish” appeared in this draft of the Offenses Clause, distinguishing the power to “punish” offenses against the law of nations from the power to “define and punish” piracy and felonies at sea. Farrand’s compilation indicates that “punish” was omitted from the Committee on Style report but apparently inserted by Madison on his own copy of the report; Farrand explains that the omission was the result of a typographical error. See 2 *id.* at 595. The confusion may have arisen after the language addressing counterfeiting was moved to a separate clause, perhaps leaving unclear which verbs were intended to remain. However it made its appearance, “punish” does appear in the version of the Offenses Clause debated by the delegates, who voted to remove it.

95. 2 *id.* at 614 (Madison’s notes, Sept. 14, 1787).

96. 2 *id.* at 615.

97. 2 *id.* Brackets indicate corrections or additions made by Madison to his own notes when he reviewed the manuscript in later years. See Farrand’s explanations of Madison’s edits, 1 *id.* at xv-xix, and of Farrand’s use of brackets to indicate those changes, 1 *id.* at xix.

98. U.S. CONST. art. I, § 8, cl. 10; Farrand, *supra* note 68, at 615.

There was little reported debate about the Offenses Clause during the ratification process. Speaking to the Virginia Convention, Madison offered the Clause as an example of the difficulties of obtaining "precision" in the use of technical terms in the Constitution.<sup>99</sup> To avoid the need to rely on British laws, Madison explained, the Constitution used the "technical term of the law of nations . . . [so] that we should find ourselves authorized to introduce it into the laws of the United States."<sup>100</sup> The comment seems to indicate that without congressional action, the law of nations, as part of the common law, would be binding on the United States as it had been interpreted by the courts of Great Britain. The Offenses Clause avoided that unpalatable approach by making clear Congress's power to legislate directly on the topic.

The Anti-Federalist Cincinnatus worried that the Offenses Clause would permit Congress to bar publications criticizing treaties or other foreign affairs:

[T]he proposed Congress are empowered—to define and punish offenses against the law of nations—mark well, Sir, if you please—to *define* and punish. Will you, will any one say, can 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?<sup>101</sup>

Presumably, contemporaries would have responded to his complaint by pointing to the limited meaning of the word "define": 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. A more powerful response, however, came shortly thereafter with the adoption of the Bill of Rights and, in particular, the First Amendment.<sup>102</sup>

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99. See 3 Farrand, *supra* note 68, at 331-32 (Madison's remarks in the Virginia Convention, June 20, 1788).

100. 3 *id.* at 332.

101. Essays by Cincinnatus, Letter of Nov. 1, 1787, in 6 THE COMPLETE ANTI-FEDERALIST, *supra* note 65, at 8.

102. See *infra* text accompanying notes 357-62 (discussing *Boos v. Barry*, 485 U.S. 312 (1988), and the impact of international law and the foreign affairs power on the First Amendment).

The only other recorded comments on the Clause praised it as an example of the Constitution's assignment of issues relating to the law of nations to federal control. Iredell, for example, emphasized the propriety of placing authority over offenses against the law of nations within the control of the national government:

[C]ertainly the cases enumerated wherein the Congress are empowered either to define offenses, or prescribe punishments, are such as are proper for the exercise of such authority in the general Legislature of the Union. They only relate to "counterfeiting the securities and current coin of the United States," to "piracies and felonies committed on the high seas, and offenses against the law of nations," and to "treason against the United States." These are offenses immediately affecting the security, the honor or the interest of the United States at large, and of course must come within the sphere of the Legislative authority which is intrusted with their protection.<sup>103</sup>

In *The Federalist Papers*, Madison similarly stressed the role of the Clause in affording the national government authority over foreign affairs. He placed the Clause in context as one of the "class of powers" assigned to the federal government that "regulate the intercourse with foreign nations."<sup>104</sup> In particular, the Offenses Clause would permit the federal authorities to prevent the states from endangering the nation through violations of the law of nations:

The power to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations, belongs with equal propriety to the general government, and is a still greater improvement on the articles of Confederation. These articles contain no provision for the case of offenses against the law of nations; and consequently leave it in the power of any indiscreet member to embroil the Confederacy with foreign nations.<sup>105</sup>

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103. Answers to Mr. Mason's Objections to the New Constitution, 1788, in 1 BERNARD SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 452 (1971).

104. *THE FEDERALIST* NO. 42, at 270 (James Madison) (Prometheus Books 2000).

105. *Id.* at 272.

These comments echoed one of the concerns that led to the momentous decision to draft the Constitution, the need to vest control over both international law and foreign policy in the central government. Referring to federal judicial jurisdiction over matters relating to the law of nations, Hamilton reiterated the

plain proposition, that the peace of the WHOLE ought not to be left at the disposal of a PART. The Union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for an injury ought ever to be accompanied with the faculty of preventing it.<sup>106</sup>

Madison as well noted "the advantage of . . . immediate responsibility to the nation in all those for whose conduct the nation itself is to be responsible."<sup>107</sup>

As guidance for an understanding of the foreign affairs powers of the federal government, the framers' comments are notably consistent. Neither the individual states nor individual citizens could be allowed to endanger the nation through unredressed violations of international law. The concern with accountability appeared repeatedly throughout these discussions: because the federal government would be forced to take responsibility for violations of the law of nations, the federal government must have the power to prevent and punish such violations. The language of the Constitution that most directly responds to this concern is that

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106. THE FEDERALIST NO. 80, at 516-17 (Alexander Hamilton) (Prometheus Books 2000). Jay made the same point: "It is of high importance to the peace of America that she observe the laws of nations towards all these [foreign] powers, and to me it appears evident that this will be more perfectly and punctually done by one national government than it could be either by thirteen separate States or by three or four distinct confederacies." THE FEDERALIST NO. 3, at 14 (John Jay) (Prometheus Books 2000). Jay emphasized that the national government would have both the "power [and] inclination to prevent or punish" violations of treaties and the law of nations. *Id.* at 15-16.

107. THE FEDERALIST NO. 44, at 289 (James Madison) (Prometheus Books 2000). As Justice Miller stated in the late nineteenth century, discussing a California statute purporting to regulate immigration, "If [the United States] should get into a difficulty which would lead to war, or to suspension of intercourse, would California alone suffer, or all the Union?" *Chy Lung v. Freeman*, 92 U.S. 275, 279 (1875). During the years leading up to the Constitutional Convention, Thomas Jefferson wrote repeatedly of the need to unify control of foreign affairs in the federal government. See CHARLES WARREN, THE MAKING OF THE CONSTITUTION 14, 46-48 (Fred B. Rothman & Co. 1993) (1929); Dickinson, *supra* note 69, at 36 n.28.

of the Offenses Clause, which empowers Congress to guarantee enforcement of international law within the United States.

### III. JUDICIAL APPLICATION OF THE OFFENSES CLAUSE: FEDERAL POWER OVER THE EVOLVING LAW OF NATIONS

The Supreme Court has cited the Offenses Clause fewer than two dozen times, and has relied upon it in only a handful of cases. Nevertheless, the Supreme Court references indicate that the Clause reflects the framers' intent to vest foreign affairs powers in the federal government. Moreover, these cases emphasize that the Clause authorizes Congress to punish offenses against the law of nations as that law develops over time, not as it existed at the time it was drafted and ratified. Finally, the case law offers support for a view of the Clause as encompassing civil responses to violations of international law, as well as criminal.

The Court has several times referred to the Offenses Clause as an example of the Constitution's intent to assign to the federal government broad powers over foreign affairs.<sup>108</sup> A pair of cases a century apart tie the Clause not only to federal control over foreign affairs, but more specifically to the need to ensure that the United States complies with its international law obligations.<sup>109</sup> As the Court said in the more recent of the two cases: "[T]he United States has a vital national interest in complying with international law. The Constitution itself attempts to further this interest by expressly authorizing Congress '[t]o define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations.'"<sup>110</sup> Similarly, 100 years earlier, the Court noted that

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108. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 n.25 (1964) ("Various constitutional . . . provisions [including the Offenses Clause] reflect[] a concern for uniformity in this country's dealings with foreign nations and indicat[e] a desire to give matters of international significance to the jurisdiction of federal institutions."); *Fong Yue Ting v. United States*, 149 U.S. 698, 711-12 (1893) (listing Offenses Clause as one of many constitutional provisions that make clear that the federal government possesses "the entire control of international relations" and "all the powers of government necessary to maintain that control and to make it effective"); *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 570 (1840) (listing the Offenses Clause as one of several clauses that indicate that "[a]ll the powers which relate to our foreign intercourse are confided to the general government").

109. See *Boos v. Barry*, 485 U.S. 312, 323 (1988); *United States v. Arjona*, 120 U.S. 479, 483 (1887).

110. *Boos*, 485 U.S. at 323.



since the national government is "responsible to foreign nations for all violations by the United States of their international obligations . . . Congress is expressly authorized 'to define and punish . . . offenses against the law of nations.'"<sup>111</sup>

The evolving penal authority derived from the Offenses Clause is apparent from an early case challenging the constitutionality of a statute imposing criminal penalties for counterfeiting foreign securities, *United States v. Arjona*.<sup>112</sup> In *Arjona*, one of only a few cases in which the Court has analyzed the reach of the Offenses Clause, the Court applied an evolving notion of international law to hold that Congress had the power to punish conduct that violated then-existing requirements of the law of nations.<sup>113</sup> *Arjona* was charged with violating a federal statute making it a crime to counterfeit notes issued by foreign government-owned banks.<sup>114</sup> He pointed out that such foreign notes were unknown at the time the Constitution was drafted, and argued that his crime could not therefore have fallen within the framers' understanding of the Offenses Clause.<sup>115</sup> The Court nevertheless found the statute to be authorized, holding that "the law of nations" as used in the Clause "extended to the protection of this more recent custom among bankers of dealing in foreign securities."<sup>116</sup> The Court expressed no hesitation in finding that the concept of the law of nations incorporated into the Offenses Clause evolved over time, reflecting new developments of international law.

The Supreme Court also relied on the Offenses Clause in a set of cases arising out of World War II that upheld congressional power to criminalize violations of the laws of war.<sup>117</sup> In *Ex parte Quirin*, for example, the Court considered the constitutionality of a military commission established to try two groups of German saboteurs

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111. *Arjona*, 120 U.S. at 483 (second alteration in original).

112. 120 U.S. 479 (1887).

113. *See id.* at 483.

114. *See id.* at 480-82. The constitutional provision empowering Congress to punish counterfeiting did not apply, as it is limited to counterfeiting "the Securities and current Coin of the United States." U.S. CONST. art. I, § 8, cl. 6.

115. *See Arjona*, 120 U.S. at 485-86.

116. *Id.*

117. *See Madsen v. Kinsella*, 343 U.S. 341 (1952); *Hirota v. MacArthur*, 338 U.S. 197, 207-15 (1948) (Douglas, J., concurring); *In re Yamashita*, 327 U.S. 1 (1946); *Ex parte Quirin*, 317 U.S. 1 (1942).

captured after landing in New York and Florida intending to attack war facilities in the United States.<sup>118</sup> Congress had provided for such tribunals to try certain offenses against the laws of war, and the Court found Congress's action within the reach of the Offenses Clause:

Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases. Congress . . . has thus exercised its authority to define and punish offenses against the law of nations by sanctioning, within constitutional limitations, the jurisdiction of military commissions to try persons for 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>119</sup>

The Court thus upheld Congress's power to impose criminal sanctions on actions in violation of the law of nations—here, that branch of the law of nations governing the laws of war.

In these cases, the Court again looked at the content of international law at the time the statute was enacted, not at the time of the framing of the Constitution, and applied an evolving notion of the law of nations. In *Quirin*, for example, the specific question before the Court was whether, under the laws of war, enemy agents who entered the United States in disguise with the intent to commit sabotage could be tried as war criminals.<sup>120</sup> The Court determined the content of the laws of war by looking at a twentieth-century treaty, the Hague Convention,<sup>121</sup> as well as

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118. 317 U.S. at 21.

119. *Id.* at 28. In *Madsen v. Kinsella*, 343 U.S. 341, 346-48 (1952), the Court applied the same reasoning to uphold the constitutionality of the military trial of a civilian living in occupied German territory.

120. See *Quirin*, 317 U.S. at 24-25, 31-33. Enemy soldiers in uniform would have been treated as lawful belligerents and thus detained as prisoners of war rather than put on trial. See *id.* at 35-36 n.12 ("[T]he authorities are unanimous in stating that a soldier in uniform who commits the acts mentioned would be entitled to treatment as a prisoner of war; it is the absence of uniform that renders the offender liable to trial for violation of the laws of war.").

121. Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, annex, § 1, ch. 1, art. 1, 36 Stat. 2277, 2295, 205 Consol. T.S. 277, 289, cited in *Quirin*, 317 U.S. at 30 n.7.

modern rules governing warfare in other nations,<sup>122</sup> the opinions of modern commentators,<sup>123</sup> and the historical and modern practices of the U.S. armed forces.<sup>124</sup> Based on its review of all of these sources, the Court concluded that the laws of war incorporated into the congressional enactment permitted trial of the defendants as war criminals:

This precept of the law of war has been so recognized in practice both here and abroad, and has so generally been accepted as valid by authorities on international law that we think it must be regarded as a rule or principle of the law of war recognized by this Government by its enactment of the [applicable] Article of War.<sup>125</sup>

The rules followed by the United States at the time the Constitution was adopted were relevant to show the development of international law, but the Court's analysis did not begin and end at that point in history; to the contrary, the Court looked at the law as codified, applied and analyzed by modern sources.

Similarly, the Offenses Clause provided constitutional support for a modern statute criminalizing conduct threatening to foreign diplomats. In *Boos v. Barry*, the Supreme Court considered the constitutionality of a statute limiting certain peaceful protests in the vicinity of foreign embassies.<sup>126</sup> The Court recognized the importance of protecting diplomats, citing the obligations imposed by the Vienna Convention on Diplomatic Relations,<sup>127</sup> which "all parties" accepted as stating "the current state of international law."<sup>128</sup> Again, the Court looked at modern obligations toward

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122. See *Quirin*, 317 U.S. at 30-31 (highlighting similarities in the laws of war of several countries).

123. See *id.* at 30-36, nn. 7, 8 & 12.

124. See *id.* at 31-36.

125. *Id.* at 35-36 (footnote omitted).

126. 485 U.S. 312 (1988).

127. Vienna Convention on Diplomatic Relations and Optional Protocol on Disputes, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95 [hereinafter Vienna Convention].

128. *Boos*, 485 U.S. at 332. The Convention imposes "[the] special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity." Vienna Convention, *supra* note 127, art. 22, § 2, 23 U.S.T. at 3237-38, 500 U.N.T.S. at 108.

diplomats, not the international norms in effect at the time the Constitution was drafted.

The significance of the evolving notion of international law cannot be underestimated. International law is governed both by treaties and by customary international law. The Constitution assigns a special role to treaties, providing for their adoption by the President "with the Advice and Consent of the Senate"<sup>129</sup> and their supremacy over state law,<sup>130</sup> and authorizing Congress to make such laws as are "necessary and proper" to their implementation.<sup>131</sup> But much international law develops through custom and practice.<sup>132</sup> Where such customs are generally and consistently followed "from a sense of legal obligation," they attain the status of binding law in the international arena.<sup>133</sup> Today, as in the late eighteenth century, customary international law governs issues ranging from commercial practices to human rights norms to the basic principles by which sovereign nations interact.<sup>134</sup>

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129. U.S. CONST. art. II, § 2, cl. 2.

130. *See id.* art. VI, cl. 2.

131. *Id.* art. I, § 8, cl. 18.

132. The RESTATEMENT (THIRD), *supra* note 1, § 102(1), lists three sources of international law: customary law, international agreement, and general principles common to the major legal systems.

133. "Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation." *Id.* § 102(2); *see also* IAN BROWNLEE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 4-11 (4th ed. 1990) (discussing sources of international law); JANIS, *supra* note 1, at 35-46 (same).

134. Customary international law dominated international relations until this century and continues to occupy an important role to this day.

Until recently, international law was essentially customary law: agreements made particular arrangements between particular parties, but were not ordinarily used for general law-making for states. In our day, treaties have become the principal vehicle for making law for the international system; more and more of established customary law is being codified by general agreements. To this day, however, many rules about status, property, and international delicts are still customary law, not yet codified.

RESTATEMENT (THIRD), *supra* note 1, pt. I, ch. 1, introductory note at 18. The basic rules that bind nations to obey their international agreements are rooted in customary international law, *see id.*, as are, for example, key aspects of the law of the sea and the laws of war. *See* LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 232 (2d ed. 1996) ("Even now, in our third century under the Constitution and after a century of radical change in the international legal system, most of the international rights and obligations of the United States lie in unwritten, customary, international law."); Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law After Erie*, 66 FORDHAM L. REV. 393, 456-57 (1997).

As the Supreme Court has recognized, customary international law evolves over time, a result of the combined impact of the actions of the nations of the world.<sup>135</sup> The United States plays an important role in the development of international law,<sup>136</sup> and can arguably "opt out" of developing rules, thereby blocking their application to this country.<sup>137</sup> The process is nevertheless a collective enterprise which is to some extent out of the control of any one nation. Given that treaties are otherwise covered by the Constitution, it is likely that the Offenses Clause primarily addresses violations of customary international law. The framers granted Congress the power to define and punish offenses against an evolving law of nations, a power that would by definition change over time. In *Arjona* and the war crimes cases, the Supreme Court recognized that the Offenses Clause incorporated this evolving body of customary international law.<sup>138</sup>

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135. See, e.g., *The Paquete Habana*, 175 U.S. 677, 694 (1900) (applying newly developed customary international norms). In a district court decision, Justice Story held that the slave trade, once permitted by international law, was prohibited by newly evolved principles: "It does not follow . . . that because a principle cannot be found settled by the consent or practice of nations at one time, it is to be concluded, that at no subsequent period the principle can be considered as incorporated into the public code of nations." *United States v. La Jeune Eugenie*, 26 F. Cas. 832, 846 (D. Mass. 1822). His conclusion was overruled by the Supreme Court on the basis that international law had not yet reached a consensus on the illegality of the slave trade. See *The Antelope*, 23 U.S. (10 Wheat.) 66, 101-02 (1825); Jeffrey M. Blum & Ralph G. Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after Filártiga v. Peña-Irala*, 22 HARV. INT'L L.J. 53, 61 n.41 (1981).

136. As one of the two superpowers in the years before the breakup of the Soviet Union, and now as the world's only superpower, the United States plays a unique role in the development of international law. See Stephens, *supra* note 134, at 456-58. Moreover, international custom often requires the consent of those nations most affected by a particular rule; thus, the United States plays a pivotal role in the development of norms in those areas of most importance to it, for example, the law of the sea, the law of outer space, and the law governing the development and deployment of nuclear weapons. See RESTATEMENT (THIRD), *supra* note 1, § 102, cmts. b, i, reporters' note 2 (discussing the significance of consent of those States most affected by an emerging rule).

137. See RESTATEMENT (THIRD), *supra* note 1, § 102, cmt. d ("[I]n principle a state that indicates its dissent from a practice while the law is still in the process of development is not bound by that rule even after it matures."). Some commentators have disputed the "persistent objector" rule, arguing that customary international law norms bind all States. See, e.g., ANTHONY D'AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* 190-96 (1971) (asserting that states consent to international law as a whole system and may not opt out of particular laws); Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT'L L. 529, 538 (1993) (concluding that "the rule is open to serious doubt").

138. See *supra* notes 112-25 and accompanying text.

Finally, the *Arjona* decision indicates the Supreme Court's recognition of the breadth of the Clause: "[I]f the thing made punishable is one which the United States are required by their international obligations to use due diligence to prevent, it is an offense against the law of nations."<sup>139</sup> Thus, offenses within the meaning of the Clause encompass all acts which international law requires the United States "to use due diligence to prevent."<sup>140</sup> Certainly, a great many violations of international law under this formulation would not constitute crimes—indeed, they might not even constitute violations of the domestic laws of the United States.

The Offenses Clause, then, grants to Congress the power to legislate over a broad and ever-changing set of issues, with the scope governed not only by domestic decisions but by the combined actions of the many nations of the world.<sup>141</sup> This interpretation of the Clause meshes neatly with what we know of the framers' understanding of the law of nations and the appropriate remedies for violations of its norms.

#### IV. THE UNSUBSTANTIATED CRIMINAL LAW RESTRICTION

As a grant to Congress of the authority to deter and penalize violations of the evolving body of international law, the Offenses Clause empowers Congress to enact a range of legislation addressing foreign affairs. The Clause has been rarely cited, even as an alternative constitutional basis for this broad foreign affairs power, largely because it has been understood as limited to *criminal* sanctions—an unfounded limitation, unsupported by the Clause's history or the eighteenth-century significance of its terms.

Those who argue that the Offenses Clause empowers Congress to impose criminal sanctions for violations of international law, but not to create a civil cause of action for the same behavior, assume

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139. *United States v. Arjona*, 120 U.S. 479, 488 (1887).

140. In this regard, the Offenses Clause is similar to the treaty power, which extends the federal government's powers to "all proper subjects of negotiation between our government and the governments of other nations." *Geofroy v. Riggs*, 133 U.S. 258, 266 (1890). See *infra* notes 380-416 and accompanying text for additional discussion of the Treaty Clause and its relationship to other constitutional provisions.

141. This is also exactly the result feared by those who raise alarms about broad views of the foreign affairs powers of the federal government, misplaced fears that will be addressed in Part V.

that an *offense* against the law of nations refers only to a criminal law violation, and that to *punish* such an offense means only to impose criminal sanctions. In this part, I examine each of the assumptions underlying this narrow construction of the Clause. I first look at the meaning of the term "offenses against the law of nations" at the time of the framing, a phrase that included a broad range of violations which triggered an equally broad range of sanctions. I then explore the eighteenth-century usage of "offense," concluding that the word contained considerable ambiguity, and was capable of referring to all violations of legal norms. Similarly, the concept of punishment, at the time of the framing as well as today, encompasses far more than criminal sanctions. To the contrary, punishment has long included a range of penalties including monetary fines paid to private persons as well as the government, and payment of compensatory and punitive damages.

Next, I look at the murky line distinguishing criminal and civil actions. Although the Constitution provides special procedures for criminal prosecutions, both in the original document and in the Bill of Rights, late-eighteenth-century legislatures imposed civil and criminal sanctions with apparent disregard for the distinctions. Indeed, the Supreme Court has struggled for over two hundred years—and continues to struggle today—to define the distinction, in the face of a broad range of legal actions that defy categorization. Having reviewed this history, I conclude that the language of the Offenses Clause is sufficiently broad so as to empower Congress to impose a range of criminal and civil sanctions. Finally, I apply this new understanding of the Clause to help understand the constitutional basis of a statute enacted by the First Congress, creating civil remedies for violations of the law of nations.

#### *A. The Eighteenth-Century Significance of Offenses Against the Law of Nations*

The eighteenth-century understanding of the law of nations and of offenses in violation of that law, to the extent that we can discern it, represents a broad approach both to the body of international law and to the remedies available for infractions.

### 1. *Offenses Against the Law of Nations in Blackstone's Commentaries*

The phrase "offenses against the law of nations" appears in the resolution of the Continental Congress bemoaning the states' failure to impose sanctions on such infractions.<sup>142</sup> Its likely source is William Blackstone's famous four-volume treatise, *Commentaries on the Laws of England*, the book most often relied upon by jurists of the framers' generation.<sup>143</sup> Blackstone devoted one chapter to "offenses against the law of nations."<sup>144</sup> Although this section is best known today for its short list of three possible "crimes" in violation of the law of nations, its analysis is in fact much broader, covering

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142. See *supra* text accompanying notes 74-80.

143. As the Court stated in *Schick v. United States*:

[The Constitution] must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the Constitution. Blackstone's *Commentaries* are accepted as the most satisfactory exposition of the common law of England. At the time of the adoption of the Federal Constitution it had been published about twenty years, and it has been said that more copies of the work had been sold in this country than in England, so that undoubtedly the framers of the Constitution were familiar with it.

195 U.S. 65, 69 (1904) (citations omitted); see Albert W. Alschuler, *Rediscovering Blackstone*, 145 U. PA. L. REV. 1, 4-19 (1996) (discussing the importance of Blackstone's *Commentaries* in the early years of the nation). Professor Alschuler confirms that thousands of copies of the *Commentaries* were sold in the United States in the eighteenth century, purchased by many of those involved in forging the new nation. See *id.* at 5-6, 15 n.87 (listing some of those who were noted as subscribers to the initial American edition of the *Commentaries*, including sixteen who later signed the Declaration of Independence). Many of the words used in the Constitution were employed as defined by Blackstone: "Such words and phrases in the Constitution as 'due process,' 'crimes and misdemeanors,' 'treason,' 'felonies,' 'ex post facto laws,' 'criminal prosecutions,' 'judicial power,' 'legislative power,' 'legal rights and liabilities,' 'remedies,' 'levying war,' and many others were used in the sense in which Blackstone had employed them." George W. Wickersham, Presentation of Blackstone Memorial (July 20, 1924), in 10 A.B.A. J. 571, 578 (1924).

Blackstone's importance continued throughout the first century of the nation. According to one estimate, the *Commentaries* were cited 10,000 times in reported U.S. cases between 1789 and 1915. See Alschuler, *supra*, at 7 n.29 (citing DAVID A. LOCKMILLER, SIR WILLIAM BLACKSTONE 176 (1938)). As summarized by Professor Boorstin, "In the history of American institutions, no other book—except the Bible—has played so great a role." DANIEL J. BOORSTIN, *THE MYSTERIOUS SCIENCE OF THE LAW* at iii (Peter Smith 1973) (1941). "In the first century of American independence, the *Commentaries* were not merely an approach to the study of law; for most lawyers they constituted all there was of the law." *Id.* at 3.

144. Chapter 5 of the fourth volume of the *Commentaries* is entitled "Of Offenses Against the Law of Nations." 4 BLACKSTONE, *supra* note 46, at \*66-73.



both civil and criminal responses to offenses against international law.

Blackstone placed this discussion within a volume dealing with "public wrongs."<sup>145</sup> As Blackstone explained,

Wrongs are divisible into two sorts or species; *private wrongs*, and *public wrongs*. The former are an infringement or privation of the private or civil rights belonging to individuals, considered as individuals; and are thereupon frequently termed *civil injuries*: the latter are a breach and violation of public rights and duties, which affect the whole community, considered as a community; and are distinguished by the harsher appellation of *crimes* and *misdemeanors*.<sup>146</sup>

Despite the distinction between public and private wrongs, many fell into both categories and triggered both public and private remedies.<sup>147</sup> For example, acts of violence directed against an individual such as assault, mayhem, or false imprisonment, constituted both private and public wrongs. Each was considered in the *Commentaries* first as a private wrong "for which a satisfaction or remedy is given to the party aggrieved."<sup>148</sup> Each reappeared as a public wrong: "[T]aken in a public light, as a breach of the king's peace, an affront to his government, and a damage done to his subjects, they are also indictable and punishable with fines and imprisonment; or with other ignominious corporal penalties . . ."<sup>149</sup>

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145. Blackstone divided his legal universe into rights and wrongs, and further divided wrongs into public and private wrongs. Thus, the four-volume *Commentaries* contained four books: The Rights of Persons, the Rights of Things, Private Wrongs, and Public Wrongs. The 14 categories of public wrongs are treated in chapters 4 through 17 of volume 4 of the *Commentaries*. See 4 BLACKSTONE, *supra* note 46.

146. 3 *id.* at \*2.

147. Like other of Blackstone's efforts to codify and organize his legal subjects, the distinction between public and private wrongs proved difficult to maintain. See, e.g., 1 WILLIAM BLACKSTONE, COMMENTARIES 91-92 n.1 (George Sharswood ed., J.B. Lippincott Co. 1859) (stating Christian's criticism of Blackstone's division of "rights" into the rights of persons and the rights of things as "resting upon a solecism"). Christian, however, does not judge Blackstone harshly, for he views the organizational task as fruitless: "[A]s the order of legal subjects is, in a great measure, arbitrary, and does not admit of that mathematical arrangement where one proposition generates another, it perhaps would be difficult to discover any method more satisfactory than that which the learned judge has pursued . . ."  
1 *id.*

148. 4 BLACKSTONE, *supra* note 46, at \*216.

149. 4 *id.*

Further, Blackstone asserted that all crimes also have a private aspect: "In all cases the crime includes an injury: every public offense is also a private wrong, and somewhat more; it affects the individual, and it likewise affects the community."<sup>150</sup>

For instance; in the case of battery, or beating another, the aggressor may be indicted for this at the suit of the king, for disturbing the public peace, and be punished criminally by fine and imprisonment: and the party beaten may also have his private remedy by action of trespass for the injury, which he in particular sustains, and recover a civil satisfaction in damages. So also, in case of a public nuisance, as digging a ditch across a highway, this is punishable by indictment, as a common offense to the whole kingdom and all his majesty's subjects; but if any individual sustains any special damage thereby, as laming his horse, breaking his carriage, or the like, the offender may be compelled to make ample satisfaction, as well for the private injury, as for the public wrong.<sup>151</sup>

Blackstone generalized from these varied examples, concluding that, "in taking cognizance of all wrongs, or unlawful acts, the law has a double view," aiming both to provide redress to the injured party, and to vindicate the public's need to prevent and punish wrongs that threaten the public good.<sup>152</sup> Battery, nuisance and trespass were all "offenses" for which a private individual might have a civil claim for damages, while the public prosecutor might also prosecute for the harm to the community.<sup>153</sup>

Similarly, offenses against the law of nations included both private and public wrongs. To begin, the law of nations itself governed a wide range of international commercial transactions and diplomatic disputes between States, as well as acts by individuals that infringed upon the rights of foreign States. As to private commercial interactions, international law governed "in mercantile

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150. 4 *id.* at \*5.

151. 4 *id.* at \*6-7.

152. 4 *id.* at \*7.

153. See 4 *id.* at \*6-7, \*216; see also 3 *id.* at \*220 (stating that although public nuisances are generally public wrongs, as to which only the king can bring an action, nevertheless an exception is made "where a private person suffers some extraordinary damage, beyond the rest of the king's subjects, by a public nuisance; in which case he shall have a private satisfaction by action").

questions, such as bills of exchange and the like; in all marine causes, relating to freight, average, demurrage, insurances, bottomry, . . . [and] in all disputes relating to prizes, to shipwrecks, to hostages, and ransom-bills . . . ."<sup>154</sup> In short, the law of nations governed "civil transactions and questions of property between the subjects of different states";<sup>155</sup> offenses against these norms constituted private wrongs, redressed through private litigation.

"Public wrongs" in violation of the law of nations generally involved disputes between States, and were resolved through diplomacy or avenged through war.<sup>156</sup> As explained in the Commentaries:

[O]ffenses against this law are principally incident to whole states or nations: in which case recourse can only be had to war; which is an appeal to the God of hosts, to punish such infractions of public faith, as are committed by one independent people against another: neither state having any superior jurisdiction to resort to upon earth for justice.<sup>157</sup>

Where, however, an individual committed a public wrong, violating a rule of the law of nations with public consequences, world peace might be endangered, and "it is then the interest as well as duty of the government, under which they live, to animadvert upon them with a becoming severity, that the peace of the world may be maintained."<sup>158</sup> In England, such "animadversion" involved criminal

154. 4 *id.* at \*67.

155. 4 *id.*

156. See 4 *id.* at \*68.

157. 4 *id.*

158. 4 *id.* What is the significance of the obscure verb, "animadvert"? Modern dictionaries define the term as to "consider," "utter criticism," or "express censure or blame," and note a now-archaic definition, to "take legal cognizance of," or "to proceed by way of punishment." 1 THE OXFORD ENGLISH DICTIONARY 474 (2d ed. 1989). Blackstone's statement probably encompassed a combination of censure, judicial cognizance, and punishment—a range of remedies, including but not limited to criminal sanctions.

For contemporaneous eighteenth-century usage, consider the language of participants at the Constitutional Convention, who used the term to refer to strong criticism, as in Madison's statement, "I restrain myself from animadverting on the report, from the respect I bear to the members of the committee. But I must confess I see nothing of concession in it," 1 Farrand, *supra* note 68, at 535 (Yates' Notes, July 5, 1787), or a description of Randolph as "animadverting on the indefinite and dangerous power given by the Constitution to Congress," 2 *id.* at 631 (Madison's Notes, Sept. 15, 1787). In an early case, a Pennsylvania

sanctions for a handful of such offenses: violations of safe-conducts, infringements of the rights of ambassadors, and piracy.<sup>159</sup> It also included provision of a civil remedy to the injured party: several contemporaneous statutes offered "restitution" and "amends" to the victim of the violation. Thus, "notwithstanding the party be convicted of treason, the injured stranger should have restitution out of his effects . . . ."<sup>160</sup> Moreover, "if any of the king's subjects attempt or offend, upon the sea," the justices "may cause full restitution and amends to be made to the party injured."<sup>161</sup>

Blackstone described the various criminal and civil remedies he cited as "the principal cases, in which the statute law of England interposes, to aid and enforce the law of nations, as part of the common law; by inflicting an adequate punishment upon offenses against that universal law, committed by private persons."<sup>162</sup> Thus, "punishment" of an "offense against the law of nations" committed by a private individual included both criminal prosecution and restitution or compensation to the victim of the violation.

Blackstone thus provided the framers with a model of the law of nations which protected a long list of private rights, as well as public rights. Violations of private rights were properly redressed through private civil litigation. Violations of public rights, rights that implicated public interests and constituted public wrongs, were subject to both criminal sanctions and to civil remedies for private parties injured by the "offense."

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court used *animadvert* to refer to criminal sanctions. See *Respublica v. De Longchamps*, 1 U.S. (1 Dall.) 111, 117 (1784) (Ct. Oyer & Terminer Phila.) ("And it is now the interest as well as duty of the government, to animadvert upon your conduct with a becoming severity,—such a severity as may tend to reform yourself, to deter others from the commission of the like crime, preserve the honor of the State, and maintain peace with our great and good Ally, and the whole world."). In a later prize case, however, counsel called for "animadversion" through civil restitution. See *The Fortuna*, 15 U.S. (2 Wheat.) 161, 164-165 (1817) ("The court can only animadvert upon such misconduct by depriving the captors of their spoil . . . .").

159. See 4 BLACKSTONE, *supra* note 46, at \*68. The list is not exhaustive: Blackstone describes these as the "principal offenses against the law of nations, animadverted on as such by the municipal laws of England . . . ." 4 *id.* (emphasis added).

160. 4 *id.* at \*69.

161. 4 *id.* at \*69-70. See Judge Bork's discussion of this chapter of the *Commentaries* in *Tel-Oren v. Libyan Arab Republic*: "[A]t least some offenses against the law of nations, such as violations of safe-conducts, resulted not only in criminal punishment but in restitution for the alien out of the offender's effects." 726 F.2d 774, 814 n.22 (D.C. Cir. 1984) (Bork, J., concurring) (citing 4 BLACKSTONE, *supra* note 46, at \*69).

162. 4 BLACKSTONE, *supra* note 46, at \*73.

## 2. *The Framers' Views of Offenses Against the Law of Nations*

The Continental Congress shared this view of the assorted means of sanction and redress available to address violations of the law of nations. As discussed earlier, resolutions passed in 1781 and 1785 called upon the states to enact legislation creating both criminal sanctions for violations of the law of nations and also civil remedies to compensate those injured by such violations.<sup>163</sup> The very first Congress followed through, sanctioning violations of the law of nations by providing both criminal and civil remedies. The Crime Bill of 1790 made it a federal crime to commit certain violations of the diplomatic rights of ambassadors, consuls, and other foreign representatives.<sup>164</sup> The statute specifically incorporated "the law of nations," making it a crime, for example, to "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>165</sup> Further criminal law codification was unnecessary in the early years of the federal government, since it was generally assumed that the federal courts had the power to sanction common law crimes—a power that was not definitively rejected by the Supreme Court until 1816.<sup>166</sup> Several cases record prosecutions based on common law violations of the law of nations, without the need for congressional action to define the offense or the proper punishment.<sup>167</sup>

In its first session, as part of the Judiciary Act of 1789, the First Congress also codified the civil side of the Offenses Clause, authorizing federal court jurisdiction over claims by aliens for "a tort only in violation of the law of nations."<sup>168</sup> Although no records

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163. See *supra* text accompanying notes 74-80, 84-85.

164. See Crime Bill of April 30, 1790, ch. 9, §§ 25-28, 1 Stat. 112, 117-18.

165. *Id.* § 28; see also *id.* § 26 (stating that persons executing a "writ or process" on an ambassador or other public minister "shall be deemed violaters [sic] of the laws of nations").

166. See *United States v. Coolidge*, 14 U.S. (1 Wheat.) 415, 416-17 (1816); *United States v. Hudson*, 11 U.S. (7 Cranch) 32 (1812); see also Jay, *supra* note 53, at 825-26, 842-43 (explaining controversy over federal common law crimes).

167. See *Talbot v. Janson*, 3 U.S. (3 Dall.) 133, 161 (1795); *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 474 (1793); *Henfield's Case*, 11 F. Cas. 1099, 1108 (C.C.D. Pa. 1793) (No. 6360); see also Jay, *supra* note 53, at 825-26, 842-43 (listing additional cases).

168. Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73, 77 (codified at 28 U.S.C. § 1350

have been uncovered detailing the reasoning underlying the provision, it seems clear that Congress was heeding in part the resolutions of the Continental Congress, which had urged the states in vain to provide criminal sanctions and civil remedies for violations of the law of nations.<sup>169</sup> The Alien Tort Claims Act (ATCA) was drafted by Oliver Ellsworth, principal author of the resolutions passed just a few years earlier.<sup>170</sup> The common concerns that run from those early resolutions through the drafting of the Offenses Clause also underlie the ATCA: ensuring redress for aliens harmed by violations of the law of nations.

The importance of civil remedies for offenses against the law of nations was highlighted in an early reference to the ATCA, a 1795 opinion of Attorney General William Bradford.<sup>171</sup> Bradford was asked by then-Secretary of State Edmund Randolph to respond to a complaint from the Sierra Leone Company alleging that U.S. citizens had joined a French attack on the British colony, "plundering or destroying the property of British subjects on that coast."<sup>172</sup> Bradford responded that attacks against a country with which the United States is at peace, if committed within the territory or jurisdiction of the United States, would constitute "an offense against this country," and would be "punishable by the laws of this country."<sup>173</sup> He found that criminal prosecution would not be possible if the acts were committed within the territory of a foreign country, and expressed some doubt about the statutory authorization for such prosecutions if the events took place "on the high seas."<sup>174</sup> Bradford concluded, however, that civil remedies for the "offense" were both possible and perhaps preferable:

But there can be no doubt that the company or individuals who have been injured by these acts of hostility have a remedy by a *civil* suit in the courts of the United States; jurisdiction being expressly given to these courts in all cases where an alien sues for a tort only, in violation of the laws of nations, or a treaty of

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(1994)). For a full discussion, see *infra* notes 303-20 and accompanying text.

169. See *supra* text accompanying notes 74-80, 84-85.

170. See *supra* note 81.

171. See 1 Op. Att'y. Gen. 57, 59 (1795).

172. *Id.* at 58.

173. *Id.*

174. *Id.* at 58-59.

the United States; and as such a suit may be maintained by evidence taken at a distance, on a commission issued for that purpose, the difficulty of obtaining redress would not be so great as in a criminal prosecution, where *viva voce* testimony alone can be received as legal proof.<sup>175</sup>

In a similar vein, Attorney General Randolph informed the Secretary of State in 1792 that the unauthorized removal of slaves from Martinique might constitute the "offense" of piracy, for which the culprit could face either criminal trial or a civil case instituted by the slave owners for restitution.<sup>176</sup> Thus, in the years shortly after the ratification of the Constitution, these key figures in the developing U.S. legal system viewed criminal prosecution and civil actions for damages as two means by which offenses against the law of nations could be sanctioned.

Early cases addressing violations of the law of nations also recognized the importance of civil remedies for such offenses. One of the few prize cases decided during the period predating ratification of the Constitution for which a written record has survived, *The San Antonio*, concerned the capture of a ship in the mouth of the Mississippi River.<sup>177</sup> The case provoked a diplomatic uproar, with Spain insisting that the capture violated Spanish sovereignty. The Court of Appeals in Cases of Capture, a court established by the Continental Congress to hear appeals from state court decisions in prize cases,<sup>178</sup> found that the capture violated the law of nations and ordered both payment of damages and restitution of the seized vessel and cargo.<sup>179</sup>

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175. *Id.* at 59.

176. See 1 Op. Att'y Gen. 29, 29-30 (1792). Civil proceedings, Randolph noted, had the distinct advantage of "impos[ing] the expense of a suit upon the individuals interested, rather than to assume any responsibility on the United States." *Id.* at 30.

177. See Henry J. Bourguignon, *Incorporation of the Law of Nations During the American Revolution—The Case of the San Antonio*, 71 AM J. INT'L L. 270 (1977). Bourguignon's article reconstructs in detail the record and legal arguments of the case, as gleaned from notes and scattered references.

178. See *id.* at 276 (explaining the history of this Court of Appeals); see also HENRY J. BOURGUIGNON, *THE FIRST FEDERAL COURT: THE FEDERAL APPELLATE PRIZE COURT OF THE AMERICAN REVOLUTION 1775-1787* (1977) (same).

179. See Bourguignon, *supra* note 177, at 292. Bourguignon notes that the litigants relied heavily on *The Law of Nations*, the well-known treatise by Emmerich de Vattel published in 1758 and available in an English translation published in 1759-60. See VATTEL, *supra* note 51; Bourguignon, *supra* note 177, 284 n.73. Vattel called for both punishment and

In a series of admiralty cases in the 1790s, the courts again recognized that a seizure of property at sea in violation of the law of nations constituted an offense against the law of nations, and that the victim could obtain compensation in a civil suit for restitution, compensation, or other monetary reparations. In *Talbot v. Janson*, for example, the Court held that the seizure of a ship by U.S. citizen constituted "not merely an offense against the [United States], but also against the law of nations."<sup>180</sup> Restitution was proper, the Court concluded, whether or not the unlawful taking constituted piracy within the meaning of the congressional statute.<sup>181</sup> The following year, the Court found that a civil in rem proceeding under admiralty jurisdiction was a proper remedy for the "offense" of exporting arms to a nation with which the United States was not at war.<sup>182</sup> When the French Ambassador to the United States organized privateers to seize British ships, Hamilton recognized that criminal penalties were possible, noting that under the law of nations, "[f]oreign *recruiters are hanged immediately*, and

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"satisfaction" for offenses against the law of nations:

Whoever offends the state, injures its rights, disturbs its tranquility, or does it a prejudice in any manner whatsoever, declares himself its enemy, and exposes himself to be justly punished for it. [The sovereign] should avenge his wrongs, punish the aggressor, and, if possible, oblige him to make full reparation . . .

VATEL, *supra* note 51, at 161.

The Court of Appeals was not granted the authority to enforce its decisions, and the Massachusetts courts adamantly refused to recognize the judgment, despite the explicit request for enforcement from the Continental Congress. See Bourguignon, *supra* note 177, at 292-94. As Bourguignon concludes, the case "glaringly exposed the inadequacy of this appellate prize system established by the Continental Congress," and undoubtedly contributed to the framers' resolve to create a federal court system with the power to enforce its decrees. *Id.* at 295.

180. 3 U.S. (3 Dall.) 133, 161 (1775).

181. *See id.*

182. *See United States v. La Vengeance*, 3 U.S. (3 Dall.) 297 (1796). The Attorney General argued that the case was criminal, given that the owner of the ship had violated a criminal statute (as a criminal matter, the Circuit Court would not have had jurisdiction over the appeal). *See id.* at 298-99. The Supreme Court disagreed, holding that the action was a civil claim for forfeiture of the ship, not a criminal prosecution of its owner: "[I]t is a civil cause: It is a process in the nature of a libel *in rem*; and does not, in any degree, touch the person of the offender." *Id.* at 301; *see also United States v. Peters*, 3 U.S. (3 Dall.) 121 (1795) (demanding compensation for a tortious act at sea, in violation of the law of nations).



very justly."<sup>183</sup> In this case, however, he urged reliance on a civil remedy, recommending restitution of the seized vessels.<sup>184</sup>

In the controversial *Henfield's Case*, leading jurists among the framers stressed the U.S. obligation to impose sanctions for offenses against the law of nations, emphasizing both the duty to so act and the range of responses open to the government.<sup>185</sup> The case played a key role in the controversy over federal common law crimes, triggering concerns that led to Supreme Court decisions finding such criminal jurisdiction unconstitutional.<sup>186</sup> Despite the short life of its holding as to common law crimes, the case illustrates the mix of criminal and civil remedies available as sanctions for violations of international law. As Wilson instructed the Grand Jury, "faults or offenses" committed by individuals should not be automatically imputed to their government, for "[i]n every state, disorderly citizens are unhappily to be found."<sup>187</sup> The consequences for the nation may be mitigated if the individual is held accountable, both through punishment and by requiring the culprit to "make satisfaction" or offer reparation:

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183. Letter from Alexander Hamilton to George Washington (May 15, 1793), reprinted in 4 THE WORKS OF ALEXANDER HAMILTON 408, 410 (H. Lodge ed., 1904).

184. See *id.* at 414-15; see also Stewart Jay, *Origins of Federal Common Law: Part One*, 133 U. PA. L. REV. 1003, 1042-43 (1985) (discussing the incident in the context of the larger "neutrality controversy").

185. 11 F. Cas. 1099 (C.C.D. Pa. 1793) (No. 6360).

186. The background to the *Henfield* controversy is detailed in Jay, *supra* note 184, at 1042-53, as well as in several annotations to the reported record of the case. See *Henfield's Case*, 11 F. Cas. at 1099 n.1, 1116, 1122-23 n.7. During the hostilities between Great Britain and France, President Washington issued a controversial Proclamation of Neutrality. See *id.* at 1102. Gideon Henfield joined the crew of a French privateer in various attacks on British ships; at trial, he claimed ignorance of the law. See *id.* at 1110. Henfield's prosecution for a common law violation of the neutrality act raised the ire of the vocal supporters of the French battle against the former enemy of the new nation. See Jay, *supra* note 184, at 1042-52. Judges Wilson, Iredell, and Peters, as well as prosecutors Rawle and Randolph, all agreed that the federal government had the power to impose criminal punishment for nonstatutory violations of the law of nations, and so instructed the jury. See *id.* at 1050. Their position horrified opponents of the growing federal powers, seemingly confirming fears that the central government would become an instrument of unchecked repression. This combination of hostility toward the common law indictment and sympathy for the French led to perhaps the first recorded act of jury nullification in the young legal system: the jury acquitted Henfield, despite jury instructions which clearly directed them to find him guilty, and he was carried off to celebrate with his French allies. See *id.* at 1051. Unfortunately, his zeal led him to enlist once more in the French cause, and he was soon taken prisoner by the British after another attack on British shipping. See *id.* at 1051 n.240.

187. *Henfield's Case*, 11 F. Cas. at 1108.

Let such be held responsible, when they can be rendered amenable for the consequences of their crimes and disorders. If the offended nation have the criminal in its power, it may without difficulty punish him, and oblige him to make satisfaction. When the offending citizen escapes into his own country, his nation should oblige him to repair the damage, if reparation can be made, or should punish him according to the measure of his offense.<sup>188</sup>

Rawls, the district attorney, and Randolph, the Attorney General, also argued that the United States had a series of options available in response to violations of the law of nations. They stressed that the violation of neutrality constituted "an offense against the law of nations," and was therefore "punishable by indictment on information as such."<sup>189</sup> They noted that this option, however, was concurrent with various other remedies, including trial of the offenders as pirates by the injured nation, as well as both peaceful and bellicose interactions between the governments implicated in the offense: negotiation or war.<sup>190</sup> "We may negotiate as well on national as on private concerns, but without prejudice to the judicial remedy."<sup>191</sup> Judicial remedies included civil remedies as well as criminal prosecutions: The prosecutors refer to two English statutes cited by Blackstone,<sup>192</sup> one of which authorizes courts to "cause full restitution and amends to be made to the party injured" by an offense against the law of nations.<sup>193</sup>

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188. *Id.* at 1108 (Wilson, J.) (Charge to the Grand Jury) (citations omitted). Only "[i]f the nation refuse to do either" does "it render[] itself in some measure an accomplice in the guilt, and become[] responsible for the injury," responsibility that would most probably lead to war. *Id.*

189. *Id.* at 1117 (Joint statement to Grand Jury).

190. *See id.*

191. *Id.*

[I]t is the honour of free states that the judicial remedy is necessary. . . . [O]ur courts should, with that impartial and unbiased dignity which characterizes their judicial investigations of truth, apply the law of nations to men, of which nations are composed, and substitute the scales of justice for the sword of war.

*Id.*

192. *See id.*

193. 4 BLACKSTONE, *supra* note 46, at \*69-70.

[I]f any of the king's subjects attempt or offend, upon the sea, or in any port within the king's obeysance, against any stranger in amity, league, or truce, or

### 3. *Eighteenth-Century Usage of "Offenses"*

The Blackstonian concept of "offenses against the law of nations" encompassed a broad range of infractions that triggered an equally broad range of remedies, including civil claims for damages as well as criminal sanctions. The Continental Congress in the years before the drafting of the Constitution employed the same approach, urging that such offenses be sanctioned by both criminal penalties and civil remedies, and the courts and leading legal figures of the 1790s shared this approach.

In context, then, the constitutional phrase "offenses against the law of nations" incorporates this flexible approach. A brief review of the use of the term "offenses" in the late eighteenth and early nineteenth centuries confirms that its significance was not restricted to crimes, but rather varied depending on the context and the modifiers attached to it. Although often used to refer to violations of the public trust, usage was inconsistent: at times an offense was synonymous with crimes, but it was also used as a neutral term, taking meaning from its modifier, as in "political offense" or "criminal offense." Overall, the term was broad enough to carry a range of meanings, with the writer relying on context to make clear which meaning was intended.

At the Constitutional Convention, the various notetakers captured speakers using the term to refer to "offensive" actions that provoked outrage;<sup>194</sup> as a synonym for felonies and other crimes;<sup>195</sup>

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under safe-conduct; and especially by attaching his person, or spoiling him or robbing him of his goods; the lord chancellor with any of the justices of either the king's-bench, or common pleas, may cause full restitution and amends to be made to the party injured.

*Id.* Wilson as well recognized "The general principle" of the law of nations that "prohibits injury and commands the reparation of damage done." Wilson, *supra* note 56, at 138.

194. See, for example, Colonel Mason's reference to "offensive laws," 1 Farrand, *supra* note 68, at 102 (Madison's Notes, June 4, 1787), and to the danger of giving "offense" to the people of certain states, 2 *id.* at 415 (Madison's Notes, Aug. 25, 1787).

195. Examples include a proposal to include a requirement that a citizen of one state committing an "offense" in another state be subject to the same penalty as would apply to a local citizen, see 1 *id.* at 243 (Madison's Notes, June 15, 1787), the discussion of the power to pardon all "offenses" except treason, see 1 *id.* at 292 (Madison's Notes, June 18, 1787), and a proposal requiring that a trial be held where the "offense" was committed, see 2 *id.* at 433 (Mason's Notes, Aug. 27, 1787).

and as a general term indicating violations of legal duties, frequently modified by "criminal."<sup>196</sup> Several references used offenses and variations thereof—"offending," "offended," and "offender"—to refer to violations of the law of nations. Thus, Patterson's early constitutional proposal described as an offense a violation of rules regulating foreign trade, rules that were governed at the time by the law of nations.<sup>197</sup> Randolph used the concept to describe violations committed by *states*, bodies that by definition cannot commit *crimes*, as well as violations by individuals. In explaining the deficiencies of the Articles of Confederation at the opening of the Convention, Randolph stated:

If a State acts against a foreign power contrary to the laws of nations or violates a treaty, [the Confederation] cannot punish that State, or compel its obedience to the treaty. It can only leave the offending State to the operations of the offended power. It therefore cannot prevent a war. If the rights of an ambassador be invaded by any citizen it is only in a few States that any laws exist to punish the offender.<sup>198</sup>

Similarly, Madison complained that the Confederation had no power "to compell [sic] an offending member of the Union" to obey the law of nations.<sup>199</sup> In all of these passages, the speakers cited "offenses" against the law of nations to refer to violations of international norms,<sup>200</sup> not to criminal conduct.

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196. This expression was used repeatedly in reference to what later became Article III, Section 2, Clause 3 of the Constitution: "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed." As originally proposed, the Clause used "criminal offenses" in place of "crimes." See 2 Farrand, *supra* note 68, at 144 (Randolph's Plan); 2 *id.* at 173 (Wilson); 2 *id.* at 187 (Madison's Notes, Aug. 6, 1787); 2 *id.* at 433 (Mason's Notes, Aug. 27, 1787); 2 *id.* at 438 (Madison's Notes, Aug. 28, 1787). See *infra* text accompanying notes 218-21 for a discussion of the Supreme Court's analysis of the significance of this change.

197. See 1 *id.* at 243 (Madison's Notes, June 15, 1787).

198. 1 *id.* at 24-25 (McHenry's Notes on Randolph's Speech, May 29, 1787).

199. 1 *id.* at 315 (Madison's Notes, June 19, 1787).

200. Wilson made even broader use of the term "offense" in a 1791 essay on the law of nations, arguing that conduct of one nation in pursuit of "its own duties and rights" that is "disagreeable or even inconvenient to another," should not be viewed as an injury that gives "offense": "If, at such conduct, *offense* is taken, it is the fault of [the offended nation,] not of that nation, which occasions it." Wilson, *supra* note 56, at 147 (emphasis added).

"Offense" was also frequently used at the time in the context of impeachment, both at the federal and the state levels. The president and other high office holders were to be impeached for certain "offenses." "Offense" and "offender" in these references often referred to violations of the public trust, political offenses that were not necessarily criminal.<sup>201</sup> In the debates over ratification of the federal Constitution, for example, Hamilton specified that impeachment should reach political offenses:

The subjects of its jurisdiction are those offenses which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself.<sup>202</sup>

Story as well referred to impeachable offenses as "political offenses . . . of so various and complex a character" as to be "utterly incapable of being defined, or classified."<sup>203</sup> Wilson made clear in his analysis of the Constitution that impeachable "offenses" were a unique category, unlike other kinds of legal violations: "Impeachments, and offenses and offenders impeachable, [do not] come . . . within the sphere of ordinary jurisprudence. They are founded on different principles; are governed by different maxims;

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201. At the Constitutional Convention, for example, Wilson suggested that Congress be permitted to expel members for an "offense," and included disorderly and indecent behavior within the meaning of the term. See 2 Farrand, *supra* note 68, at 156. The 1776 Delaware Constitution used "offense" to describe impeachable "misbehaviour" or "mal-administration," expressions that included broad categories of misconduct. DEL. CONST. of 1776, arts. 5, 23. The 1776 Virginia Constitution used similar wording, permitting impeachment of the Governor for "offending against the State, either by mal-administration, corruption, or other means," and referring to such abuses as "crimes or offenses." VA. CONST. of 1776, arts. 16-17. The New Hampshire Constitution of 1784 also used "offense" to describe the "misconduct" and "maladministration" for which a government official could be impeached. N.H. CONST. of 1784, Part 2, Senate, Executive Power. The debate at the federal convention made clear that "maladministration" was not limited to crimes. Madison argued successfully against permitting impeachment for "maladministration," explaining that it was "[s]o vague a term" that impeachment on that ground would "be equivalent to a tenure during pleasure of the Senate." 2 Farrand, *supra* note 68, at 550.

202. THE FEDERALIST NO. 65, at 423-24 (Alexander Hamilton) (Prometheus Books 2000).

203. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 287 (Carolina Academic Press 1987) (1833).

and are directed to different objects . . . ."<sup>204</sup> Debates continue to this day about whether "impeachable offenses" were limited to "indictable offenses,"<sup>205</sup> but just posing the issue makes clear that "offenses" can include noncriminal (nonindictable) violations.<sup>206</sup> "Political offenses" were a unique category to the framers and their contemporaries—just as "offenses against the law of nations" were unique within their legal world.

In early Supreme Court opinions as well, "offenses" was at times used to refer to crimes,<sup>207</sup> but also reflected a broader sense of public wrongs. Several cases used "offense" to describe violations of international norms, often in prize cases.<sup>208</sup> Seizures of vessels violating U.S. laws were considered in rem civil cases seeking remedies for the "offense" through confiscation of the "offending" property. "The thing is here primarily considered as the offender, or rather the offense is attached primarily to the thing . . . ."<sup>209</sup> The Court distinguished between criminal prosecutions of an individual which might include forfeiture of property as part of the criminal

204. James Wilson, *Comparison of the Constitution of the United States with that of Great Britain, Lectures in Law (1790-91)*, in 1 WILSON, *supra* note 56, at 382, 408.

205. See Jason J. Vicente, *Impeachment: A Constitutional Primer*, 3 TEX. REV. L. & POL. 117, 145-47 (1998). Compare Frank Thompson, Jr. & Daniel H. Pollitt, *Impeachment of Federal Judges: An Historical Overview*, 49 N.C. L. REV. 87, 107-08, 117-18 (1970) (arguing that the only impeachable offenses are indictable offenses), with Michael J. Gerhardt, *The Constitutional Limits to Impeachment and Its Alternatives*, 68 TEX. L. REV. 1, 82-89 (1989) (stating that a wide range of nonindictable offenses fall within the umbrella of "impeachable offenses").

206. "High crimes and misdemeanors" denotes "certain serious crimes akin to treason and bribery ('high crimes'), as well as certain serious political offenses that were not necessarily indictable as crimes ('high misdemeanors')." The Framers thus viewed impeachable acts as 'great offenses.'" Ken Gormley, *Impeachment and the Independent Counsel: A Dysfunctional Union*, 51 STAN. L. REV. 309, 329 (1999) (citing RAOUL BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* 91 (1973)) (additional citations omitted).

207. See, e.g., *United States v. Hamilton*, 3 U.S. (3 Dall.) 17, 18 (1795) (referring to treason and other crimes as offenses); *Georgia v. Brailsford*, 2 U.S. (2 Dall.) 402, 403 (1792) (referring to treason and other crimes triggering confiscation of the defendant's property as offenses).

208. See, e.g., *Darby v. The Brig Erstern*, 2 U.S. (2 Dall.) 34, 36 (Fed. Ct. App. 1782) (stating that a flagrant violation of international rules governing neutrality constitutes an offense); *Nathan v. Virginia*, 1 U.S. (1 Dall.) 77 n.a (Ct. C.P. Phila. County 1781) (describing attorney's argument that attachment of goods belonging to the Commonwealth of Virginia in violation of the law of nations would constitute an offense).

209. *The Palmyra*, 25 U.S. (12 Wheat.) 1, 14 (1827); see also *United States v. 1960 Bags of Coffee*, 12 U.S. (8 Cranch) 398 (1814) (upholding forfeiture of coffee from innocent purchasers, because the forfeiture occurred at the time the "offense" was committed, and remained with the property as it changed hands).

sanction, and civil in rem proceedings directed against the offending property itself.<sup>210</sup>

The term "offenses" was also broad enough to refer generally to violations of legal obligations. Thus torts, particularly egregious torts calling for punitive damages, were often described as offenses. In an oft-quoted holding, for example, the Court stated:

It is a well-established principle of the common law, that in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offense rather than the measure of compensation to the plaintiff.<sup>211</sup>

The Court proceeded to discuss this "offense" in language that indicates the overlap between criminal and civil proceedings: "By the common as well as by statute law, men are often punished for aggravated misconduct or lawless acts, by means of a civil action, and the damages, inflicted by way of penalty or punishment, given to the party injured."<sup>212</sup> As these varied examples illustrate, the term "offenses" was used to refer to a wide range of violations or transgressions of various rules of law—regulatory rules and moral precepts as well as civil and criminal statutes—for which the appropriate sanctions varied just as widely.<sup>213</sup>

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210. See *The Palmyra*, 25 U.S. at 14. Given that this action is directed against the property, not its owner, seizure is justified regardless of whether the property owner was aware of the offense committed by the property: "[This] is a proceeding against the vessel, for an offense committed by the vessel, which is not less an offense, and does not the less subject her to forfeiture, because it was committed without the authority, and against the will of the owner." *United States v. The Little Charles*, 26 F. Cas. 979, 982 (C.C.D. Va. 1818) (No. 15,612). These holdings as to the civil nature of actions seizing property that has committed an "offense," even when the offense concerned a violation of a criminal statute, provide the foundation for modern analysis of the nature of civil forfeiture statutes. See, e.g., *United States v. Bajakajian*, 524 U.S. 321, 330-31 (1998) (quoting *The Palmyra* in discussion of civil forfeitures). In *Bajakajian*, Justice Thomas noted that the "guilty property" theory behind in rem forfeiture can be traced to the Bible, which describes property being sacrificed to God as a means of atoning for an offense." *Id.* at 330 n.5.

211. *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1851); see also *Vasse v. Smith*, 10 U.S. (6 Cranch) 226, 231 (1810) ("The conversion is still in its nature a tort . . . and is within that class of offenses for which infancy cannot afford protection.").

212. *Woodworth*, 54 U.S. at 371.

213. Contemporary usage of the word "offense" displayed a similar inconsistency, with usage ranging from broad misbehavior to criminal misconduct, as well as usage as a neutral

#### 4. "Offenses" in the Constitution

The word "offense" is used three times in the Constitution: in the Offenses Clause;<sup>214</sup> in defining the President's pardon power;<sup>215</sup> and in the Fifth Amendment.<sup>216</sup> As we shall see, the Supreme Court has consistently found "offenses" to be a broader category than "crimes." The most salient characteristic of the Court's "offenses" jurisprudence, however, has been its clause-specific approach. As the Court said in relation to the prohibition on bills of attainder: "[T]he proper scope of [this] Clause, and its relevance to contemporary problems, must ultimately be sought by attempting to discern the reasons for its inclusion in the Constitution, and the evils it was designed to eliminate."<sup>217</sup> Similarly, the constitutional meaning of "offenses" has varied according to the purpose of the clause in which it is used.

The Supreme Court's first discussion of the meaning of "offenses" actually arose not from its use in the Constitution, but rather from its deletion. The Constitution provides that "[t]he Trial of all Crimes, except in Cases of Impeachment; shall be by Jury."<sup>218</sup> As presented to the Constitutional Convention, the clause provided that "the trial of all criminal offenses . . . shall be by jury"; "all criminal offenses" was replaced by "all crimes" in a unanimous

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term, gaining meaning through the adjective attached to it, as in "criminal offense." For example, early Pennsylvania decisions often used "offense" to refer to crime, but usage also reflected a broader meaning. *Compare, e.g.,* *Ingles v. Bringhurst*, 1 U.S. (1 Dall.) 341, 345 (Ct. C.P. Phila. 1788) (defining failure to pay share of cost of "party wall" as an offense), *Respublica v. Teischer*, 1 U.S. (1 Dall.) 335, 337-38 (Sup. Ct. Pa. 1788) (debating whether the "offense" of killing a horse is "indictable" or whether plaintiff "is left to his civil remedy"), and *Respublica v. De Longchamps*, 1 U.S. (1 Dall.) 111, 114 (Ct. Oyer & Terminer Phila. 1784) (stating that violation of the law of nations is an offense), *with* *Respublica v. Mulatto Bob*, 4 U.S. (4 Dall.) 145, 146 (Sup. Ct. Pa. 1795) (murder), *The Commonwealth v. Dillon*, 4 U.S. (4 Dall.) 116, 117 (Sup. Ct. Pa. 1792) (arson), *Jones v. Ross*, 2 U.S. (2 Dall.) 143, 143-44 (Sup. Ct. Pa. 1792) (crimes), and *Johnson v. Hocker*, 1 U.S. (1 Dall.) 406, 408 (Sup. Ct. Pa. 1789) (forgery).

214. See U.S. CONST. art. I, § 8, cl. 10.

215. See *id.* art. II, § 2, cl. 1 (granting the President the "Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment").

216. See *id.* amend. V ("[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . .").

217. *United States v. Brown*, 381 U.S. 437, 442 (1965).

218. U.S. CONST. art. III, § 2, cl. 3.



vote.<sup>219</sup> To interpret the reach of the right to a jury trial, the Supreme Court first turned to Blackstone for an analysis of the meaning of the word "crime":

A crime, or misdemeanor, is an act committed, or omitted, in violation of a public law either forbidding or commanding it. This general definition comprehends both crimes and misdemeanors; which, properly speaking, are mere synonymous terms; though in common usage the word "crimes" is made to denote such offenses as are of a deeper and more atrocious dye; while smaller faults and omissions of less consequence are comprised under the gentler name of "mi[s]demeanors" only.<sup>220</sup>

Given this definition of "crimes" as "offenses . . . of a deeper and more atrocious dye," the Court read the replacement of "criminal offenses" with "crimes" as narrowing the reach of the constitutional protection:

The significance of this change cannot be misunderstood. If the language had remained "criminal offenses," it might have been contended that it meant all offenses of a criminal nature, petty as well as serious, but when the change was made from "criminal offenses" to "crimes," and made in the light of the popular understanding of the meaning of the word "crimes," as stated by Blackstone, it is obvious that the intent was to exclude from the constitutional requirement of a jury the trial of petty criminal offenses.<sup>221</sup>

To the framers, the Court concluded, "criminal offenses" encompassed all "offenses of a criminal nature," including petty crimes as well as felonies and others of a "more atrocious dye," while the term "crimes" was limited to more serious violations. As a result, the Court held that the constitutional right to a jury trial does not apply to petty criminal offenses, those that are excluded from the category of "crimes." The analysis confirms that "offense" by itself is an ambiguous word, taking its meaning from the context and modifiers attached to it. The expressions "criminal offenses"

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219. *Schick v. United States*, 195 U.S. 65, 70 (1904).

220. *Id.* at 69-70 (quoting 4 BLACKSTONE, *supra* note 46, at \*5).

221. *Id.* at 70.

and "offenses of a criminal nature," after all, would be redundant unless the term "offenses" by itself is broader than criminal violations.

In an analysis of the President's power to pardon "Offenses against the United States,"<sup>222</sup> the Court again concluded that "offenses" is a broader term than "crimes": "[T]he term 'offenses' is used in the Constitution in a more comprehensive sense than are the terms 'crimes' and 'criminal prosecutions.'"<sup>223</sup> In *Ex parte Grossman*, "offense" was read to include criminal contempts. The Court explained at some length that contempt proceedings are "*sui generis* and not criminal prosecutions" within the protections of the Sixth Amendment or other provisions of the Bill of Rights.<sup>224</sup> Thus, once again the Court found that the term "offense" in the Constitution is not a synonym for "crime"; for the purposes of the Pardons Clause, "offense" includes certain contempt adjudications.

The Supreme Court has also recognized the breadth of the term "offense" in analyzing the Double Jeopardy Clause of the Fifth Amendment. The Clause states: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb."<sup>225</sup> As discussed at greater length in the next section, the Court has struggled to respond to the recognition that civil penalties can be imposed as punishment for an offense, but only criminal punishment by the same sovereign triggers the Double Jeopardy Clause.<sup>226</sup> In an early case involving the Double Jeopardy Clause, the Court drew an analogy to the common (and constitutional) imposition of both civil and criminal sanctions on an offender: "A man may be compelled to make reparation in damages to the injured party, and be liable also to punishment for a breach of the public peace, in consequence of the same act; and may be said, in common parlance, to be twice punished for the same offense."<sup>227</sup> For the purposes of the Double Jeopardy Clause, therefore, an "offense"

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222. U.S. CONST. art. II, § 2, cl. 1 ("The President . . . shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.").

223. *Ex parte Grossman*, 267 U.S. 87, 117 (1925).

224. *Id.*

225. U.S. CONST. amend. V.

226. See *Hudson v. United States*, 522 U.S. 93 (1997); *infra* text accompanying notes 237-44.

227. *Moore v. Illinois*, 55 U.S. (14 How.) 13, 19-20 (1852); see *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 549-50 (1942).

can trigger both civil and criminal punishment, but only the threat of double *criminal* punishment is barred by the Clause. To arrive at an understanding of the significance of this constitutional protection, the Court has had to look beyond the ambiguous terms "offense" and "punishment" to give effect to the intent underlying this particular Clause.

As these constitutional usages indicate, "offenses" is a broader term than "crimes," with a range of possible meanings; its significance can be determined only by looking at the use of the word in context. As we have seen, the context of the Offenses Clause points to a broad authorization to regulate, sanction, and deter violations of international law.

### B. To Punish

Just as the term "offense" encompasses civil as well as criminal wrongs, the term "punish" includes civil as well as criminal consequences. As with the analysis of "offenses" in general, and of "offenses against the law of nations" in particular, an understanding of this term turns on an understanding of the purpose of the particular constitutional clause in which it is used; nothing in the word "punish" itself limits Congress to criminal sanctions.<sup>228</sup>

A few years before the drafting of the Constitution, the Continental Congress had appointed a committee "to prepare a recommendation to the states to enact laws for *punishing* infractions of the laws of nations."<sup>229</sup> This committee reported three antecedent problems: the failure of state criminal justice systems to "sufficiently comprehend offenses against the law of nations"; the danger that the United States might be held responsible by a foreign nation for its failure to punish transgressions; and the importance of requiring the offender to compensate those injured by

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228. See Wayne A. Logan, *The Ex Post Facto Clause and the Jurisprudence of Punishment*, 35 AM. CRIM. L. REV. 1261, 1280-81 (1998) (analyzing recent Supreme Court decisions as concluding that "the answer to whether a particular sanction is 'punishment,' at bottom, should be driven by the identity of the particular constitutional challenge before the Court").

229. Randolph et al., *supra* note 74, at 66 (emphasis added); see *supra* text accompanying notes 74-80.

a violation of the law of nations "out of his private fortune."<sup>230</sup> The recommendation reflected each of these points, including the tort aspect, and recommended that the states "authorise suits to be instituted for damages by the party injured."<sup>231</sup>

The concept of civil damages as a form of punishment would not have been foreign to the framers. They, no less than ourselves, understood that an award of civil penalties might amount to punishment, as stated in an oft-cited 1763 decision: "Damages are designed not only as a satisfaction to the injured person, but likewise *as a punishment to the guilty*, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself."<sup>232</sup> This realization carries through to recent cases noting that "even remedial sanctions carry the sting of punishment."<sup>233</sup> The overlap between the assorted goals of various civil and criminal sanctions is unsurprising, for "sanctions frequently serve more than one purpose,"<sup>234</sup> and those purposes are not rigidly divided between the civil and criminal realms.<sup>235</sup>

The mode by which the "penalty" is imposed—by civil or criminal actions—is irrelevant to its character as a form of punishment for the underlying "offense":

Admitting that the penalty may be recovered in a civil action, as well as by a criminal prosecution, it is still as a punishment for the infraction of the law. The term "penalty" involves the idea of punishment, and its character is not changed by the mode in which it is inflicted, whether by a civil action or a criminal prosecution. . . . He has been punished in the amount

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230. Randolph et al., *supra* note 74, at 66.

231. *Id.* at 66-67.

232. *Wilkes v. Wood*, 1 Lofft. 1, 18-19, 98 Eng. Rep. 489, 498-99 (K.B. 1763) (emphasis added), *quoted in* *Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 274 n.20 (1989).

233. *United States v. Halper*, 490 U.S. 435, 447 n.7 (1989).

234. *Austin v. United States*, 509 U.S. 602, 610 (1993).

235. As the Court noted in *United States v. Brown*, 381 U.S. 437, 458 (1965), "[i]t would be archaic to limit the definition of 'punishment' to 'retribution.' Punishment serves several purposes: retributive, rehabilitative, deterrent—and preventive." Justice Frankfurter noted some years earlier, "[p]unitive ends may be pursued in civil proceedings, and, conversely, the criminal process is frequently employed to attain remedial rather than punitive ends." *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 554 (1943) (Frankfurter, J., concurring).

paid upon the [civil] settlement for the offense with which he was charged . . . .<sup>236</sup>

The divide between the civil and the criminal is of great importance, however, to the determination of the applicability of several constitutional provisions. In its long and tortured efforts to distinguish between civil and criminal proceedings, the Supreme Court has recognized that the fact that a defendant is *punished* is not determinative; civil actions often result in sanctions that constitute punishment. "By the common as well as by statute law, men are often punished for aggravated misconduct or lawless acts, by means of a civil action, and the damages, inflicted by way of penalty or punishment, given to the party injured."<sup>237</sup>

The Court rejected an early challenge to a state criminal conviction on the grounds that it punished for the same offense as a federal statute, noting that offenders can be punished through imposition of both civil and criminal "punishment." The Double Jeopardy Clause is not implicated where both civil damages and criminal sanctions are imposed "in consequence of the same act," even though the defendant "may be said, in common parlance, to be twice punished for the same offense."<sup>238</sup> Compensatory damages to the civil plaintiff can constitute "punishment"—but for the purposes of the Double Jeopardy Clause, the mere fact that a particular sanction imposes "punishment" is not sufficient to trigger the various constitutional protections afforded in criminal proceedings.

The Court has struggled with this problem in the past decade. In *United States v. Halper*, the Court held that the fact that a civil remedy constituted punishment might trigger the concerns of the Double Jeopardy Clause, noting that "[t]he notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law."<sup>239</sup> The double jeopardy aspect of this holding was overruled in *Hudson v. United States*, which revived the longstanding constitutional recognition that, while both civil and criminal proceedings may serve to "punish," only criminal proceedings trigger the special protections of the Double Jeopardy

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236. *United States v. Chouteau*, 102 U.S. 603, 611 (1880).

237. *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1851).

238. *Moore v. Illinois*, 55 U.S. (14 How.) 13, 20 (1852); see *Hess*, 317 U.S. at 549-50.

239. 490 U.S. 435, 447-48 (1989).

Clause.<sup>240</sup> Thus, the first step in the constitutional analysis is to determine "[w]hether a particular punishment is criminal or civil," a matter of statutory construction relying on the intent of the legislature.<sup>241</sup>

That civil remedies can constitute "punishment" is even more clear when considering punitive damages. As the Supreme Court noted in a recent case, civil damage awards in excess of the amount necessary to redress the injured plaintiff were an established practice in the eighteenth century:

[T]he practice of awarding damages far in excess of actual compensation for quantifiable injuries was well recognized at the time the Framers produced the Eighth Amendment. Awards of double or treble damages authorized by statute date back to the 13th century, and the doctrine was expressly recognized in cases as early as 1763.<sup>242</sup>

The modern Supreme Court has also made it clear that "punitive damages advance the interests of punishment and deterrence, which are also among the interests advanced by the criminal law."<sup>243</sup> Indeed, as Justice O'Connor noted in dissent in *Browning-Ferris*: "The Court's cases abound with the recognition of the penal nature of punitive damages."<sup>244</sup>

240. 522 U.S. 93 (1997).

241. *Id.* at 99.

242. *Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 274 (1989) (citing *Wilkes v. Wood*, 1 Lofft. 1, 18-19, 98 Eng. Rep. 489, 498-99 (K.B. 1763)) (additional citations omitted).

243. *Browning-Ferris*, 492 U.S. at 275.

244. *Id.* at 297 (O'Connor, J., dissenting). As the Court noted in *Beckwith v. Bean*: "The principle of permitting damages, in certain cases, to go beyond naked compensation, is for example, and the punishment of the guilty party for the wicked, corrupt, and malignant motive and design which prompted him to the wrongful act." 98 U.S. (8 Otto) 266, 277 (1878). See also *Lake Shore & M.S. Ry. Co. v. Prentice*, stating that in civil cases, exemplary damages are imposed where there is

evidence of such wilfulness, recklessness or wickedness, on the part of the party at fault, as amounted to criminality, which for the good of society and warning to the individual ought to be punished. . . . [I]n such cases, or in any case of a civil nature, it is the policy of the law to visit upon the offender such exemplary damages as will operate as punishment and teach the lesson of caution to prevent a repetition of criminality . . . .

147 U.S. 101, 115-16 (1893).

Use of the term "punish" in the Offenses Clause, therefore, does not limit its reach to criminal sanctions. To the contrary, civil awards of compensatory and punitive damages have long been recognized as a form of "punishment" of the defendant. Congress's authority to "punish" violations of the law of nations includes the power to impose civil liabilities for such violations.

### *C. The Civil/Criminal Line*

The historical context and the language of the Offenses Clause indicate that the framers sought to grant Congress a flexible range of options to respond to violations of international law, imposing whatever sanctions best served to punish the perpetrators, deter future violations, and make whole both the victims and the U.S. government. This conclusion is buttressed as well by an understanding of the blurred distinction between the criminal and the civil at the time that the Constitution was framed. Indeed, a sharp constitutional line limiting Congress to criminal sanctions rather than civil remedies would have been an anomaly in the late eighteenth century, for the practice at the time was to employ an overlapping mix of civil and criminal penalties.<sup>245</sup> The distinction between the criminal and the civil was both more malleable than it is today, and less clearly pegged to modern notions of public versus private prosecution, or imprisonment and fines versus compensation. Reading our own notions of these distinctions into the Constitution would impose categories that were of limited significance at the time the document was drafted.

The framers, it is true, understood the importance of preventing governmental abuse of the criminal process, and amended the Constitution accordingly soon after ratification. The Constitution, and particularly the Bill of Rights, carefully delineate the special procedures applicable to criminal prosecutions, but not to civil litigation.<sup>246</sup> Despite this careful distinction, however, the early

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245. See *supra* notes 232-36 and accompanying text.

246. Article III, Section 2, Clause 3 states: "Trial of all Crimes . . . shall be by Jury . . . in the State where the said Crimes shall have been committed . . ." Similarly, the Fifth Amendment provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor shall any person

legislators frequently switched from civil sanctions to criminal penalties with apparent disregard for the fact that the defendant would thereby gain or lose the greater protections offered by the Bill of Rights.<sup>247</sup> This is not to say that the framers did not recognize the distinction, but rather that they viewed both categories of judicial action as appropriate means to penalize legal transgressions, and often applied them interchangeably. A constitutional limitation to criminal sanctions would have been an oddity in the legal environment of the time.

To put a brief historical context behind this observation, civil and criminal proceedings share tangled roots. The early English legal system did not distinguish between crimes and torts. Instead, violations of legal obligations were punished by monetary fines payable to the Crown or by imprisonment, without distinction between private and public wrongs or distinctive legal proceedings. "Most offenses were punished by amercements or fines which were exacted in lieu of imprisonment. Every tort, indeed, every civil action, was a punishable offense."<sup>248</sup> The distinction between civil and criminal proceedings developed slowly over the centuries, with civil proceedings continuing to reflect their mixed heritage as a means of both punishing the offender and compensating the

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be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself . . ."

Finally, the Sixth Amendment ensures that:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The framers clearly thought that they knew a criminal prosecution when they saw one—as one commentator has phrased it: "The Framers, for all their prescience, did not anticipate post-modernism. They apparently thought they knew what the 'criminal' process was." Stephen J. Schulhofer, *Two Systems of Social Protection: Comments on the Civil-Criminal Distinction, with Particular Reference to Sexually Violent Predator Laws*, 7 J. CONTEMP. LEGAL ISSUES 69, 78-79 (1996). In practice, however, jurists of the time had a great deal of difficulty in determining what proceedings triggered the constitutional protections, a problem that continues to plague the Supreme Court, as discussed *supra* text accompanying notes 237-44.

247. See *supra* notes 232-36 and accompanying text.

248. Gerald W. Boston, *Punitive Damages and the Eighth Amendment: Application of the Excessive Fines Clause*, 5 COOLEY L. REV. 667, 720 (1988).



victim.<sup>249</sup> The monetary payments that had been paid to the king as punishment for an offense developed into compensatory and punitive damages paid to the injured party through private tort litigation.

[T]he English courts in the eighteenth and nineteenth centuries have simply transplanted the reparative and punitive functions from medieval times to the modern practice of private torts. The only difference between amercements in King John's time and modern civil actions is that payment goes to the plaintiff, not the crown.<sup>250</sup>

On the other hand, criminal prosecutions maintained attributes that we associate with private civil proceedings. Although nominally in the name of the king, they were often litigated by private parties, usually the victim, but sometimes a stranger.<sup>251</sup> The private party filed the charges, paid all expenses and presented evidence.<sup>252</sup> Although a fine collected in such a lawsuit would be paid to the king, private prosecutors could benefit from the procedure by accepting a payment from the defendant in lieu of prosecution—serving a function similar to a civil damage award.<sup>253</sup> Purely private prosecutions in the name of the victim were also possible.<sup>254</sup> Furthermore, private informers or relators could litigate

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249. See *id.* at 730-31 n.266.

250. *Id.* at 731; see also Calvin R. Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons From History*, 40 VAND. L. REV. 1233, 1267 (1987) ("[T]he function of amercements, namely to sanction those guilty of offenses not criminal but worthy of punishment, is clearly replicated in the awarding of punitive damages.").

251. See David D. Friedman, *Making Sense of English Law Enforcement in the Eighteenth Century*, 2 U. CHI. L. SCH. ROUNDTABLE 475, 475-76 (1995).

252. See *id.*

253. "Compounding" a misdemeanor in this way was legal in eighteenth-century England, and although compounding a felony was illegal, Friedman concludes that it was fairly common. See *id.* at 486-87. Friedman argues that the system worked well to deter and punish misconduct and compensate those injured:

The possibility of compounding provided an incentive to prosecute—it converted the system into something more like a civil system, where a victim sues in the hope of collecting money damages. And while compounding might save the criminal from the noose, he did not get off scot-free. He ended up paying, to the prosecutor, what was in effect a fine.

*Id.* at 487.

254. Called an "appeal of felony," the procedure was rarely used in the late eighteenth century. See *id.* at 476 n.11 (citing 4 BLACKSTONE, *supra* note 46, at \*312-16).

claims for violations of statutory duties against both private defendants and against government officials for violations of public duties. Some statutes permitted the private litigator to keep part of the fine imposed on the defendant.<sup>255</sup> Thus, in eighteenth-century English civil and criminal actions, neither the sanctions imposed nor the identity of the litigator conformed to modern notions of a civil/criminal distinction.

Early U.S. law followed the English model, authorizing redress for public offenses both through "pure" criminal proceedings, initiated by a government prosecutor seeking imprisonment or fines payable to the government, and through private litigation in which a penalty or forfeiture for violation of a public duty could be recovered by a private individual. "Statutes providing for actions by a common informer . . . have been in existence for hundreds of years in England, and in this country ever since the foundation of our Government."<sup>256</sup> The informer was a stranger to the underlying action, litigating the claim for personal gain.<sup>257</sup> In a society short of public resources to prosecute criminal violations, private actions played a key role in the enforcement of penal statutes, and many such statutes authorized both options: "Almost every fine or forfeiture under a penal statute, may be recovered by an action of debt as well as by information."<sup>258</sup>

Civil and criminal proceedings were so intertwined at the time of the drafting of the Constitution that distinguishing between them

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255. See 4 BLACKSTONE, *supra* note 46, at \*308.

256. *Marvin v. Trout*, 199 U.S. 212, 225 (1905), *quoted in* *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 541 n.4 (1943); *see also* Evan Caminker, Comment, *The Constitutionality of Qui Tam Actions*, 99 YALE L.J. 341, 341-43 (1989) (discussing early history of qui tam actions).

257. "The right to recover the penalty or forfeiture granted by statute is frequently given to the first common informer who brings the action, although he has no interest in the matter whatever except as such informer." *Marvin*, 199 U.S. at 225.

258. *Adams v. Woods*, 6 U.S. (2 Cranch) 336, 341 (1805). Eleven statutes enacted by the First Congress created qui tam actions, including several that "imposed penalties and/or forfeitures for conduct injurious to the general public" and provided that the recovery be "shared between the informer and the United States." Caminker, *supra* note 256, at 342 n.3. Offenses included "marshals' misfeasance in census-taking," "harboring runaway mariners," "unlicensed Indian trade," "unlawful trades or loans by Bank of United States subscribers," and "avoidance of liquor import duties." *Id.* Others "authorized informers bringing successful prosecutions to keep the entire recovery." *Id.* (citing statutes governing "import duty collectors' failure to post accurate rates" and "failure to register vessels properly"). An additional qui tam statute allowed a suit for damages for copyright infringement. *See id.*

in the historical record presents "[p]articularly thorny" problems.<sup>259</sup> "Colonial legislatures, like Parliament, made no sharp distinction between different forms directed to the same end."<sup>260</sup> Frankfurter and Corcoran, in an exhaustive study of early criminal law procedures in several of the colonies at the time of the Framing, noted the difficulty of "observ[ing] the distinction between formally different proceedings producing, as a matter of substance, the same result."<sup>261</sup> Listing hundreds of early statutes penalizing "petty offenses," they pointed to "the wholly capricious way in which infractions of the law were sometimes directed to be enforced by formal criminal prosecutions, and sometimes by civil penalties."<sup>262</sup> Moreover, nominally civil proceedings could lead to imprisonment for failure to pay the fine imposed.<sup>263</sup> These early legal proceedings did not distinguish between civil and criminal proceedings based on either the identity of the litigator of the action (public official or private citizen) or the form of the sanction (fine paid to the government, fine paid to a private person, or imprisonment).

The First Congress recognized that violations of federal statutes would be punished through both criminal and civil enforcement procedures, providing federal court jurisdiction for both proceedings. The Judiciary Act of 1789 asserted exclusive federal jurisdiction both over "all crimes and offenses that shall be cognizable under the authority of the United States . . . and of all suits for penalties and forfeitures incurred, under the laws of the United States."<sup>264</sup> The Crime Bill of 1790 specified that its statute

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259. See Felix Frankfurter & Thomas G. Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917, 937 (1926).

260. *Id.*

261. *Id.* at 937 n.91.

262. *Id.* In one of many examples documented by Frankfurter and Corcoran, discharging firearms in New York on New Year's Eve in 1771 subjected an offender to a fine of 20 shillings, enforced through a criminal prosecution. See *id.* at 946. In 1785, the fine was doubled and enforcement shifted to civil *qui tam* suits, with half of the fine paid to the informer, and half to the benefit of the poor. See *id.*

263.

From 1732 down to the Revolution there is abundant resort to *qui tam* prosecutions for the enforcement of laws relating to fishing, hunting, Indians, hawkers and peddlers, liquor, adulteration of food, with penalties as high as fifty pounds and, in default of payment, imprisonment for six months at hard labor.

*Id.*

264. Act of Sept. 24, 1789, ch. 20, § 9, 1 Stat. 73, 76-77.

of limitations applied not just to prosecutions upon indictment or information, but also to suits for "any fine or forfeiture under any penal statute."<sup>265</sup> In 1805, the Supreme Court ruled in *Adams v. Wood* that this language applied to an action of debt, a private civil action to recover money owed to the government, as well as to criminal prosecutions.<sup>266</sup>

The confused interrelation between civil and criminal actions is illustrated by the judiciary's struggle to classify these actions over the ensuing decades. In *Adams*, Chief Justice Marshall noted that "[a]lmost every fine or forfeiture under a penal statute, may be recovered by an action of debt as well as by [criminal] information."<sup>267</sup> Shortly thereafter, Justice Thompson, sitting on a circuit court in *Stearns v. United States*, confronted the question of whether an action of debt seeking to recover a fine imposed by a criminal statute was a criminal or civil action.<sup>268</sup> The case offers a striking example of the mix between what we would today view as civil and criminal proceedings and sanctions. The litigation began when William Cardell was sued in Vermont state court in a civil action by a private party seeking a penalty for violations of a federal criminal statute imposing duties on liquor retailers. Stearns posted a bond to release Cardell from custody. When neither Cardell nor Stearns paid the debt, Stearns was imprisoned "as bail" for Cardell—imprisoned, that is, for failure to pay the civil debt owed on Cardell's bond.<sup>269</sup> After Stearns was released early under a local statute "relative to poor prisoners," an unknown private party brought this action of debt in the name of the United States, arguing that Stearns had escaped from prison and should be forced to pay his debt.<sup>270</sup> Under the applicable statute, half of the recovery would have gone to the private party—"the collector or informer"—and half to the United States.<sup>271</sup>

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265. Act of Apr. 30, 1790, ch. 10, § 32, 1 Stat. 112, 119.

266. 6 U.S. (2 Cranch) 336, 340-42 (1805).

267. *Id.* at 341.

268. 22 F. Cas. 1188 (no date or district given) (No. 13,341). The issue was central to the case because the court took as given that the state courts had no jurisdiction over federal criminal prosecutions. *See id.* at 1189-90.

269. *See id.* at 1189.

270. *Id.*

271. *Id.* at 1192.

Stearns argued that if the underlying action against Cardell were criminal, the Vermont court would not have had jurisdiction. Justice Thompson rejected this challenge, however, concluding that the suit was civil, not criminal: "This was not a criminal prosecution, but a civil action to recover a penalty for breach of a statute. . . . To sustain this suit, is not administering the criminal law of the United States. Actions for penalties are civil actions, both in form and in substance . . . ." <sup>272</sup> Thus, the court concluded, an action by a private party to collect a fine imposed for a crime is a civil action, depriving the distinction between the two of virtually all normative and structural significance.

The Supreme Court has returned to this issue several times, however, to determine what, if any, constitutional protection must be afforded the defendant in these nominally civil proceedings. The result has been to further muddy the line between civil and criminal proceedings. In *Lees v. United States*, the Court once again reaffirmed the civil nature of the action of debt:

[A] penalty may be recovered by indictment or information in a criminal action, or by a civil action in the form of an action of debt. . . . [A]lthough the recovery of a penalty is a proceeding criminal in its nature, yet in this class of cases it may be enforced in a civil action, and in the same manner that debts are recovered in the ordinary civil courts. <sup>273</sup>

Nevertheless, the Court has applied the criminal law statute of limitations to these civil actions, <sup>274</sup> and refused to allow the government's choice of civil rather than criminal remedies to limit the defendant's privilege against self-incrimination: "This, though an action civil in form, is unquestionably criminal in its nature, and in such a case a defendant cannot be compelled to be a witness against himself." <sup>275</sup> Efforts to draw constitutional lines around

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272. *Id.* Although the circuit court upheld the validity of the underlying state court judgment against Cardell, *see id.* at 1189-92, it reversed the federal district court's judgment in the action against Stearns, holding that he had been validly released from prison under the applicable state law and thus was not obligated to pay the fine. *See id.* at 1192.

273. 150 U.S. 476, 479 (1893).

274. *See Adams v. Woods*, 6 U.S. (2 Cranch) 336, 340-42 (1805).

275. *Lees*, 150 U.S. at 480.

these "quasi-criminal" proceedings continue to stymie courts and commentators alike.<sup>276</sup>

Traditional civil lawsuits also bore similarities to criminal prosecutions. Imprisonment for debt was common in the late eighteenth century, and debtors accounted for a substantial proportion of the prison population well into the nineteenth century.<sup>277</sup> Recall that the unfortunate Joseph Stearns was imprisoned because of the debt arising out of his failure to pay the bond he posted on Cardell's behalf—that is, he was imprisoned for failure to pay a civil judgment.<sup>278</sup> It was not until the mid-nineteenth century that states began to eliminate imprisonment for failure to satisfy civil monetary judgements, a reform drive that was not substantially successful until the beginning of the twentieth century.<sup>279</sup>

Several statutory schemes in the late eighteenth and early nineteenth century reflected the common practice of combining remedies that we would today classify as civil or criminal. The most notorious early example, the Fugitive Slaves Act of 1793,<sup>280</sup> arose out of the southern states' push to implement their constitutionally protected right to reclaim slaves who escaped to other states.<sup>281</sup> The criminal statute imposed sanctions on those who interfered with a slave owner's efforts to recapture a slave. The penalties included a

276. See Gregory Y. Porter, Note, *Uncivil Punishment: The Supreme Court's Ongoing Struggle with Constitutional Limits on Punitive Civil Sanctions*, 70 S. CAL. L. REV. 517 (1997).

277. See Vern Countryman, *Bankruptcy and the Individual Debtor—And a Modest Proposal to Return to the Seventeenth Century*, 32 CATH. U. L. REV. 809, 812-14 (1983); Richard Ford, *Imprisonment for Debt*, 25 MICH. L. REV. 24, 29 (1926). One member of the Constitutional Convention, Robert Morris, was incarcerated nearly three years for debt, and was released in 1801 only after Congress enacted a new bankruptcy law. See CHARLES WARREN, *BANKRUPTCY IN UNITED STATES HISTORY* 13, 20 (William S. Hein & Co. 1994) (1935). Another, Supreme Court Justice James Wilson, was forced to flee Pennsylvania in 1798 to avoid imprisonment for debt. See *id.* at 13.

278. See *supra* text accompanying notes 268-72.

279. See PETER J. COLEMAN, *DEBTORS AND CREDITORS IN AMERICA: INSOLVENCY, IMPRISONMENT FOR DEBT, AND BANKRUPTCY, 1607-1900*, at 249-68 (1974).

280. Act of Feb. 12, 1793, ch. VII, 1 Stat. 302.

281.

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

U.S. CONST. art. IV, § 2, cl. 3.

fine payable to the slave owner or the owner's agent in an action of debt; the owner was given a private right of action to file a civil suit to collect the fine.<sup>282</sup> In addition, the statute granted the slaveowner the right to sue in tort for damages.<sup>283</sup> Thus, to secure the constitutionally protected "property" right in slaves, Congress offered a range of civil and criminal remedies to those whose rights were violated.

The Court upheld similar crossover statutory schemes in other areas, recognizing Congress's power to impose a mix of sanctions for violations of statutory rights. For example, in *United States v. Hall*, the Court considered a broad statute regulating the distribution of federal pensions.<sup>284</sup> The Court found that Congress's power to establish the pension system implied the power to impose a wide range of sanctions—both public and private, criminal and civil—to protect that system.<sup>285</sup> In an analogous setting, addressing a statute imposing civil penalties for violations of regulations governing railroads, the Court held that Congress has the power to create remedies enforced by either the government or a private party:

The power of the State to impose fines and penalties for a violation of its statutory requirements is coeval with government; and the mode in which they shall be enforced, whether at the suit of a private party, or at the suit of the public, and what disposition shall be made of the amounts collected, are merely matters of legislative discretion.<sup>286</sup>

These holdings indicate that, given the power to require compliance with a given set of norms, Congress has the complementary power to choose the method by which such compliance shall be enforced. That enforcement can include, at the discretion of Congress, penalties enforceable through civil suits or through criminal prosecutions.

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282. See Act of Feb. 12, 1793, ch. VII, § 4, 1 Stat. 302, 305; Robert J. Kaczorowski, *The Tragic Irony of American Federalism: National Sovereignty Versus State Sovereignty in Slavery and in Freedom*, 45 U. KAN. L. REV. 1015, 1025-27 (1997).

283. See ch. VII, § 4, 1 Stat. at 305.

284. 98 U.S. 343 (1878).

285. See *id.* at 357-58.

286. *Missouri Pac. Ry. Co. v. Humes*, 115 U.S. 512, 523 (1885).

Similarly, given a constitutional power to sanction violations of the law of nations, Congress is free to employ a range of different means to enforce compliance with those norms. Such flexibility is inevitable given the fluidity of the line between civil and criminal proceedings at the time the Constitution was drafted.

*D. Civil Regulation as an Adjunct to the Power to Criminalize*

The Offenses Clause incorporates an evolving notion of international law, as that law develops over time.<sup>287</sup> Combined with the broad powers conveyed by the Necessary and Proper Clause, the Offenses Clause authorizes Congress to take all steps designed to implement international law. As the Court noted in *Arjona*:

A right secured by the law of nations to a nation, or its people, 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.<sup>288</sup>

Thus, even if the Clause were specifically directed to penal sanctions, imposition of civil sanctions would be authorized as an outgrowth of that criminal power by the Necessary and Proper Clause. Under the Court's broad reading of that power, if Congress deems the creation of a civil cause of action necessary to implement the Offenses Clause, it can constitutionally do so; civil sanctions are an included adjunct of a criminal power.

The Constitution grants Congress explicitly penal powers in three other areas: counterfeiting,<sup>289</sup> piracy, and offenses on the high seas.<sup>290</sup> As to all three, Congress clearly has a broad authority to regulate as well as to impose criminal penalties. It is difficult to trace the source of this authority, however, because the civil

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287. See *supra* notes 108-41 and accompanying text.

288. *United States v. Arjona*, 120 U.S. 479, 487 (1887).

289. See U.S. CONST. art. I, § 8, cl. 6 (granting Congress the power "[t]o provide for the Punishment of counterfeiting the Securities and current Coin of the United States").

290. See *id.* art. I, § 8, cl. 10 (granting Congress the power "[t]o define and punish Piracies and Felonies committed on the high Seas").



regulatory power in each of these areas has an additional basis. As to counterfeiting, the expansion of the Commerce Clause and other constitutional powers long ago rendered the Counterfeiting Clause irrelevant;<sup>291</sup> there has been no need for the courts to determine the full reach of the Clause.

The Offenses Clause is part of the broader provision that grants Congress the power "[t]o define and punish Piracies and Felonies committed on the high Seas."<sup>292</sup> Although both "piracies" and "felonies" refer to crimes,<sup>293</sup> the specific criminal language does not indicate that they authorize only criminal sanctions. Both commentators and courts have long recognized congressional power to provide civil remedies for both piracy and offenses at sea. For example, in 1795, Attorney General William Bradford discussed the possible legal consequences for U.S. citizens who, in violation of the U.S. neutrality in the war between Great Britain and France, joined a French fleet attacking the British colony in Sierra Leone.<sup>294</sup> As "crimes committed on the high seas *are* within the jurisdiction" of the U.S. courts, the Attorney General stated, the "offense" could be prosecuted in those courts.<sup>295</sup> In addition, a civil suit by either the corporation or individuals injured in the attack could be brought under what is now known as the Alien Tort Claims Act (ATCA),

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291. See Nathan K. Cummings, *The Counterfeit Buck Stops Here: National Security Issues in the Redesign of U.S. Currency*, 8 S. CAL. INTERDISC. L.J. 539, 539 (1999) (stating that despite specific language of the Counterfeiting Clause, "the Supreme Court has surprisingly construed other constitutional provisions to be the main bases of Congress' power to combat counterfeiting, thus rendering the Counterfeiting Clause largely superfluous").

292. U.S. CONST. art. I, § 8, cl. 10. The full text of Clause 10 grants Congress the power "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations."

293. As noted earlier, the only reference I have uncovered prior to the 1990s that addresses the issue of whether the Offenses Clause applies to civil as well as criminal claims, a paragraph in a 1944 law review article, dismisses in a sentence the possibility on the basis of the placement of "offenses against the law of nations" in this Clause alongside piracy and felonies. See Pergler, *supra* note 24, at 325. This superficial conclusion ignores the fact that civil sanctions may be imposed for criminal behavior.

294. See 1 Op. Att'y Gen. 57 (1795).

295. *Id.* at 58. Bradford noted some doubt about whether such prosecutions could actually be undertaken, because of confusion about the terms of the authorizing legislation. He did not question, however, the federal government's power to provide for such prosecutions. See *id.* at 58-59.

which provides federal jurisdiction for torts in violation of the law of nations.<sup>296</sup>

That same year, a federal district court sustained jurisdiction over a civil claim for restitution of "property" seized as sea, finding jurisdiction under both admiralty and the ATCA.<sup>297</sup> The ATCA soon lost significance as a basis for jurisdiction over such actions, as the Supreme Court confirmed admiralty jurisdiction over civil claims arising at sea.<sup>298</sup> In a case implicating the Piracy Clause, the Court decided in 1825 that admiralty jurisdiction permits civil suits for damages against a tortfeasor even in cases where the harm was caused through criminal acts such as piracy.<sup>299</sup> With federal jurisdiction over such civil litigation firmly based in admiralty law, the courts had no need to consider the civil implications of the powers granted to Congress by the Piracy Clause or the provision governing "Felonies committed on the high Seas."<sup>300</sup>

296. See *id.* at 59. The ATCA is now codified at 28 U.S.C. § 1350 (1994), and is discussed *infra* notes 303-20 and accompanying text. Attorney General Bradford noted the advantages of a civil proceeding: Since "such a suit may be maintained by evidence taken at a distance, on a commission issued for that purpose, the difficulty of obtaining redress would not be so great as in a criminal prosecution, where *viva voce* testimony alone can be received as legal proof." 1 Op. Att'y Gen. at 59.

297. See *Bolchos v. Darrel*, 3 F. Cas. 810 (D.S.C. 1795) (No. 1,607). I put "property" in quotation marks because the dispute concerned "property" rights to three human beings, slaves who were aboard a Spanish ship when it was captured as prize. See *id.* at 810.

298. There has been some dispute about whether the civil power was originally intended to derive from admiralty jurisdiction. Compare William R. Casto, *The Origins of Federal Admiralty Jurisdiction in an Age of Privateers, Smugglers, and Pirates*, 37 AM. J. LEGAL HIST. 117 (1993) (arguing that the founders viewed admiralty jurisdiction as addressing public litigation, not private civil litigation), with Jonathan M. Gutoff, *Original Understandings and the Private Law Origins of the Federal Admiralty Jurisdiction: A Reply to Professor Casto*, 30 J. MAR. L. & COM. 361 (1999) (refuting Casto's public law paradigm).

299. The Court held in *Manro v. Almeida* that a civil claim for damages did not "merge" with the crime of piracy and could be litigated under admiralty jurisdiction:

Upon the whole, we are of opinion, that for a maritime trespass, even though it savours of piracy, the person injured may have his action in personam, and compel appearance by the process of attachment on the goods of the trespasser, according to the forms of the civil law, as ingrafted upon the admiralty practice. 23 U.S. (10 Wheat.) 473, 496 (1825); see also *Ex parte McNiel*, 80 U.S. (13 Wall.) 236, 242 (1871) ("Courts of admiralty have undoubted jurisdiction of all marine contracts and torts."); Solon D. Wilson, *Offences on the High Seas*, 18 CRIM. L. MAG. & REP. 651, 659 (1896) ("The admiralty possesses unquestioned jurisdiction of suits for the redress of private injuries to the rights of personal security and personal liberty committed on the high seas."). Wilson's article considers both the criminal law and civil consequences arising out of "offenses" committed at sea.

300. U.S. CONST. art I, § 8, cl. 10. These intertwined constitutional provisions, authorizing

*E. The Civil Power in Action: Remedies for Human Rights Violations*

Properly understood, the Offenses Clause authorizes congressional regulation of any topic governed by the law of nations. In particular, Congress has the power to "punish" an international law violation by creating a federal cause of action for damages against the perpetrator. Indeed, Congress has done exactly that in two statutes enacted 200 years apart, the Alien Tort Claims Act<sup>301</sup> and the Torture Victim Protection Act,<sup>302</sup> each of which demonstrates congressional implementation of the powers granted by the Offenses Clause.

Congress enacted the ATCA just two years after the ratification of the Constitution. As part of the Judiciary Act of 1789,<sup>303</sup> the ATCA provides federal court jurisdiction over a claim for damages "by an alien for a tort only, committed in violation of the law of nations."<sup>304</sup> The ATCA was virtually ignored until the 1980 decision in *Filártiga v. Peña-Irala*, when the Second Circuit applied the statute to sustain jurisdiction over a claim against a Paraguayan police official for the torture and death of a young man in Paraguay.<sup>305</sup> The *Filártiga* court recognized that the statute

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a range of responses to violations of legal norms, further indicate the difficulty of attempting to sharply divide the civil and criminal realms.

301. 28 U.S.C. § 1350 (1994).

302. 28 U.S.C. § 1350 note (1994).

303. Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 63, 77. The original language stated that the district courts "have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States." *Id.*

304. 28 U.S.C. § 1350 (1994).

305. 630 F.2d 876, 880 (2d Cir. 1980); see also BETH STEPHENS & MICHAEL RATNER, INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 8 (1996) (describing the pre-*Filártiga* history of the ATCA).

Although some commentators have argued that the ATCA is purely jurisdictional, eighteenth-century references to the statute rely on its intent to grant a right to sue for international law violations, as well as to shift jurisdiction from the state to the federal courts. See, for example, Attorney General Bradford's discussion of the statute as granting a right to sue for a violation of international law rules governing neutrality, *supra* text accompanying notes 171-75. Every court that has reached the issue has concluded that the ATCA provides a cause of action as well as federal court jurisdiction over such claims. See *Abebe-Jira v. Negewo*, 72 F.3d 844, 847 (11th Cir. 1996), *cert. denied*, 519 U.S. 830 (1996) (interpreting the statute "as providing both a private cause of action and a federal forum

incorporates an evolving notion of international law, holding that "it is clear that courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today."<sup>306</sup> Courts over the past twenty years have applied the ATCA to a growing list of human rights abuses, including some that violate recently developed international norms.<sup>307</sup> Cases have also expanded the range of defendants who can be held accountable under the ATCA to commanders as well as the actual torturer,<sup>308</sup> and to private actors, including corporations.<sup>309</sup> Moreover, although

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where aliens may seek redress for violations of international law"); *Kadic v. Karadzic*, 70 F.3d 232, 246 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996) (upholding ATCA claims for genocide, war crimes, and official torture); *In re Estate of Marcos*, 25 F.3d 1467, 1474-75 (9th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995) (rejecting argument that the ATCA is merely jurisdictional). Moreover, in enacting the TVPA, 28 U.S.C. § 1350 note (1994), a modern Congress indicated its agreement with this line of cases and their interpretation of the ATCA. See H.R. REP. NO. 102-367, at 1 (1992), *reprinted in* 1992 U.S.C.C.A.N. 84; see also *Abebe-Jira*, 72 F.3d at 848 (noting Congress's endorsement of the *Filártiga* line of cases). For a full discussion of the various theories regarding the ATCA as a cause of action, see Harold Hongju Koh, *Civil Remedies for Uncivil Wrongs: Combatting Terrorism Through Transnational Public Law Litigation*, 22 TEX. INT'L L.J. 169, 186 nn.61-62 (1987); Kenneth C. Randall, *Further Inquiries into the Alien Tort Statute and a Recommendation*, 18 N.Y.U. J. INT'L L. & POL. 473, 477-95 (1986); Ralph G. Steinhardt, *Fulfilling the Promise of Filártiga: Litigating Human Rights Claims Against the Estate of Ferdinand Marcos*, 20 YALE J. INT'L L. 65, 72-82 (1995).

306. *Filártiga*, 630 F.2d at 881. All courts that have decided the issue have agreed that the statute refers to current norms of international law, and Congress has indicated its agreement as well. See, e.g., *Abebe-Jira*, 72 F.3d at 848; H.R. REP. NO. 102-367, at 4 (1992) (noting that the ATCA permits suits based on "norms that already exist or may ripen in the future into rules of customary international law"). The only dissenting judicial voice appeared in a concurring opinion by Judge Bork in *Tel-Oren v. Libyan Arab Republic*, in which he argued that the statute should be limited to crimes similar to those recognized as violations of the law of nations by Blackstone, an argument that has not been adopted in any of the subsequent cases. 726 F.2d 774, 813-16 (D.C. Cir. 1984).

307. See, e.g., *Kadic*, 70 F.3d at 246 (genocide, war crimes, and crimes against humanity); *Doe I v. Unocal Corp.*, 963 F. Supp. 880, 891-92 (C.D. Cal. 1997) (slavery); *Xuncax v. Gramajo*, 886 F. Supp. 162, 185-89 (D. Mass. 1995) (certain acts of cruel, inhuman, or degrading treatment); *id.* at 173-75 (gender violence such as rape as a form of torture); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1541-42 (N.D. Cal. 1987), *reconsidered*, 694 F. Supp. 707, 709-11 (N.D. Cal. 1988) (summary execution, prolonged arbitrary detention, and disappearance).

308. See, e.g., *Kadic*, 70 F.3d at 242 (holding de facto head of state responsible for abuses committed by his military forces); *In re Estate of Marcos*, 25 F.3d at 1474-76 (holding ex-dictator of the Philippines responsible for abuses committed by his security forces).

309. See *Kadic*, 70 F.3d at 239-45 (applying statute to private actors); *Jama v. United States Immigration and Naturalization Serv.*, 22 F. Supp. 2d 353, 365-66 (D.N.J. 1998) (corporate defendant); *Doe I*, 963 F. Supp. at 889-95 (corporate defendant).

the ATCA has been used primarily as the basis for suits against foreign officials and U.S.-based corporations for actions taken abroad, recent cases have also challenged the actions of U.S. and local government officials.<sup>310</sup>

The ATCA has been the subject of extensive scholarly debate over everything ranging from its philosophical underpinnings<sup>311</sup> to the significance of the word "only" in its text.<sup>312</sup> One key dispute for purposes of this Article concerns the constitutional basis for the provision. Courts and commentators have generally pointed to two interrelated grounds, both deriving to some extent from the framers' expressed intent to centralize foreign affairs powers in the federal government. First, as discussed at greater length in the next section, the broad federal authority over foreign relations supports congressional power to regulate foreign affairs by affording those harmed by violations of international law the right to seek damages in federal court.<sup>313</sup> In the ATCA, the eighteenth-century Congress delegated to the courts the task of defining the exact contours of such claims.<sup>314</sup> Such delegation was unexceptional to the framers, who assumed that customary international law was a part of the

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310. See *Martinez v. City of Los Angeles*, 141 F.3d 1373, 1377 (9th Cir. 1998); *Jama*, 22 F. Supp. 2d at 365-66.

311. See generally STEPHENS & RATNER, *supra* note 305 (providing an overview of the history of the statute and its judicial application, and debates about the statute's significance); THE ALIEN TORT CLAIMS ACT: AN ANALYTICAL ANTHOLOGY (Ralph G. Steinhardt & Anthony D'Amato eds., 1999) (presenting a selection of articles on the ATCA with an extensive bibliography).

On the philosophical underpinnings of the ATCA, compare D'Amato, *supra* note 57, at 64-65, stressing a concern that mistreatment of aliens could lead to wars, endangering national security, and Casto, *supra* note 59, at 488-510, stressing the need to protect foreign diplomats, with Burley, *supra* note 53, at 464-88, suggesting that the statute's primary purpose was to satisfy a moral duty to comply with international law, and critiquing alternative theories as to the original goal of statute.

312. Compare Joseph Modeste Sweeney, *A Tort Only in Violation of the Law of Nations*, 18 HASTINGS INT'L & COMP. L. REV. 445 (1995) (arguing that the use of "only" indicates intent to limit statute to torts committed in course of captures at sea), with Dodge, *supra* note 59, at 254-56 (concluding that "only" was intended to restrict statute to torts rather than contract claims).

313. See *infra* notes 324-47 and accompanying text.

314. "[W]e conclude that the Alien Tort Claims Act establishes a federal forum where courts may fashion domestic common law remedies to give effect to violations of customary international law." *Abebe-Jira v. Negewo*, 72 F.3d 844, 848 (11th Cir. 1996).

common law of both the states and of the new federal government.<sup>315</sup>

In our modern, post-*Erie* world, this unwritten international law is part of the federal common law, a source of both supreme federal law binding on the states, and of federal court jurisdiction.<sup>316</sup> A second constitutional basis for the ATCA, relied on in part by the *Filártiga* court, rests upon the conclusion that since customary international law is part of the federal common law, cases alleging violations of such international norms "arise under" federal law for the purposes of Article III of the Constitution.<sup>317</sup>

The Offenses Clause provides a third constitutional plank, one that rests upon a specific, enumerated power. Under the Clause, Congress has the power to "define and punish" violations of the law of nations. It did so in the ATCA by creating a civil cause of action for such violations, leaving the definition of the offenses to the courts. A modern Congress followed suit when it enacted the TVPA, which creates a federal cause of action for torture and extrajudicial execution.<sup>318</sup> Congress referred to the incorporation of international

315. See Stephens, *supra* note 134, at 408-13.

316. See *id.* at 433-53. Debate over this issue continues. Commentators seem to agree that customary international law was labelled as general common law prior to *Erie*, and thus part of both federal and state common law, and that *Erie* put an end to the mixed general common law. Instead, the crux of the dispute centers on whether, after *Erie*, the "federal" components of the general common law, including customary international law, were adopted into the newly recognized federal common law. Compare Koh, *Is International Law State Law?*, *supra* note 26 (arguing that customary international law is a matter of federal law), and Stephens, *supra* note 134 (same), with Curtis A. Bradley & Jack L. Goldsmith, *Federal Courts and the Incorporation of International Law*, 111 HARV. L. REV. 2260 (1998) [hereinafter Bradley & Goldsmith, *Federal Courts*] (arguing that customary international law is not federal law).

317. See *Filártiga v. Peña-Irala*, 630 F.2d 876, 887 (2d Cir. 1980).

318. Enacted in 1992, the TVPA, 28 U.S.C. § 1350 note (1994), provides a modern counterpart to the ATCA. The TVPA authorizes a civil suit by any individual—citizen or noncitizen—for extrajudicial execution and torture, when committed by "[a]n individual" acting "under actual or apparent authority, or color of law, of any foreign nation." *Id.* § 2(a). The TVPA's detailed definitions of the two torts reflect accepted international standards. See *id.* §§ 3(a), 3(b). See also the comparison of TVPA definitions with international law norms in STEPHENS & RATNER, *supra* note 305, at 63-68. The legislative history of the TVPA stresses that it is not intended to replace the ATCA, but rather to define two specific human rights claims that trigger federal court jurisdiction, and to extend the cause of action to citizens as well as aliens. As the House Report stated:

The TVPA would establish an unambiguous and modern basis for a cause of action that has been successfully maintained under an existing law, . . . the Alien Tort Claims Act . . . [The ATCA] has other important uses and should not be replaced. There should also, however, be a clear and specific remedy, not

law into federal common law as a source of its constitutional power to enact the TVPA,<sup>319</sup> and also to the Offenses Clause.<sup>320</sup> Once established that the Clause authorizes imposition of civil remedies, the TVPA and the ATCA fit neatly within its grant of congressional powers.

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A narrow, ahistorical reading of the Offenses Clause would define an "offense" as a crime and "punish" as the imposition of sanctions through criminal proceedings, and would combine them to interpret the punishment of "Offenses against the Law of Nations" as limited to criminal prosecutions for acts defined as crimes by Congress. We have seen that these cramped definitions, however, are inconsistent with the historical meaning of the words and the legal context in which the Clause was drafted. "Offense" was often used to refer to violations of legally protected rights, rights implicated by injuries to the public trust as well as private harms. "Punish" has consistently included a variety of sanctions, including monetary payments to private parties and to the government, whether intended as compensation, deterrence, or retribution. Most importantly, "Offenses against the Law of Nations" refers to a broad range of

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limited to aliens, for torture and extrajudicial killing.

H.R. REP. NO. 102-367, at 3 (1992); see also S. REP. NO. 102-249, at 4-5 (1992) (same).

319. The Senate Report states:

Congress clearly has authority to create a private right of action for torture and extrajudicial killing committed abroad. Under article III of the Constitution, the Federal judiciary has the power to adjudicate cases "arising under" the "law of the United States." The Supreme Court has held that the law of the United States includes international law. In *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 481 (1983), the Supreme Court held that the "arising under" clause allows Congress to confer jurisdiction on U.S. courts to recognize claims brought by a foreign plaintiff against a foreign defendant.

S. REP. NO. 102-249, at 5 (1992) (footnotes omitted).

320. The Senate also stated: "Congress' ability to enact this legislation also drives from article I, section 8 of the Constitution, which authorizes Congress 'to define and punish . . . Offenses against the Laws of Nations.'" *Id.* at 5-6 (alteration in original).

The *Filártiga* court noted the possibility that the Offenses Clause authorized Congress's enactment of the ATCA, but declined to rest its decision on that basis. See *Filártiga*, 630 F.2d at 887; see also *Eastman Kodak Co. v. Kavlin*, 978 F. Supp. 1078, 1090 (S.D. Fla. 1997) ("[The ATCA] presumably is based upon Congress' power under Article I, section 8 to 'define and punish . . . Offenses against the Law of Nations.'" (alteration in original)).

violations of international norms, subject to an equally broad range of sanctions. The Clause thus authorizes Congress to regulate matters governed by international law, by prohibiting conduct that violates those norms and imposing both civil and criminal sanctions for violations.<sup>321</sup>

This flexible understanding of the Offense Clause reflects the "the reasons for its inclusion in the Constitution, and the evils it was designed to eliminate," as the Supreme Court has instructed.<sup>322</sup> The framers repeatedly expressed concern about preventing, as well as punishing, violations of international law. In the language familiar to them at the time, the punishment of an offense against the law of nations encompassed multiple means of redress.

This formulation of the powers granted to Congress by the Offenses Clause leaves open two sets of questions. First, such a broad ranging power could lead to conflicts with other constitutional provisions, such as protections of individual rights, or the division of powers among the separate branches of the federal government. Further, although the Clause clearly incorporates an evolving definition of the scope of international law, modern international norms reach into areas previously governed by the states, raising federalism concerns. The following sections analyze the scope of the Offenses Clause in light of these potential limitations.

## V. THE OFFENSES CLAUSE IN CONSTITUTIONAL CONTEXT

The Offenses Clause, one of the short list of enumerated congressional powers, is also one of several constitutional provisions ensuring federal control over foreign affairs. The federal foreign affairs power has long been viewed as distinct from the powers exercised by the federal government in the domestic arena. Recent

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321. As Professor Henkin has concluded, the Clause "authorize[s] Congress to enact into U.S. law any international rules designed to govern individual behavior." HENKIN, *supra* note 134, at 69; see Koh, *Is International Law State Law?*, *supra* note 26, at 1835 (describing the Offenses Clause as granting power "to define and fashion federal rules with regard to the law of nations"). Judge Bork has summarized the Clause as empowering Congress "to enforce adherence to the standards of the law of nations." *Finzer v. Barry*, 798 F.2d 1450, 1458 (D.C. Cir. 1986), *aff'd in part and rev'd in part by* *Boos v. Barry*, 485 U.S. 312 (1988).

322. *United States v. Brown*, 381 U.S. 437, 442 (1965) (referring to the clause prohibiting bills of attainder).



scholarship, however, has challenged the federal primacy over foreign affairs, criticizing the view that the federal government has greater powers in foreign affairs than it has in the domestic sphere as "foreign affairs exceptionalism."<sup>323</sup> A proper interpretation of the long-ignored Offenses Clause adds weight to the conclusion that the framers themselves were foreign affairs exceptionalists, crafting a Constitution that affords Congress broad power to legislate on otherwise domestic matters that implicate international law.

In this part, I examine the impact of the long-overlooked Offenses Clause on the traditional analysis of the federal foreign affairs power. I first consider the general contours of the foreign affairs power, and then review several potential limitations: individual rights, separation of powers, and, in particular, federalism. Although the individual rights protected by the Constitution and its division of powers among the branches of the federal government do impact upon the foreign affairs power, federalism concerns are largely irrelevant. Finally, to demonstrate one of the consequences of an accurate understanding of the Offenses Clause, I apply this new interpretation to the example posed at the outset of this Article, concluding that Congress has the power to prohibit the juvenile death penalty, should it find that such a prohibition is necessary to implement international law.

### *A. The Constitutional Structure of Foreign Affairs*

Despite its potential breadth, the Offenses Clause is rarely cited, in part because other constitutional provisions are interpreted as authorizing wide-ranging congressional powers in the field of foreign affairs. Congress's power over foreign commerce, immigration and naturalization, and the declaration and conduct of war, along with the power to enact legislation to implement treaties, all support actions touching international law.<sup>324</sup> In addition, the broad

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323. See, e.g., Bradley, *Breard*, *supra* note 5, at 539 n.51 (decrying "foreign affairs exceptionalism," defined as "the view that the usual constitutional restraints on the federal government's exercise of power do not apply in the area of foreign affairs").

324. Article I, Section 8 of the Constitution grants Congress the authority to "regulate Commerce with foreign Nations," U.S. CONST. art. I, § 8, cl. 3, "establish a uniform Rule of Naturalization," *id.* cl. 4, "define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations," *id.* cl. 10, "declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water," *id.* cl. 11,

interpretation of the Necessary and Proper Clause endorsed by the Supreme Court in the early nineteenth century made it less necessary to rely on specific enumerated powers such as the Offenses Clause.<sup>325</sup>

The Supreme Court has also recognized a federal foreign affairs power founded upon the basic structure of our government, in which the federal government handles foreign affairs on behalf of the entire nation. As stated in a case addressing federal authority over immigration: "For local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power."<sup>326</sup> The Court has frequently used similar principles to explain federal supremacy over issues touching upon foreign affairs. In *Hines v. Davidowitz*, for example, the Court held unconstitutional a state statute requiring aliens to carry registration cards.<sup>327</sup> The Court relied upon the supremacy of federal authority over "the general field of foreign affairs," of which immigration and related issues are just one example, a supremacy to which the Court has "given continuous recognition."<sup>328</sup>

The Federal Government, representing as it does the collective interests of the forty-eight states, is entrusted with full and exclusive responsibility for the conduct of affairs with foreign

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and "repel Invasions," *id.* cl. 15, and "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States," including treaties, *id.* cl. 18.

The Supreme Court has noted that these constitutional provisions, along with parallel provisions granting the executive and judicial branch substantial foreign affairs powers, "reflect[] a concern for uniformity in this country's dealings with foreign nations and indicat[e] a desire to give matters of international significance to the jurisdiction of federal institutions." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 n.25 (1964).

325. See U.S. Const. art. I, § 8, cl. 18. In Chief Justice Marshall's famous words: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).

326. *The Chinese Exclusion Case*, 130 U.S. 581, 606 (1889); see also *MacKenzie v. Hare*, 239 U.S. 299, 311 (1915) ("As a government, the United States is invested with all the attributes of sovereignty. As it has the character of nationality it has the powers of nationality, especially those which concern its relations and intercourse with other countries.").

327. 312 U.S. 52 (1941).

328. *Id.* at 62.

sovereignities. . . . Our system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference.<sup>329</sup>

This has been the consistent holding of the Supreme Court, stated most strongly in *United States v. Curtiss-Wright Export Corp.*, where Justice Sutherland reasoned, "the powers of external sovereignty [do] not depend upon the affirmative grants of the Constitution," but rather are "vested in the federal government as necessary concomitants of nationality."<sup>330</sup> The Constitution, Sutherland concluded, was based upon the "irrefutable postulate that though the states were several their people in respect of foreign affairs were one."<sup>331</sup> Despite extensive criticism of *Curtiss-Wright's* historical analysis, its holding as to federal supremacy over foreign affairs reflects basic principles of federalism.<sup>332</sup> As the Supreme Court summarized the following year: "Governmental power over external affairs is not distributed, but is vested exclusively in the national government."<sup>333</sup> Similar statements were made in cases evaluating the effect on state property laws of federal diplomatic agreements,<sup>334</sup> including Justice Sutherland's dismissive comments about the states' role in foreign affairs in *United States v. Belmont*: "In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state

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329. *Id.* at 63.

330. 299 U.S. 304, 318 (1936).

331. *Id.* at 317.

332. See, e.g., HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 94-95 (1990) (detailing the "withering criticism" of *Curtiss-Wright's* historical analysis); see also HENKIN, *supra* note 134, at 19 (noting that "challenging [Justice Sutherland's] history does not necessarily destroy his constitutional doctrine"). Henkin notes that, despite its weaknesses, *Curtiss-Wright* "has been cited with approval in later cases, and remains authoritative doctrine." HENKIN, *supra* note 134, at 20. "Whatever the theory, then, there is virtually nothing related to foreign affairs that is beyond the constitutional powers of the federal government." *Id.* at 21.

333. *United States v. Belmont*, 301 U.S. 324, 330 (1937).

334. See *United States v. Pink*, 315 U.S. 203, 233 (1942). "We repeat that there are limitations on the sovereignty of the States. No State can rewrite our foreign policy to conform to its own domestic policies. Power over external affairs is not shared by the States; it is vested in the national government exclusively." *Id.*

lines disappear. As to such purposes the State of New York does not exist."<sup>335</sup>

The Supreme Court relied on this power more recently, upholding the constitutionality of the Foreign Sovereign Immunities Act (FSIA).<sup>336</sup> The FSIA defines the claims for which foreign sovereigns shall be amenable to suit in U.S. courts, and grants the federal courts jurisdiction over all such suits.<sup>337</sup> The Second Circuit had found the statute unconstitutional as applied to suits by aliens founded upon state law, such as contract disputes or tort actions.<sup>338</sup> According to the appellate court, since such actions neither arise under federal law nor trigger diversity jurisdiction, Congress had no constitutional authority to grant the federal courts jurisdiction.<sup>339</sup>

The Supreme Court disagreed, analyzing the FSIA as two complementary parts, one that defined, as a matter of federal law, the circumstances in which sovereign immunity was waived, and the second asserting federal court jurisdiction over such claims.<sup>340</sup> If the former was a valid exercise of congressional powers, then the claims raised issues of federal law, and the jurisdictional grant was constitutionally valid.<sup>341</sup> The Court found the delineation of the

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335. 301 U.S. 324, 331 (1937).

Foreign affairs are national affairs. The United States is a single nation-state and it is the United States (not the states of the Union, singly or together) that has relations with other nations; and the United States Government (not the governments of the states) conducts those relations and makes national foreign policy.

HENKIN, *supra* note 134, at 13; *see also* *Zschemnig v. Miller*, 389 U.S. 429, 432, 436 (1968) (declaring unconstitutional an Oregon statute that imposed conditions on a foreign heir's ability to inherit, finding the statute to be "an intrusion by the State into the field of foreign affairs," and declaring that "foreign affairs and international relations" are "matters which the Constitution entrusts solely to the Federal Government"). *See generally* Spiro, *supra* note 4, at 1228-41 (tracing the principle of exclusive federal foreign affairs powers from the framing of the Constitution through the nineteenth century, and noting that the principle applies both to enumerated constitutional powers and to powers implicit in the structure of federal government).

336. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983).

337. 28 U.S.C. §§ 1330, 1602-11 (1994).

338. *See Verlinden B.V. v. Central Bank of Nigeria*, 647 F.2d 320 (2d Cir. 1981), *rev'd*, 461 U.S. 480 (1983).

339. *See id.* at 324-30.

340. *See Verlinden*, 461 U.S. at 486-97.

341. *See id.* at 497.

scope of sovereign immunity to be a valid exercise of Congress's foreign relations powers:

By reason of its authority over foreign commerce and foreign relations, Congress has the undisputed power to decide, as a matter of federal law, whether and under what circumstances foreign nations should be amenable to suit in the United States. Actions against foreign sovereigns in our courts raise sensitive issues concerning the foreign relations of the United States, and the primacy of federal concerns is evident. To promote these federal interests, Congress exercised its Art. I powers by enacting a statute comprehensively regulating the amenability of foreign nations to suit in the United States.<sup>342</sup>

The Court relied on two distinct sources of congressional authority, foreign commerce and foreign relations. Foreign commerce alone would not have supported the holding, given that the FSIA addresses all litigation involving foreign sovereigns, including torts and other noncommercial suits.<sup>343</sup> Thus, congressional authority over foreign relations is essential to the constitutionality of the statute.

Many of the cases triggering discussions of the inherent foreign affairs powers of the federal government, and, specifically, of Congress, could have been decided under the Offenses Clause. Read in tandem with the Necessary and Proper Clause, the Offenses Clause authorizes virtually any legislation that specifies rules governing interactions with foreign actors. For example, the

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342. *Id.* at 493 (footnote and citations omitted). The Court explained that the application of federal law thus triggered federal court jurisdiction:

The statute must be applied by the district courts in every action against a foreign sovereign, since subject-matter jurisdiction in any such action depends on the existence of one of the specified exceptions to foreign sovereign immunity. At the threshold of every action in a district court against a foreign state, therefore, the court must satisfy itself that one of the exceptions applies—and in doing so it must apply the detailed federal law standards set forth in the Act. Accordingly, an action against a foreign sovereign arises under federal law, for purposes of Art. III jurisdiction.

*Id.* at 493-94 (footnote and citation omitted).

343. 28 U.S.C. § 1605 (1994 & Supp. IV 1998) lists the claims for which a foreign sovereign can be sued in federal court, including, *inter alia*, claims arising out of commercial activity, *see id.* § 1605(a)(2), ownership of property, *see id.* § 1605(a)(4), or for personal injury or death cause by a "tortious act or omission," *id.* § 1605(a)(5).

Offenses Clause, properly understood to authorize Congress to regulate all issues concerning international law, provides an additional constitutional basis for the FSIA. Indeed, Congress relied on the Offenses Clause, a fact noted but not discussed by the Supreme Court.<sup>344</sup> Of the specific constitutional provisions cited by Congress, only the Offenses Clause supports congressional regulation of noncommercial, domestic torts committed by foreign sovereigns.

Even if the other enumerated powers, including the treaty power, coupled with the structural foreign affairs power and the Necessary and Proper Clause, are interpreted as granting the federal government exclusive authority over foreign affairs, an accurate interpretation of the Offenses Clause is nevertheless important.<sup>345</sup> The Supreme Court has indicated, for the first time in decades, an intent to construe congressional powers more narrowly, requiring a demonstrable connection between the constitutional language and the congressional action.<sup>346</sup> At the same time, commentators continue to debate the validity of basing federal foreign affairs powers on the structure of the constitutional system.<sup>347</sup> The Offenses Clause provides direct authorization for congressional foreign affairs enactments, with textual and historical support for a broad reading of the scope of the power. Furthermore, a broad understanding of Offenses Clause contributes to the ongoing debates about the modern division of foreign affairs powers among

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344. See Verlinden, 461 U.S. at 493 n.19; H.R. REP. NO. 94-1487, at 12 (1976), reprinted in U.S.C.C.A.N. 6604, 6610-11.

345. Professor Spiro challenges the modern justification for a *dormant* federal foreign affairs power that bars the states from acting in the absence of a contrary federal action, but nevertheless recognizes that *positive* federal powers are still an important safeguard: "[W]e should be more hesitant to scale down affirmative federal powers than dormant ones. . . . [O]ne would want to reserve a federal capacity to overcome subnational resistance where the national interest continues to demand it." Spiro, *supra* note 4, at 1273.

346. Curtis Bradley argues that the Supreme Court's recent decisions restricting federal powers as unconstitutional interference with states' rights "at least raise the question of whether similar restrictions might apply in the area of foreign affairs." Bradley, *New Foreign Affairs Law*, *supra* note 9, at 1100.

347. See Michael D. Ramsey, *The Power of the States in Foreign Affairs: The Original Understanding of Foreign Policy Federalism*, 75 NOTRE DAME L. REV. 341 (1999) (challenging the "conventional view" that structural design of the Constitution vested exclusive foreign affairs powers in the federal government).

the branches of the federal government and between the federal government and the states, debates to which I turn next.

*B. Constitutional Limits on the Federal Foreign Affairs Powers*

Recent scholarship has attacked the notion that the constitutional regime governing foreign affairs is distinct from that regulating domestic matters. In a flurry of articles, Professors Jack Goldsmith and Curtis Bradley have challenged what they see as unexamined assumptions about the role of the federal government in implementing international law.<sup>348</sup> Two particular concerns animate their work. First, they challenge the role of the federal courts in applying international law as federal common law, in the absence of instructions from the political branches.<sup>349</sup> This concern is based largely on separation of powers, the complaint being that when the courts apply the federal common law of foreign affairs, they enter into a realm delegated to the legislature and the executive. Second, Bradley argues that Congress's foreign affairs power should be subject to the same constitutional limitations as its

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348. See, e.g., Bradley, *Breard*, *supra* note 5; Bradley, *New Foreign Affairs Law*, *supra* note 9; Bradley, *The Treaty Power*, *supra* note 5; Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997) [hereinafter Bradley & Goldsmith, *Customary International Law*]; Bradley & Goldsmith, *Federal Courts*, *supra* note 316; Curtis A. Bradley & Jack L. Goldsmith, III, *The Current Illegitimacy of International Human Rights Litigation*, 66 FORDHAM L. REV. 319 (1997) [hereinafter Bradley & Goldsmith, *Current Illegitimacy*]; Goldsmith, *supra* note 5; Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113 (1999).

349. See Bradley & Goldsmith, *Current Illegitimacy*, *supra* note 348, at 319 (stating that "courts should not apply CIL [Customary International Law] as federal law unless authorized to do so by the federal political branches"); Bradley & Goldsmith, *Customary International Law*, *supra* note 348, at 817 (stating that "contrary to conventional wisdom, CIL should not have the status of federal common law"); Bradley & Goldsmith, *Federal Courts*, *supra* note 316, at 2260 (stating that "our view is that CIL should not be a source of law for courts in the United States unless the appropriate sovereign—the federal political branches or the appropriate state entity—makes it so"); Goldsmith, *supra* note 5, at 1640-41 (noting the difficulties arising from the application of CIL as federal common law, stating that "if customary international law is federal common law, it binds the states under the Supremacy Clause," and consequently "a state law that is consistent with federal statutes and the federal Constitution would nonetheless be invalid if inconsistent with customary international law") (citations omitted); Goldsmith & Posner, *supra* note 348, at 1168 (noting that "[i]t is often the case . . . that courts apply CIL without any guidance from the political branches").

domestic powers, including limits imposed by the states' traditional authority over domestic matters.<sup>350</sup> This federalism concern, he argues, has a new relevance, given the Supreme Court's renewed attention to states' rights as a limit on federal powers. Bradley summarizes his objections by decrying what he calls "foreign affairs exceptionalism," defined as the view that the Constitution resolves disputes as to the allocation of authority over foreign relations in a manner distinct from that used to resolve such disputes on a domestic level.<sup>351</sup>

These complaints conflate three separate constitutional concerns: protections of individual rights; separation of powers; and federalism's division of foreign affairs authority between the federal and state governments. As to individual rights and separation of powers, foreign affairs trigger no unusual constitutional scrutiny. But on the key issue of federalism, a distinct distribution of authority is built into the very structure of our government. Indeed, constitutional text, structure, history, and precedent all indicate that the framers themselves were "foreign affairs exceptionalists," and modern developments have only highlighted the wisdom of their approach.

### 1. Individual Rights

In principle, the federal foreign affairs power is subject to the same constitutional protections of individual rights as domestic powers. "Nothing in the Constitution suggests that the rights of individuals in respect of foreign affairs are different from what they are in relation to other exercises of governmental power."<sup>352</sup> Although the Supreme Court suggested in *Missouri v. Holland* that the treaty power might be exempt from other constitutional restraints,<sup>353</sup> this possibility was rejected in *Reid v. Covert*, in which

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350. See, e.g., Bradley, *Breard*, *supra* note 5, at 539 n.51, 555-56 (decrying "foreign affairs exceptionalism," defined as "the view that the usual constitutional restraints on the federal government's exercise of power do not apply in the area of foreign affairs"); Bradley, *The Treaty Power*, *supra* note 5, at 461 (arguing that "foreign affairs exceptionalism" is unfounded because the sharp distinction between domestic and foreign affairs has faded).

351. See Bradley, *Breard*, *supra* note 5, at 539 n.51.

352. HENKIN, *supra* note 134, at 283.

353. 252 U.S. 416, 433 (1920) ("Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made



the court stated that "no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government which is free from the restraints of the Constitution."<sup>354</sup> Treaties and other international agreements cannot circumvent the individual protections of the Constitution. Federal statutes, of course, are enacted pursuant to the Constitution and free from any unfounded doubt raised by *Holland*. Thus, statutes enacted pursuant to the Offenses Clause, as well as treaties, are subject to the limitations imposed by specific provisions of the Constitution.

In practice, however, application of constitutional protections to federal actions touching upon foreign affairs has been limited by an extreme degree of deference to governmental concerns. Most protections require a balancing of competing interests or permit restrictions where the government interest is compelling. Where the government claims that national security interests underlie foreign policy decisions, the courts regularly defer to the political branches and limit individual rights. Examples of these limitations range from the indefensible discrimination based on race and national origin that led to the internment of Japanese Americans during World War II,<sup>355</sup> to more recent limitations on the right to travel and to free speech.<sup>356</sup>

In *Boos v. Barry*, the only Supreme Court case to consider the interplay between the Offenses Clause and constitutional protections, the Court considered and rejected a claim that a content-based restriction on speech was justified because of a

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under the authority of the United States.").

354. 354 U.S. 1, 16 (1957) (four-justice plurality opinion). The plurality distinguished *Holland*, noting that the migratory bird treaty at issue in that case did not violate any specific provision in the Constitution, whereas the treaty challenged in *Reid* violated the constitutional right to a jury trial in a criminal prosecution. *See id.* at 18-19.

Commentators in the period between the decisions in *Holland* and *Reid* had considered the possibility that the Court might find the treaty power to be exempt from other constitutional restrictions on the theory that the Constitution does not require that treaties be made "pursuant to the Constitution." *Reid* rejected this construction of the constitutional language. Statutes enacted under the authority of the Offenses Clause, of course, are clearly subject to constitutional restraints.

355. *See Korematsu v. United States*, 323 U.S. 214 (1944).

356. *See, e.g.,* *Regan v. Wald*, 468 U.S. 222, 240-43 (1984) (upholding restrictions on travel to Cuba); *Haig v. Agee*, 453 U.S. 280, 306-10 (1981) (upholding decision to revoke passport of U.S. citizen deemed a threat to national security); *Kleindienst v. Mandel*, 408 U.S. 753, 765-70 (1972) (upholding denials of visa to lecturer invited to speak in the United States).

compelling international interest.<sup>357</sup> *Boos* addressed the constitutionality of a statute enacted by Congress to regulate political protests in the vicinity of foreign embassies in the District of Columbia.<sup>358</sup> The Court struck down the statute as an invalid interference with First Amendment-protected activity largely because it was unnecessarily restrictive, as evidenced by the less severe federal legislation in effect in the rest of the nation.<sup>359</sup> After quoting *Reid v. Covert* for the proposition that agreements with foreign nations are subject to the restraints of the Constitution, the court proceeded to apply the First Amendment to the challenged statute, concluding that "the fact that an interest is recognized in international law does not automatically render that interest 'compelling' for purposes of First Amendment analysis."<sup>360</sup>

Nevertheless, while applying traditional, domestic constitutional standards to an issue with significant foreign affairs implications, the Court recognized the possibility that the balance might be affected in a future case by the requirements of international law.

We need not decide today whether, or to what extent, the dictates of international law could ever require that First Amendment analysis be adjusted to accommodate the interests of foreign officials. Even if we assume that international law recognizes a dignity interest and that it should be considered sufficiently "compelling" to support a content-based restriction on speech, we conclude that [this statute] is not narrowly tailored to serve that interest.<sup>361</sup>

*Boos* thus leaves open the possibility that constitutional protections might in appropriate cases be outweighed by the needs of foreign policy, as the Court has found in prior "national security" cases.

*Boos* thus confirms and applies the holding of *Reid v. Covert*, finding that, in principle, constitutional protections for individual rights limit federal powers in the area of foreign affairs just as they do in the domestic sphere. International concerns do not automatically provide the compelling interest necessary to override

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357. 485 U.S. 312, 315 (1988).

358. See *id.* at 324.

359. See *id.* at 326.

360. *Id.* at 324.

361. *Id.*

constitutional protections. Where *Reid* considered the treaty power, *Boos* relied on the Offenses Clause, and held that congressional enactments pursuant to that Clause are not automatically overridden by the pressing concerns of international law. *Boos* leaves open, however, the possibility that the historic deference to national security affairs might also extend to international law, permitting "narrowly tailored" limitations on individual rights where mandated by "compelling" international law interests.<sup>362</sup>

## 2. Separation of Powers

The assignment of foreign affairs powers to the federal government does not explain the division of such powers among the three branches of that government. This issue has provoked heated arguments since the first years of the new nation and continues unabated today. While various foreign affairs powers are listed and assigned in the Constitution, it contains no general explanation of the intended distribution of the federal power that was such a precipitous force in the drafting of the Constitution.<sup>363</sup> Although there are strong indications that the framers intended Congress to play a key role in formation of foreign policy,<sup>364</sup> disputes about the roles of the executive and legislative branches broke out quickly

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362. The Senate addressed a particular free speech concern when it gave its "advice and consent" to the International Covenant on Civil and Political Rights (ICCPR), Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368. The ICCPR prohibits "propaganda for war" and "advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence." *Id.* art. 20. The Senate attached a reservation to the ICCPR ratification that states: "Article 20 does not authorize or require legislation or other action by the United States that would restrict the right of free speech and association protected by the Constitution and laws of the United States." See 138 CONG. REC. 8070 (1992) (conditioning ratification on this reservation).

363. Professor Henkin has noted that "where foreign relations are concerned the Constitution seems a strange, laconic document" in which "many powers of government are not mentioned." HENKIN, *supra* note 134, at 13-14. Professor Corwin recognized the consequences of this structure, describing the Constitution as "an invitation to struggle for the privilege of directing American foreign policy." EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS, 1787-1957*, at 171 (1957).

364. See, e.g., Rakove, *supra* note 68, at 4-16 (concluding that framers intended to allocate primary control over treatymaking to the Senate, with the President adding some measure of control over that body). As to foreign affairs in general, Rakove concludes that the framers "vest[ed] substantial authority over foreign relations in the legislature while providing the president with a degree of independence that might, over time, evolve into a capacity for the initiation and direction of foreign policy." *Id.* at 17.

during the Washington presidency. Washington proclaimed neutrality in a foreign war without the consent of Congress, provoking the framers to express widely divergent views about the foreign affairs powers of the two houses of Congress and the executive branch<sup>365</sup>—a debate that continues today.<sup>366</sup> Over the past several decades, the dispute has focused on the distribution of war powers between the executive and legislative branches, although few deny the reality that the pendulum has swung sharply toward the presidency.<sup>367</sup>

Scholars have long debated the constitutional standards by which foreign affairs powers should be distributed among the three branches. Those favoring domestic implementation of international law have generally argued that the traditional checks and balances among the three branches of government should apply without exception to foreign affairs decisionmaking. Thus, they have urged recognition and protection of Congress's role in declaring war and other foreign policy decisions, and have encouraged federal courts to play their accustomed role in evaluating foreign policy issues, rather than mechanically deferring to the political branches.<sup>368</sup>

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365. See RAKOVE, *supra* note 21, at 355-65; ABRAHAM D. SOFAER, WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER: THE ORIGINS 85-93 (1976); Ruth Wedgwood, *The Revolutionary Martyrdom of Jonathan Robbins*, 100 YALE L.J. 229, 258-66 (1990).

366. See, e.g., THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY (David Gray Adler & Larry N. George eds., 1996); FOREIGN AFFAIRS AND THE U.S. CONSTITUTION (Louis Henkin et al. eds., 1990).

367. See, e.g., Harold Hongju Koh, *Why the President Almost Always Wins in Foreign Affairs*, in THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY, *supra* note 366, at 158.

368. This issue, as well as the relationship between individual rights and foreign affairs, is distinct from the division of foreign affairs powers between the federal government and the states. Thus, Professor Bradley errs in accusing advocates of domestic implementation of international law of "opportunistic" inconsistency when they call for the standard operation of separation-of-powers principles to decide the division of responsibilities among the branches of the federal government, but "special" rules in determining the division between federal and state governments. See Bradley, *Breard*, *supra* note 5, at 555-56. One can consistently argue that the division of foreign affairs powers among the three federal branches should be same as for domestic issues, while arguing that the federal/state division of foreign affairs powers operates differently than the division of domestic powers. Professor Motomoru makes a similar distinction in analyzing "immigration exceptionalism," arguing that one can consistently call for exclusive federal government authority over immigration while opposing the view that the judiciary is barred from reviewing executive branch decisions on immigration matters. See Hiroshi Motomura, *Federalism, International Human Rights, and Immigration Exceptionalism*, 70 U. COLO. L. REV. 1361, 1364-65, 1392-94 (1999).

The Offenses Clause makes clear the role of Congress in defining international rights and duties and incorporating them into federal law. It assigns Congress a key role in determining the content of the nation's international obligations, but a role that coexists with the constitutional prerogatives of the co-equal branches of the federal government. The executive branch frequently states the official position of the U.S. government as to which norms of customary international law will be considered binding. As the law of the sea evolved over the course of this century, for example, the President and his representatives played an active role both in the international discussions that led to the development of the relevant rules and in deciding which rules would be accepted as binding norms by the United States.<sup>369</sup> In another field, the executive branch has recognized that many provisions of the laws of war are binding on the United States as customary international law, even if the United States has not ratified the relevant treaties.<sup>370</sup> As illustrated by these examples, the executive branch participates in the formation of customary norms, sifts through

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369. See RESTATEMENT (THIRD), *supra* note 1, pt. V, introductory note at 3-8 (summarizing U.S. recognition of customary law rules governing aspects of the law of the sea); Henry M. Arruda, Comment, *The Extension of the United States Territorial Sea: Reasons and Effects*, 4 CONN. J. INT'L L. 697 (1989) (detailing history of international and U.S. positions as to sovereignty over coastal waters and control over undersea resources). The United States' concept of coastal state economic rights over the continental shelf, announced in 1945, was so quickly accepted as customary international law binding on all states that it has been cited as an example of "instant customary law." RESTATEMENT (THIRD), *supra* note 1, § 102 note 2.

370. For example, although the U.S. has not ratified Protocol I to the Geneva Conventions, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3, 16 I.L.M. 1442 (1977), the government considers some of its provisions to be binding as customary international law norms. See Michael J. Matheson, *Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT'L L. & POL'Y 419 (1987) (discussing the Reagan administration's analysis of which of the multiple provisions of the Protocols constitute norms of customary international law, binding on the United States).

The Reagan administration's approach to the Protocols is illustrative. Having decided not to sign Protocol I because of disagreement as to certain key provisions, the executive branch undertook a careful review of which of its provisions were nonetheless binding on this country as customary international law. A Department of State attorney observed at the time, "This question is not an academic one, but has considerable practical importance," because the United States would consider itself legally bound by those rules that reflected customary international law. *Id.* at 419. Clarity as to which rules were binding was necessary to guide U.S. military commanders, as well as U.S. allies.

emerging norms, and determines which norms reach binding status.<sup>371</sup>

Federal courts also play a role in the enforcement of international law within our federal system, although the contours of that role have changed as the judiciary's approach to the common law has evolved. At the time the Constitution was drafted, the framers recognized the legal force of customary international law, and expected both federal and state courts to interpret and apply its unwritten international rules.<sup>372</sup> As the Supreme Court has long held, "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."<sup>373</sup> Prior to the *Erie* decision, before the courts acknowledged a uniquely federal common law, federal court decisions were labeled interpretations of the "general common law" shared by both state and federal legal systems.<sup>374</sup> In practice, however, during the decades leading up to the *Erie* decision, the federal courts began to develop characteristically federal common law principles to govern several uniquely federal questions, including foreign relations.<sup>375</sup> After *Erie*, the Supreme Court quickly began to regroup these areas under the newly recognized category of federal common law.<sup>376</sup>

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371. "[I]t is the executive branch, far more than the courts, that acts for the United States to help legislate customary international law." Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1562 (1984).

372. See Stephens, *supra* note 134, at 400-03, 410.

373. *The Paquete Habana*, 175 U.S. 677, 700 (1900).

374. See Stephens, *supra* note 134, at 418.

375. See *id.* at 413-33.

376. See *id.* at 433-47. The status of customary international law within the federal legal framework has provoked debate over the past few years. Compare Koh, *Is International Law State Law?*, *supra* note 26 (arguing that customary international law is incorporated into federal law), Gerald L. Neuman, *Sense and Nonsense about Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371 (1997) (same), and Stephens, *supra* note 134 (same), with Bradley & Goldsmith, *Current Illegitimacy*, *supra* note 348 (arguing that customary international law is not included in federal law), Bradley & Goldsmith, *Customary International Law*, *supra* note 348 (same), and Bradley & Goldsmith, *Federal Courts*, *supra* note 316 (same). In these articles, Bradley and Goldsmith reject the conclusion that post-*Erie* cases have acknowledged the federal common law status of customary international law.

The Offenses Clause makes clear Congress's power to determine the domestic significance of international law<sup>377</sup> where it chooses to do so, but that power does not negate the federal courts' power to apply customary international law as federal law in the absence of legislative or executive branch instructions to the contrary. As stated in *The Paquete Habana*, "where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations."<sup>378</sup> The federal courts apply rules of international law "in the absence of any treaty or other public act of their own government in relation to the matter."<sup>379</sup> Thus, Congress's power to regulate the domestic incorporation of international law does not conflict with the traditional role of the judiciary in enforcing customary rules of international law as part of the common law.

The Offenses Clause fits neatly within the constitutional division of powers among the three branches of government, clarifying Congress's role, but neither demanding nor requiring an "exceptional" redistribution of the powers of the other two branches.

### 3. *Federalism and Foreign Affairs*

Federal control over foreign affairs is deeply embedded in the structure of our government. As a general principle, issues affecting our relations with other nations are entrusted to the federal government and governed by federal law.<sup>380</sup> The full extent of this power is difficult to define, although we have seen one set of limitations, at least in principle, in constitutional protections for individual rights. The Supreme Court, however, has rejected similar constraints arising out of the states' traditional authority

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377. The international significance of an international rule of law may be beyond the control of Congress or any branch of the federal government. Thus, if Congress declines to obey an international law mandate, the legislative decision may have binding legal force within the United States, but nevertheless leave the United States in violation of its international law obligations. See RESTATEMENT (THIRD), *supra* note 1, § 115(1)(b) (stating that the fact that the United States has blocked application of an international norm as U.S. "domestic law does not relieve the United States of its international obligation or of the consequences of a violation of that obligation").

378. 175 U.S. at 700 (emphasis added).

379. *Id.* at 708.

380. See *supra* notes 324-47 and accompanying text.

over domestic matters. That is, federal responsibility for foreign affairs authorizes the federal government to venture onto terrain that would otherwise be left to state control. The Court has recognized this foreign affairs authority as arising out of the structural division of powers between the state and federal governments, as well as the treaty power. Where the basis of federal action is the Offenses Clause, one of Congress's enumerated powers, congressional authority to regulate activities otherwise left to state control should be equally apparent.

The Court recognized the broad reach of the foreign affairs power in *Zschernig v. Miller*, holding unconstitutional an Oregon probate statute that imposed conditions on a foreign heir's ability to inherit, rejecting the statute as "an intrusion by the State into the field of foreign affairs."<sup>381</sup> Declaring that "foreign affairs and international relations" are "matters which the Constitution entrusts solely to the Federal Government,"<sup>382</sup> the Court held that the state's traditional authority over probate matters "must give way if [state regulations] impair the effective exercise of the Nation's foreign policy."<sup>383</sup> The extent of this dormant foreign affairs preemption, applicable in the absence of federal government action, was not defined in the opinion and has not been applied since.<sup>384</sup> But questions about the *Zschernig* precedent leave unshaken the narrower principle that

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381. 389 U.S. 429, 432 (1968).

382. *Id.* at 436.

383. *Id.* at 440. "[T]he conduct of our foreign affairs is entrusted under the Constitution to the National Government, not to the probate courts of the several States." *Id.* at 443 (Stewart, J., concurring).

384. See Koh, *Is International Law State Law?*, *supra* note 26, at 1847-48.

The question of a dormant foreign commerce power was at issue in *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298 (1994), where the Court considered a challenge to a state method of calculating taxes on foreign corporations that had prompted repeated complaints from foreign governments. The bank argued that the state tax intruded into an area reserved to the federal government, but the Court found congressional and executive acquiescence in the state practice sufficient to negate the claim of a violation of federal control over foreign commerce. *See id.* at 324-30. Prior decisions, the Court noted, held that explicit congressional authorization was not necessary. "Congress may more passively indicate that certain state practices do not 'impair federal uniformity in an area where federal uniformity is essential.'" *Id.* at 323 (quoting *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 448 (1979)). Moreover, the Solicitor General expressly called on the Court to stay out of the dispute, declaring that the state action did not interfere with foreign policy. *See id.* at 330 n.32.

Note that there is no question that Congress could act to preempt state statutes such as those at issue in both *Zschernig* and *Barclays Bank*—the question in both cases was whether state legislation was preempted in the absence of *affirmative* congressional action.



Congress has the authority to regulate matters otherwise left to the states where the matters at issue implicate foreign affairs concerns.

This principle was reaffirmed in two recent Supreme Court decisions, both finding state statutes affecting foreign commerce to be preempted by federal provisions that governed the same activity. In *United States v. Locke*, the Court held that federal laws regulating oil tankers preempted efforts by the State of Washington to impose its own rules on tankers entering Puget Sound.<sup>385</sup> In *Crosby v. National Foreign Trade Council* as well, the Supreme Court found that a Massachusetts statute barring the state from purchasing goods from companies doing business in Burma was preempted by a federal law addressing the same concerns.<sup>386</sup>

Where the treaty power is invoked, the Supreme Court has squarely held that the federal government has the power to regulate actions that would otherwise be subject to state control. In *Missouri v. Holland*, the Court considered a constitutional challenge to a federal statute enacted pursuant to a treaty protecting migratory birds.<sup>387</sup> Two lower courts had found a similar statute, enacted prior to the ratification of the treaty, to be an unconstitutional interference with the reserved powers of the states.<sup>388</sup> The Supreme Court, however, rejected the argument "that what an act of Congress could not do unaided, in derogation of the powers reserved to the States, a treaty cannot do."<sup>389</sup> To the contrary, the Court held: "It is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could

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385. 120 S. Ct. 1135 (2000). In *Locke*, the Court explained the dual test governing federal preemption. In an area traditionally subject to state regulation, there is a presumption against preemption that can be overcome by clear congressional intent. *See id.* at 1147. No such presumption against preemption applies, however, "when the State regulates in an area where there has been a history of significant federal presence," such as the regulation of foreign shipping. *Id.* *Locke* addressed an area in which "Congress has legislated . . . from the earliest days of the Republic," the area of "national and international maritime commerce." *Id.* at 1148.

386. 120 S. Ct. 2288, 2301 (2000). Having found a conflict with a congressional statute, the Supreme Court declined to consider whether, in the absence of such preemption, the state action would have been barred under *Zschernig* as an interference with the federal foreign affairs power, *see id.* at 2294 n.8, an argument that had been accepted by the First Circuit. *See National Foreign Trade Council v. Natsios*, 181 F.3d 38 (1st Cir. 1999).

387. 252 U.S. 416, 430-31 (1920).

388. *See id.* at 432.

389. *Holland*, 252 U.S. at 432.

not deal with but that a treaty followed by such an act could . . . ."<sup>390</sup> Finding that the migratory bird treaty did not "contravene any prohibitory words to be found in the Constitution,"<sup>391</sup> the Court rejected the claim that it was "forbidden by some invisible radiation from the general terms of the Tenth Amendment. . . . No doubt the great body of private relations usually fall within the control of the State, but a treaty may override its power."<sup>392</sup>

As noted earlier, the Supreme Court later rejected the implication in *Holland* that treaties are completely free from constitutional restraint.<sup>393</sup> The decision in *Reid*, however, reaffirmed *Holland's* rejection of Tenth Amendment limitations on the treaty power, noting that while a treaty could not circumvent the specific provisions of the Constitution, the Tenth Amendment's reservation of powers to the states was simply inapplicable to the treaty power: "To the extent that the United States can validly make treaties, the people and the States have delegated their power to the National Government and the Tenth Amendment is no barrier."<sup>394</sup>

Scholars have recently debated the history of the exclusive federal foreign affairs power. G. Edward White, for example, argues that the modern view of federal preeminence was adopted only in the twentieth century.<sup>395</sup> Spiro and Cleveland dispute White's history, finding ample evidence that the federal courts rejected virtually all state intrusions into foreign affairs throughout the nineteenth century.<sup>396</sup> Nevertheless, the historical studies reflect surprising agreement on crucial points. First, the Supreme Court

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390. *Id.* at 433.

391. *Id.*

392. *Id.* at 434.

393. See *Reid v. Covert*, 354 U.S. 1, 15-19 (1957); *supra* notes 353-54 and accompanying text.

394. *Reid*, 354 U.S. at 18.

395. See G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 VA. L. REV. 1 (1999) (arguing that the nineteenth-century view that federal foreign affairs powers were limited by the reserved powers of the states was replaced only in the early twentieth century with the now-dominant view that the federal government's foreign affairs powers are subject to no federalism limitations).

396. See Sarah H. Cleveland, *The Plenary Power Background of Curtiss-Wright*, 70 U. COLO. L. REV. 1127, 1128-30 (1999); Spiro, *supra* note 4, at 1228-41. Spiro traces the "exclusivity principle" from the framing of the Constitution through the Cold War, even while arguing that it should now be rejected. See Spiro, *supra* note 4, at 1241-46, 1259-70.

during this period never found a treaty or a statute implementing a treaty to be an unconstitutional invasion of state powers.<sup>397</sup> Second, although the Court's opinions in the nineteenth century recognized the theoretical possibility that state powers might limit federal treaty powers, the limit referred to was a narrow one, one that protected the very heart of the constitutional structure. For example, in 1890, Justice Stephen Field explained:

[The treaty power is] unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent. But with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country.<sup>398</sup>

Thus, although White stressed that the Court "regularly intimated" that there might be limits imposed by the states' reserved powers, he also acknowledged that those potential restrictions were themselves limited to infringement on "state powers so essential to the sovereignty of the states that the federal government could not abrogate them."<sup>399</sup> Even the nineteenth-century language relied upon by White recognizes that the treaty power permits regulation

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397. See Cleveland, *supra* note 396, at 1129 ("As White acknowledges, although the Supreme Court had addressed several cases involving conflicts between treaty provisions and existing state legislation during the nineteenth century, the Court had never invalidated a treaty provision on the grounds that it conflicted with reserved state powers."). White recognizes that "successive Supreme Court cases, extending over a lengthy period of time, had regularly sustained the treaty power when the provisions of a specific treaty conflicted with specific state laws." White, *supra* note 395, at 24 (citing *Geofroy v. Riggs*, 133 U.S. 258 (1890), *Hauenstein v. Lynham*, 100 U.S. 483 (1879), *Ware v. Hylton* 3 U.S. (3 Dall.) 199 (1796)).

398. *Geofroy v. Riggs*, 133 U.S. 258, 267 (1890) (citations omitted).

399. White, *supra* note 395, at 24.

of less "essential" domestic affairs that would otherwise be entrusted to the states.<sup>400</sup>

As an enumerated congressional power, the Offenses Clause is subject to no greater restrictions. The Clause grants to Congress the authority to legislate as to all matters encompassed by it or "necessary and proper" to the implementation of its mandate. Such actions are, of course, subject to the restrictions imposed by the individual protections incorporated into the Constitution. But Congress is constrained by the Tenth Amendment and the states' reserved powers only if its actions go beyond the enumerated authority of the Clause. Moreover, in deciding what falls within the reach of the Clause, Congress's decisions are entitled to significant deference from the judiciary.

In *Boos v. Barry*, the Court reviewed a statute that penalized certain protests in the vicinity of diplomatic embassies.<sup>401</sup> Although the Court invalidated the statute for its unwarranted interference with First Amendment-protected activity, the Court accepted without pause Congress's authority to regulate activity that would otherwise have been left to the control of the states, solely because of its foreign affairs impact.<sup>402</sup> Noting the historic roots of

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400. A contrary claim would clash with the reality that "treaties have dealt with domestic matters for as long as the Republic has existed." Martin S. Flaherty, *Are We to be a Nation? Federal Power vs. "States' Rights" in Foreign Affairs*, 70 U. COLO. L. REV. 1277, 1306 (1999).

401. 485 U.S. 312 (1988).

402. The particular statute enacted by Congress and subsequently invalidated in *Boos* governed the District of Columbia; Congress has exclusive legislative authority over the capital district. See U.S. CONST. art. I, § 8, cl. 17; *Boos*, 485 U.S. at 327. Congress also enacted a less restrictive national statute—in effect everywhere except the District of Columbia—addressing the same concerns, and penalizing "willful acts or attempts to 'intimidate, coerce, threaten, or harass . . . a foreign official.'" *Boos*, 485 U.S. at 325 (quoting 18 U.S.C. § 112(b)(2)). The Court invalidated the statute largely because it found that Congress itself no longer felt its more restrictive provisions were necessary: indeed, at the time the case was decided, Congress had begun the process of replacing the D.C. statute with the narrower legislation in effect in the rest of the country. See *id.* at 325-29. The Court "rel[ie]d on congressional judgment in this delicate area" to hold that the less restrictive statute adequately complied with U.S. obligations under international law:

Thus, after a careful balancing of our country's international obligations with our Constitution's protection of free expression, Congress has determined that § 112 adequately satisfies the Government's interest in protecting diplomatic personnel outside the District of Columbia. . . . [I]f ever it did so, Congress no longer considers this statute necessary to comply with our international obligations. Relying on congressional judgment in this delicate area, we conclude that the availability of alternatives such as § 112 amply demonstrates

international efforts to protect diplomats, the Court stressed that "[t]he need to protect diplomats is grounded in our Nation's important interest in international relations."<sup>403</sup> Indeed, the Court stated that, if anything, the pressing national interest in diplomatic protections is "even more true today given the global nature of the economy and the extent to which actions in other parts of the world affect our own national security."<sup>404</sup> Whereas *Boos* applied the individual protections of the Constitution to limit Congress's foreign affairs powers, federalism constraints were conspicuously absent from the analysis. Moreover, the Court relied heavily on "congressional judgment in this delicate area" involving U.S. obligations under international law.<sup>405</sup>

Statutes seeking to implement international obligations fall neatly within the reach of the Offenses Clause, whether or not congressional action on a particular issue would otherwise be authorized. *Boos* itself points to the Offenses Clause as authority for this congressional regulation of criminal activity directed at diplomats—activity that would fall beyond the scope of congressional control if not for its international implications.<sup>406</sup> Indeed, this was clearly the intent of the framers; several of the incidents that concerned them during the Confederation involved state action (or inaction) as to violent crimes—a domestic matter normally subject to state regulation.<sup>407</sup> The very first Crime Bill of 1790 imposed federal criminal penalties for certain violent attacks on diplomats, violent crimes that would have been left to state control if not for the fact that the victim was protected by international law.<sup>408</sup>

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that the display clause is not crafted with sufficient precision to withstand First Amendment scrutiny.

*Id.* at 326, 329.

403. *Id.* at 323.

404. *Id.*

405. *Id.* at 329.

406. Congress enacted the District of Columbia statute "pursuant to its authority under Article I, § 8, cl. 10, of the Constitution to 'define and punish . . . Offenses against the Law of Nations.'" *Boos*, 485 U.S. at 316 (alteration in original).

407. See *supra* text accompanying notes 59-60. The framers were also concerned with the states' refusal to enforce debts owed to the British, also an area otherwise falling within state control. See *supra* text accompanying notes 63-64.

408. The statute made it a crime to "assault, strike, wound, imprison, or in any other manner infract the law of nations, by offering violence to the person of an ambassador or

It is illustrative to compare this early statute and the legislation at issue in *Boos* to recent congressional efforts to impose federal penalties under the Commerce Clause. In *United States v. Morrison*, the Supreme Court rejected a congressional effort to create federal civil remedies for violence against women, finding the Violence Against Women Act to be an unconstitutional assertion of Commerce Clause powers.<sup>409</sup> The *Brzonkala* majority dismissed extensive congressional fact-finding about the impact of violence against women on the national economy, because it found that Congress had utilized a "method of reasoning that is unworkable if we are to maintain the Constitution's enumeration of powers."<sup>410</sup> Congress's error was to employ a "but-for causal chain from the initial occurrence of violent crime . . . to every attenuated effect upon interstate commerce."<sup>411</sup>

We . . . reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce. The Constitution requires a distinction between what is truly national and what is truly local. In recognizing this fact we preserve one of the few principles that has been consistent since the Clause was adopted. The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States. Indeed, we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims.<sup>412</sup>

According to the *Brzonkala* majority, then, the Commerce Clause does not permit Congress to regulate a noneconomic, intrastate crime solely because of the aggregate impact of many such crimes on interstate commerce. By contrast, however, *Boos* and the history

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other public minister." Crime Bill of April 30, 1790, ch. 9, § 28, 1 Stat. 112, 118.

409. 120 S. Ct. 1740, 1745 (2000). *United States v. Morrison* was combined with *Brzonkala v. Morrison* on a writ of certiorari to the Supreme Court. I will refer to the cases collectively as *Brzonkala*.

410. *Id.* at 1752.

411. *Id.*

412. *Id.* at 1754 (citations omitted).

to which it refers demonstrate that the federal foreign affairs power has long permitted Congress to penalize even a single act of violence directed against an internationally protected person. The distinction is that even one act of violence in violation of the law of nations impacts upon international relations, and thus brings the activity within the regulatory powers of the federal government.

Would the Court defer to congressional and executive branch decisions as to the foreign affairs impact of otherwise local activities? In *United States v. Lopez*, despite striking down a statute making it a federal crime to possess a firearm within a school zone, the majority recognized Congress's broad authority to implement its enumerated powers.<sup>413</sup> The *Lopez* majority noted that judicial review is limited to deciding "whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce."<sup>414</sup> Two members of the five-justice majority emphasized the deference due to the legislative branch's determinations regarding the impact of local actions on interstate commerce.<sup>415</sup> Moreover, given the great deference the courts have traditionally accorded to the political branches in the area of foreign affairs, it is likely that a provision enacted by Congress and signed by the President would receive a less searching review than those enacted pursuant to the Commerce Clause. Indeed, as previously noted, the *Boos* court referred to congressional expertise in these areas,

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413. 514 U.S. 549, 557 (1995). In *Lopez*, the Court held that Congress exceeded the reach of the Commerce Clause because there was no direct connection between the possession of fire arms in school zones and interstate commerce, and because the possible "indirect effect" on interstate commerce was so tenuous as to threaten to "federalize" all aspects of school and family life. See *id.* at 555.

414. *Id.* at 557.

415. While Justice Kennedy accepted that the judiciary must police the outer limits of the enumerated powers, he stressed the primary role of Congress in determining the reach of the Commerce Clause. See *id.* at 568 ("[T]he Commerce Clause grants Congress extensive power and ample discretion to determine its appropriate exercise."); *id.* at 573 ("The deference given to Congress has since been confirmed."); *id.* at 577 ("Whatever the judicial role, it is axiomatic that Congress does have substantial discretion and control over the federal balance.") (Kennedy, J., concurring). Kennedy thus reluctantly found the Gun-Free School Zone statute unconstitutional, see *id.* at 568, concluding that it sought to regulate actors and activities that have no commercial character or nexus, see *id.* at 580.

The Court in *Brzonkala* cited Kennedy's opinion in *Lopez* when stating, "Due respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds." *Brzonkala*, 120 S. Ct. at 1748.

"[r]elying on congressional judgment in [the] delicate area" of foreign affairs.<sup>416</sup>

The foreign affairs power reflected in the Offenses Clause addresses an area that has traditionally been delegated to the federal government. If a particular effort to implement international law falls within the congressional power under the Offenses Clause, it will be valid whether or not it impacts activities otherwise reserved to the states—federalism is no bar.

### C. *The Juvenile Death Penalty*

The consequences of a broad view of the Offenses Clause become clear upon examining domestic issues over which the federal government exercises authority only because those issues are governed by international law. If the federal government chooses to recognize an international norm as binding on the United States, either through the treaty power or acceptance of a rule of customary international law, it can enforce compliance even in an area otherwise regulated by the states. This issue frames the claimed conflict between federalism and the foreign affairs power: The authority contained in the Offenses Clause—or in other constitutional foreign affairs powers—authorizes Congress to act in areas that would otherwise fall beyond its domestic powers.

Several recent controversies illustrate the reach of the foreign affairs power into areas otherwise beyond congressional authority. For example, commentators have argued that Congress could enact statutes such as the Gun Free School Zone, the Religious Freedom Restoration Act, or the Violence Against Women Act pursuant to the treaty power, if such statutes implemented treaty obligations.<sup>417</sup>

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416. *Boos v. Barry*, 485 U.S. 312, 329 (1988).

417. See, e.g., Gerald L. Neuman, *The Global Dimension of RFRA*, 14 CONST. COMMENT. 33, 41-47 (1997) (arguing that treaty obligations authorize Congress to provide protections for religion that might not be authorized by Congress's enumerated constitutional powers). An amicus brief filed in *Brzonkala* argued that Congress was authorized to enact the statute to implement both treaty obligations and customary international law, but the Supreme Court did not address the argument. See Brief Amici Curiae on Behalf of International Law Scholars and Human Rights Experts in Support of Petitioners, *United States v. Morrison*, 120 S. Ct. 1740 (2000) (Nos. 99-5, 99-29), available at [http://supreme.findlaw.com/supreme\\_court/briefs/99-5/99-5fol0/brief/brief01.html](http://supreme.findlaw.com/supreme_court/briefs/99-5/99-5fol0/brief/brief01.html). But see Bradley, *Treaty Power*, *supra* note 5, at 400-09 (listing examples but arguing that the treaty power should be read narrowly).



A parallel argument applies to the Offenses Clause: if such a statute were necessary and proper to implement an international law obligation, the Offenses Clause would authorize congressional action. To quote *Arjona* once again: "[I]f the thing made punishable is one which the United States are required by their international obligations to use due diligence to prevent, it is an offense against the law of nations."<sup>418</sup> If international law thus called for protecting schools from gun violence, or eliminating certain restrictions on the exercise of religion, Congress could, under the Offenses Clause, take action to implement those international obligations. In the area of human rights, Congress can also act to implement international obligations pursuant to the treaty power, if the obligation is reflected in a treaty, or pursuant to the Offenses Clause.<sup>419</sup>

The international prohibition of the juvenile death penalty offers a useful demonstration of the potential reach of the Offenses Clause. There is a convincing argument that the international community considers the execution of defendants who committed their crimes as juveniles a violation of customary international law. The prohibition is contained in numerous treaties that have been ratified by most of the nations of the world. The International Covenant on Civil and Political Rights, for example, states that a "[s]entence of death shall not be imposed for crimes committed by persons below eighteen years of age."<sup>420</sup> Similar prohibitions are contained in a wide range of other international agreements.<sup>421</sup> The

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to avoid this result).

418. *United States v. Arjona*, 120 U.S. 479, 488 (1887).

419. Recent human rights treaties, however, have been ratified with controversial reservations limiting their domestic import. See Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341 (1995); David P. Stewart, *United States Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings, and Declarations*, 42 DEPAUL L. REV. 1183 (1993).

420. International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 6, para. 5, 999 U.N.T.S. 171, 175, 6 I.L.M. 368, 370. The United States expressly refused to be bound by the Covenant's provision on the juvenile death penalty. See 138 CONG. REC. 8070 (1992) (reserving "the right . . . to impose capital punishment on any person (other than a pregnant woman) . . . including such punishment for crimes committed by persons below eighteen years of age").

421. See, e.g., Protocol Additional to The Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, art. 77, 1125 U.N.T.S. 3, 39, 16 I.L.M. 1391, 1425; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to The Protection of Victims of International

overwhelming majority of countries around the world have prohibited the death penalty for juveniles, leaving the United States as one of the few nations to continue the practice.<sup>422</sup> During the debates surrounding the drafting of the International Covenant, no nation—including the United States—expressed any objection to the juvenile death penalty ban.<sup>423</sup>

The United States has refused to follow this international rule, rejecting the customary international law prohibition and refusing to be bound by provisions in international treaties that incorporate this norm.<sup>424</sup> However, if the President and Congress changed their view as to this rule, indicating that they accepted the customary norm, the international community would view the prohibition as

Armed Conflicts (Protocol II), June 8, 1977, art. 6, 1125 U.N.T.S. 609, 614, 16 I.L.M. 1442, 1445-46; American Convention on Human Rights, Nov. 22, 1969, art. 4(5), 1144 U.N.T.S. 123, 146, 9 I.L.M. 673, 676; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 68, 6 U.S.T. 3516, 75 U.N.T.S. 286; *Convention on the Rights of the Child*, art. 37(a), G.A. Res. 44125, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/44/736 (1989), reprinted in 28 I.L.M. 1448, 1470 (1989). See analysis of these and other international documents in Ved P. Nanda, *The United States Reservation to the Ban on the Death Penalty for Juvenile Offenders: An Appraisal Under the International Covenant on Civil and Political Rights*, 42 DEPAUL L. REV. 1311, 1328-33 (1993).

422. See Peter J. Spiro, *The States and International Human Rights*, 66 FORDHAM L. REV. 567, 574 (1997) (describing the United States "as one of only a handful of mostly rogue states that continue to allow such executions"). Nanda totals the juvenile executions between 1981 and 1991 as follows:

Of the reported juvenile executions between 1981 and 1991 worldwide, four were carried out in the United States, one in Barbados (which subsequently changed its minimum age for capital punishment to eighteen), one in Nigeria, one in Bangladesh, and three in Pakistan. An unknown number of juvenile offenders have been executed by Iran and Iraq. In 1992, another juvenile was put to death in the United States.

Nanda, *supra* note 421, at 1333 (footnotes omitted).

423. See Joan F. Hartman, "Unusual" Punishment: *The Domestic Effects of International Norms Restricting the Application of the Death Penalty*, 52 U. CIN. L. REV. 655, 671-72 (1983) ("[T]he view was expressed, without opposition, that the execution of juvenile offenders was contrary to basic principles of respect for human rights and should be prohibited explicitly in a treaty intended to be a comprehensive codification of human rights norms.") (footnotes omitted); Nanda, *supra* note 421, at 1334.

424. See Reservation to the U.S. Ratification of the ICCPR, 138 CONG. REC. 8070 (1992); SENATE COMM. ON FOREIGN RELATIONS REPORT ON THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, S. EXEC. REP. NO. 102-23, at 11 (1992), reprinted in 31 I.L.M. 645, 653 (1992); Laura Dalton, Note, *Stanford v. Kentucky and Wilkins v. Missouri: A Violation of an Emerging Rule of Customary International Law*, 32 WM. & MARY L. REV. 161, 172-84 (1990). But see Hartman, *supra* note 423, at 682-86 (arguing that United States failed to dissent from formation of international norm prohibiting the death penalty and is therefore bound by it).

binding upon the United States.<sup>425</sup> Could Congress then enact legislation prohibiting state executions of convicted killers who committed their crimes as juveniles, or would such a statute intrude upon state powers in violation of the Constitution?

The answer under the Offenses Clause is clear; indeed, this seems to be exactly the situation contemplated by the Clause. Congress is authorized to incorporate into U.S. law the norms of international law. Applying the Supreme Court's analysis of the Clause in *Arjona*, the juvenile death penalty would be an offense against the law of nations that the United States is bound by its "international obligations to use due diligence to prevent."<sup>426</sup> If the United States is bound by international law to prevent the execution of juveniles, then such executions constitute offenses against the law of nations that Congress is authorized to punish, through the wide range of sanctions available under the Clause. Were Congress to determine that the execution of juveniles impacted foreign affairs, legislation in this area would not violate the Constitution.

#### CONCLUSION: FOREIGN AFFAIRS POWERS IN A GLOBAL SOCIETY

Given that the range of topics covered by international law has changed significantly over the past fifty years, some commentators have argued that Congress's foreign affairs powers must be somehow limited to avoid trespassing on domestic terrain properly regulated by the states. The argument is straightforward: the expanded reach of the modern foreign affairs powers would enable the federal government to invade domestic areas, such as criminal law and family law, that are otherwise assigned to the states by our traditional federal-state division of powers.<sup>427</sup> Such broad

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425. The international norm would also become binding upon the United States if contained in a treaty signed and ratified by the President with the advice and consent of the Senate. See U.S. CONST. art. II, § 2, cl. 2 (granting the President the power to make treaties with the consent of two-thirds of the Senate); *id.* art. VI, cl. 2 (stating that treaties are the supreme law of the land).

426. *United States v. Arjona*, 120 U.S. 479, 488 (1887).

427. See Goldsmith, *supra* note 5, at 1622-23 ("The problem is that the traditional conception of foreign affairs has changed to include matters formerly viewed as purely domestic issues, . . . matters traditionally regulated by states in which the states have a genuine interest . . .").

definitions of foreign affairs and international law, opponents argue, go beyond the understandings of the framers who drafted, debated, and ratified our Constitution and threaten to dismantle the federal system. To prevent the forbidden expansion of federal powers, they assert that the foreign affairs power should be restricted to State-to-State concerns of the kind that might provoke war or economic retaliation, as they were at the time the Constitution was framed.<sup>428</sup>

The response is equally straightforward. First, the foreign affairs power contains no such limitation, but rather reflects the fundamental principle that relations with the rest of the world should be regulated by the federal government. The language of the Offenses Clause, for example, was not restricted to a fixed definition of the law of nations, any more than the treaty power was restricted to certain subjects. To the extent that we can uncover the background assumptions of the framers, the evidence is strong that they understood the law of nations broadly, even more broadly than we understand it today. In addition, they recognized both that this body of law would evolve over time, and that the United States, as just one member of the world community, would not be able to control this evolution. Indeed, we have seen that when the Offenses Clause was adopted at the Constitutional Convention, authorizing Congress to "define and punish . . . Offenses against the Law of Nations,"<sup>429</sup> the only recorded opposition addressed the incongruence of a claim that the United States could "define" the law of nations.<sup>430</sup> The framers understood that the world community would take international law along paths that they could not predict; rather than fixing its content, they chose language that

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428. Bradley and Goldsmith categorize "what has traditionally been thought of as international law" as including "the law regulating the relations among nations," the "treatment of diplomats and the use of military force." Bradley & Goldsmith, *Current Illegitimacy*, *supra* note 348, at 325. They contrast this with what they label the "new" customary international law, which "has developed to regulate to some extent the ways in which nations treat their citizens." *Id.* at 327.

429. U.S. CONST. art. I, § 8, cl. 10.

430. "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." 2 Farrand, *supra* note 68, at 615 (Madison's Notes, Sept. 14, 1787); see *supra* text accompanying notes 95-98.

would enable the Constitution to evolve along with the law of nations.<sup>431</sup>

This is not to say, of course, that any participant in the drafting and ratification of the Constitution foresaw the expansion of foreign affairs into areas previously considered to be "domestic." They did not foresee, for example, that police abuse or mistreatment of detainees in state or federal prisons would be of international concern, reported to the United Nations Human Rights Committee as possible violations of international law.<sup>432</sup> An attack on the expansion of areas of international concern on the basis of unforeseeability is meaningless: most of the core institutions of our current society were unforeseeable at the time the Constitution was adopted.<sup>433</sup> The significance of the phrase "the law of nations" must evolve, just as "interstate commerce" has evolved to meet the needs of a national economy, or the expectation of privacy in the Fourth Amendment has evolved so as to protect against government wiretapping.<sup>434</sup> When the nations of the world decided that domestic human rights violations were a topic of international concern, the implementation of human rights norms became a federal—not a state—concern.

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431. As the Second Circuit warned in *Filártiga*, courts should not "prejudge the scope of the issues that the nations of the world may deem important to their interrelationships, and thus to their common good." *Filártiga v. Peña-Irala*, 630 F.2d 876, 888 (2d Cir. 1980).

432. See, e.g., *Comments on United States of America*, U.N. GAOR Hum. Rts. Comm., 53d Sess., 1413th mtg. ¶ 17, U.N. Doc. CCPR/C/79/Add.50 (1995) (raising concerns about allegations of police abuses); *id.* ¶ 20 (raising concerns about prison conditions), available at <http://www1.umn.edu/humanrts/hrcommittee/US-ADD1.htm>.

433. See *United States v. Lopez*, 514 U.S. 549, 574 (1995) (Kennedy, J., concurring) (quoting *New York v. United States*, 505 U.S. 144, 157 (1992), in praise of a constitutional framework that "has been sufficiently flexible over the past two centuries to allow for enormous changes in the nature of government").

434. See Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 SUP. CT. REV. 125, 132-34 (describing evolution of constitutional privacy protections as "translation" of constitutional language to respond to changing conditions). Flaherty notes that the Constitution adjusts to changes in the nature of international law just as it has adjusted to changes in the national economy:

It may be objected that such a change in degree—like the emergence of a national industrial economy—could not have been foreseen at the time the text was written and ratified. Barring a theory that would also require the Court to return the nation to pre-Depression Commerce Clause jurisprudence, limitations to the treaty-making power cannot be implied on the ground that the legitimate scope of treaties has evolved along with much else.

Flaherty, *supra* note 400, at 1306.

Moreover, to the extent that the goal of the Offenses Clause was to enable Congress to avoid international disputes, the drafters were quite astute in recognizing that they could not predict what future generations would consider to be of international concern. In their day, the most contentious issues concerned treaty violations, diplomatic immunity, and protections of aliens while abroad, areas in which a failure to act could trigger diplomatic or even military repercussions. Today, however, issues of trade and human rights are just as likely to provoke international uproars. The 1999 Kosovo War, for example, was justified as an international effort to stop human rights abuses within the borders of a sovereign nation,<sup>435</sup> while battles over the intersection between trade and human rights have dominated international relations over the past year.<sup>436</sup>

Disputes over the granting of asylum and "safe havens" also provoke international controversy, as when the United States's willingness to allow the Shah of Iran to seek exile triggered the occupation of the U.S. embassy in Iran in the late 1970s; or, more recently, when several European nations asserted the right to prosecute Chilean General Pinochet. As systems of international accountability, including both civil litigation and criminal prosecution, become more widespread, the failure to hold wrongdoers accountable has developed into a topic of international concern. Even the death penalty, applied to juveniles, foreigners, or even U.S. citizens, has triggered international disputes, with objections both to the fact that the United States continues to employ capital punishment and to the method by which the death penalty is imposed.<sup>437</sup> A broad range of topics now threaten to

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435. See Joint Statement on Kosovo, 35 WEEKLY COMP. PRES. DOC. 711, 711-12 (Apr. 23, 1999) (describing the military action against the Federal Republic of Yugoslavia as aimed at ending ethnic cleansing and other violence and protecting "universal human rights and freedoms" in Kosovo); Address to the Nation on Airstrikes Against Serbian Targets in the Federal Republic of Yugoslavia (Serbia and Montenegro), 35 WEEKLY COMP. PRES. DOC. 516, 516-17 (Mar. 24, 1999) (describing air strikes as a "moral imperative," aimed, in part, to halt Serb attacks "on a largely defenseless people").

436. Demonstrations at the World Trade Organization meeting in Seattle in December 1999 brought international attention to the impact of trade on human rights. See, e.g., Coalition Promises Continued Fight Against WTO, China, CONGRESSDAILY, Dec. 14, 1999, available in WL 28417552 ("The coalition of labor, environmental and human rights groups that took to the streets of Seattle during the World Trade Organization ministerial meeting two weeks ago vowed anew today to 'fix or nix' the WTO . . .").

437. A sampling of headlines from the first six months of 2000 indicates the protests

provoke diplomatic and even military confrontations; to the extent that federal control over issues of international law is justified as necessary to prevent such disputes, the area subject to such control must expand along with the areas of potential conflict.<sup>438</sup>

As these contentious issues illustrate, the concept of foreign affairs encompasses whatever relations among nations those nations view as proper subjects of collective concern. The fact that international obligations now govern a State's domestic activities reflects developments in international law over the past fifty years, developments that the United States has both guided and accepted. This evolution was triggered by the harsh lessons of World War II, during which egregious human rights violations within the boundaries of a single nation had devastating consequences for the entire world and contributed to international chaos. The decision to place human rights concerns at the center of the international stage reflected the self-interest of all nations, including the United States. The acceptance of these norms into international law reflects a new international consensus that such issues are of international concern—that they do affect international, diplomatic relations.<sup>439</sup>

Ultimately, of course, the clash between these two basic truths of our constitutional system—the limited nature of our federal

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triggered by U.S. death penalty practices. See *Amnesty International Slams U.S. Death Penalty, Prison Conditions*, AGENCE FRANCE-PRESSE, June 14, 2000, available in 2000 WL 2815053; Eric Berger, *Olympics Bid Confronts Death Penalty: Boosters of 2012 Games in Houston Dismiss Capital Punishment as Issue*, HOUSTON CHRONICLE, May 28, 2000, at A37, available in 2000 WL 4301459; *Berlin Denounces U.S. Enforcement of Death penalty*, AGENCE FRANCE-PRESSE, June 24, 2000, available in 2000 WL 2821804; Suzanne Daley, *Europeans Deplore Executions in the U.S.*, N.Y. TIMES, Feb. 26, 2000, at A8, available in LEXIS, News, New York Times File; Robert Anthony Phillips, 9000 French Fight to Save Death Row Inmate (Feb. 28, 2000), available at [http://www.apbnews.com/cjsystem/justicenews/2000/02/28/francedeath0228\\_1.html](http://www.apbnews.com/cjsystem/justicenews/2000/02/28/francedeath0228_1.html).

438. "The critical feature of all international law, new and old, for purposes of the federalism issue is that state-level violations may result in foreign offense and retaliation against the nation as a whole." Spiro, *supra* note 4, at 1252 n.130.

439. The history of the last 50 years shows a marked reluctance to employ these constitutional powers on the part of all three branches of the federal government. Great care has been taken to avoid clashes with advocates of greater states' rights or with opponents of the incorporation of international norms into U.S. law. The federal government's constitutional powers, however, are not subject to claims of "use it or lose it." Despite the political branches' reluctance to exercise their foreign affairs powers, it remains crucial to recognize the breadth of those powers and their strong historical roots.

government versus federal supremacy over foreign affairs—cannot be resolved solely by reference to the framers and their understandings of this complex interaction. At a time when the domestic impact of foreign affairs could be confined within narrow bounds, the framers accepted limited federal intrusion into the states' control over criminal and other matters. Now that a vast swath of our daily lives has the potential to impact upon foreign affairs, how should we resolve the trade-off between local control and the need for international consistency? As articulated by Lawrence Lessig, applying the Constitution to this modern-day dilemma requires the complex skills of a translator, one who not only understands the meanings of the various words employed by the document, but who can also give them meaning in our language, our culture, our society.<sup>440</sup>

We face today a world linked as never before by economic, political, and social interdependence. New international rules of law are developing at a rapid pace to govern these new international relationships, administered by an expanding set of international institutions. Ironically, after centuries of general acceptance of the dominant role of the federal government in regulating U.S. foreign affairs, doubts about the extent of those federal powers have been raised just as the international community has begun to reach consensus on the need for universal application of international rules of law. Written by a generation of internationalists who understood the exigencies of the law of nations and the importance of cooperation among nations, our Constitution grants the federal government the powers necessary to incorporate international norms into our domestic legal system and to lead our nation into the international world of the new century.

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440. See Lessig, *supra* note 434, at 134.