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Constitutional Constraints on the International Law-Making Power of the Federal Courts

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CONSTITUTIONAL CONSTRAINTS ON THE INTERNATIONAL LAW-MAKING POWER OF THE FEDERAL COURTS

JASON JARVIS*

Table of Contents

I. INTRODUCTION

The sole clause in the Constitution expressly giving Congress power to define law is the Offenses Clause.[1] That clause states, in part, "The Congress shall have power...to define and punish... offences against the Law of Nations."[2] This unique clause constrains courts' law-making power further than previously expressed by courts or commentators. While the federal courts' common law power to make law is only to be used sparingly,[3] if at

* Pepperdine University, B.A. 1995, J.D. 2003. I would like to thank Professors Robert J. Pushaw, Jr., and Roger P. Alford for their insight and suggestions; the editors of The Florida State University *Journal of Transnational Law & Policy*; and, finally, my wife for her support and encouragement.

1. U.S. CONST. art. I, § 8, cl. 10. Also sometimes referred to as the "Power to Define," "Define and Punish," or "Law of Nations" clause. Obviously, this is not pertaining directly to legislative power.

2. *Id.*

3. *See, e.g.*, Louise Weinberg, *Federal Common Law*, 83 NW. U. L. REV. 805, 832-33 (1989) (suggesting federal common law creation is rare in and of itself, and in its pure form, virtually unique).

all,[4] in this article I argue that the federal courts are without power to define the law of nations due to the Offenses Clause. Other scholars have argued that the clause constrains certain doctrines,[5] but, in fact, compliance with the Constitution mandates the federal courts' complete withdrawal from the determination or enforcement of non-statutory customary international law.[6] Thus, the long-held doctrine for determining international law is flawed from its foundation and must be discarded for a constitutionally permissible alternative. In Part II, I review the background of the Offenses Clause and consider (1) the text of the Clause; (2) the structure and theory behind the Clause; and (3) the history of both the Clause and its American jurisprudence. Next, in Part III, I examine other scholars' attempts to quantify the Clause and limits arising from it. Finally, in Part IV, I analyze what the proper role of the courts in determining the law of nations should be. I conclude by pointing out that these limitations only apply to freestanding determinations of customary international law, not to the interpretive, express role of the courts in applying and interpreting treaties, domestic legislation with international implications, or any subject matter over which jurisdiction is expressly granted by Article III.

II. BACKGROUND TO THE OFFENSES CLAUSE

A. The Text of the Offenses Clause

"Congress shall have the power...[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations."[7] There are two things of note about the plain language of this clause.

First, that Congress has the power "to define and punish" is unique within the Constitution. No place else is the word "define"

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4. *See* Martin H. Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process: An "Institutionalist" Perspective*, 83 NW. U. L. REV. 761, 765 (1989) (questioning the legitimacy of judicial creation of federal common law in the "political context of a carefully structured system of separation of powers").

5. *See, e.g.*, Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 481-84 (1998) (reexamining the modern international application of the Charming Betsy doctrine in light of separation of powers concernes); 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, 155 (1998) (hereinafter "Constitutional Structure") (arguing that separation of powers concerns limit application of the ATCA under the Offenses Clause).

6. "Customary international law" is the modern term for the "law of nations." Although arguably, they do not mean the exact same thing, I endeavor to use each term in its popular context; i.e., when talking about the Offenses Clause I use the term "law of nations," and when discussing modern international law doctrines such as the Act of State doctrine I use the term "customary international law."

7. U.S. CONST. art. 1 § 8, cl. 10.

used in the context of Congressional law-making power.[8] It is a foundational principle of the Constitution that the power to make and modify law is granted in the legislature; this principle needs no further discussion.[9]

The second unique aspect to the language of this clause is the almost wholly international flavor. International law is referred to in the Constitution very few times: the President's power to make treaties with the advice and consent of the Senate, the prohibition of several states' rights to make treaties, the judicial power over treaties, and the Supremacy clause's incorporation of treaties.[10] No other Constitutional provision expressly refers to international law. When a textual commitment of an issue is made to one branch of the government in a wholly unique manner (the power to define exists only in the Offenses Clause), regarding a matter only referred to in that clause (the phrase "law of nations" only appears in the Offenses Clause), it should be treated uniquely. Clearly, something special was intended for the Offenses Clause. To determine what this is, an examination of the structure and theory behind the Constitution is in order.

B. Structure and Theory

It may be said that the United States of America must speak with one voice to the world community; one voice capable of providing a strong and complete response to foreign complaints. Accordingly, it should be recognized that the structure and location of the Offenses Clause dictates the manner in which the Founders saw such a desire operating. Sources contemporaneous to the drafting and eventual adoption of the Constitution express two principles of relevance: first, that the power to define and punish was specifically vested in the Congress as a legislative power; and second, that this grant of power was unique and intended as separate from traditional federal jurisdiction.

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8. *See generally* U.S. CONST.

9. However, it has never been as clear the extent to which the federal courts have law making power irrespective of the discussion herein regarding international law. *See generally* Weinberg, *supra* note 3; Redish, *supra* note 4.

10. *See* U.S. CONST. art. I, § 10; art. 2, § 2, cl. 2; art III, § 2, cl. 1; art. VI. References to treaties and ambassadors are made in these sections, but no place other than the Offenses Clause contains a reference to the law of nations.

1. A Government of Enumerated Powers

The structure of the Constitution itself suggests a restrained reading of the Offenses Clause.[11] The common sense, widely held rule of Constitutional construction is that where a power is committed to one branch of the government it was meant exclusively. A written Constitution that limits the federal government to exercising only enumerated powers means that power for one branch to act must be given separately or by necessary implication. A corollary is that express delegation of power to one branch implies no delegation to another branch.[12] Thus, for example, to the extent that Article I gives Congress express powers to regulate commerce and tax and spend for the general welfare, it, by negative implication, excludes the President and the federal courts from exercising these powers. When the Court contemplates shared powers (such as the power of making judicial appointments or treaties), it frequently declines to define with precision the roles each must take.[13]

Thus, because Article I gives Congress the power to "define and punish.... Offenses against the Law of Nations," by implication the federal courts lack that power.[14]

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11. Simply put, the Offenses Clause of Article I gives the power to define to Congress. Article III says nothing to contradict the general rule of Constitutional construction that powers enumerated in one article are intended to be exclusive.

12. This is not to say, as discussed elsewhere, that Congress cannot delegate power to another branch. *See, e.g.*, United States v. Smith, 18 U.S. (5 Wheat.) 153, 157-58 (1820).

13. A recent case involving treaty adoption that illustrates this principle is Made in the USA Foundation v. United States, 242 F.3d 1300, 1318 (11th Cir. 2001) ("a review by this court of the process by which the President and Congress enter into international agreements would run the risk of intruding upon the respect due coordinate branches of government").

14. U.S. CONST. art. I. § 8, cl.10. But it must be noted that Joseph Story, commenting on the Offenses Clause 13 years after the *Smith* decision considered the question of exclusivity:

> Whether this power [to define offenses against the law of nations], so far as it concerns the law of nations, is an exclusive one, has been doubted by a learned commentator. As, up to the present time, that question may be deemed for most purposes to be a mere speculative question, it is not proposed to discuss it, since it may be better reasoned out, when it shall require judicial decision.

3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES: WITH A PRELIMINARY REVIEW OF THE CONSTITUTIONAL HISTORY OF THE COLONIES AND STATES, BEFORE THE ADOPTION OF THE CONSTITUTION, 58 (1833).

2. The Judicial Power

The obvious counter-argument to this point is that "judicial power" includes some common law-making power in the area of international law.[15] Why this argument does not apply to the Offenses Clause is in part the subject of this article. But as a structural matter, the unique aspect of the Offenses Clause, its subject matter and its unique grant of "defining" power, should be read, likewise, as a unique grant of power. Whatever the judicial power extends to in a domestic context, in the international context it is limited to interpreting and applying *statutes passed by Congress* regarding the law of nations.[16]

This structural reading is supported by the seminal case of *United States v. Hudson & Goodwin*.[17] The pertinent holding of *Hudson* was that no federal common law jurisdiction in criminal cases exists in the absence of a legislative pronouncement to the affirmative.[18] In *Hudson,* the common law crime of libel was implicated; and the Court refused to impart itself common-law making power.[19] By comparison, for the Offenses Clause, there is an affirmative grant of the power to define the law of nations to

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15. *See generally* U.S. CONST. art III.

16. *See* Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution,* 86 IOWA L. REV. 735, 744-47 (2001). Professor Pushaw illustrates the difference between law making by the courts and Congress, stating that a:

> constitutional precept is the distinction between legislative and judicial lawmaking processes. Article I grants Congress alone the "legislative power" to create — or to decline to create — federal law whenever and however it sees fit according to its policy preferences.... By contrast, a federal court cannot formulate law until a person...appropriately presents a claim that must be decided by interpreting and applying the law in a principled manner.... [T]he Court has confined "federal common law" to situations of genuine necessity...and protecting uniquely federal interests ...

Id. at 746-47. *But see* Stewart Jay, *Origins of Federal Common Law: Part One,* 133 U. PA. L. REV. 1003, 1012-13 (1985) (suggesting that the history and development of federal common law "has a great deal to do with the balance of political forces in the society, the degree of attention that courts wish to devote to certain areas, and a range of other elements that form the judicial personalities of an era").

17. 11 U.S. (7 Cranch) 32 (1812).

18. *See id.* at 32. Professor Pushaw nicely sums up *Hudson's* holding:

> According to the Court, [three] "simple" constitutional principles [resulted in the holding]: (1) the national government had only those powers "expressly given" it by the Constitution; (2) the Constitution authorized Congress to create inferior federal courts — and, by implication, to specify their jurisdiction; and (3) therefore, Congress alone could define federal crimes and grant courts cognizance over them.

Pushaw, *supra* note 16, at 767-68.

19. *See Hudson,* 11 U.S. at 32.

Congress.[20] By way of analogy, this is as though Article I included a provision such as, "Congress shall have the power to define and punish crimes of libel." Clearly, the *Hudson* court needed no such affirmative grant to recognize the structural limits in the federal courts to make common law.[21] Thus, the Offenses Clause should cause far greater reason for concern at any federal court's use of common law-making power or principles to usurp the constitutionally granted power of Congress. Furthermore, other structural concerns support the restrictive reading of the Offenses Clause.

3. "International" Power in Articles I and II

Article III indeed provides broad power for the third branch.[22] It gives jurisdiction over "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made...."[23] However, except with certain narrow exceptions,[24] "jurisdiction" over issues of international character are committed by enumeration in Articles I and II.[25]

It is a well-established rule of law that "[t]he conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative — 'the political' — Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision."[26] Courts are ill equipped to deal with the intricacies and policy issues inherent in deciding matters of great international import — this principle likely led the Founders to delineate the separation of powers in the Constitution.[27] It is why the treaty-making power exists in Article II. Treaties are formal statements of law between two or more countries. Treaties, being definite, are, pursuant to Article III, specifically within the court's jurisdiction.[28] Likewise, Articles I and II commit the making of laws

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20. U.S. CONST. art. I, § 8, cl. 10.

21. *See generally id.*

22. U.S. CONST. art. III. It is clear that the Framers thought that the federal courts power was the narrowest of the three branches. *See, e.g.*, THE FEDERALIST NO. 78 (Alexander Hamilton) ("the judiciary is beyond comparison the weakest of the three departments of power").

23. U.S. CONST. art. III, § 1.

24. The power over ambassadors and the inclusion in the federal jurisdiction over treaties being examples thereof.

25. *See* U.S. CONST. arts. I, II.

26. Oetjen v. Central Leather Co., 246 U.S. 297, 302 (1918).

27. *See, e.g.*, Coleman v. Miller, 307 U.S. 433, 455 (1939) (noting that the conduct of foreign relations often involves "considerations of policy... [that render a court] entirely incompetent to [their] examination and decision" (quoting Ware v. Hylton, 3 U.S. (3 Dall.) 199, 260 (1796))).

28. *See* U.S. CONST. art. III, § 2.

concerning the relationship of the United States of America to other nations, i.e., foreign affairs, to Congress and the President.[29] Article III gives power to the courts to protect individual legal rights arising out of foreign affairs decisions that result in treaties or domestic statutes.[30]

A more subtle argument may also be made: it was common at the time of the Founders to consider the law of nations strictly in a nationalistic function; that is to say, the law of nations applied only to nation-states.[31] This view appears to have been shared by both European and American commentators of the time.[32] However, this view may be countered by the prevailing incidents present during the time of the adoption of the Constitution, however, and the disagreement between contemporaries of Vattel and Wilson illustrates the tenuous nature of this assertion.[33] To the extent the law of nations was only to apply to states, however, it may be said

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29. *See* U.S. CONST. arts. I, II.

30. *See* U.S. CONST. art. III.

31. In fact, later commentaries seem to agree with the less-exclusive reading of the Offenses Clause specifically for federalism concerns. *See, e.g.*, WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA, 106-09 (Leonard W. Levy ed., Da Capo Press 1970) (1829) (commenting that, while Congress is appropriately given power to define the law of nations, "if cases arise for which no...statutory provision has been made, both these descriptions of courts are thrown upon those general principles [of commonly-held international law norms]"). Rawle acknowledged the sole grant of power to Congress, but appears to have read it only in the federalism context as a federal power as opposed to state grant. *See id.* at 107-09.

32. James Wilson said this, explicitly: "The law of nature, when applied to states or political societies, receives a new name, that of the law of nations." JAMES WILSON, *Of the Law of Nations, in* 1 THE WORKS OF JAMES WILSON 148, 148 (Robert Green McCloskey ed., Harvard Univ. Press 1967) (1804). Wilson explained that the law of nature was an inherent natural foundation of immutable law derived from divine sources, and that the law of nations more properly was derived of consent by man-made institutions. *See id.* at 146-67. Vattel differed slightly in his understanding of these concepts, asserting instead that the law of nations was derived from the law of nature. *See* EMER DE Vattel, THE LAW OF NATIONS, OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS lvi (Joseph Chitty ed., Philadelphia, T. & J.W. Johnson 1863) (1758). However, Vattel clearly intended his rules regarding the law of nations to apply primarily to the sovereign states of the world, not to individuals. *See generally id. See also* Jason Jarvis, *A New Paradigm for the Alien Tort Statute Under Extraterritoriality and the Universality Principle*, 30 PEPP. L. REV. 671, 676-78 (describing conflicts regarding ambassadors prior to adoption of the U.S. Constitution). Wilson attempted to note the general disagreement between Grotius and Puffendorf as to the origin of the law of nations — mutual national consent and complete devotion to the law of nature, respectively. WILSON, *supra*, at 151. However, it is unclear if Wilson correctly interpreted Grotius' thoughts on the law of nations, as Grotius is not only one of the legal scholars most responsible for the concept of the law of nature, but also a devoted and serious adherent to a law for all nations bereft of vicissitude. *See* ARTHUR NUSSBAUM, A CONCISE HISTORY OF THE LAW OF NATIONS 102-07 (1947). Regardless, Grotius' thoughts on the law of nations are not as important to this discussion as are Wilson's.

33. For an in-depth discussion of the these scholars see Nussbaum, *supra*, note 32.

that such devotion of this power to Congress was due to separation of powers concerns.

Congress and the President are clearly granted the foreign affairs power. The grant of the Offenses Clause falls within this overall scheme. Read in light of the notion that the law of nations was primarily focused at states, it provides even more compelling evidence for why the courts were intentionally left out of this international power-sharing occurring between the political branches.[34]

4. Federal Common Law and the Three Forms of Law-Defining Power

Swift v. Tyson[35] and *Erie Railroad Co. v. Tompkins*[36] reviewed and settled a nagging question of federal jurisprudence: whether a state or federal law governs various aspects of a dispute. Such history is important to the issue at hand because it illustrates the struggles the federal courts have undertaken to establish (as in the case of *Swift*) and then restrict (as in the case of *Erie*) the broad authority of federal common law. After *Erie*, it is clear that the surviving federal common law exists only in narrow circumstances.[37] *Erie* corrected the ambiguity and forum shopping resulting from federal common law, but also illustrated why some areas of law are best left to Congress to determine.[38]

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34. *See* United States v. Curtiss-Wright Corp., 299 U.S. 304, 319-20 (1936) (illustrating that foreign relations powers are devoted almost exclusively to the political branches).

35. 41 U.S. (16 Pet.) 1 (1842).

36. 304 U.S. 64 (1938).

37. Such as certain Federal Rules of Evidence — like expert testimony or inadvertent disclosure.

38. That is to say, that state substantive law is wholly appropriate for use in federal court in situations like that in *Erie* (tort actions); but it may be inappropriate for issues concerning the nation as a whole--such as international law. *See Erie*, 304 U.S. at 78-79. An ancillary point may be made at this juncture. *Swift v. Tyson* began nearly 100 years of federal common law creation. *See id.* at 71. Such decisions determined that in the absence of state statutory schemes the federal court should fashion and obey federal common law. This raises important parallels apparent to the astute reader as *The Paquete Habana* caused federal courts to create (or at least "determine") what is essentially international common law in the absence of federal statutes. The Paquete Habana, 175 U.S. 677, 700. Thus, *The Paquete Habana* court was justifiably consistent with then-contemporary federal courts' reading of their expansive power to create law in the absence of statutory instruction. If this parallel is true, then likewise, with the advent of *Erie*, it would be thought that the modern courts would realize the greater constitutional restrictions on legislating from the bench, especially in areas of foreign affairs. The Court's concern with uniformity can find no better illustration of its importance than in the international context. *See Erie*, 304 U.S. at 74. Thus, just as *Erie* ended *Swift's* common law power, *Erie* should have curtailed common law making power in the international law context (perhaps even specifically overruling *The Paquete Habana*). Of course, *Erie* relied on the Rules of Decision Act, and therefore concerned an already made domestic statute of delegation. *See id.* at 71. Whether the Judiciary Act of 1789's international law ramifications can serve as a corollary is a question best left to another day.

Looking at the issue of the Offenses Clause through the prism of *Erie* and its progeny, three distinct forms of law-definition power within the federal court system are revealed.[39] First are wholly domestic, substantive issues traditionally of state concern, such as property law, family law, and criminal law. Second is federal court power over substantive areas such as the Freedom of Information Act,[40] the Federal Tort Claims Act,[41] or bankruptcy, where controlling federal statutes and federal common law exist. Third is power over cases in federal court where there is no established domestic federal law or established domestic state law — namely, international law.[42] International law may be governed by domestic statute, such as the Foreign Corrupt Practices Act,[43] treaty, such as the Vienna Convention for the International Sale of Goods,[44] or the law of nations.[45] This last category of law-defining power is the only category specifically granted to Congress in Article I.[46] Even substantive law subjects, such as bankruptcy and tax, also enumerated in Article I, are not referred to as a power to "define and punish."[47]

Thus, considering the plain language of the clause and the structural commitment of coordinate power to other branches, it seems indicated that the Constitution provides for no ability on the part of federal courts to determine the law of nations. This becomes even more manifest when an examination of the history of the clause is undertaken.

C. The History Behind the Offenses Clause

A survey of the understanding of law-making power, especially in the international law context, illuminates further support for the strict reading of the Offenses Clause.[48]

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39. The discussion herein concerns international litigation occurring in federal courts, and does not discuss state court powers or jurisdiction except insofar as necessary to distinguish it.

40. 5 U.S.C. § 552 (1976).

41. 28 U.S.C. §§ 1346(b), 2401(b), 2671-2680 (2003).

42. The determination of which, of course, is the subject of this article.

43. 15 U.S.C. § 78dd-1 (2003).

44. *See* United Nations Conference on Contracts for the International Sale of Goods, Apr. 11, 1980, 19 I.L.M. 668 (entered into force Jan. 1, 1988).

45. *See generally Smith*, 18 U.S. (5 Wheat.) at 153-60. .

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

47. *See id.* Of course, the "legislative power" is the power to make (define) law. But for other reasons noted herein, it seems plain that the use of the specific "define and punish" phrase meant something more than the traditional legislative power.

48. A sense of irony may be born in the reader's mind: after all, this article advocates a departure from federal courts' current process for determination of international legal precedent, namely, consultation of international legal scholars; yet does exactly that in seeking to establish the proposition which it sets forth. However, to establish the proper

1. Impetus for Incorporation of the Clause into the Constitution

The circumstances for the Offenses Clause manifest the clause's unique history.[49] Constitutional impetus for the Offenses Clause was found in two important needs of the fledgling country. The greatest need at the time of the constitutional convention arose out of the several states' failure to adequately remedy and address two notable incidents with international implications: the *De Longchamps* affair[50] and the *Dutch Ambassador* incident.[51] These notable instances where state law failed to provide adequate remedies for ambassadors injured on U.S. soil, raised considerable ire in the international community[52] and cemented the need for a strong, central international voice in the minds of the Founders.[53]

The two examples cited above where the several states failed to address concerns of international figures provided what may be termed a "sensationalist" need for a federal international law.[54] But it was the general view of those most eloquent of Founders, the Federalist authors, who most compellingly expressed the operative perspective.[55] This perspective can best be summed up as the abhorrence for leaving issues of international significance to the

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understanding of Offenses Clause limits on the federal courts is *not* to determine the law of nations.

49. I discuss the overall constitutional structure and early court decisions at *infra,* Parts III and IV, respectively. This is to establish the unique background to the Offenses Clause before placing it into the context of the entire Constitution and early jurisprudential use.

50. Respublica v. De Longchamps, 1 U.S. (1 Dall.) 111 (Pa. Ct. Oyer & Terminer 1784).

51. Curtis Bradley, *Alien Tort Statute and Ariticle III*, 42 Va. J. Int'l L 587, 641 (2002).

52. *Id.*

53. *See, e.g.,* Edmund Randolph et al., Report to Congress Nov. 1781, *reprinted in* 3 THE FOUNDERS CONSTITUTION 66 (Phillip B. Kurland and Ralph Lerner, eds. 1987).

54. Pennsylvania and New York were those in which the incidents occurred. *But see,* Jason Jarvis, *A New Paradigm for the Alien Tort Statute Under Extraterritoriality and the Universality Principle*, 30 Pepp. L. Rev. 671, n. 39 (2003) (arguing that the states did in fact adequately address the penal issue regarding international offenders and a more political impetus drove the convention's interest in a federal constitutional provision speaking to international offenses).

55. John Jay, James Madison and Alexander Hamilton, authors of The Federalist Papers.

several states.[56] Professor Charles D. Siegal sums up the mindset well:

> The Framers understood that certain acts violated the law of nations; they were aware that the states had failed to deal adequately with those acts as crimes under their common law and that the law of nations was imprecise — the new nation needed both a way to treat such offenses and uniformity.[57]

2. *The Constitutional Debates and Discussion Over the Language of the Clause*

One of the early suggestions for federal court jurisdiction included "authority to hear and determine...all Cases...*on the Law of Nations.*"[58] Yet the language of Article III allows for no such

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56. These ideals are espoused best in the following sources: "The power to define and punish...offenses against the law of nations [does not yet rest in the federal government and therefore it is] in the power of any indiscreet member to embroil the Confederacy with foreign nations." THE FEDERALIST NO. 42 (James Madison). "It is of high importance to the peace of America that she observe the laws of nations...and...it appears evident that this will be more perfectly and punctually done by one national Government than it could be...by the thirteen separate States." THE FEDERALIST NO. 3, (John Jay). "[T]he peace of the WHOLE ought not to be left at the disposal of a PART." The Federalist No. 80 (Alexander Hamilton). Hamilton noted the complexity of international conflicts rendered their determination by federal courts imperative: "So great a proportion of the cases in which foreigners are parties, involve national questions, that it is by far most safe and most expedient to refer all those in which they are concerned to the national tribunals." *Id.* And Madison once stated that it was the greatest single deficit on the Articles of Confederation that they did not empower one national government to speak in matters of international import. *See* JAMES MADISON, JOURNAL OF CONSTITUTIONAL CONVENTION 60 (E. H. Scott ed., 1970) (1840).

57. Charles D. Siegal, *Deference and Its Dangers: Congress' Power to "Define...Offenses Against the Law of Nations,"* 21 VAND. J. TRANSNAT'L L. 865, 879 (1988). Professor Siegal's article composes the most thorough background specifically to the Offenses Clause, but does not analyze it under the exclusivity principle I advocate. Still, for a more in-depth treatment of the Founders and the Offenses Clause, see *id.* at 874-886.

58. Committee of Detail VII, *in* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 157 (Max Farrand ed., Yale Univ. Press 1966) (1911) [hereinafter 2 Farrand]. *But see* Bradley, *supra* note 5, at 494. Professor Bradley notes that

> [I]nternational law during this period was widely considered to be objective and discoverable...due in part to international law's association with natural law. As the nineteenth century progressed, the objectivity and discoverability of international law were derived more from its association with state practice. Regardless of the basis, international law was accepted as "knowable doctrine." Judges who applied international law were seen as involved in a process of discovery rather than creation.

Id. Professor Bradley does not seem to suggest that courts were not capable of creating law, but he does suggest that such was not in the contemplation of the jurists of the time. *Id.* Read in light of the principles already discussed in this article regarding the Founder's specific grant of defining power to Congress, Professor Bradley's assertion supports the notion that Judges were not thought to be in the business of making new law. *Id.*

authority; the Framers retained the judicial power over cases of admiralty jurisdiction and those affecting ambassadors, but deleted power to determine the law of nations.[59] This reading is further supported by the affirmative grant of power to the Senate "to provide tribunals and punishment for mere offenses against the Law of Nations;"[60] and the grant of power "to declare the Law and Punishment of Piracies and...of offenses against the Law of Nations."[61]

However, it is in the notes of Madison on the debates that provide perhaps the most compelling support for the intended denial of power to the judiciary.[62] In debating the Offenses Clause, Wilson posited that purporting to "define" the law of nations "would have a look of arrogance" and hoped such language would not be used.[63] However, the will of the majority appeared to be that the law of nations was "too vague and deficient to be a rule."[64] If the Framers had intended for the judiciary to define the law of nations, they certainly would have manifested this intent with a specific provision in Article III, and would not have inserted the Offenses Clause into Article I.

3. American Commentators

One of the early writings expressing the need for courts capable of cognizing issues of international law was the letter by Edmund Randolph to the Congress, stating "that it be farther [sic] recommended to the several states to erect a tribunal in each State, or to vest one already existing with power to decide on offenses against the law of nations... "[65] This language suggests Randolph's

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59. *See* U.S. CONST. art. III, § 2, cl. 2.

60. Committee of Detail IV, 2 Farrand, *supra* note 58, at 143.

61. Committee of Detail VII, 2 Farrand, *supra* note 58, at 168. An affirmative grant of definitional power both for piracy and offenses against the law of nations is distinct in theory, but conflated in reality. One of the primary offenses against the law of nations, both as understood at the time of the founding, and as cited by courts today, is piracy. *See, e.g.*, 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 66-73 (Garland Publishing 1978) (1766).

62. *Id.* at 614-15.

63. *Id.* at 615.

64. *Id.* There are then two possible meanings for the Offenses Clause as illustrated by this portion of the Records: first, that inserting the word "punish" in front of "offenses against the law of nations" would be too great of an implication of arrogance for the fledgling United States; that is to say, that the United States of America did not have the power to *punish anything* in the international arena. The second meaning is that by using such a term, the Constitution might *limit* the ability of Congress *to define* the offenses, exactly what the delegates did *not* want to imply. Thus, it is clear that in either case, the intent was to expressly grant Congress the power to define the law of nations, not merely to punish it (as would have been the case without the stricken term).

65. Randolph, *supra* note 53, at 66.

desire to see power vested in the judiciary, but it is clear from the records of the debates of the Committee on Style that this was not the majority view of the delegates and that the power to define and punish ought to be vested in the Congress.[66]

Commentators relatively contemporary with the founding of the Constitution further support the "exclusive grant" reading of the Offenses Clause:

> And here we may remark by the way, the very guarded manner in which congress are [sic] vested with authority to legislate upon the subject of crimes, and misdemeanors. They are not entrusted with a general power over these subjects, but a few offences are selected from the great mass of crimes with which society may be infested, upon which, only, congress are authorized to prescribe the punishment, or define the offence. All felonies and offences committed upon land, in all cases not expressly enumerated, being reserved to the states respectively. From whence this corollary seems to follow. *That all crimes cognizable by the federal courts (except such as are committed in places, the exclusive jurisdiction of which has been ceded to the federal government) must be previously defined, (except treason,) and the punishment thereof previously declared, by the federal legislature.*[67]

Thus, the historical framework for the adoption of the Offenses Clause suggests specific intent on the part of the Framers to vest power for law-making in Congress.

4. International Commentators

Much of the historical commentary on the making of international law can trace its roots to Grotius.[68] Best known for his work, *De jure belli ac pacis* (On the Law of War and Peace), Grotius is considered by some to be seminal in the history of international law.[69] This tradition was continued by the famous Swiss writer,

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66. *See 2* Farrand, *supra* note 58 at 615.

67. 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES, WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND OF THE COMMONWEALTH OF VIRGINIA app. at 269-70 (Augustus M. Kelly 1969) (1803) (emphasis added). Although Tucker's anti-federalist views must be taken in context, his Commentaries are worthwhile in their general appraisal of the historical context to the Offenses Clause.

68. www.icrc.org/web/eng/siteengo.nsf (last visited October 10, 2003).

69. *See id. See* ARTHUR NUSSBAUM, A CONCISE HISTORY OF THE LAW OF NATIONS 102 (1947).

Emer de Vattel. Vattel was so influential that he was still being quoted in 1887 for support of an issue of the law of nations.[70] No discussion of the influences on American jurisprudence is complete without Sir William Blackstone.

The vast importance of Blackstone to early American legal theory cannot be underestimated, yet his importance to precepts on international law was less broad.[71] Blackstone's best-known commentary on the law of nations described the three common violations against it.[72] These violations are referred to repeatedly by the Founders and considered accurate, if limited, descriptions of common violations of the law of nations as they were thought to be in England during the time of the Founding.[73] Blackstone characterized these laws thusly, "[t]he principal offences against the law of nations...are of three kinds: (1) [v]iolation of safe-conducts; (2) [I]nfringement of the rights of ambassadors; and, (3) [p]iracy."[74]

5. English Courts

The English courts' international law-making powers are, much like their American progeny, complicated and involved multiple layers of jurisprudence and political controversy.[75] The clearest reference to the power of a court to interpret the law of nations may be found in Sir William Holdsworth's seminal work on English law, *A History of English Law*:[76]

> Lord Stowell said in the case of *The Recovery*, "It is to be recollected that this is a court of the law of nations, though sitting here under the authority of the king of Great Britain. It belongs to other nations as well as to our own; and, what foreigners have a right to demand from it, is the administration of the *Law of Nations* simply, and exclusively of the introduction of principles borrowed from our own municipal jurisprudence."

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70. *E.g.*, United States v. Arjona, 120 U.S. 479, 484 (1887) (citing with approval Vattel for his understanding of the law of nations).

71. *See* 4 BLACKSTONE, *supra* note 61, at 68. Blackstone's writings on the law of nations are sparse in the commentaries.

72. *Id.*

73. *Supra* note 57.

74. *Id.* at 68. It should provoke the curiosity of the thoughtful reader, however, why such sparce attention is given to international law when volumes of other domestic thought existed at the time. International law was not as it is today.

75. One such layer included the admiralty prize courts that "determined whether a captured vessel was a legitimate prize." *at* http://www.maritime-scotland.com/introduc.html.

76. 1 SIR WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 565-66 (A.L. Goodhart & H.G. Hanbury eds., 1966) (1903).

> It is clear that an English statute can compel a judge to depart from these principles; but it has been held by the Privy Council in the case of *The Zamora* that nothing short of a statute can have this effect.[77]

Holdsworth reviewed two "modern" cases for his discussion of the law of nations: *The Recovery* and *The Zamora*.[78] These two cases demonstrated the divergence of the nineteenth century courts of England as to their duty to the law of nations versus that of the crown, and while not exhaustive by any stretch, illustrate how some English courts interpreted the law of nations with great deference to applicable domestic statutes.[79]

The essential point to be gleaned from Holdsworth's review of the history of English law, however, is that it was "clear that in the sixteenth and seventeenth centuries the judges of the court of Admiralty, exercising...[prize] jurisdiction, were very much under the thumb of the crown."[80] It is this tradition, contemporaneous with and prior to the establishment of the American colonies, that would have informed the Founding Fathers. Disagreement abounded in English courts in the eighteenth and nineteenth centuries about the reach and power of international law in domestic courts,[81] but by that time American courts had begun to develop independent of their English counterparts and the parallel then begins to lose its impact.

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77. *Id.* Holdsworth further illuminates the power of domestic decisions, "I doubt very much whether [a domestic statute issued by the crown] can be disregarded [by the courts] if it contravenes a rule of international law." *Id.* at 567.

78. *Id.* at 566-67. Holdsworth illuminated the power of domestic decisions. "[I]t was probably the better opinion in the eighteenth century that, even if [a domestic statute issued by the crown] could not be...justified [by a treaty], the court must obey it, even though obedience might... expose the country to reprisals." *Id.* Thus, we are left with two cases from the Prize Courts of England, one which determined that the law of nations ought to reign supreme over English Common Law, and one which determined that decisions of the Crown are effectively acts of state and definitionally, then, international law for domestic purposes. Holdsworth recognized the complexity of the situation in England when he stated that "the contents of those rules of international law which have not been incorporated with the common law is intimately bound up with the prerogative of the crown in relation to foreign affairs...." *Id.*

79. *See id.* The point is that the Crown and some judges of the Prize courts were in conflict over whether the common law ought to incorporate the law of nations. *Id.* Whether such conflict can be removed from the conflicts between the English courts of common pleas and chancery is a question best left to another day, but for our purposes the conflicts in England were not so important as the agreement which preceded them.

80. *Id.* at 566. That is, the domestic sovereign's determination of international law reigned supreme.

81. *See id* at 566-67.

6. American Jurisprudence and the Offenses Clause

a. Early Court Decisions

The seminal case of *United States v. Smith,*[82] provided an early framework to the Offenses Clause. *Smith* concerned an indictment for piracy; the statute upon which imposition of criminal rested, stated, "if any person or persons...commit the crime of piracy, as defined by the law of nations...such offender or offenders shall... upon conviction...be punished with death."[83] Justice Story, writing for the court, addressed the validity of such a pronouncement (it is clearly constitutional, as supported by the Offenses Clause) and then addressed the prisoner's argument.[84] The gravamen of this argument was: "that Congress is bound to define, in terms, the offence of piracy, and is not at liberty to leave it to be ascertained by judicial interpretation."[85] The Court rejected this argument as "too narrow a view of the language of the constitution."[86] Instead, Justice Story set forth two justifications for this conclusion: first, that since the law of nations cannot simply be ascertained by review of "any public code recognised by the common consent of nations," the power to define bore "peculiar fitness" for review by the Court.[87] Why this meant Congress is not bound to define the offenses is not readily apparent. What Justice Story may have meant is that the power of Congress to *delegate* the power to define offenses against the law of nations is logical.

The second justification was that Congress need not have explicitly defined the offence of piracy.[88] As Justice Story writes, "there is nothing which restricts [Congress] to a mere logical enumeration in detail of all the facts constituting the offence."[89] A requirement for express definitions of all offenses of all sorts, felonious or otherwise, would result in "no end to our difficulties...for each [definition] would involve some terms which might still require some new explanation."[90]

Such a reading of the Offenses Clause is valid. It is in fact quite logical. It would make no sense for Congress to have to define every single term that could need defining in the law of nations. Yet, that is not why Justice Story is essentially correct in his application of

82. U.S. v. Smith, 18 U.S. (5 Wheat.) 153 (1820).
83. *Id.* at 157.
84. *Id.* at 158.
85. *Id.*
86. *Id.*
87. *Id.* at 159.
88. *Smith,* 14 U.S. at 159-60.
89. *Id.* at 159.
90. *Id.* at 160.

the felony of *piracy* to the defendant in *Smith*. It was the Court's description of how to determine the law of nations which leads future courts astray.[91] The Court determined to examine the law of nations and apply it, not because the power had been delegated to the Courts by Congress, but because it presumed the Court's power extended to cover such determinations.

Justice Livingston took a different tack in his dissent.[92] He made clear that the power to define piracy, to which *Smith* referred, had been enumerated to Congress.[93] Note the following:

> If it had been intended to adopt the definition...[of piracy]...it might as well at once have been adopted as a standard by the constitution itself. The object, therefore, of referring its definition to Congress was, and could have been no other than, to enable that body, to select from sources it might think proper, and then to declare, and with reasonable precision to define, what act or acts should constitute this crime .... Can this be the case, or can a crime be said to be defined, even to a common intent, when those who are desirous of information on the subject are referred to a code, without knowing with any certainty, where it is to be found.... Although it cannot be denied that some writers on the law of nations do declare what acts are deemed piratical, yet it is certain, that they do not all agree; and if they did, it would seem unreasonable to impose upon that class of men, who are the most liable to commit offences of this description, the task of looking beyond the written law of their own country for a definition of them. If in criminal cases every thing is sufficiently certain, which by reference may be rendered so, which was an argument used at bar, it is not perceived why a reference to the laws of China, or to

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91. The conundrum faced by Justice Story is cyclical upon first blush. If (i) the power to define piracy and the law of nations is given to Congress; and (ii) Congress gives the courts power to define piracy; but (iii) does so by reference to the law of nations; and (iv) gives no further direction; arguably Justice Story had to determine the law of nations before he could determine what piracy was or was not. This excuses Justice Story of some culpability in the Constitutional error discussion in this article. Indeed, the error is not so much contained in *Smith*as it is in later cases. Cases that extend the quandary of Justice Story beyond where courts are required by statute to determine the law of nations to a general self-grant of power authorizing courts to do so without an express delegation from Congress. *See, e.g.,* The Paquete Habana, 175 U.S. 667, 700 (1899).

92. *Smith*, 14 U.S. at 164-83.

93. *See id.*

> any other foreign code, would not have answered the purpose quite as well as the one which has been resorted to. It is not certain, that on examination, the crime would not be found to be more accurately defined in the code thus referred to, than in any writer on the law of nations; but the objection to the reference in both cases is the same; *that it is the duty of Congress to incorporate into their own statutes a definition in terms, and not to refer the citizens of the United States for rules of conduct to the statutes or laws of any foreign country....*[94]

Several things distinguish Justice Livingston's dissent from the thesis of this article. First, the issue in *Smith* concerned whether the definition of piracy was sufficiently compelling to warrant a conviction thereon.[95] It appears from Justice Livingston that the fact a criminal conviction was at issue factored heavily into his desire for greater specificity.[96] Second, Justice Livingston correctly noted that the Offenses Clause required Congress to define an offense against the law of nations [97] (without specifically referring to the Offenses Clause), but did not follow through on the separation of powers ramifications: namely, that such enumeration of power in Article I deprived Article III courts of that jurisdiction.[98] Finally, Justice Livingston did not agree that the delegation of the power to define piracy via the law of nations gave the courts the power to do so. He would have required Congress to define piracy, not by another indistinct term such as the law of nations, but by express specificity.[99] Arguably, the degrees of separation between Story's opinion and Livingston's dissent are few: the majority held that a definition of piracy by the law of nations using two degrees of definition is sufficient; the dissent framed the issue as requiring merely one degree of definition (piracy itself).[100]

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94. *Id.* at 176-83 (emphasis added).
95. *See generally id.* at 164-81.
96. *See id.*
97. *Id.*
98. *See supra* Part II(B).
99. *See id.*
100. *See generally id.* at 153-83. Although the most important, *Smith* was not the first case to confront important issues of international law. Two prior cases worth note dealt with issues of interpretation. The first was *Ware v. Hylton*, 3 U.S. 199, 240-41 (1796). *Hylton* is most often cited for the proposition that "general rules of construction apply to international agreements." *E.g.*, Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 262 (1984) (Justice Stevens, dissenting). *Hylton* is important, distinct from the Offenses Clause discussion herein, because it concerned the interpretation of a treaty — clearly a place where Congress has made the initial "definition" required by the Offenses Clause. The second case dealing with interpretation was *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116

b. The Paquete Habana

The case that culminated this expanse of the federal courts' power into unconstitutional waters was *The Paquete Habana*.[101] *The Paquete Habana* was a ship captured by the United States while flying a Spanish flag.[102] To determine the legality of this capture, the Supreme Court looked to common law norms of historical international law.[103] "By an ancient usage among civilized nations, beginning centuries ago, and gradually ripening into a rule of international law, coast fishing vessels, pursuing their vocation of catching and bringing in fresh fish, have been recognized as exempt...from capture as prize of war."[104] The court traced the history of fishing vessel exemptions to wartime capture rules and found, by and large, agreement among the international community that fishing vessels were exempt.[105] *The Paquete Habana* court then made this oft-quoted statement: "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."[106]

(1812). *The Schooner Exchange* concerned issues of territoriality. *Id.* at 136. Chief Justice Marshall stated regarding territoriality that "All exceptions...to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself.... This consent may be either express or implied." *Id.* at 136. Chief Justice Marshall set the stage for *Smith* and *The Paquete Habana* by, without expressly stating so, looking to the international works of jurists and commentators. *See The Schooner Exchange,* 11 U.S. (7 Cranch) at 144. "In exploring an unbeaten path, with few, if any, aids from precedents or written law, the court has found it necessary to rely much on general principles, and on a train of reasoning, founded on cases in some degree analogous to this." *Id.* at 136. Chief Justice Marshall's concern to expand, not restrict, the power of the federal judiciary and the Supreme Court may explain the Court's arguable need to stretch the power of the Court to determine indeterminate issues of international law in contravention of the Offenses Clause. In fact, he displayed a fundamental appreciation for the law of nations: "A nation would justly be considered as violating its faith...which should suddenly and without previous notice, exercise its territorial powers in a manner not consonant to the usages and received obligations of the civilized world." *Id.* at 137. However, to be properly deferential to the commitment of the power to define these "obligations" Chief Justice Marshall would have been more accurate to include a parenthetical, "as defined by Congress," for example, at the end of such a statement. It was not until *The Paquete Habana*, however, that the Court deviated expressly from the Constitutional mandate of the Offenses Clause.

101. The Paquete Habana, 175 U.S. 677.

102. *Id.* at 678.

103. *See id.* at 686.

104. *Id.*

105. *See id.* at 686-700 The court did not find unanimous agreement however as to this rule.

106. *Id.* at 700. The court then, arguably, drew on *Smith* when completing the statement:

> For this purpose, 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; and, as evidence of these, to the works of jurists and commentators.... Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.

The "methods" became an outgrowth of what Justice Story referred to in *Smith*, "[consultation of] the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law."[107] Professor Louis Henkin illustrates *The Paquete Habana* method with characteristic aplomb:

> In a real sense federal courts *find* international law rather than make it, as was not true when courts were applying the "common law," and as is clearly not the case when federal judges make federal common law pursuant to constitutional or legislative delegation. The courts determine international law for their purposes, but the determinants are not their own judgments or the precedents of U.S. courts.[108]

The Paquete Habana was wrongly decided; not because of its result but because of its reasoning. In reaching the result (that fishing vessel protection was valid under the law of nations) the Court reached beyond the specific delegation of authority by the *Smith* court in determining piracy.[109] Instead, *The Paquete Habana* court declared that in the absence of other instructions they should simply consult the so-called "customs and usages of civilized nations."[110] The court erred fundamentally because it relied on *Smith* and *Hylton* to *determine how to determine the law of nations.* Unfortunately, it did not ask the question *whether it should determine the law of nations.* The court thereby mistakenly usurped this Congressional power.

The ramifications of this over-extension of federal jurisdiction can be seen in the following modern uses of *The Paquete Habana.*

7. Modern Uses of "Customary International Law" in the United States

The term "customary international law," came in to use in the twentieth century.[111] But, in all respects it mirrors and duplicates

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107. *Smith*, 14 U.S. at 160. The Court restated this list in *The Paquete Habana*, 175 U.S. at 700.

108. Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1561-1562 (1984).

109. Note again that the Court in *Smith* had the benefit of a statute charging courts with defining piracy by using the law of nations. *Smith*, 18 U.S. at 162.

110. The Paquete Habana, 175 U.S. at 700.

111. It appears that one of the first instances the term "customary international law" was used in American jurisprudence was in 1951, in *Aboitiz & Co v. Price*, 99 F. Supp. 602, 609 (D. Utah 1951), where the court stated:

the term "law of nations."[112] The first time the Supreme Court interpreted the law of nations in the twentieth century was in the case of *In re Yamashita*.[113] But the most important Supreme Court case of the twentieth century concerning international law, and the first time the Court used the term "customary international law," was *Banco Nacional de Cuba v. Sabbatino*.[114] *Sabbatino* examined customary international law to determine the international practices regarding "a state's power to expropriate the property of aliens."[115]

Sabbatino illustrates how the Court struggles with its self-imposed need to define customary international law, and why it should refrain from doing so.[116] The Court admitted the great

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> Although it is correct to say that international law governs only the relations between States, and that it has nothing to do directly with disputes between private individuals, the principle has been clearly adopted in the United States that it is part of the law of the land, because either we have signed international agreements, or have otherwise written it into our municipal law. Oppenheim says: "Such customary International Law as is universally recognized or has at any rate received the assent of the United States, and further all international conventions ratified by the United States are binding upon American courts, even if in conflict with previous American statutory law; for according to the practice of the United States customary as well as conventional International Law overrule previous Municipal Law, provided, apparently, that they do not conflict with the Constitution of the United States."

Id. at 609 (citation omitted).

112. The Supreme Court did not use the term until 1964 in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964). This is a term of recent use and development if not in legal academia, then at least in the common parlance of the Court, but there is no indication that a court seeking to establish the law of nations is seeking anything different whatsoever from establishing customary international law.

113. 327 U.S. 1 (1946). *Yamashita* concerned the habeas application of a Japanese general convicted of war crimes by a military tribunal in the Philippines to the Supreme Court. *Id.* at 4.

114. 376 U.S. 398 (1964).

115. *Id.* at 428.

116. *See id* at 428. Note this paragraph in the Court's opinion:

> There are few if any issues in international law today on which opinion seems to be so divided as the limitations on a state's power to expropriate the property of aliens. There is, of course, authority, in international judicial and arbitral decisions, in the expressions of national governments, and among commentators for the view that a taking is improper under international law if it is not for a public purpose, is discriminatory, or is without provision for prompt, adequate, and effective compensation. However, Communist countries, although they have in fact provided a degree of compensation after diplomatic efforts, commonly recognize no obligation on the part of the taking country. Certain representatives of the newly independent and underdeveloped countries have questioned whether rules of state responsibility toward aliens can bind nations that have not consented to them and it is argued that the traditionally articulated standards governing expropriation of property reflect "imperialist" interests and are inappropriate to the circumstances

division among international authorities,[117] yet still the Court managed to settle on a single interpretation, ruling that "the act of state doctrine is applicable [to expropriation] even if international law has been violated."[118] *Sabbatino* provides an early example of *The Paquete Habana* method in action, but the Courts' usurpation of the power to define international law continued.

8. Emerging Trends Among the Circuit Courts and Expansion of the Federal Courts' International Law Making Power

Filartiga v. Pena-Irala[119] concerned the suit by a resident alien against another alien based on allegations of the torture and murder of a political dissident's son in Paraguay.[120] The Second Circuit began its analysis to find liability under the Alien Tort Statute (ATS)[121] by requiring a clear violation of the "law of nations."[122] Defining the law of nations became the first order of business for the panel, which began its analysis by reviewing Supreme Court jurisprudence on this issue.[123] Relying upon the expression contained in *The Paquete Habana*,[124] the *Filartiga* panel reviewed the authorities for determination of the law of nations, and then noted the unequivocal condemnation of the use of torture by

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of emergent states.

Id. at 428-29 (citations omitted).

117. *See id* at *430*. "It is difficult to imagine the courts of this country embarking on adjudication in an area which touches more sensitively the practical and ideological goals of the various members of the community of nations." *Id.* at 430. Professor Henkin poses an interesting question in reviewing *Sabbatino*: "Was the Court merely seizing an occasion to aggrandize judicial power?" Louis Henkin, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 57 (2d ed., Claredon Press 1996) (1990). Although Henkin is referring to the Courts insistence that the Act of State doctrine was judicially empowered, arguably his comment may encompass far more. *See id.* at 57-58.

118. *Sabbatino*, 376 U.S. at 431.

119. 630 F.2d 876 (2d Cir. 1980).

120. *Id.* at 878.

121. 28 U.S.C. § 1350 (2003).

122. *Id* at 880.

123. *Id.* "The law of nations 'may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recogni[s]ing and enforcing that law.'" *Id.* (quoting *Smith*, 18 U.S. at 160-161) (alteration in original). It is noteworthy that not only the order in which these sources are listed might be considered counterintuitive, but they furthermore recognize the importance of reviewing international law in a *manner similar to the modus of the courts in other countries*The Second Circuit made a base(if harmless) error, however, in not consulting what is clearly the most important domestic source of the law of nations, Congress and the Constitution. *See* U.S. CONST. art. I, § 8, cl. 10. For a discussion of the use of the Offenses clause with respect to extraterritoriality, see Zephyr Rain Teachout, Note, *Defining and Punishing Abroad: Constitutional Limits on the Extraterritorial Reach of the Offenses Clause*, 48 DUKE L.J. 1305, 1316 (1999).

124. *See supra* note 101.

"civilized nations."[125] The court found that the conduct alleged in *Filartiga* clearly violated the law of nations.[126] *Filartiga* is notable for two reasons: (1) it revitalized (if not resurrected) use of the ATS; and (2) by doing so, reminded the international legal community that the law of nations was alive and meaningful. The opinion is otherwise unremarkable for the purposes of this article.

Another important case (also utilizing the ATS), *Tel-Oren v. Libyan Arab Republic* [127] arose just a few years after *Filartiga*. *Tel-Oren* involved a lawsuit filed by the claims of survivors and relatives of persons murdered and injured by a terrorist attack in Israel.[128] In the course of the attack the terrorist tortured, shot and killed numerous adults and children.[129] Most victims were Israeli, but some Americans and Dutch were also affected.[130] These plaintiffs brought their claim in the District of Columbia against a number of defendants, including the Palestinian Liberation Organization.[131]

Although all three judges on the *Tel-Oren* panel agreed to dismiss the action for lack of subject matter jurisdiction, their reasoning greatly diverged.[132] Briefly, Judge Edwards reasoned that while *Filartiga* had been properly decided and torture is prohibited

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125. *Id* at 881. The court also wisely noted that a particular rule need not be adhered to by every single nation. "Were this not so, the courts of one nation might feel free to impose idiosyncratic legal rules upon others, in the name of applying international law." *Id.*

126. *Id.* This is another important point because in many later cases, the greatest issue facing litigants is whether or not something violated the law of nations. Proof of a tort, and proof of alien status are both patent. Proof of violation of the law of nations is extremely fact-sensitive, and thus, torture's implication as a clear violation was important insofar as the reach *Filartiga* has had, and should have. *See, e.g.*, Tel-Oren v. Libyan Arab Republic, 726 F.2d. 774, 775 (D.C. 1984) (Edwards, J., concurring) ("This case deals with an area of the law that cries out for clarification by the Supreme Court. We confront at every turn broad and novel questions about the definition and application of the 'law of nations.'").

127. 726 F.2d 774 (D.C. Cir. 1984).

128. *Id.* at 775.

129. *Id.* at 776.

130. *Id.*

131. *Id.* at 775. Judge Edwards, in his concurring opinion, pointed out that he was self-limiting his analysis "to the allegations against the Palestine Liberation Organization... [because] the complainants' allegations against the Palestine Information Office and the National Association of Arab Americans are too insubstantial to satisfy the... [the ATS and] [j]urisdiction over Libya is barred by the Foreign Sovereign Immunities Act." *Id.*(citations omitted). Commentators have disagreed whether this analysis is correct in light of *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964). *Compare* Ryan Goodman & Derek P. Jinks, *Filartiga's Firm Footing: International Human Rights and Federal Common Law*, 66 FORDHAM L. REV. 463, 480-497 (1997) ("According to *Sabbatino's* reasoning...judicial incorporation of CIL for such claims would survive the act of state doctrine."), *with* Gary B. Born, *International Civil Litigation in United States Courts* 743 (3d ed. 1996) ("The act of state doctrine articulated in Sabbatino would presumptively forbid U.S. courts from sitting in judgment on the foreign state's misconduct.").

132. *See generally* Tel-Oren v. Libyan Arab Republic, 726 F.2d. 774 (D.C. 1984)The three D.C. Circuit Judges were Judge Edwards, Judge Bork, and Senior Judge Robb. Each filed a separate concurring opinion joining no part of any of the others. *Id.*

by the law of nations, such referred to "official" torture as perpetrated by a state actor.[133] Judge Bork took a new, and then-to-date unique tack: he also held to affirm the dismissal of action, but on the theory that the ATS provides jurisdiction but no cause of action for violations of the law of nations.[134] Judge Bork suggested that implying a cause of action would, in effect, make the ATS self-executing and go beyond that which Congress intended or undertook.[135]

After compiling quite an extensive and exhaustive list of rationales for doing so, Judge Robb concurred on the basis that the issue presented to the panel was non-justiciable under the political question doctrine.[136] But Judge Robb noted something in his concurrence dispositive of the issue in this article that:

> I agree with the sentiment expressed by Chief Justice Fuller in his dissent to *The Paquete Habana*, where he wrote that it was "needless to review the speculations and repetitions of writers on international law.... Their lucubrations may be persuasive, but are not authoritative." Courts ought not to serve as debating clubs for professors willing to argue over what is or what is not an accepted violation of the law of nations.... The typical judge or jury would be swamped in citations to various distinguished journals of international legal studies, but would be left with little more than a numbing sense of how varied is the world of public international "law."[137]

Other cases discussing the law of nations utilized a similar approach to that of the *Filartiga* panel.[138]

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133. *Id.* at 777.

134. *Id.* at 809. For just one drop of water in a sea of criticism for this point of view, see Anthony D'Amato, *What Does Tel-Oren Tell Lawyers? Judge Bork's Concept of the Law of Nations is Seriously Mistaken*, 79 AM. J. INT'L L. 92 (1985).

135. *Tel-Oren*, 726 F.2d. at 808-12.

136. *Id.* at 823. Judge Robb arguably based this assertion on one fundamental but unspoken difference from the other Judges: that the act of terrorism committed by the defendants was a political or war-time act and not that of a private tortfeasor in the classic sense. *See id.* at 825.

137. *Id.* at 827 (internal citations omitted).

138. The best example of this is *Kadic v. Karadzic*, 70 F. 3d 232, 241 (2d Cir. 1995) (reviewing the law of nations in order to determine violations thereof with respect to genocide).

III. SCHOLARLY REVIEW OF OFFENSES CLAUSE LIMITATIONS

Having examined the text of the Offenses Clause, the history and structure of its passage, and the American jurisprudence interpreting the clause, I turn to the present, first by considering other scholars' work on the Offenses Clause.

A. "Deference and Its Dangers"[139]

In what may be the seminal work on the Offenses Clause, Charles Siegal argues that the courts have given Congress free rein in defining the law of nations.[140] While an accurate rendition of the state of the law, this analysis misses the mark. The courts have never had the power to "give Congress free rein" because the power to define has always been vested in Congress. It was Congress' right to give courts a free rein (by delegating its authority) rather than the other way around. Such a commonly held improper reading of the courts' law making power is precisely why a new and more thorough appreciation for the unique qualities of the Offenses Clause requires thought.

B. The Charming Betsy Doctrine

Curtis Bradley suggests that in light of certain constitutional understandings of the law of nations, combined with the modern evolution of customary international law, the *Charming Betsy* canon ought to be revised.[141]

The *Charming Betsy* doctrine is simple and well-settled,[142] and may be best stated by quoting its source: "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."[143] The Restatement (Third) of Foreign Relations adjusts this standard somewhat in adopting the language "where fairly possible."[144] Scholars and courts debate regarding the appropriate level of vagueness required for a court to

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139. Siegal, *supra* note 57.

140. *Id.* at 880. In pertinent part:

> Indeed, no court has ever invalidated a statute enacted pursuant to the offenses clause on the ground that no offense against the law of nations existed. The cases, albeit equivocally, seem to give Congress a somewhat freer hand in defining crimes under the offenses clause than they generally give courts in integrating customary international law into United States law, in the sense that in some cases less evidence of custom is needed to establish an offense than is needed to establish custom generally.

141. *See* Bradley, *supra* note 5, AT 484.

142. *See id.* at 482-84.

143. *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

144. RESTATEMENT (THIRD) FOREIGN RELATIONS § 114 (1987).

look to international law for possible violations,[145] but as an essential doctrine the canon has survived nearly 200 years. Professor Bradley's argument is complicated. A vastly simplified summary is as follows:

> to the extent that the [*Charming Betsy*] canon is to be retained, it is best thought of today as a device to preserve the proper separation of powers between the three branches of the federal government....
>
> ...[T]he canon was adopted during a time when the international status of the United States, prevailing views...of international law, and the role of federal courts were all very different than they are today.[146]

The *Charming Betsy* canon cannot survive the principles suggested by a careful reading of the Offenses Clause.[147] Specific suggestions for how to alter the doctrine such that it complies with the principles espoused here must be left for another day, although arguably Professor Bradley's description of the "separation of powers conception" fits nicely within the Offenses Clause limitations.[148] This is because, like *Charming Betsy, The Paquete Habana* relied on an overbroad understanding of the power of federal courts to make determinations of international law. Furthermore, in both cases, less deference is paid to domestic law than ought to be in light of the Offenses Clause. If the Offenses Clause is to be properly respected, it must be noted that the affirmative grant of power to Congress to make international law was not only to keep it out of the hands of the courts (as discussed herein), or the several states,[149] but also out of the hands of foreign nations. Thus, rather than paying deference to the law of nations by reading domestic law in accordance therewith, the law of nations should be read in accordance with domestic law and under proper

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145. *See* Bradley, *supra* note 5, at 490-91.

146. *See id.* at 484. These arguments are similar to this article's in that I also advocate a separation of powers framework for understanding why courts do not have power to define the law of nations; yet Professor Bradley does not seem to rest his qualified acceptance of *Charming Betsy* upon such constitutional bases. *See generally id.*

147. Professor Bradley concluded his article by illustrating that the *Charming Betsy* canon is similar to other presumptive interpretive canons "such as the canon that federal statutes should be construed to avoid serious constitutional questions." *Id.* at 536. However, while Professor Bradley recognizes the fundamental problems with permitting the courts to interpret statutes in light of the law of nations, he does not recognize that the source of this fundamental problem is the Offenses Clause. *See generally id.*

148. *See id.* at 524-29.

149. *See supra* Section II(C) regarding the impetus for the Offenses Clause.

Constitutional principles.[150] Another article addressed a specific use of the Offenses Clause that has seen ever-increasing use since the *Filartiga* case referenced above.

C. *The Alien Tort Statute*

Congress passed the Alien Tort Statute (commonly called the Alien Tort Claims Act) as part of the Judiciary Act of 1789.[151] The statute provides that "[t]he district courts shall have original jurisdiction of any civil action for a tort only, committed in violation of the law of nations or a treaty of the United States."[152] Although the number of successful litigants utilizing the ATS has been limited, the ATS has engendered substantial commentary.[153] One such commentator, Donald J. Kochan, argues that the ATS should be restricted to violations against the law of nations as understood by the Founders and thereby only to those cognizable in American law.[154]

This argument is facially similar to that in this article but foundationally different. Kochan argues (compellingly) that the structure and context of the ATS should be read restrictively as to the courts' power.[155] He does not make the argument that, foundationally, federal courts lack the judicial power to determine even what the law of nations is. Thus, while this argument may be sound in principle it neither supports nor opposes the principles espoused herein.

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150. It is realized that this American-centric view of international law may not be popular with other countries or many scholars. However plain the interest of the Founders in respecting international law and proving the United States would, as a fledgling country, respect the law of nations, it is likely that they also intended Congress to be the final arbiter on what the law of nations would be. This turns the *Charming Betsy* canon on its head, and arguably parallels Professor Bradley's point.

151. Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649, 680 (2000).

152. 28 U.S.C. § 1350 (2003). Originally, the ATS provided that the district courts "shall also 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." *See* Judiciary Act of 1789 § 9(b).

153. *See, e.g.*, Kenneth C. Randall, *Federal Jurisdiction Over International Law Claims: Inquires into the Alien Tort Statute*, 18 N.Y.U. J. INT'L L. & POL. 1 (1985); William R. Casto, *The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467 (1986); Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L. L. 587 (2002); Jarvis, Comment, *A New Paradigm for the ATS*, 30 PEPP. L. REV 671 (2003). A number of factors likely enter into the popularity of commentary: it is an old, unused statute revitalized in the 1980s; it can be used in everything from egregious and heinous human rights violations to complicated environmental torts; and it allows litigants without a United States nexus to litigate in United States courts.

154. *See generally* 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 (1998).

155. *See id.* at 156.

IV. THE PROPER ROLE OF COURTS IN INTERPRETING THE LAW OF NATIONS

Having examined the background of the Offenses Clause, it appears, in sum, that there are two instances where the federal courts may determine the law of nations.

A. Where There is Domestic Law on Point

There are numerous statutes passed by Congress that concern issues of international law; in fact, far too many to list here. Notable ones used frequently by litigants include the Alien Tort Statute,[156] the Foreign Sovereign Immunities Act,[157] and the Torture Victims Protection Act.[158] This does not include the hundreds (if not thousands) of laws that do not appear intentionally directed in an international context, but which include powerful ramifications therefore.[159] For courts to either directly apply, or interpret these or any other pertinent statute, is clearly within the power contemplated by Article III. Yet it is the presumption by the federal courts that the law of nations is like treaties or domestic statutes in that the judicial power extends to it, which is erroneous. Courts must, in the future, look to whether a treaty or domestic statute is on point, and analyze the issues in that, and only that, framework.

B. Where Delegated by Congress

Nothing prohibits Congress from delegating its constitutional authority.[160] Perhaps the most notable instance of this is the case discussed at length above, *United States v. Smith*.[161] In *Smith*, Justice Story made an ultimately correct decision, not because the Court had constitutionally granted jurisdiction over the law of nations, but because Congress had expressly delegated the power to define piracy by passing the act upon which the indictment was returned![162] By passing such an act and directing courts to determine the law of nations definition of piracy, Congress gave the courts power to determine piracy. This did not mean the courts then had the power to define the law of nations. Unfortunately,

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156. 28 U.S.C. § 1350 (2003).

157. Pub. L. No. 94-583, 90 Stat. 2891-97 (1976) (codified at 28 U.S.C. § 1330 (2003)).

158. Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 (2003).

159. *See, e.g.*, Roger P. Alford, *The Extraterritorial Application of Antitrust Laws: The United States and European Community Approaches*, 33 VA. J. INT'L L. 1, 6-7 (1992) (examining application of the Sherman Anti-Trust Act in an international context).

160. For example, Congress delegated the power to promulgate the Federal Rules of Evidence to the courts.

161. 18 U.S. (5 Wheat.) 153 (1820).

162. *See supra* Section IIC(6)(a).

Justice Story took a step further when forced to define piracy as under the law of nations. As he stated early in the opinion, "the definition of piracies might have been left without inconvenience to the law of nations, though a legislative definition of them is to be found in most municipal codes."[163] Thus, it appears Story considered the delegation of power to define piracy as given to the courts to determine in a manner *distinct from their definition by reference to the law of nations.* This is confusing in light of the language of the statute conferring specifically upon piracy its definition in the law of nations.[164]

C. A Suggested Approach for Federal Courts.

I suggest therefore, a two-pronged approach for federal courts confronted with issues pertaining to the law of nations.[165] First, a court should ask: is the issue one covered directly by any domestic statute or applicable treaty? If so, the inquiry should stop there. The statute or treaty would control. This is not really different from the current regime. The second prong is: has the power to determine the law of nations for this issue been delegated to the courts by Congress? It may be a situation such as *Smith*, where the domestic statute requests that the court determine the law of nations. This suggested approach is nothing revolutionary, but framed in these two simple questions is the essence of this article's thesis: that the federal courts must have been given by Congress an affirmative grant of authority, either expressly by statute or treaty, or impliedly by delegation, before the courts can determine the law of nations. In the absence of such a grant, the federal courts lack jurisdiction.

V. CONCLUSION

The textual commitment of the power "[t]o define and punish... offenses against the law of nations," indicate a clear intent on the part of the Framers to limit the federal courts' jurisdiction to matters already defined by Congress or those so delegated.[166] Considered also in light of the strong public policy concerns favoring the courts' refraining from determining sensitive, undeclared issues of customary international law, it is clear what must be a new rule

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163. *Smith*, 18 U.S. at 158.

164. *See id.* at 153.

165. Should this proper understanding of the Offenses Clause come to light, litigants will no longer be able to look to courts to make the law and will instead seek appropriate redress with the political process.

166. *See* U.S. CONST. art. II, § 8.

of federal jurisprudence for international law: *unless Congress has either expressly delegated the defining power authority to the courts, or already legislated on a subject of customary international law, courts must dismiss actions calling for any determination of the law of nations for want of jurisdiction.*[167] In many respects this is essentially the view taken by Judge Robb in his *Tel Oren* concurrence.[168]

It is important to note what the principle stated in this article does not advance. It does not advance the proposition that courts lack jurisdiction to review matters of international law where Congress has defined the law of nations. Any time Congress makes a treaty, domestic statute, suggests findings on the state of international law, or passes a law intended to have international consequences (such as the Torture Victims Protection Act), courts may interpret and apply these rules. Courts may also act in cases such as *Smith* where Congress has delegated the power to determine the law of nations to the courts.

Absent such a grant of legislation or delegation, however, the Constitution demands courts bow out of any litigant request for a determination of the law of nations. It is not likely that the courts will seek to limit their own power, thus it lies with Congress to duly exercise their power and duty, to set forth new laws either delegating the power to, or defining itself, the law of nations.

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167. A corollary to this argument may be made: That the political question doctrine would also abrogate jurisdiction by the federal courts to make determinations of the law of nations

168. "I agree with the sentiment expressed by Chief Justice Fuller in his dissent to the *Paquete Habana*, where he wrote that it was 'needless to review the speculations and repetitions of writers on international law.... Their lucubrations may be persuasive, but are not authoritative.'" *Tel Oren*, 726 F.2d at 827 (quoting *Paquete Habana*, 175 U.S. 677, 720 (1900) (Fuller, J. dissenting).