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The "Define and Punish" Clause and the Limit of Universal Jurisdiction

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THE “DEFINE AND PUNISH” CLAUSE AND THE LIMITS OF UNIVERSAL JURISDICTION[†]

*Eugene Kontorovich**

INTRODUCTION.....	150
I. METHODOLOGICAL ISSUES	156
A. <i>Interpretive Theories</i>	156
B. <i>Evolution in Common and International Law</i>	157
II. ORIGINS OF THE CLAUSE	159
A. <i>The Drafting</i>	160
B. <i>The Double Redundancy</i>	163
C. <i>Uniqueness of Piracy</i>	165
D. <i>Summary</i>	167
III. POLICY OF THE CLAUSE.....	168
A. <i>Purposes</i>	168
B. <i>Background Assumptions</i>	171
C. <i>Summary</i>	174
IV. MURDER ON THE HIGH SEAS	174
A. <i>Grand Jury Charges</i>	176
B. <i>John Marshall and Jonathan Robbins</i>	179
C. <i>The Crimes Act in the Supreme Court</i>	185

[†] This Article is the first of a two-part project on Congress’s power to exercise universal jurisdiction under the Constitution’s Define and Punish Clause. This Article develops an understanding of the jurisdictional limits of the clause. The companion article applies the principles developed here to the statute that currently provides the basis for most universal jurisdiction prosecutions: the Maritime Drug Law Enforcement Act (MDLEA). See Eugene Kontorovich, *Beyond the Article I Horizon: Congress’s Enumerated Powers and Universal Jurisdiction over Drug Crimes*, 93 MINN. L. REV. (forthcoming 2009). That article also considers other possible bases of constitutional authority for MDLEA, such as the treaty power. See *id.*

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This Article is dedicated to the memory of my teacher, David Currie (1936–2007), who showed that constitutional law could be studied objectively.

D. <i>Summary</i>	192
V. THE SLAVE TRADE	194
A. <i>The Constitution in Congress</i>	194
B. The Antelope	197
CONCLUSION	198

INTRODUCTION

Several federal statutes criminalize conduct by foreigners that has no relation to the United States. Some of these measures purportedly exercise Congress’s power to “define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations.”¹ This raises a serious and previously unexplored question about the meaning and jurisdictional breadth of the Define and Punish Clause: Does the clause authorize Congress to legislate for the rest of the world?

This question intersects with several pressing controversies. As European nations have increasingly begun to exercise universal jurisdiction over various crimes, there is pressure on the United States to follow suit.² Aliens have increasingly turned to U.S. courts to adjudicate purely foreign disputes.³ Also, the interplay between international law and constitutional law has become a much debated issue.⁴ A better understanding of the Define and Punish Clause will illuminate each of these controversies:⁵ in one

¹ U.S. CONST. art. I, § 8, cl. 10 (“Clause Ten” or the “Define and Punish Clause”). When speaking of particular parts of the clause, this Article will refer to the high seas power as the “Piracies and Felonies” provision and to the law of nations power as the “Offenses” provision.

² See, e.g., FIONA MCKAY, REDRESS TRUST, UNIVERSAL JURISDICTION IN EUROPE: CRIMINAL PROSECUTIONS IN EUROPE SINCE 1990 FOR WAR CRIMES, CRIMES AGAINST HUMANITY, TORTURE AND GENOCIDE (1999), available at <http://www.redress.org/publication/UJEurope.pdf>; LUC REYDAMS, UNIVERSAL JURISDICTION: INTERNATIONAL AND MUNICIPAL PERSPECTIVES (2003); David B. Rivkin, Jr. & Lee A. Casey, Op-Ed., *Europe’s Runaway Prosecutions*, WASH. POST, Feb. 28, 2007, at A19 (discussing the use of universal jurisdiction by European nations in attempting to prosecute American officials for alleged violations of international law).

³ See, e.g., *Belhas v. Ya’alon*, 515 F.3d 1279 (D.C. Cir. 2008) (involving suit by Lebanese citizens against Israeli defense officials concerning military actions in southern Lebanon); *Khulumani v. Barclay Nat’l Bank Ltd.*, 509 F.3d 148 (2d Cir. 2007) (involving suit by South African nationals against U.S. and foreign corporations for abetting apartheid); *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (allowing suit by Paraguayan nationals against former Paraguayan military officials for torture committed during that country’s civil war); see also Eugene Kontorovich, *Implementing Sosa v. Alvarez-Machain: What Piracy Reveals About the Limits of the Alien Tort Statute*, 80 NOTRE DAME L. REV. 111 (2004).

⁴ See, e.g., Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT’L L. 43 (2004); Eugene Kontorovich, *Disrespecting the “Opinions of Mankind”: International Law in Constitutional Interpretation*, 8 GREEN BAG 2D 261 (2005); John O. McGinnis, *Foreign to Our Constitution*, 100 NW. U. L. REV. 303 (2006).

⁵ *United States v. Suerte*, 291 F.3d 366, 375 (5th Cir. 2002) (noting that the Piracies and Felonies power is “the only specific grant of power to be found in the Constitution for the punishment of offenses outside the territorial limits of the United States” (internal quotation marks omitted)).

breath the clause addresses universal jurisdiction (piracies), extraterritorial crimes (felonies on the high seas), and violations of international law.

This Article demonstrates that the Define and Punish Clause limits Congress’s power to criminalize conduct that lacks a U.S. nexus. Two possible interpretations emerge from examining the evidence. At most, Congress can legislate universally only when international law has made punishment of the regulated conduct universally cognizable. In the narrowest interpretation, Congress’s universal jurisdiction powers under the clause are restricted solely to piracy. In either case, the restriction comes not from the independent force of international law but from the Constitution itself, which incorporates international law by reference in Clause Ten. This conclusion suggests that at least one important criminal law currently in force and several others pending in Congress exceed Congress’s Article I competence. Moreover, it has cautionary implications for Alien Tort Statute (ATS) cases against foreign officials for abuses committed against their own nationals.

Understanding the limits on universal jurisdiction under the Define and Punish Clause requires exploring its particularly obscure “Piracies and Felonies” provision.⁶ This inquiry also has important ramifications for the scope of the more often used “Offenses” power. Because maritime matters were so central to the life of the early Republic, almost all discussions of universal jurisdiction from the Founding Era until the twentieth century involved matters on the “high seas,” and thus primarily implicate those powers. The Piracies and Felonies provision has direct modern relevance: Congress has relied on it to enact America’s most used criminal universal jurisdiction statute, the Maritime Drug Law Enforcement Act (MDLEA).⁷

No scholarship has examined the meaning of the Piracies and Felonies provision.⁸ (It is wonderful that this can still be said of any constitutional provision.) Clause Ten’s other element, the power to “define and punish . . . Offences against the Law of Nations,” has been recently described as

⁶ See *United States v. Biermann*, 678 F. Supp. 1437, 1445 (N.D. Cal. 1988) (“The courts of the United States have not had many occasions to interpret this constitutional provision.”); HERITAGE FOUND., *THE HERITAGE GUIDE TO THE CONSTITUTION* 126 (Edwin Meese III et al. eds., 2005) (describing the clause’s meaning as “not . . . controversial”); Curtis A. Bradley, *Universal Jurisdiction and U.S. Law*, 2001 U. CHI. LEGAL F. 323, 337 (“[T]he scope of the Define and Punish Clause is unclear . . .”).

⁷ See *United States v. Madera-Lopez*, 190 Fed. App’x 832, 835–36 (11th Cir. 2006) (rejecting the contention that the Piracies and Felonies power does not authorize universal jurisdiction over drug offenses).

⁸ Professor Crosskey discusses the provision in some detail, but from a separation of powers perspective. See 1 WILLIAM WINSLOW CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 443–58 (1953). He sees the provision as giving Congress authority that, in British law, because of its connection to the admiralty, would have resided with the executive. *Id.* at 445–46; see also A. Mark Weisburd, *Due Process Limits on Federal Extraterritorial Legislation?*, 35 COLUM. J. TRANSNAT’L L. 379, 419–22 (1997) (reading *United States v. Furlong*, 18 U.S. (5 Wheat.) 184, 186 (1820), to mean that Congress lacks constitutional authority to punish purely foreign conduct not subject to universal jurisdiction under international law). The *Furlong* case is discussed *infra* Part IV.C.3.

the least “understood”⁹ and most “understudied”¹⁰ constitutional provision.¹¹ Surely its even more neglected sibling, the Piracies and Felonies provision, demands analysis.

The inquiry begins with the text itself, which contains no explicit jurisdictional limits. However, Clause Ten’s doubly redundant structure has important implications for the permissibility of universal jurisdiction when considered against the legal background of 1789. Piracy was both a “Felon[y]” and an “Offense[] against the Law of Nations.” Yet the powers are mentioned separately, drawing attention to the one feature that distinguished piracy from all other felonies and offenses. Piracy was the *only* universal jurisdiction crime.¹² By separating out the jurisdictionally unique offense, the text suggests a separate jurisdictional treatment for it. When dealing with piracy, Congress can use the uniquely broad jurisdictional scope associated with that offense. However, this jurisdiction does not extend to the other high seas felonies and international law crimes punishable under Clause Ten. If Congress could apply universal jurisdiction to regular high seas felonies, it would obliterate the only legal distinction between piracies and felonies.

Going beyond the text, this Article brings together a wide variety of sources—judicial, political, and legislative—bearing on the jurisdictional scope of Clause Ten.¹³ This Article considers the views of the Framers and other important interpreters from the early Republic in all three branches of government.

The view that the Congress cannot use Clause Ten as a basis for universal jurisdiction over any crime except piracy had support from such leading jurists as James Wilson (a drafter of the Constitution), John Marshall, and Joseph Story. Their discussions of the clause arose in the context of major historical dramas—the extradition of a mutineer to the British in 1799, which nearly lead to the congressional censure of President Adams; the revolt of Spain’s South American colonies in the 1810s, which lead to a

⁹ J. Andrew Kent, *Congress’s Under-Appreciated Power to Define and Punish Offenses Against the Law of Nations*, 85 TEX. L. REV. 843, 847 (2007).

¹⁰ Julian G. Ku, *Structural Conflicts in the Interpretation of Customary International Law*, 45 SANTA CLARA L. REV. 857, 860 (2005).

¹¹ The clause has in recent years attracted attention, particularly for its role in granting extraterritorial powers to Congress. See Kent, *supra* note 9, at 848, 848 n.19 (citing an earlier work and noting a “lack of in-depth scholarship about the Clause”); Beth Stephens, *Federalism and Foreign Affairs: Congress’s Power to “Define and Punish . . . Offenses Against the Law of Nations”*, 42 WM. & MARY L. REV. 447, 453–54 (2000); Zephyr Rain Teachout, Note, *Defining and Punishing Abroad: Constitutional Limits on the Extraterritorial Reach of the Offenses Clause*, 48 DUKE L.J. 1305, 1305 (1999).

¹² See Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction’s Hollow Foundation*, 45 HARV. INT’L L.J. 183, 190–205 (2004) (discussing piracy’s status as the prototypical universal jurisdiction crime).

¹³ Cf. Bradley, *supra* note 6, at 335 (“Although the founders may not have envisioned that this power would be used to regulate conduct on foreign soil, I am not aware of any evidence showing that they meant to disallow such power if and when international law evolved to allow for its exercise.”).

period of maritime lawlessness; and the broad Anglo-American campaign to abolish the slave trade. By 1820, both Congress and the Supreme Court had rejected universal jurisdiction over anything but “piracies.” When the question arose again in recent decades, legislators and jurists simply neglected to ask whether the Define and Punish power had jurisdictional limits.¹⁴

* * *

The Article’s conclusions have implications for many of the nation’s universal jurisdiction laws. The sole source of universal jurisdiction used by the United States today is the MDLEA.¹⁵ This statute extends U.S. narcotics laws to foreigners found with contraband on foreign vessels anywhere in the world, regardless of their destination. Aside from the MDLEA, U.S. law allows for universal jurisdiction in a few other situations.¹⁶ It proscribes giving “material support” to terrorist groups¹⁷ even when neither the support nor the group itself has any connection to America.¹⁸ The material support law was recently enlarged to apply U.S. narcotics laws universally to any drug trafficking anywhere, if its proceeds support terrorism.¹⁹ Furthermore, Congress recently extended universal jurisdiction to the use or recruitment of child soldiers, and recent legislative

¹⁴ One can only speculate about the reasons for the oversight. The greatly expanded scope of Congress’s power since the 1930s may make one forget that it still needs an Article I basis. In addition, the growing acceptance of universal jurisdiction in international law may have distracted attention from whether the Constitution authorizes it. Finally, the great decline in the admiralty docket might have led people to miss what would have previously been more obviously suggested by the juxtaposition of “Piracies” and “Felonies.”

¹⁵ 46 U.S.C.A. §§ 70501–07 (West 2008); *see also* 46 U.S.C.A. § 70502(c)(1)(A), (C) (West 2008) (establishing jurisdiction over vessels “without nationality” and vessels “registered in a foreign nation where the flag nation has consented or waived objection to the enforcement of United States law by the United States”).

¹⁶ Piracy, the original universal jurisdiction offense, remains universally cognizable under current states. *See* 18 USC § 1651 (2006).

¹⁷ 18 U.S.C. § 2339B(a)(1) (2006).

¹⁸ 18 U.S.C. § 2339B(d)(1)(C) (2006).

¹⁹ *See* USA Patriot Improvement and Reauthorization Act of 2005, Pub. L. 109-177, § 122, 120 Stat. 192, 224 (2006) (amending the Controlled Substance Import and Export Act, 21 U.S.C. §§ 951–71 (2000)). Jurisdiction is satisfied simply if the offender subsequently comes or “is brought” to the United States. *Id.*; *see also* *Conference Report on H.R. 3199, USA Patriot Improvement and Reauthorization Act of 2005*, 151 CONG. REC. H11515, H11538–39 (daily ed. Dec. 14, 2005) (statement of Rep. Hyde) (“Our hardworking Drug Enforcement Administration will no longer be challenged to produce evidence of a nexus of these illicit drugs to the United States.”).

The material support law already criminalizes any financial aid to terror groups. The new provision, in effect, allows for an additional and greater sentence when the support comes through conduct that would violate U.S. drug law if there was an American nexus.

efforts have tried to do the same with human trafficking.²⁰ Congress has authorized universal jurisdiction for hijacking, hostage-taking, and torture, which have been designated universal jurisdiction offenses by multilateral conventions.²¹ These laws have only been used in a few cases, and perhaps never as the basis for a purely universal jurisdiction prosecution.²² Other statutes give universal scope to civil liability²³ for certain violations of international law²⁴ and U.S. boycott regulations.²⁵

* * *

This Article focuses on limitations on universal jurisdiction inherent in the Define and Punish Clause. It does not consider other constitutional objections to universal criminal legislation, nor does it deal with other potential justifications. Assertions of universal jurisdiction, and extraterritorial jurisdiction more generally, have been challenged, with little success, for

²⁰ See Child Soldiers Accountability Act of 2008, 18 U.S.C.A. § 2442(c)(3) (West 2008); see also Trafficking in Persons Accountability Act of 2007, S. 1703, 110th Cong. (2007).

²¹ Antihijacking Act of 1974, 49 U.S.C. § 46502(b) (2000) (implementing the Convention for the Suppression of Unlawful Seizure of Aircraft); Destruction of Aircraft Act, 18 U.S.C. § 32(b)(3) (2006); Hostage Taking Act, 18 U.S.C. § 1203(b)(1)(B) (2006) (extending jurisdiction solely on the basis of subsequent U.S. presence of suspect, pursuant to the International Convention Against the Taking of Hostages, G.A. Res. 34/146, U.N. Doc. A/34/46, reprinted in 18 I.L.M. 1456 (Dec. 17, 1979)); see 18 U.S.C. § 2340A (2006) (criminalizing torture anywhere in the world); *United States v. Rezaq*, 134 F.3d 1121, 1131–32 (D.C. Cir. 1998) (finding that Congress specifically intended to create universal jurisdiction over hijacking); see also Genocide Accountability Act of 2007, S. 888, 110th Cong. (2007).

²² One might think *United States v. Shi*, 525 F.3d 709, 721 (9th Cir. 2008), which explicitly invokes universal jurisdiction over piracy, is an exception to U.S. shyness in universal jurisdiction matters. Yet the case—involving the murder of a foreign national by a Chinese sailor on a Taiwanese-owned, Seychelles-flagged fishing vessel in the middle of the Pacific Ocean—was not truly one of piracy, or universal jurisdiction. Under international law, offenses committed by crewmembers aboard their own vessel do not amount to piracy. While the court was mistaken in treating it as a piracy case, it did have subject matter jurisdiction by virtue of a treaty and implementing legislation. See Eugene Kontorovich, *International Decisions: United States v. Shi*, 103 AM. J. INT'L L. (forthcoming Apr. 2009).

²³ Some argue that the Define and Punish Clause may not authorize anything but criminal measures, in which case the analysis here would not apply to the noncriminal statutes. See, e.g., HERITAGE FOUND., *supra* note 6, at 127. But see Stephens, *supra* note 11, at 483–519 (arguing that “Offenses” also includes civil wrongs).

²⁴ See Alien Tort Statute, 28 U.S.C. § 1350 (2006); Torture Victim Protection Act of 1991, Pub. L. 102-256, 106 Stat. 73 (1992) (providing liability for “any person” acting under authority from a “foreign nation”). While the latter explicitly contemplates universal jurisdiction, the scope of universal jurisdiction under the former remains unclear. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 761–63 (2004) (Breyer, J., concurring in part and concurring in the judgment); Kontorovich, *supra* note 3.

²⁵ Under the Iran and Libya Sanctions Act, the President can impose civil sanctions on foreigners who invest in or provide certain goods to the eponymous countries. See J. Brett Busby, Note, *Jurisdiction to Limit Third-Country Interaction with Sanctioned States: The Iran and Libya Sanctions and Helms-Burton Acts*, 36 COLUM. J. TRANSNAT'L L. 621, 647 (1998) (“[T]he Iran and Libya Sanctions Act does not require the proof of any U.S.-related conduct whatsoever before its sanctions may be imposed.”). To the extent such trade may be maritime, the Act might implicate the Define and Punish Clause.

violating due process rights.²⁶ The argument is that the Fifth Amendment requires the defendant’s conduct to have some nexus with the United States. This presumes that Congress has the Article I authority to criminalize purely foreign conduct in the first place. While this Article demonstrates the existence of a nexus limitation on extraterritorial prosecution, its source is not due process, but rather the Define and Punish power. The exact source of a nexus requirement is important. With Article I limitations, unlike the personal rights implicated by due process, the consent of the defendant or foreign state is irrelevant. Foreign nations cannot bestow additional legislative powers on Congress.

The exception to this rule is legislation pursuant to treaties. Mainstream interpretations of the treaty power authorize Congress to implement treaties through domestic legislation that would not otherwise be within its enumerated powers.²⁷ Thus, the Offenses power refers to customary rather than conventional international law because when a treaty is in the picture, it defines the relevant scope of Congress’s power. Most universal jurisdiction laws were passed to implement particular treaties.²⁸ However, there is no obvious treaty basis for the MDLEA, the ATS, or the child soldier law. This Article does not explore treaty power or other possible constitutional bases for universal jurisdiction laws, which should be examined on a statute-by-statute basis.²⁹

* * *

Part I of this Article deals with some issues of interpretive method. It explains that while for circumstantial reasons the Article relies heavily on evidence from the Founding generation, it does not require a commitment to originalism. It also discusses whether constitutional provisions that refer to international law—such as Clause Ten—incorporate the law as it was in 1789 or as it is today. Parts II and III examine the origins and purposes of the Define and Punish Clause by looking to its emergence in the Articles of

²⁶ See, e.g., *United States v. Tinoco*, 304 F.3d 1088, 1107–10 (11th Cir. 2002) (holding that provisions of the MDLEA requiring courts to decide whether statutory jurisdictional requirements have been met do not violate the Due Process Clause or the right to a jury trial).

²⁷ See *Missouri v. Holland*, 252 U.S. 416, 435 (1920) (upholding migratory bird regulations that may not have been within Congress’s Commerce Clause power because it was passed to implement treaty obligations with Britain).

²⁸ See *supra* note 21. However, these statutes arguably go further than the treaties on which they are based. The conventions only purport to create “universal” jurisdictional rights over nationals of signatory states. While most nations have joined these treaties, the implementing statutes do not limit their application to the nationals of signatory states.

²⁹ Unlike the Torture Victim Protection Act, passed pursuant to Torture Convention, the ATS by its terms encompasses both customary and conventional international law, and thus it is hard to see it as “necessary and proper” to any particular treaty. The companion piece to this Article discusses a range of alternate bases for the MDLEA, including treaty powers and the Foreign Commerce Clause, but ultimately finds them inadequate. See Kontorovich, *supra* note †.

Confederation, the reasons behind its adoption in Philadelphia, the strange redundancy in its terms, and how it should be understood given the background legal norms of the time. Parts IV and V look at the two major episodes in which the constitutional question has been confronted. Part IV examines the hostile judicial response to a law passed by the First Congress that, if read literally, would have made a wide variety of maritime crimes subject to universal jurisdiction. Part V recounts how Congress, when it sought to establish slave trading as a universal jurisdiction offense, ultimately concluded that it lacked the constitutional authority to do so. Finally, the conclusion assembles the pieces of evidence to formulate a general statement of the jurisdictional limits under Clause Ten, taking into account the major expansion of universal jurisdiction in recent decades.

I. METHODOLOGICAL ISSUES

A. *Interpretive Theories*

This Article focuses heavily on the views of the Framers and their immediate successors in the early Republic. This should not be mistaken as a commitment to any brand of originalism. All major interpretive approaches place great weight on the views of the Constitution's authors, adopters, and early interpreters.³⁰ Furthermore, the use of such evidence is unavoidable, as almost all discussion of Clause Ten's scope took place in the Republic's first thirty years.

This Article's only axiom is that Congress's powers are finite and enumerated.³¹ Beyond that, the Article does not rely on any particular theory of constitutional interpretation. It promiscuously considers the background and drafting history of the clause, the meaning of the text given the legal vocabulary of the time, the understanding of the founding generation, the subsequent application of the clause by Congress and the courts in situations not necessarily contemplated by the Framers, and the more general purposes it was designed to serve.³² Recourse to particular theories of interpretation is unnecessary when, as here, the evidence from a variety of sources points predominantly in one direction.

³⁰ See Kent, *supra* note 9, at 858–60 (describing consensus among interpretive methods on the importance of the Constitution's original meaning).

³¹ See generally Bradley, *supra* note 6, at 334–35 (taking these principles as axiomatic).

³² This Article disclaims a strong version of original intent. It does not contend that the delegates at Philadelphia used the words "Piracies and Felonies" for the particular purpose of limiting universal jurisdiction. Rather, the limitations are a consequence of the words they used, which had well-established public meanings.

B. Evolution in Common and International Law

In the eighteenth and early nineteenth centuries, customary international law was widely regarded as part of American general law. Indeed, the common law explicitly incorporated certain aspects of the law of nations, like the definition and universal status of piracy.³³ Thus, when it was relevant, judges would feel free to look at the law of nations even in the absence of a statute. However, all agreed that Congress could trump the law of nations through legislation,³⁴ and certainly the Constitution could limit its application.³⁵ This remains the view today.

At the same time, the Constitution explicitly uses terms of art from both the common law and the law of nations, partially incorporating them by reference. Indeed, even if customary international law does not apply of its own force after the post-*Erie* abandonment of general common law, the Constitution’s use of common law and international law terms makes those bodies of law the standard for understanding the Constitution itself.³⁶ In other words, customary international law is domestic law only when the Constitution makes it so. By invoking terms of customary international law or the common law, the Constitution partially incorporates the associated bodies of law, but only insofar as they are relevant to understanding the terms in the Constitution.³⁷

³³ See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 714 (2004).

³⁴ *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, C.J.) (“[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”).

³⁵ See *Chisom v. Georgia*, 2 U.S. (2 Dall.) 419, 449 (1793) (Iredell, J., dissenting) (“The Conventional Law of Nations . . . [cannot] otherwise apply [to the case] than as furnishing rules of interpretation, since unquestionably the people of the United States had a right to form what kind of union, and upon what terms they pleased If upon a fair construction of the Constitution of the United States, the power contended for really exists, it undoubtedly may be exercised, though it be a power of the first impression. If it does not exist . . . ten thousand examples of similar powers would not warrant its assumption.” (internal quotation marks and emphasis omitted)).

³⁶ See Bernadette Meyler, *Towards a Common Law Originalism*, 59 STAN. L. REV. 551 (2006); see also Sarah Cleveland, *Our International Constitution*, 31 YALE J. INT’L L. 1, 12 (2006) (“In its strongest form, the Constitution textually commands consideration of international law through [Clause Ten] . . .”).

³⁷ For common law, see *Crawford v. Washington*, 541 U.S. 36, 54 (2004) (holding that the constitutional right of the accused “to be confronted with the witnesses against him” refers to common law right of confrontation at the time of the Founding). For international law, see *Henfield’s Case*, 11 F. Cas. 1099, 1101 (C.C.D. Pa. 1793) (No. 6360) (Jay, C.J.) (“Whenever doubts and questions arise relative to the validity, operation or construction of treaties . . . [these] must be settled according to the maxims and principles of the laws of nations applicable to the case.”); *Ware v. Hylton*, (C.C.D. Va. 1793) (Iredell, J.), in 7 DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES 264–68 (Maeva Marcus ed., 2003) (turning to the law of nations to determine construction and validity of U.S. treaty); and *United States v. Coolidge*, 25 F. Cas. 619, 619 (C.C.D. Mass. 1813) (No. 14,857) (Story, J.) (“The existence, therefore, of the common law is not only supposed by the [C]onstitution, but is appealed to for the construction and interpretation of its powers.”). See also JAMES MADISON, *Power of the President to Appoint Public Ministers & Consuls in the Recess of the Senate*, in 9 THE WRITINGS OF JAMES MADISON, COMPRISING HIS PUBLIC PAPERS AND HIS PRIVATE CORRESPONDENCE 91 n.1 (Gaillard Hunt

An even broader view of the common law's role in understanding the Constitution would be to take certain late eighteenth-century common law principles as providing a gloss or background without which the entire Constitution could not be understood. In this view, international law limits might be constitutional but not textual,³⁸ much like sovereign immunity³⁹ and limitations on standing.⁴⁰

John Quincy Adams laid out the "background rules" approach to the relevance of international law to constitutional interpretation:

The legislative powers of Congress are . . . limited to specific grants contained in the Constitution itself, all restricted on one side by the power of internal legislation within the separate States, and on the other, by the laws of nations These are not subject to the legislative authority of any one nation, and they are, therefore, not included within the powers of Congress.⁴¹

In the very next breath, Adams expressed the narrower explicit-incorporation view, while providing an apt summary of this Article's thesis:

The powers of *declaring war*, of *regulating commerce*, of *defining and punishing* piracies and felonies committed on the high seas, and *offenses AGAINST THE LAW OF NATIONS*, are among the special grants to Congress, but over that law itself, *thus expressly recognised*, and all-comprehensive as it is, Congress has no alterative power.⁴²

Given that the Constitution refers to international law for a definition of its terms, it raises the question of whether the terms lock in the law of 1789 or whether they track the constant changes and evolutions in the body of law to which they refer. The same question arises with the many constitutional terms referring to common law concepts. The topic is a major one in its own right. The conclusion of the Article briefly touches on this question, as possible answers have different implications for universal jurisdiction under Clause Ten today.

For the purposes of this Article, in considering the opinions expressed by the Framers, the first Supreme Court Justices, and early Congresses, it is

ed., 1910) ("The case of diplomatic missions belongs to the Law of Nations, and the principles & usages on which that is founded are entitled to a certain influence in expounding the provisions of the Constitution which have relation to such missions.").

³⁸ See Cleveland, *supra* note 36, at 33 (observing that the Supreme Court sometimes looks to "background" norms of jurisdiction under international law because of "the assumption that the constitutional system implicitly received and distributed certain powers of government and rights of individuals that were recognized under international law," and that this use of international law "involves a mixture of resort to international law as binding and persuasive authority").

³⁹ See Alden v. Maine, 527 U.S. 706, 713 (1999).

⁴⁰ Raines v. Byrd, 521 U.S. 811, 833 (1997) (Souter, J., concurring) (noting the "traditional common-law cause of action at the conceptual core of the case-or-controversy requirement").

⁴¹ JOHN QUINCY ADAMS, THE JUBILEE OF THE CONSTITUTION 71 (New York, Samuel Colman 1839).

⁴² *Id.* (last emphasis added).

crucial to identify the *source* of any obstacle they perceived to universal jurisdiction. Much of their discussion mentioned international law, which could be relevant either by virtue of its own direct applicability or through its incorporation in the Constitution. This Article is only concerned with the latter use of international law, because as a matter of domestic law, international law by its own force cannot trump clear statutes.

II. ORIGINS OF THE CLAUSE

The Define and Punish Clause was among the least controversial in the Constitution. It represented an incremental and obvious improvement on a similar provision in the Articles of Confederation.⁴³ It received little “serious” discussion at the Philadelphia Convention⁴⁴ and seems not to have been an issue at all during the ratification process. Nonetheless, an examination of the clause’s origins, text, purposes, and the few statements about it by the Framers, when taken together, greatly illuminates the scope of the clause.

Courts and commentators often mistakenly construe the Piracies and Felonies provision as granting a single power.⁴⁵ However, the two words have different meanings and convey distinct competencies. The authority over felonies covers a wider range of conduct but is narrower in its extraterritorial scope than piracy. Piracy has until recently been a unique crime—the only one to which universal jurisdiction attached. The Constitution mentions piracy separately from two broader terms that would be thought to encompass it—“felonies” and “offenses.” Piracy’s unique status as a universal jurisdiction offense suggests that its separate enumeration in Clause Ten specifically allows Congress to exercise universal jurisdiction over that particular type of offense—but not over other high seas crimes or international law offenses.

⁴³ ARTS. OF CONFED. art. IX, § 1, cl. 6 (only allowing for the “appointing of courts for the trial of piracies and felonies committed on the high seas,” and not for the definition or punishment of those crimes).

⁴⁴ 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1160 (Boston, Hilliard, Gray, & Co. 1833).

⁴⁵ See, e.g., *United States v. Suerte*, 291 F.3d 366, 374 (5th Cir. 2005) (suggesting that these “parallel” provisions are interchangeable terms); *United States v. Moreno-Morillo*, 334 F.3d 819, 824–25 (9th Cir. 2003) (holding that drug smuggling in international waters is a “piracy or felony within the meaning of Article I, Section 8, Clause Ten” without specifying whether it is justified by the power over piracies or over felonies); *United States v. Martinez-Hidalgo*, 993 F.2d 1052, 1056 (3d Cir. 1993) (noting that the MDLEA is justified by Congress’s authority under the Piracies and Felonies provision without specifying whether drug smuggling is piracy or a felony). *But see* *United States v. Shi*, 525 F.3d 709, 721, 724 (9th Cir. 2008) (noting that the Supreme Court has “treat[ed] ‘Piracies,’ ‘Felonies on the high Seas,’ and ‘Offenses against the Laws of Nations’ as three separate” categories, and noting that the MDLEA is an exercise of the felonies power).

A. *The Drafting*

1. *The Articles of Confederation.*—The phrase “piracies and felonies” first appeared in the Articles of Confederation in a provision giving Congress exclusive power to “appoint[] courts for the trial of piracies and felonies committed on the high seas.”⁴⁶ The reasons for including this in the Articles do not appear to have been discussed, probably because its utility was evident.⁴⁷

“Piracies and felonies” was a well-known legal formula for maritime crimes, used in the leading statutes and treatises.⁴⁸ Coke’s massively influential work speaks of “piracies[] and felonies,”⁴⁹ even though piracies were a subspecies of felony. In a historical note typical of his erudite work, Coke explains that piracy was not originally a common law felony, but rather a crime cognizable only in admiralty, which was civil law.⁵⁰ However, under Henry VIII, piracy was brought within the common law processes by statute and denominated a felony.⁵¹ By the late seventeenth century, felony had come to mean any very serious crime, especially those punishable by death.⁵² Thus, the popular or public meaning of felony by 1776 would have subsumed piracy.

The Framers were aware of the historical difference between piracy and felony jurisdiction, and Madison went so far as to suggest that it was

⁴⁶ ARTS. OF CONFED. art. IX. State constitutions lacked analogous provisions; such power fell within their general criminal jurisdiction. Some royal charters had specified that the colonial authorities had power to take military action against pirates; piracy was sometimes understood as being closer to war than crime. See, e.g., CHARTER OF CAROLINA art. XV (1663) (authorizing local authorities “to make war and pursue [pirates and robbers] . . . even without the limits of the said province . . . to vanquish and take them, and, being taken to put them to death by the law of war, or to save them, at their pleasure”).

⁴⁷ Some small differences can be found between the final Articles and the first draft, prepared by a committee led by John Dickinson in June 1776, just a month after Congress called for a constitution to be written. The first version presented to Congress in the summer of 1776, authorized “[a]ppointing Courts for the Trial of all Crimes, Frauds & Piracies committed on the High Seas . . .” 5 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1778, at 550 (Worthington Chauncy Ford ed., 1906). The “frauds” on the high seas are a mystery; it is not clear what the term meant or why it was dropped.

⁴⁸ See CROSSKEY, *supra* note 8, at 445–46.

⁴⁹ SIR EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: CONCERNING HIGH TREASON, AND OTHER PLEAS OF THE CROWN, AND CRIMINAL CAUSES 111 (London, W. Clarke and Sons 1817).

⁵⁰ *Id.* at 112 (“[P]iracy, or robbery on the high sea was no felony, whereof the common law took any knowledge, . . . but was only punishable by the civill law . . .”).

⁵¹ See *Report to Congress on Draft Ordinance for the Trial of Piracies and Felonies* (Sept. 29, 1785) (statement of John Jay) [hereinafter Jay, *Report*], in 29 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 797 (John C. Fitzpatrick ed., 1933); 4 WILLIAM BLACKSTONE, COMMENTARIES *71 (writing that statutes have made piracy a “felony” in English law).

⁵² See BLACKSTONE, *supra* note 51, at *94 (defining felony as crime with significant and often capital punishment).

the reason that the term “felony” itself would not suffice.⁵³ But it is implausible that piracy was mentioned separately simply to make clear that America’s common law courts could reach piracy. In 1776, piracy had been a common law felony for 250 years. It seems preposterous that the drafters would think that merely saying felonies without mentioning piracies would repeal the effect of the ancient statute of Henry VIII, making piracy a case that a jury could not try.⁵⁴

Indeed, the situation described by Coke was irrelevant in the colonies, where *neither* high seas felonies nor robberies were tried by common law courts. A 1700 statute put most maritime crimes near the colonies within the purview of the admiral, as it had originally been before the statute of Henry VIII.⁵⁵ The result was that in 1776 both piracy and maritime felonies were tried before special admiralty courts in the colonies, while in England both were tried in common law courts.⁵⁶ Madison’s discussion of the ancient history of piracy as being in a different category from felony simply shows that he was very familiar with Coke, but not that this history was relevant to the drafting of the Articles. Rather, “piracies and felonies” was an established legal formula. While the difference between the two in terms of forum had long been eliminated, differences in jurisdictional scope remained, of which the drafters were also certainly aware.

Under the Articles, Congress lacked the power to define the substance of these offenses.⁵⁷ Thus the courts, manned by state court judges drafted into a concurrent federal service,⁵⁸ would draw the definition of the crimes from the common law.⁵⁹ Nor did Congress have any power over offenses against the law of nations, which remained entirely within the jurisdiction of the states. Soon after the Articles had been drafted, many concluded that it had been a mistake not to also grant a power to *define* these “piracies and

⁵³ Madison noted the difference during the Philadelphia Convention. JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 473–74 (Adrienne Koch ed., 1966) (noting that “felony at common law” was a vague term, but not so with piracy, and referring to historic statutes on the subject); *see also* Jay, *Report*, *supra* note 51, at 798.

⁵⁴ Indeed, the original practice in England appears to have been to try pirates and other sea criminals in ordinary courts; a statute of Edward III in 1361 moved piracies to special royal tribunals, where they would be prosecuted until Henry VIII returned them to law nearly two hundred years later. CROSSKEY, *supra* note 8, at 446–47.

⁵⁵ *See id.* at 445–446, 450.

⁵⁶ *Id.* at 452–53.

⁵⁷ STORY, *supra* note 44, § 1153.

⁵⁸ *Ordinance for Establishing Courts for the Trial of Piracies and Felonies Committed on the High Seas*, in 19 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 354, 354–55 (Gaillard Hunt ed., 1912); *see also* James E. Pfander, *Federal Supremacy, State Court Inferiority, and the Constitutionality of Jurisdiction-Stripping Legislation*, 101 NW. U. L. REV. 191, 207–08 (2007) (distinguishing Congress’s power under the Articles of Confederation to deputize state courts to hear high seas crimes from its power to establish a uniquely federal court of appeals for captures cases).

⁵⁹ *See* Jay, *Report*, *supra* note 51, at 797–98.

felonies.”⁶⁰ As a result of the omission, the punishment of offenses on U.S.-flagged vessels would depend on the state where the crime was adjudicated.⁶¹ Two identical acts on the same ship, involving the same people, could have different legal consequences if prosecuted in different states.

2. *Philadelphia*.—At the Constitutional Convention, Clause Ten generated no excitement. The drafters took the “Piracies and Felonies” phrase from the Articles and expanded it by giving Congress legislative and not just judicial power in these areas, as well as over “Offenses against the Law of Nations.” Presumably, “Piracies and Felonies” referred to the same thing that it had in the Articles.⁶² Yet no one has ever suggested that Congress under the Articles could establish courts for the “trial . . . of felonies on the high seas” aboard foreign vessels with no U.S. connection.

The need to strengthen Congress’s criminal powers over these crimes was assumed by the delegates at the convention. There is no recorded discussion of the clause until it appeared in the Committee of Detail’s report. That version varied little from the text that would ultimately be adopted.⁶³ The brief debate that followed focused not on the types of crimes Congress could deal with, but rather on what it meant for Congress to “define” and “punish” them.⁶⁴ The original draft allowed Congress to “declare the law of” An effort to strike these words failed, and after toying with “desig-

⁶⁰ After the final draft of the Articles of Confederation had been submitted to the states, a proposal was made to modify Article IX by allowing the federal courts to “declar[e] what acts committed on the high seas shall be deemed piracies and felonies.” See STORY, *supra* note 44, § 1153 n.4. The motion failed 9-2, probably because Congress did not want to reopen the Articles for revision once they had been submitted to the states, as many states had submitted a long list of relatively minor drafting revisions. *Id.*; 11 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 651-58 (Worthington Chauncey Ford ed., 1908).

⁶¹ See Jay, *Report*, *supra* note 51, at 797.

⁶² See *United States v. Mackenzie*, 30 F. Cas. 1160, 1163 (S.D.N.Y. 1843) (No. 18,313) (observing that when the Convention “transferred to the new constitution the language of the confederation in relation to the government of the land and naval forces, and the spirit of the provision in respect to piracies and felonies, it is natural to suppose that these provisions were understood in the same sense, and were designed to convey the same power, as that affixed to them in the usages and practices under the preceding government”).

⁶³ The Committee on Detail’s draft provided for the power “To declare the law and punishment of piracies and felonies committed on the high seas” MADISON, *supra* note 53, at 389. This of course was what South Carolina had thought the Articles should have said. Interestingly, the committee’s draft sandwiched the punishment of counterfeiting between “Piracies and Felonies” and “Offenses against the Law of Nations,” suggesting they saw themselves as enumerating Congress’s overall criminal powers rather than merely elaborating those that might bear most on foreign relations or extraterritorial offenses.

⁶⁴ *Id.* at 472-74.

nate” as a substitution,⁶⁵ the delegates settled on Madison and Randolph’s proposed “define” instead of “declare the law.”⁶⁶

While this discussion seems no less “obscure” today than it did to Justice Story two hundred years ago,⁶⁷ the general concern seems to have been whether the original language would limit Congress too tightly to some pre-existing description of the crimes, or whether the amendment gave Congress too much leeway to depart from existing meanings. Some thought it took too much from the states to give Congress power to define offenses that already existed in state law.⁶⁸ Similarly, others felt it would be “arrogance” to purport to define offenses against the law of nations, which all countries played a joint role in developing.⁶⁹ The answer to both concerns was that the specifications of crimes in both the common law and the law of nations were too uncertain and shifting to provide an administrable and uniform rule.⁷⁰ The “define” power was necessary to fix the version of the offense, and in Madison’s view, to clarify that international law did not create individual criminal liability of its own force.⁷¹

Nobody said a word about the meaning of “Piracies,” “Felonies,” or “Offenses.” Nor was there any discussion of whether there was any jurisdictional limit on Congress’s power to define, though it was agreed that Congress could create substantively new crimes.⁷²

B. The Double Redundancy

The resulting provision, Clause Ten, contains a striking double redundancy. “Piracies” refers to a particular crime. “Felonies,” in contrast, describes a broad category, as does “Offenses against the Law of Nations.”⁷³ Piracy is a subspecies of felony, and one that necessarily occurs on the high seas. Moreover, piracy was an offense against the law of nations⁷⁴—indeed,

⁶⁵ 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 316 (Max Farrand ed., 1911). This proposal was made by Gouverneur Morris because “*define* . . . being as he conceived, limited to the pre-existing meaning.” *Id.* He was reassured by “others” that the draft’s term was “applicable to the creating of offences also, and therefore suited the case both of felonies & of piracies.” *Id.* (emphasis added).

⁶⁶ MADISON, *supra* note 53, at 472–74.

⁶⁷ STORY, *supra* note 44, § 1162.

⁶⁸ THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 65, at 315 (“Mr. Mason . . . doubted . . . the propriety of taking the power in all these cases wholly from the States.”).

⁶⁹ *Id.* at 615.

⁷⁰ *Id.* at 316.

⁷¹ *Id.* (“[N]o foreign law should be a standard farther than is expressly adopted The proper remedy for all these difficulties was to vest the power proposed by the term ‘define’ in the Natl. legislature.”).

⁷² *See supra* note 65.

⁷³ WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES 107–08 (2d ed., Philadelphia, Philip H. Nicklin, 1829) (“Felony . . . when committed on the high seas, amounts to piracy.”).

⁷⁴ *See* BLACKSTONE, *supra* note 51, at *68; THE FEDERALIST NO. 42, at 280–81 (James Madison) (Jacob E. Cooke ed., 1961) (observing that piracy is a crime against the law of nations).

the “highest Violation,” according to John Jay.⁷⁵ The first redundancy between piracy and felonies already existed in the predecessor clause in the Articles. But the phrase does not explain why—if it was redundant—it was preserved in the Constitution, which the drafters recognized as a different kind of document, one in which every word would be closely construed. Indeed, in several instances the drafters condensed and clarified phrases borrowed from British law that were prone to redundant expressions.⁷⁶ In the discussion at Philadelphia, the words “define” and “punish” were parsed quite carefully. Yet no one said that the new grant of power over “Offenses” made “Piracies” redundant. This suggests that “Piracies” indicates something that “Offenses” and “Felonies” do not.

Constitutional construction disfavors readings of one provision that that render another superfluous.⁷⁷ In the Supreme Court’s first major piracy case, Justice Story insisted that potentially overlapping words in Clause Ten take separate meanings.⁷⁸ A double-redundancy requires investigating whether anything distinguishes piracy both from other felonies and from other offenses against the law of nations—whether there might be a reason for the Constitution treating them differently.⁷⁹ If piracy has a salient, well-known feature distinguishing it from other felonies, it would suggest that the separate enumeration of piracy seeks to emphasize and pick up on that feature.

Contemporaneous evidence suggests the Framers understood “Piracies and Felonies” as referring to two distinct powers, with different features and scope. In 1785, Congress asked John Jay, then head of the Foreign Office, to draft a statute establishing courts for piracy and high-seas felonies pursuant to Article IX of the Articles of Confederation. In his response, Jay complained that the Articles did not authorize Congress to “declare” the

⁷⁵ See Jay, *Report*, *supra* note 51, at 797.

⁷⁶ See CROSSKEY, *supra* note 8, at 456 (explaining that the term “high seas” was a contraction of a much longer phrase used in British statutes to refer to admiralty jurisdiction).

⁷⁷ See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803) (Marshall, C.J.) (rejecting an interpretation that would make part of the Constitution “mere surplusage,” because “[i]t cannot be presumed that any clause in the constitution is intended to be without effect”). Redundancy is disfavored, but not out of the question. For example, Marshall’s interpretation of the Necessary and Proper Clause in *McCulloch v. Maryland* makes the Counterfeiting Clause redundant to the power to coin money. 17 U.S. (4 Wheat.) 316, 416–17 (1819). However, the presumption is particularly strong within a clause. See Gary Lawson, *Discretion as Delegation: The “Proper” Understanding of the Nondelegation Doctrine*, 73 GEO. WASH. L. REV. 235, 252 (2005) (arguing that the anti-redundancy presumption is weak for provisions in different articles of the Constitution).

⁷⁸ *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 158 (1820) (“The power given to Congress is not merely ‘to define and punish piracies;’ if it were, the words ‘to define,’ would seem almost superfluous, since the power to punish piracies would be held to include the power of ascertaining and fixing the definition of the crime.”).

⁷⁹ *Cf. Marbury*, 5 U.S. (1 Cranch) at 174 (holding that construing words as redundant “is inadmissible, unless the words require it” (emphasis added)).

definition or punishment of either piracies or felonies.⁸⁰ However, he continued, because piracy is in a sense an act of war against the nation, it would be acceptable for the United States to define and punish it; just as the war power resided on the federal level, so too the power to deal with pirates.⁸¹ Jay went on to observe that cases of felonies are “distinguished from Piracy,” and thus Congress was limited to the definitions found in state laws with respect to them.⁸² Similarly, at the Federal Convention, delegates spoke of “piracies” and “felonies” as different things.⁸³ Finally, in *United States v. Smith*, the seminal case on piracy, the Court addressed “the authority delegated to Congress upon the subject of piracies” as distinct from its authority over felonies on the high seas.⁸⁴ Justice Story also observed in dicta that the powers involve different legal and policy considerations.⁸⁵

C. Uniqueness of Piracy

One major difference existed between piracy and the other powers listed in Clause Ten, lending strength to the view that the separate mention of “Piracies” set it apart as a distinct power.⁸⁶ Piracy was jurisdictionally unique. For as long as sovereignty-based jurisdictional principles have existed (that is, at least since the early seventeenth century) piracy was the only universal jurisdiction offense.⁸⁷ The pirate was known in law as *hostis*

⁸⁰ See Jay, *Report*, *supra* note 51, at 797.

⁸¹ *Id.* at 797–78; see also U.S. CONST. art. I, § 8, cl. 10–11 (giving Congress power to punish piracy and declare war).

⁸² Jay, *Report*, *supra* note 51, at 798.

⁸³ See MADISON, *supra* note 53, at 473–74; THE FEDERALIST NO. 42, *supra* note 74, at 281 (“The definition of piracies might perhaps without inconveniency, be left to the law of nations A definition of felonies . . . is evidently requisite.”).

⁸⁴ 18 U.S. (5 Wheat.) 153, 158–59 (1820).

⁸⁵ *Id.* Similarly, in his treatise on constitutional law, piracies, felonies, and offenses are treated as distinct aspects of the Clause Ten power. STORY, *supra* note 44, § 1155.

⁸⁶ Constitutional construction often involves learning about a term’s meaning from surrounding terms. For example, the Impeachment Clause, like the Define and Punish Clause, lists several classes of offenses: “Treason, Bribery, or other high crimes and misdemeanors.” U.S. CONST. art. II, § 4. Many scholars argue that the “or” means that the broader category should be understood as expanding on the characteristics of the two particular illustrations. See Thomas Lee, *The Clinton Impeachment and the Constitution: Introduction to the Federalist Society Panel*, 1999 B.Y.U. L. REV. 1079, 1086–87 (observing that debates about the text of the clause invoked “the *ejusdem generis* canon of construction, which dictates that terms in a list should be construed to be ‘of the same kind’ as the other terms whose company they keep”).

⁸⁷ See *Smith*, 18 U.S. (5 Wheat.) at 162 (noting the “general practice of all nations in punishing all persons, whether natives or foreigners, who have committed this offence against any persons whatsoever”); *Talbot v. Jansen*, 3 U.S. (3 Dall.) 133, 159–60 (1795) (“All piracies and trespasses committed against the general law of nations, are enquirable, and may be proceeded against, in any nation”); *United States v. Robins*, 27 F. Cas. 825, 862 (D.S.C. 1799) (No. 16,175) (“[P]iracy under the law of nations which *alone* is punishable by all nations” (quoting a speech of John Marshall to Congress) (emphasis added)); see also *United States v. Yousef*, 327 F.3d 56, 104 (2d Cir. 2003) (“The class of

humani generis; the offense was almost synonymous with universal jurisdiction.⁸⁸ The unique jurisdictional status of pirates was not an obscure piece of legal trivia.⁸⁹ Piracy was a significant problem, one with which the public in a maritime nation was generally concerned. Moreover, a legalized form of piracy—privateering—was almost a national pastime during the Revolutionary War. The laws of prize were as familiar to the lawyers of the day as the rules of baseball are today.⁹⁰ The line between piracy and privateering was perhaps the most important one to know. Though jurisdictionally broad, the crime of piracy was substantively narrow. It consisted simply of robbery on the high seas.⁹¹ Other crimes that occurred on the high seas were dealt with under traditional jurisdictional principles.⁹²

Thus piracy had a uniform technical meaning as an international law offense. At the same time, nations could and did attach the term “piracy” to a variety of different maritime crimes.⁹³ This was done either to draw on the strong condemnatory connotations attached to the term because it had a popular meaning of serious or capital offense on the high seas, or simply out of legislative imprecision and sloppiness. Finally, because piracy in the classic sense was universally punishable by death, declaring something a piracy meant deeming it severe enough to merit the death penalty.⁹⁴ So in addition to piracy under the law of nations, different nations made diverse offenses “municipal” or “statutory piracies.” Nothing limited what a nation could dub piracy, but such statutory piracy could only be punished within the particular state’s municipal jurisdiction. Universal jurisdiction did not attach to a crime merely by calling it piracy.

crimes subject to universal jurisdiction traditionally included only piracy.”). *See generally* Kontorovich, *supra* note 12, at 190–91 (discussing piracy’s status as the prototypical universal jurisdiction crime).

⁸⁸ *See* Kontorovich, *supra* note 12, at 190.

⁸⁹ *See* BLACKSTONE, *supra* note 51, at *71 (observing that “every community” has a right to punish pirates).

⁹⁰ DONALD A. PETRIE, *THE PRIZE GAME: LAWFUL LOOTING ON THE HIGH SEAS IN THE DAYS OF THE FIGHTING SAIL* 37 (1999); *see* U.S. CONST. art I, § 8, cl. 11 (giving Congress the power to “grant Letters of Marque and Reprisal,” as privateers’ licenses were known).

⁹¹ *Smith*, 18 U.S. at 161–62 (“[P]iracy is only a sea term for robbery, piracy being a robbery committed within the jurisdiction of the admiralty.”); *Talbot*, 3 U.S. (3 Dall.) at 160 (“What is called robbery on the land, is piracy if committed at sea.”); *see also* BLACKSTONE, *supra* note 51, at *72 (defining piracy as “robbery and depredation upon the high seas”).

⁹² *See* Kontorovich, *supra* note 3, at 153–55 (discussing reasons that universal jurisdiction was confined to high seas robbery).

⁹³ 10 ANNALS OF CONG. 600 (1800) (statement of John Marshall) (“A statute may make any offense piracy, committed within the jurisdiction of the nation passing the statute . . .”).

⁹⁴ HENRY WHEATON, *ENQUIRY INTO VALIDITY OF THE BRITISH CLAIM TO A RIGHT OF VISITATION AND SEARCH OF AMERICAN VESSELS SUSPECTED TO BE ENGAGED IN THE AFRICAN SLAVE-TRADE* 16 (Philadelphia, Lea & Blanchard 1842) (“All that is meant is, that the offence is visited with the pains and penalties of piracy.”).

This jurisdictional distinction was well understood,⁹⁵ yet the careless use of “piracy” could and did lead to confusion.⁹⁶ As Wheaton, the American diplomat, reporter of Supreme Court decisions, and author of the leading early nineteenth-century American treatise on international law, put it: “There are certain acts which are considered piracy by the internal laws of a State, to which the law of nations does not attach the same signification. . . . [These laws] can only be applied . . . with reference to its own subjects, and in places within its own jurisdiction.”⁹⁷ Thus, “piracy created by municipal statute can only be punished by that State within whose territorial jurisdiction” or “on board of whose vessels, the offence thus created was committed.”⁹⁸ This clarification demonstrates that the constitutional distinction between felonies and piracies should properly track the distinction between municipal and international, or true, piracy.

D. Summary

When read against the legal backdrop of the Framing, the enumeration of “Piracies” implies that Congress can punish it the way nations generally could—without regard to the nationality of the vessel or offender.⁹⁹ However, if “Felonies” can be punished without regard to a U.S. nexus, then all distinction between it and “Piracies” falls away. The Constitution may as well have just said “crimes.” By separating the powers in Clause Ten, the Constitution keeps their consequences separate. The unique universal jurisdiction powers that all nations exercised over piracy could not be imputed to other crimes that lacked universal jurisdiction status in international law, even if they resembled piracy in that they occurred on the high seas or violated international law.

Furthermore, piracy is mentioned separately from “Offenses against the Law of Nations.” After all, piracy gets its universal jurisdiction status from international law. One might think that the power to define and punish international law crimes would naturally entail the power to ascribe universal jurisdiction to piracy. The retention of “Piracies,” which was a holdover from the Articles of Confederation, even after “Offenses” had been added at the Philadelphia Convention, could suggest that there might have been some doubt as to whether the “Offenses” provision itself would authorize universal jurisdiction over piracy. Even with regards to piracy,

⁹⁵ *Id.* (“[T]he piracy thus created by municipal statute must not be confounded with piracy under the law of nations.”); *see also* 10 ANNALS OF CONG. 600 (1800) (distinguishing “piracy under the law of nations,” or “general piracy,” from “piracy by statute”).

⁹⁶ *See* 10 ANNALS OF CONG. 600 (1800) (cautioning that “confounding” international and municipal piracy leads to “indistinct” ideas about jurisdiction).

⁹⁷ HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW, § 124, at 164 (George Grafton Wilson ed., Oxford Univ. Press 1936) (1866).

⁹⁸ *Id.*

⁹⁹ *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 162 (1820) (holding that piracy in the Constitution referred to the well-known and uniform meaning of the term in international law).

however, such expansive jurisdiction may have seemed an unnecessary danger. The young Republic tried to avoid judicial proceedings that could endanger its neutrality.¹⁰⁰ Opening U.S. courts to disputes solely about foreigners on matters likely to concern affairs of foreign states could have forced the nation into the thicket of European politics. Similarly, while today many more offenses fall under universal jurisdiction under international law, very few nations' constitutions allow their courts to actually exercise universal jurisdiction over them.¹⁰¹

Though the text, together with the drafting history, raises a strong argument about the "Felonies" and "Offenses" powers being nonuniversal, this evidence is too thin to be conclusive. But the very paucity of debate over the clause suggests something about how it was understood, especially given the background assumptions about territorial jurisdiction, the purposes of punishment, and the nature of the new union. Given many of the Framers' concerns about congressional aggrandizement, it would be odd if Congress were given authority to legislate universally without an express statement, or without someone noticing the implication. The debate at the convention focused on whether it would be impudent to define piracies and offenses against the law of nations, since these are determined by state practice in general. It would be incongruous for people to voice this concern but then say nothing about allowing Congress to actually legislate felonies for the rest of the world. Moreover, one would expect that the Anti-Federalist propagandists, who were not shy about exaggerating the potentially imperial powers of the new government, would have raised this issue during the ratification process.

III. POLICY OF THE CLAUSE

A. Purposes

By granting Congress the Define and Punish power, the Framers sought to provide a uniform standard of conduct on federal vessels and to ensure that the national government could deal with crimes that could embroil the country in disputes with foreign powers. The uniformity goal seems to have dominated at the Philadelphia Convention. Unlike piracy,

¹⁰⁰ See, e.g., *Moxon v. The Fanny*, 17 F. Cas. 942 (D. Pa. 1793) (No. 9895) (rejecting jurisdiction over libel suit brought by British owners of vessel captured by French armed schooner). See generally David Sloss, *Judicial Foreign Policy: Lessons From the 1790s*, 53 ST. LOUIS U. L.J. (forthcoming 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1144060 (discussing litigation of British and French captures in U.S. admiralty courts, and the desire of the government to keep such cases out).

¹⁰¹ See LUC REYDAMS, *UNIVERSAL JURISDICTION: INTERNATIONAL AND MUNICIPAL PERSPECTIVES* 221 (2003).

which had a single global meaning and punishment,¹⁰² felonies could vary from state to state. Without a federal power to define the elements and punishment of crimes committed on the high seas, sailors on U.S. vessels could be subject to multiple criminal codes.¹⁰³ The lack of an identifiable, uniform body of criminal law to apply to all on board U.S. vessels was seen as the principal defect of the predecessor clause in the Articles.¹⁰⁴ The high seas are outside of state authority, and ships sailing there were outposts of U.S. sovereignty, not the sovereignty of a particular state.

Second, the nation as a whole had an interest in the conduct of U.S.-flagged vessels and nationals on the high seas, where they would most often have foreign contacts and thus foreign disputes, but where foreign justice might not reach them. The entire nation, and not a state, would have to answer for the conduct of U.S. nationals on the high seas or conduct in violation of international law.¹⁰⁵ As a result, it was argued that Congress should possess the power to “define and punish all such offences, which may interrupt our intercourse and harmony with” foreign states.¹⁰⁶ This was in keep-

¹⁰² See ADAM SMITH, LECTURES ON JURISPRUDENCE 131 (R.L. Meek et al. eds., 1978) (observing that piracy is generally punished by death).

¹⁰³ MADISON, *supra* note 53, at 474 (“If the laws of the States were to prevail on this subject, the citizens of different States would be subject to different punishments for the same offence at sea.”); THE FEDERALIST NO. 42, *supra* note 74, at 281 (“The meaning of the term [felony], as defined in the codes of the several States, would be as impracticable as [it] would be a dishonorable and illegitimate guide. It is not precisely the same in any two of the States; and varies in each with every revision of its criminal laws. For the sake of certainty and uniformity therefore, the power of defining felonies . . . was in every respect necessary and proper.”).

¹⁰⁴ See Jay, *Report*, *supra* note 51, at 797 (complaining that the “wise end” of uniformity “cannot be accomplished . . . in virtue of that Article in the Confederation”).

¹⁰⁵ See THE FEDERALIST No. 80, at 535–36 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (“[T]he 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.”); James Iredell, *Charge to the Grand Jury of the Circuit Court for the District of New Jersey* (Apr. 2, 1793), in 2 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800: THE JUSTICES ON CIRCUIT, 1790–1794, at 348, 355 (Maeva Marcus ed., 1988) [hereinafter DOCUMENTARY HISTORY OF THE SUPREME COURT] (observing that the Constitution gives the Define and Punish power to Congress because “otherwise they might be [held] accountable for breaches of the Law of Nations committed without their sanction”). Justice Iredell described this power as the flip side of Congress’s war-making authority: because it would have to decide whether to enter a conflict, it should be given the necessary powers to avoid one. See *id.*

¹⁰⁶ STORY, *supra* note 44, § 1160; see also 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. D, at 268–69 (Philadelphia, William Young Birch, and Abraham Small 1803) (suggesting that Congress, rather than the states, was given power over offenses against international law because of their close link with the war power and foreign relations).

ing with British and Colonial legislation, which regulated crimes on the high seas solely to protect the Crown's sovereign interests.¹⁰⁷

This understanding of the provision's twin purposes is instructive on several counts. For one, it makes clear that Clause Ten was about rearranging power between the new federal government and the states, safely entrusting to the national government those powers previously held by the states.¹⁰⁸ The purpose was an *internal* division of power rather than an *outward* projection of the jurisdiction.¹⁰⁹ John Marshall, shortly after the adoption of the Constitution, argued that unless the states could previously punish entirely foreign conduct on the high seas, which no one has ever suggested, then they could not transfer this power to Congress.

[T]hat clause in the Constitution, which enables Congress to define and punish piracies and felonies committed on the high seas, . . . can never be construed to make to the government a grant of power, which the people making it do not themselves possess. . . . [T]he people of the United States have no jurisdiction over offences committed on board a foreign ship against a foreign nation. Of consequence, in framing a government for themselves, they cannot have passed this jurisdiction to that government.¹¹⁰

Providing uniform criminal maritime law to “the citizens of different states” would make sense only if the Felonies provision applies only to U.S. citizens as well.¹¹¹ From the perspective of seamen, a switch from multiple state definitions to a single federal one creates uniformity.¹¹² But if ex-

¹⁰⁷ See, e.g., An Act Against Piracy and Robbing upon the Sea, passed by Massachusetts Bay Assembly 172–73 (Boston, May 27, 1696), *microformed on Early American Imprints*, First Series No. 478 (Evans Digital Collection).

¹⁰⁸ See DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS, 1801–1829*, at 7 n.24 (2001).

¹⁰⁹ Indeed, the States were thought to have retained concurrent jurisdiction over piracy in areas such as the Chesapeake Bay. See *id.*; see also 5 TUCKER, *supra* note 106, ed.'s app. A, at 5.

¹¹⁰ 10 ANNALS OF CONG. 607 (1800). This view, if accepted in its entirety, could have major ramifications. It could mean that Congress never has power to violate international law, because the states could not have delegated what they did not possess under the law of nations. This would make international law, or more precisely international law in 1789, an overarching limit on all governmental action.

Marshall would not take his argument this far; he certainly thought Congress could act contrary to customary international law. See *Alexander Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804). As a politician, Marshall may have felt freer to speak more loosely and broadly than he would when later deciding cases as a Justice. Of course, this could suggest his entire discussion of Clause Ten in the Robbins affair is problematic. Yet obviously much of it is sincere, as it was echoed later in *Palmer*. *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 627–30 (1818). A narrower understanding of his statement in the Robbins matter would regard his statements as an attempt to reconstruct the intent behind the Define and Punish Clause. The clause, unlike most of the Constitution, specifically refers to international law as a standard. Thus, Marshall may simply have meant that with no evidence to the contrary, the clause cannot be understood as expanding the powers of the United States beyond what was allowable by international law—this would be his *Charming Betsy* canon of statutory interpretation applied to the text of the Constitution itself.

¹¹¹ RECORDS OF THE FEDERAL CONVENTION, *supra* note 65, at 316.

¹¹² See *id.*

tended to foreigners on foreign vessels, the clause brings “neither uniformity nor stability in the law” to defendants;¹¹³ they would be subject to the laws of a nation with which they had no connection, in addition to the laws of their home or flag state.

The foreign-relations purpose behind the clause arises only because “the welfare of the Union is essentially connected with *the conduct of our citizens* in regard to foreign nations.”¹¹⁴ Presumably, foreign countries would only take umbrage at the United States for crimes on the high seas or against international law when those crimes involved people or instrumentalities somehow connected to the United States. Thus, this reason contemplates the Define and Punish power reaching only cases with a solid American nexus—the involvement of American nationals or vessels.

Neither purpose of the Felonies provision—the need for uniform laws or the need to avoid conflict with foreign nations—suggests that the grant of that power would be thought to extend to *foreigners on foreign vessels*. In explaining the need for the clause, James Iredell, a major participant in the ratification process in the North Carolina legislature and later one of the first Justices on the Supreme Court, described the matters in Clause Ten as “*immediately affecting* the security, the honor or the interest of the United States at large”¹¹⁵ Thus, he argued, they should be entrusted to the “general Legislature of the Union.”¹¹⁶ His use of “immediately” suggests a direct nexus with the offense, rather than some general or remote “interest.”

An alternate account leading to the same conclusion was provided by St. George Tucker, one of the most influential jurists of the early Republic. He saw the Piracies and Felonies power as a necessary corollary of the Foreign Commerce Clause.¹¹⁷ Yet if Congress can regulate activity on the high seas without any U.S. nexus, such authority would swallow up the Foreign Commerce Clause, which limits Congress to regulating commerce “with” foreign nations.¹¹⁸ Such a sweeping reading of the Felonies power cannot be accepted without support from some evidence from the Framers.

B. Background Assumptions

The lack of discussion of the clause’s jurisdictional scope must be understood against the legal background of the time. On the domestic side,

¹¹³ MADISON, *supra* note 53, at 474.

¹¹⁴ STORY, *supra* note 44, § 1160 (emphasis added).

¹¹⁵ James Iredell, *Answers to Mr. Mason’s Objections to the New Constitution, 1788, as reprinted in* 1 BERNARD SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 449, 452 (1971) (emphasis added).

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ TUCKER, *supra* note 106, app. D, at 268–69 (explaining that the Constitution grants Congress the Define and Punish powers because any activity on the high seas implicates foreign commerce, which “must necessarily be transacted by communication on the high seas”).

Congress was widely seen as a body with limited and defined powers, with particularly narrow criminal jurisdiction.¹¹⁹ The “high seas” has always been the indispensable conduit of a vast range of commercial and military activity. If the Felonies power had no jurisdictional limit besides the locus, it would, with a single word, turn Congress from a body of limited powers into a world legislature.

Moreover, jurisdiction was still formalistic and heavily territorial. This followed the principle that a nation’s jurisdiction is an outgrowth of its sovereignty and that its sovereignty is territorial. Thus, no nation could have jurisdiction outside its sovereign domain except with the consent of another nation. Chief Justice Marshall powerfully stated the territorial view of sovereignty and jurisdiction in *The Schooner Exchange*.¹²⁰ He noted in dicta that jurisdiction over foreigners extended only to their acts committed within the United States. Such jurisdiction was required because it would be “obviously inconvenient and dangerous to society” to immunize foreigners.¹²¹ There was little difference between jurisdictional overreaching and the invasion of another country’s foreign prerogatives.¹²² Because of this, it was widely thought that the inherent attributes of nationhood would disable a country from exercising jurisdiction on a universal basis.¹²³

Certain eighteenth-century political and legal theorists heavily influenced the views of the Founding generation. The impact of writers like Emmerich de Vattel cannot be underestimated.¹²⁴ An appreciation of some

¹¹⁹ See *id.* at 269 (observing that Congress is not entrusted with “general” power over crimes, but rather over “but a few offences [which] are selected from the great mass of crimes with which society may be infested”).

¹²⁰ *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 136–37 (1812) (“The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction.”).

¹²¹ *Id.* at 144.

¹²² See, e.g., *Henfield’s Case*, 11 F. Cas. 1099, 1103 (C.C.D. Pa. 1793) (No. 6360) (Jay, J.) (“It is to be remembered, that every nation is, and ought to be, perfectly and absolutely sovereign within its own dominions, to the entire exclusion of all foreign power, interference and jurisdiction . . .” (emphasis added)); see also 5 TUCKER, *supra* note 106, ed.’s app. A, at 5 (“The cognizance of all crimes and misdemeanours committed within the body of any state . . . belongs exclusively to the jurisdiction of that state. . . . And in like manner the cognizance of all crimes and misdemeanours committed on the high seas (where all nations have a common jurisdiction) by citizens of the same state against each other; or, by common pirates, or robbers, against the citizens of any state, belongs to that particular state to whose citizens the injury is offered.”).

¹²³ 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 26 (New York, O. Halsted 1826) (“The subjects of all nations meet [on the ocean], in time of peace, on a footing of entire equality and independence. No nation has any right or jurisdiction at sea, except it be over the persons of its own subjects, in its own vessels . . .”).

¹²⁴ See *U.S. Steel Corp. v. Multistate Tax Comm’n*, 434 U.S. 452, 463 n.12 (1978) (noting that Vattel was the most cited authority on international law during the first fifty years of the Republic, and relying on his scholarship to determine the meaning of the terms “treaty” and “compact” as used in the Constitution). Students of Vattel included Thomas Jefferson, James Madison, and Alexander Hamilton;

of their views on extraterritorial jurisdiction helps demonstrate the general presumptions in place at the time. The authors most influential among the Framers understood society as a compact among individuals, who previously enjoyed an anarchic autonomy. Governments acquired from their subjects the power to deal with crimes. The government can only have the rights previously possessed by individuals—namely, self-defense. Thus, criminal law is justified only so long as it protects the society itself.¹²⁵ Thus, the social contract theory of punishment is inherently isolationist or inward-looking.

The leading international scholars saw jurisdiction as essentially territorial, though they recognized exceptions for particular crimes. If someone were to commit crimes in his home state and flee to another, the latter cannot punish him for crimes committed elsewhere. As Vattel described it, “the justice of each nation ought in general to be confined to the punishment of crimes committed in its own territories.”¹²⁶ Nonetheless, Vattel said, “we ought to except from this rule those villains, who, by the nature and habitual frequency of their crimes, violate all public security, and declare themselves the enemies of the human race.”¹²⁷ Because such individuals “attack all nations,” they can be punished by all.¹²⁸ Vattel regarded universal jurisdiction as limited and extraordinary.¹²⁹ Moreover, he viewed it as limited to crimes that, like piracy, directly endanger all nations and are recognized as universal by international custom.

The Framers would not likely have thought long on this question without consulting the vastly influential Dutch jurist and publicist Cornelius van Bynkershoek.¹³⁰ He thought the permissibility of universal jurisdiction was a “difficult” matter.¹³¹ While generally negatively disposed toward it, he grudgingly suggested a narrow exception for certain *in rem* proceedings before prize courts. When a nation would bring a prize ship into a third country’s port, claims could be made against the captor by the alleged proper owners of the prize.¹³² Admiralty courts heard such libels even when the

Hamilton frequently cited Vattel in his cabinet opinions and public arguments. See DANIEL GEORGE LANG, FOREIGN POLICY IN THE EARLY REPUBLIC 11, 65 (1985).

¹²⁵ See 1 EMERICH DE VATTEL, THE LAW OF NATIONS OR PRINCIPLES OF THE LAW OF NATURE §§ 169, 232 (Joseph Chitty ed., Philadelphia, T. & J.W. Johnson & Co. 1867) (1758).

¹²⁶ *Id.* § 233.

¹²⁷ *Id.* Vattel cites pirates as the main example of this “exception” in state practice, though he seems to wish to extend it to poisoners and “incendiaries by profession.” *Id.*

¹²⁸ *Id.*

¹²⁹ See *id.*

¹³⁰ His work is often discussed in Founding-era arguments about the law of nations and is cited at least twenty times in Supreme Court opinions through 1820. See, e.g., *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812). Justice Story described him as “of the highest authority.” *The Emulous*, 8 F. Cas. 697, 701 (C.C.D. Mass. 1813) (No. 4479).

¹³¹ 1 CORNELIUS VAN BYNKERSHOEK, QUESTIONS OF PUBLIC LAW § 129 (1737), in 2 THE CLASSICS OF INTERNATIONAL LAW 102 (James Brown Scott ed., Tenney Frank trans., 1930).

¹³² *Id.*

claimants and captors were foreign.¹³³ Yet van Bynkershoek only discussed criminal or *in personam* universal jurisdiction in relation to piracy.

A brief examination of some of the leading writers on international law who informed the Framers' views shows that these scholars regarded universal jurisdiction as aberrational or problematic.¹³⁴ Of course, the Framers, or subsequent interpreters, were free to diverge from these views with respect to Congress's powers. However, given this intellectual background, their silence about the jurisdictional scope of the Felonies and Offenses power suggests it was at least not intended as granting these powers on a universal basis.

C. Summary

The little affirmative evidence suggests that universal jurisdiction would be in tension with the goals of Clause Ten—providing a uniform rule on board U.S. vessels from different states and providing a federal rule and remedy for crimes that might be likely to disturb relations between the United States and other nations. Moreover, allowing for general universal jurisdiction over any felony at sea would be in tension with the widespread understandings of sovereignty and jurisdiction that informed the Framers. While the Constitution could give Congress powers that would conflict with these background assumptions, it would require some affirmative evidence from the Framing, or strong textual evidence, to conclude that it had done so. In the absence of such evidence, it seems safest to interpret the clause consistently with its purposes, the expectations of its authors, and as shown in Part II, the likely meaning of its terms to a contemporaneous reader.

IV. MURDER ON THE HIGH SEAS

With one exception, Congress did not use the Piracies and Felonies Clause to legislate universally over anything but piracy itself until the MDLEA. Given the vast array of foreign high seas conduct that was avail-

¹³³ See *id.*; Eugene Kontorovich, *Originalism and the Difficulties of History in Foreign Affairs*, 53 ST. LOUIS U. L.J. 39, 46–50 (2008) (explaining how admiralty courts functioned in the early Republic as international courts exercising universal jurisdiction in matters of captures).

¹³⁴ Jeremy Bentham, not surprisingly, had an approach to universal jurisdiction that was quite different from previous commentators. He had no objection to a country exercising jurisdiction over conduct with no nexus to the forum, purely “for the sake of mankind at large.” See JEREMY BENTHAM, *Of Subjects, or of the Personal Extent of the Dominion of the Laws*, in 2 THE WORKS OF JEREMY BENTHAM 540, 543 (John Bowring ed., London, Simpkin, Marshal & Co. 1843) (arguing that jurisdiction should be based on nothing more than the offender’s physical presence because any other criterion could lead to multiple conflicting jurisdictional claims, whereas a person can only be in one place at a time). Bentham, of course, was not a treatise-writer, and certainly did not purport to describe practice, only an idealized regime of jurisdiction. Indeed, while Bentham coined the term “international law” in this work, it was apparently never cited in the courts of the early Republic. Furthermore, his work was not available to the drafters of the Constitution, as it was only finished in 1789 and published posthumously by his executor. See 1 THE WORKS OF JEREMY BENTHAM § VII, *supra*.

able for criminalization in the Age of Sail, this congressional silence itself is telling. As Part V will show, Congress at one point contemplated attaching universal jurisdiction to a nonpiratical felony, but decided such an act would be unconstitutional.

This Part will discuss the only enacted measure that seemed to provide universal jurisdiction for felonies. Some of the leading jurists of the time—and indeed in the nation’s history—quickly challenged the universal treatment of crimes other than piracy. The statute eventually occasioned the only Supreme Court rulings on the scope of Congress’s power to punish crimes without a U.S. nexus. While there were a couple of inconclusive suggestions to the contrary, the preponderance of judicial opinion found such legislation as exceeding Congress’s Article I powers.

The First Congress exercised the Piracies and Felonies power when it enacted the first criminal statute in 1790.¹³⁵ The measure was an omnibus act, creating every federal crime, such as treason, counterfeiting, and more common crimes committed in areas of exclusive federal authority.¹³⁶ It purported to criminalize “murder or robbery” when committed by “any person” on the high seas.¹³⁷ Subsequent sections went on to denominate as piracy a variety of maritime misdeeds, such as “running away with a vessel,” revolt, assaulting commanders, and attempts and conspiracies to do those things.¹³⁸

Robbery on the high seas was the international law crime of piracy, or “general” piracy. But the statute included in the same breath other offenses that, while dubbed “piracy,” did not amount to such under international law. This itself should not and did not trouble jurists, who clearly distinguished between international and statutory, or municipal, piracy.¹³⁹ The statute, however, made no jurisdictional distinction between these provisions. The use of “any person” appears to be an umbrella term, applying equally to

¹³⁵ An Act for the Punishment of Certain Crimes Against the United States, 1 Stat. 112, ch. 9 (1790).

¹³⁶ *Id.* The bill received little discussion in Congress, with the sections that could be read as establishing universal jurisdiction apparently going entirely unremarked. See DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801*, at 93–95 (1997).

¹³⁷ Section 8 of the Crimes Act provided that:

[I]f any person or persons shall commit upon the high seas, or in any river, haven, basin or bay, out of the jurisdiction of any particular state, *murder or robbery*, or any other offence which if committed within the body of a county, would by the laws of the United States be punishable with death; or if any captain or mariner of any ship or other vessel, shall piratically and feloniously run away with such ship or vessel, or any goods or merchandise to the value of fifty dollars, or yield up such ship or vessel voluntarily to any pirate; or if any seaman shall lay violent hands upon his commander, thereby to hinder and prevent his fighting in defence of his ship or goods committed to his trust, or shall make a revolt in the ship; every such offender shall be deemed, taken and adjudged to be a pirate and felon, and being thereof convicted, shall suffer death; and the trial of crimes committed on the high seas, or in any place out of the jurisdiction of any particular state, shall be in the district where the offender is apprehended, or into which he may first be brought.

1 Stat. 112, ch. 9, § 8 (emphasis added).

¹³⁸ *Id.* §§ 9–12.

¹³⁹ See Joseph Story, *A Charge Delivered to the Grand Juries of the Circuit Court* (1819), reprinted in 1 *THE AFRICAN SLAVE TRADE AND AMERICAN COURTS* 1, 2 (Paul Finkelman ed., 1988).

robbery as well as all the other enumerated offenses. A literal reading would extend U.S. jurisdiction universally to a wide variety of crimes aboard any vessel on the high seas, and even to some offenses on land. None of these crimes were universally cognizable. It is unlikely that Congress intended the law to have such broad reach. Given the narrowness with which it otherwise tailored its criminal powers, there is no indication that Congress sought to begin its career by legislating a criminal code for all ships around the world.¹⁴⁰ The reasons, if any, for the language are unknown.¹⁴¹ Several courts blamed it on shoddy draftsmanship,¹⁴² which would have been understandable given the massive work of the First Congress.

A. *Grand Jury Charges*

The statute immediately raised doubts as to its legality, which persisted until they were resolved by the Supreme Court in 1820. The year after its enactment, two Supreme Court Justices discussed it while giving grand jury instructions. At the time, grand jury charges were lengthy disquisitions on criminal law, the Constitution, the role of the jury, and related political matters.¹⁴³ Justice James Wilson surveyed the entire corpus of federal criminal law—all thirty-two sections of the Act of 1790—for the edification of the Virginia grand jurors.¹⁴⁴

Upon reaching section 8 of the Act, Wilson expressed “an official obligation to state some doubts” about the statute’s apparent extension of universal jurisdiction beyond classic piracy.¹⁴⁵ These doubts consume the next three pages of his instructions. While noting his “diffidence” to the “power

¹⁴⁰ See Anonymous Case, 1 F. Cas. 999, 1003 (C.C.D. Mo. 1843) (No. 447) (“In some of its provisions, the words, if literally and strictly taken, go far beyond what could have been the intention of the writer; and the act has in some respects copied too closely the act of 39 Geo. III., without adverting to the difference in our constitutions.”).

¹⁴¹ The 1781 statute establishing federal courts for high seas crimes described their jurisdiction as extending to “*all and every person* and persons who . . . hereafter shall commit, *any* piracy or felony upon the high seas.” *Ordinance for Establishing Courts for the Trial of Piracies and Felonies Committed on the High Seas*, *supra* note 58, at 355 (emphasis added). No one has contended that this provision sought to grant universal jurisdiction over the high seas to the newly created courts. Interestingly, the similar language of the 1781 ordinance was never mentioned in the decades-long debate over the scope of its 1790 replacement. If anything, the earlier enactment used even broader language. See *id.* at 354–55.

¹⁴² See *United States v. Bowers*, 18 U.S. (5 Wheat.) 191, 195 (1820) (bemoaning “the obvious want of precision in language and in thought, discoverable in the act of 1790”); Anonymous Case, 1 F.Cas. at 1003 (“The act of 1790 was very unskillfully written.”).

¹⁴³ See Ruth Wedgwood, *The Revolutionary Martyrdom of Jonathan Robbins*, 100 YALE L.J. 229, 243 n.37 (1990) (noting that grand jury charges were often “political events” reprinted verbatim in newspapers).

¹⁴⁴ See James Wilson, *Charge to the Grand Jury of the Circuit Court for the District of Virginia* (May 1791), in 3 WORKS OF THE HON. JAMES WILSON 354 (Philadelphia, Lorenzo Press 1804).

¹⁴⁵ *Id.* at 374.

and legislative authority of the United States,” he suggested the murder provisions of the law went beyond such power.¹⁴⁶ Wilson noted the well-known distinction between general piracy and other maritime crimes that a nation may penalize. This distinction existed regardless of whether the latter are dubbed “piracies” by statute. If a nation wished to legislate beyond the international law definition, it could do so in cases “affecting *only* its citizens.”¹⁴⁷

As to section 8, Wilson first urged a narrower reading of the murder provision, arguing that Congress could not have meant to give the same reach to the laws of piracy and murder, given the well-known difference between them.¹⁴⁸ If, however, Congress did mean the law “to extend, in its operation, to persons not citizens of the United States,” Justice Wilson suggested it “could not be carried into effect” by the courts.¹⁴⁹ While his charge repeatedly invoked the “law of nations” and did not cite the Constitution, this last sentence suggests that Wilson, who had been a delegate to the Constitutional Convention, understood the limitation to be constitutional. Wilson, like most lawyers at the time, saw international law as part of the common law background against which the Constitution and federal laws must be construed. Yet even the strongest supporters of this view conceded that both the Constitution and laws of the United States trumped contrary customary international law.¹⁵⁰ Thus, if the Define and Punish Clause authorized universal jurisdiction over any high seas crimes, Congress would be entitled to exercise such jurisdiction despite the conflict with international law. There was no authority other than the Constitution for invalidating a statute, as Wilson said he would do.

Justice Iredell adverted to the issue in a much more cursory discussion and came to a different conclusion. Addressing the New Jersey grand jury two years later, he suggested that international law principles bear directly on the scope of Clause Ten. Unlike Wilson, he maintained that all nations share a common jurisdiction over all high seas crimes, though he offered no

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 376. This view construed jurisdiction more narrowly than anyone else would, as it would presumably prevent the punishment of foreigners on U.S. vessels.

¹⁴⁸ *Id.* at 374–77. Marshall would reject this approach, as it would require giving a common chapeau provision, “any person,” different meaning when applied to two different subsequent terms. Instead of narrowing the scope of “any person” *as applied* to murder, he chose to narrow “any person” itself. While this is in some tension with the plain language, it at least allows the plain language to mean one thing, rather than have some Heisenberg-like property. See *infra* text accompanying notes 184–187, 194–206.

¹⁴⁹ *Id.* at 377. The statement also is important as an overlooked early foreshadowing of the judicial review that would come into clear view in *Marbury v. Madison*.

¹⁵⁰ See *Chisolm v. Georgia*, 2 U.S. (2 Dall.) 419, 449 (1793) (Iredell, J., dissenting) (arguing that the Constitution trumps contrary international law, because “unquestionably the people of the United States had a right to form what kind of union, and upon what terms they pleased, without reference to any former examples”).

basis for the view.¹⁵¹ In a subsequent charge, he suggested that the United States had universal jurisdiction over at least certain nonpiratical crimes on the high seas.¹⁵² Anticipating modern universal jurisdiction, which is based on the heinousness of the crime, he said that “murder or piracy” could be punished by any nation because they are “so atrocious in their nature” that “all nations concur in punishing them” and because the high seas are outside the jurisdiction of any particular nation.¹⁵³ He did not explain how this fits with Clause Ten, which mentions piracy but not murder. Surely if murder were universally cognizable, it would not have become so in the few years since the Philadelphia Convention. His first, broader jury charge suggested a belief in a *jus gentium*, a “universal law of society” that the United States, like all other nations, merely applies in admiralty cases.¹⁵⁴

These views are somewhat inconsistent with each other and hard to understand on their own terms, as they conflict with the well-established contemporary view that only piracy was universally cognizable.¹⁵⁵ Moreover, it is in tension with views he expressed during the ratification suggesting that the purpose of Clause Ten was to reach crimes committed by or against Americans.¹⁵⁶ The suggestion that high seas were an “extraterritorial” jurisdiction also had little basis. While the “high seas” themselves could not be regulated by any nation, *ships* were literal extensions of a nation’s territory.¹⁵⁷

Wilson thought that he would soon see a case testing the scope of the Crimes Act. Such a case did not arise directly until the late 1810s. In 1819,

¹⁵¹ Iredell, *supra* note 105 at 355 (“[Congress] has express authority given in the Constitution to define and punish Piracies and Felonies . . . and Offences [committed] against the law of nations. Crimes that are committed upon the High Seas, are not the objects of any Law merely territorial, that is, a Law resting entirely on the discretion of the Legislature of the Country, but being Crimes equally against all the Nations in the world, are equally punishable in any, and therefore must have some common principle.”).

¹⁵² James Iredell, *Charge to Grand Jury of the Circuit Court for the District of South Carolina* (May 7, 1798) [hereinafter Iredell, *South Carolina Grand Jury Charge*], in 3 DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 105, at 258. Iredell does not mention the Crimes Act directly, and thus it is not clear how focused he was on the universality issue. His discussion of high seas crimes was apparently prompted by the involvement of Americans in French vessels operating against the British off the Carolina shore. See Letter from James Iredell to Hanna Iredell (May 8, 1798), in 3 DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 105, at 263.

¹⁵³ Iredell, *South Carolina Grand Jury Charge*, *supra* note 152.

¹⁵⁴ Iredell, *supra* note 105 (“Laws concerning crimes of this nature ought to be materially the same in every country.”).

¹⁵⁵ Cf. Wedgwood, *supra* note 143, at 240–41 & n.29 (explaining that some Enlightenment thinkers had a “lingering” belief that all law was universal, with each nation attempting to understand the same general law as all others, and thus there would be nothing unfair about applying jurisdiction to foreigners because jurisdictional differences were of little consequence).

¹⁵⁶ See Iredell, *supra* note 115.

¹⁵⁷ See, e.g., *United States v. Cooper*, 25 F. Cas. 631, 641 (C.C.D. Pa. 1800) (No. 14,865) (Chase, J.) (charging the jury: “All vessels, whether public or private, are part of the territory and within the jurisdiction of the nation to which they belong. This is according to the law of nations.”).

Justice Story delivered instructions to a grand jury that directly anticipated the controversies of the coming year. Story adopted and expanded Wilson’s narrow view of universal jurisdiction over Iredell’s broader conception.¹⁵⁸ Story stated that the statute “is manifestly designed to apply to all cases,” including foreigners on foreign ships. However, crimes merely called “piracy” by U.S. law are punishable only when there is American involvement.¹⁵⁹ Story thus distinguished between Congress’s power to punish piracy as defined by the law of nations and other crimes, regardless of whether the statute called them “piracy.” This insistence on the distinction between piracy proper and everything else directly corresponds to the constitutional distinction between piracies and felonies.

B. John Marshall and Jonathan Robbins

1. *The Robbins Affair.*—The Jonathan Robbins affair—a highly politicized dispute over the extradition of a mutineer to Britain—resulted in the first extended discussion of the scope of Congress’s high seas criminal jurisdiction. The Robbins flap pulled in the courts, the President, Congress, and the press. At its climax, freshman legislator John Marshall delivered an extraordinary speech on the floor of the House, which demonstrated a definite view of the Piracies and Felonies provision, closely anticipating the views he would express from the bench two decades later in the only cases squarely dealing with the issue.

In 1797, mutineers overthrew (overboard) the officers of the British warship *Hermione*.¹⁶⁰ The brutality of the revolt made Britain particularly intent on bringing the perpetrators to justice. In subsequent years, some of the crew, now on other vessels, wound up in American ports, where they were arrested. In March 1798, three of the mutineers were arrested in Perth Amboy. One was apparently an American, while the other two were probably foreigners;¹⁶¹ the concept of nationality was fuzzier at the time, and particularly difficult to apply to immigrants like Americans and migrants like seamen. Britain immediately requested their extradition under the Jay Treaty, which required both countries to “deliver up to justice [in the other country], all persons, who, being charged with murder or forgery committed within the jurisdiction of either, shall seek an asylum within any of the countries of the other.”¹⁶²

¹⁵⁸ See Story, *supra* note 139.

¹⁵⁹ *Id.*

¹⁶⁰ The discussion of the background to the Robbins affair is drawn from Wedgwood, *supra* note 143, at 235–38.

¹⁶¹ *But see* Extradition, 1 Op. Att’y Gen. 83 (Mar. 14, 1798) (suggesting that all three may have been Americans).

¹⁶² Treaty of Amity, Commerce, and Navigation, U.S.-Gr. Brit., art. XXVII, Nov. 19, 1794, 8 Stat. 116, 129 [hereinafter Jay Treaty].

The extradition request was considered at the highest levels of government. A question immediately arose about the meaning of “jurisdiction.” Certainly, a British frigate was manifestly within His Majesty’s jurisdiction. The United States had some proprietary jurisdictional claim with respect to the American defendant, but not the other two. If “jurisdiction of either” meant each nation’s *exclusive* jurisdiction, then the treaty would not require extradition in cases where the crime fell within both nations’ jurisdictions. With respect to the foreigners, their mutiny on a British warship could only be within U.S. jurisdiction if it was universally cognizable and if the Constitution would allow the punishment of such “foreign” crimes in American courts.

2. *Opinions on U.S. Jurisdiction.*—Attorney General Charles Lee and Secretary of State Timothy Pickering disagreed on this last point.¹⁶³ In a brief opinion, Lee wrote that the 1790 Crimes Act allowed the punishment of murder on the high seas even though one of the mutineers was possibly foreign.¹⁶⁴ He did not explain how such jurisdiction would be consistent with the Constitution or law of nations.¹⁶⁵ However, the mutineers had not merely seized the vessel, but also sold it to the Spanish, thus robbing the ship owners.¹⁶⁶ Because Lee’s letter dealt with both murder and piracy, he could still have regarded U.S. jurisdiction as based fundamentally on the latter. He could have seen the case as an exercise of pendent jurisdiction.¹⁶⁷ On the other hand, like Iredell’s second jury instruction, he may have thought murder was also universally cognizable under international law.

Lee’s view did not prevail. The defendants were indicted for piracy before a federal grand jury. Only the undisputedly American defendant was charged with murder, despite Lee’s broad views about the reach of section 8 of the Crimes Act. Piracy was not only universally cognizable, it was also not extraditable by the terms of the Jay Treaty. Indeed, another provision clearly contemplated that each country would itself punish pirates against the other when found within their respective territories.¹⁶⁸ This case was not the best vehicle for disentangling the treatment of piracy from murder, as they allegedly occurred together. (Whether mutiny counted as piracy in in-

¹⁶³ Extradition, 1 Op. Att’y Gen. 83.

¹⁶⁴ *Id.* at 84 (“I deem it more becoming the justice, honor, and dignity of the United States, that the trial should be in our courts.”); see also Wedgwood, *supra* note 143, at 277–78 (describing Lee’s view that murder and piracy can be punished “on board any vessel whatever”).

¹⁶⁵ Professor Rubin sees in the tone of the remark more bombast than analysis. See ALFRED P. RUBIN, *THE LAW OF PIRACY* 142 (2d ed. 1998) (“[I]t seems likely that Lee was making a broader argument for new national pride and policy reasons than a closer examination of the case and more mature judgment would warrant.”).

¹⁶⁶ See Wedgwood, *supra* note 143, at 272 n.162.

¹⁶⁷ See *id.*

¹⁶⁸ Jay Treaty, *supra* note 162, art. XX, 8 Stat. at 126–27.

ternational law was itself unclear.) A brief trial resulted in an acquittal after twenty minutes of deliberations.¹⁶⁹

The fate of Robbins took an entirely different course and inspired different legal views. In February 1799, a certain Nathan or Jonathan Robbins was arrested in Charleston, South Carolina. He was said to be Thomas Nash, one of the *Hermione* mutineers. Britain immediately requested his extradition. Again, Lee’s views were disregarded. Pickering recommended extraditing Nash. Adams agreed that the United States had no jurisdiction of crimes committed by foreigners on foreign vessels. In a brief note he “adviz[e]d and request[ed]” the federal judge before whom Nash had come to hand him over to the British.¹⁷⁰

Nash promptly began a habeas proceeding in which he made a last-minute claim that he was actually an American national, Jonathan Robbins, who had been impressed onto the *Hermione*. While it lacked any evidentiary support, this charge succeeded in arousing popular sentiments on his behalf.¹⁷¹ Impressments of American sailors were already a source of bitterness, and the idea that a kidnapped American who regained his liberty through force should be returned to brutal British naval justice seemed an outrage and a perversion.¹⁷² Judge Bee was openly skeptical of these claims and saw them as tactics to arouse anti-extradition passions.¹⁷³ While he suggested, again without explanation, that U.S. courts would have jurisdiction over Nash,¹⁷⁴ the bulk of the evidence and witnesses would be in British hands, and Nash was rendered to them. Shortly thereafter he was summarily court-martialed in Jamaica, executed, and hung in chains.¹⁷⁵

The treatment of Nash—now Robbins or Robins in the press—quickly became a national scandal. Robbins became a martyr, and when Adams’s letter to Bee became public, he became the villain in the drama. The event

¹⁶⁹ The precise circumstances of the New Jersey proceeding, such as the nationalities of the defendants and the basis for jurisdiction, were obscure and would be a subject of much controversy in the congressional debates. Supporters of Adams argued that the jury acquitted precisely because, “being judges of law as well as fact,” they considered the prosecution a jurisdictional overreach. 10 ANNALS OF CONG. 592 (1800). Gallatin and other critics of the administration’s actions argued that the indictment of the three showed there was no jurisdictional impediment to prosecuting Robbins in U.S. courts. *Id.* at 594.

¹⁷⁰ See *United States v. Robins*, 27 F. Cas. 825, 838 (D.S.C. 1799) (No. 16,175).

¹⁷¹ See Wedgwood, *supra* note 143, at 323–35 (discussing how the issue of Robbins’s claim of citizenship was used by politicians to gain favor in the upcoming elections).

¹⁷² See *id.* at 353.

¹⁷³ See *id.* at 299–302.

¹⁷⁴ *Robins*, 27 F. Cas. at 832–33 (“There is no doubt that the circuit courts of the United States have a concurrent jurisdiction, and this arises under the general law of nations; and if the 27th clause of the treaty in question had not expressly declared the right to demand, and the obligation to deliver over, the prisoner must have been tried here.”). As with Lee, Bee does not make clear whether U.S. courts would have jurisdiction without the presence of a piracy charge.

¹⁷⁵ Wedgwood, *supra* note 143, at 304. In the British proceedings, he confessed to being an Irishman. *Id.* at 304–05.

prompted massive outrage that was partly the product of broader resentment of the Adams administration and British high-handedness on the high seas.¹⁷⁶ The House promptly instituted proceedings to censure Adams for his *ex parte* role in the matter.

3. *Marshall's Decisive Speech.*—After days of debate, Marshall took the floor. His long speech effectively ended the discussion and turned the tide against censure. It immediately became famous and was widely reprinted.¹⁷⁷ Courtroom arguments would cite the speech alongside judicial precedents: “[T]hough delivered by a Congressman, [the speech] was to be awarded constitutional place in the Appendix of Wheaton’s Supreme Court opinions”¹⁷⁸

Marshall’s remarks on the subject show how early he had formulated his view and help flesh out the opinions he subsequently delivered from the bench. In discussing the extent of American jurisdiction, he presented a definite view of the Crimes Act. On the Court, he would not encounter a case that posed this question until twenty years later—a case he decided consistently with the views he first expressed on the House floor.

The jurisdictional arguments played a relatively small role in Robins’s habeas case, and even less in the subsequent debate on the propriety of the rendering. The major issues concerned the executive involvement in the decision, the propriety of extraditing “Americans,” the legitimacy of mutiny by impressed sailors, and the various inadequacies in the evidence against Nash. Nonetheless, in the protracted and heated floor debate, Marshall’s able opponents had no response to his jurisdictional arguments.

Marshall devoted more attention to the jurisdictional argument than any of the other speakers. He began by noting that the case obviously fell within British jurisdiction; the only question was whether the United States enjoyed concurrent power on the theory that “at sea all nations have a common jurisdiction.”¹⁷⁹ He denied this position as a matter of international law, citing treaties and the past practice of the United States in support:

It is not true that all nations have jurisdiction over all offences committed at sea. On the contrary, no nation has any jurisdiction at sea, but over its own citizens or vessels, or offences against itself.¹⁸⁰

A contrary rule would have had absurd consequences. Could the United States punish desertion by British seamen from a British to a French vessel, or pickpocketing among British sailors? Such a general jurisdiction

¹⁷⁶ See generally Wedgwood, *supra* note 143.

¹⁷⁷ See *id.* at 355–57.

¹⁷⁸ *Id.* at 234 n.3. Similarly, an earlier version of Marshall’s speech, published as a letter in a Virginia newspaper, was reprinted as an appendix to the report of the district court case. *Robins*, 27 F. Cas. at 833.

¹⁷⁹ 10 ANNALS OF CONG. 598 (1800).

¹⁸⁰ *Id.*

over high seas offenses had never been suggested.¹⁸¹ Thus Marshall demonstrated that Lee’s broad statements proved too much. Without some limiting principle to distinguish murder from all other crimes, it would seem that nations could either exercise complete jurisdiction over the entire conduct of foreign vessels or none at all:

It follows, then, that no such common jurisdiction exists.

In truth the right of every nation to punish is limited, in its nature, to offences against the nation inflicting the punishment. This principle is believed to be universally true.¹⁸²

Any casual conflation of murder and robbery jurisdiction, Marshall explained, stems from neglecting the distinction between international and statutory piracy:

[A]n offence which in its nature affects only a particular nation, is only punishable by that nation. It is by confounding general piracy with piracy by statute, that indistinct ideas have been produced, respecting the power to punish offences committed on the high seas. A statute may make any offence piracy, committed within the jurisdiction of the nation passing the statute, and such offence will be punishable by that nation. But piracy under the law of nations . . . alone is punishable by all nations No particular nation can increase or diminish the list of offences thus punishable.¹⁸³

While U.S. courts could have jurisdiction over Nash’s *piratical* crime, they could not prosecute him for murder. Of course, Marshall had to say something about the Crimes Act, which by its terms applied to murder on the high seas “by any person” and was not limited to American vessels. Marshall forcefully replied that the Act did not and could apply on a universal basis.

Congress could not have wanted to sweep in foreign causes. But even if it did, it could not: “Any general expression in a legislative act must, necessarily, be restrained to objects within the jurisdiction of the legislature passing the act.”¹⁸⁴ He then turned to the statute for further evidence of its limited application. He first looked to the title, which spoke of “crimes against the United States.” Then he looked at the variety of statutory piracies to which the “any person” language equally applied. They included misprision of treason, running away with a vessel, and striking an officer. But surely the United States could not punish misprision of treason by a Frenchman against France; nor could it punish a French capture of a British ship, though this might involve both striking an officer and running away

¹⁸¹ *Id.* at 599 (“A common jurisdiction over all offences at sea, in whatever vessel committed, would involve the power of punishing the offences which have been stated. Yet, all gentlemen will disclaim this power.”).

¹⁸² *Id.* at 599–600.

¹⁸³ *Robins*, 27 F. Cas. at 862.

¹⁸⁴ *Id.* at 863.

with a vessel.¹⁸⁵ In other words, as even the opposition had conceded, such offenses were outside U.S. jurisdiction,¹⁸⁶ and the words “any person” were either intended to be limited or required limitation throughout the statute. A literal reading could not be sustained throughout the statute because, despite the moral appeal of universal jurisdiction for murder, the jurisdictional distinction between piracies and felonies had to be maintained, even against Congress’s will.¹⁸⁷

Thus far, Marshall’s argument against universal jurisdiction beyond piracy rested solely on international and general law grounds.¹⁸⁸ Yet at the end of the discussion, Marshall made it exceedingly clear that this limitation was embedded in the Define and Punish Clause itself. While the limitation may have begun in the law of nations, it was cemented by the framing of the Constitution, which gave Congress only limited powers, amongst which universal jurisdiction was not one:

[The Define and Punish] clause can never be construed to make to the Government a grant of power, which the people making it do not themselves possess. *It has already been shown that the people of the United States have no jurisdiction over offences committed on board a foreign ship against a foreign nation. Of consequence, in framing a Government for themselves, they cannot have passed this jurisdiction to that Government.* The law [the Crimes Act], therefore, cannot act upon the case. But this clause of the Constitution cannot be considered, and need not be considered, as affecting acts which are piracy under the law of nations.¹⁸⁹

Because Robbins was extradited, the question of jurisdiction escaped the courts. It would take another twenty years before a prosecution would proceed against a foreigner for a murder on a foreign vessel. Marshall would repeat, perhaps less lucidly, his arguments about the statute’s title and the inapplicability of universal jurisdiction to statutory “piracies.” Yet the opinion in that case seems crabbed, almost as if it were referring back to some longer exposition of the idea. That exposition, it turns out, was his celebrated House address. This gives valuable context to the subsequent opinions, which were sketchy on the source of the jurisdictional limitation.

The House speech was an extraordinary success and attracted great attention. It was “said by Judge Story to be among the very ablest arguments on record, and . . . [it] temporarily silenced opposition.”¹⁹⁰ It had the immediate effect of saving Adams from censure. A few months later, Adams chose Marshall to replace Pickering and then shortly thereafter elevated him to the Court.

¹⁸⁵ 10 ANNALS OF CONG. 603–04 (1800).

¹⁸⁶ *Id.* at 602.

¹⁸⁷ *Id.* at 602–04.

¹⁸⁸ *See id.* at 599–606.

¹⁸⁹ *Id.* at 607 (emphasis added).

¹⁹⁰ *United States v. Robins*, 27 F. Cas. 825, 860–61 (D.S.C. 1799) (No. 16,175).

C. *The Crimes Act in the Supreme Court*

The Supreme Court has only dealt with the scope of Congress’s authority to criminalize universally in a few cases decided within a few weeks of each other. It concluded that Congress’s power to define and punish entirely foreign conduct only applied to piratical offenses.

In the 1810s, numerous Latin American colonies had revolted against Spain. With the collapse of governmental authority, a variety of fly-by-night insurgent republics freely issued letters of marque of dubious validity to shady characters in order to field some naval force against Spanish shipping. These “privateers” were often indiscriminate in their targets and, along with open pirates encouraged by the anarchy, significantly disrupted American commerce. These privateers usually had some American connection—either sailing from Baltimore or having Americans among the crew—but this connection would often be difficult to prove after a long and circuitous voyage.

I. United States v. Palmer.—*Palmer* involved classic international law piracy—the armed robbery of a Spanish vessel.¹⁹¹ Some of the defendants were American, some not, and their original ship was apparently foreign. With respect to the foreign defendants, this would be the perfect case for universal jurisdiction. The 1790 piracy statute applied by its terms to “any persons.” Marshall began his discussion by squarely holding that the Define and Punish Clause allows Congress to deal with pirates “although they may be foreigners, and may have committed no particular offence against the United States.”¹⁹² The Constitution thus entitled Congress to deal with the one universal jurisdiction crime on a universal jurisdiction basis.

Yet despite the constitutionality and international legality of such jurisdiction, Marshall held that the statute’s general language was not intended to reach even robbery on the high seas—general piracy—unless it had a U.S. nexus. Marshall suggested at least two reasons for such a narrow and seemingly artificial interpretation—both lines of thought that he had previously expressed in Congress during the Robbins affair. First, Marshall considered the title of the statute—“An Act for the Punishment of certain Crimes against the United States.” He concluded that Congress could not have put under such a heading “offences against the human race.”¹⁹³ But the statute in question was simply the complete criminal code of the United States; the piracy provisions were just a few among its thirty-two separate sections, punishing a variety of common crimes committed in federal enclaves. The title might capture the overarching purpose of the provisions as a whole. It is less obvious that the title, adopted without de-

¹⁹¹ *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 611 (1818).

¹⁹² *Id.* at 630.

¹⁹³ *Id.* at 631.

liberation, should by itself limit particular terms to less than their plain meaning. As the title is not an operative provision, a conflict between it and the plain language of the statute could arguably go to the latter.

More compelling is Marshall's second argument.¹⁹⁴ Section 8 lists a variety of offenses as piracy, starting with the classic "robbery on the high seas," but extending also to captains making off with their vessels and even sailors assaulting their commanders. The latter two offenses were not piracy according to the law of nations, and thus not universally cognizable.¹⁹⁵ Marshall suggested that Congress could not have intended the Act to apply to such crimes. Yet this conclusion flies in the face of the text: the "all persons" phrase refers to all crimes in section 8. Thus if "all persons" means universal jurisdiction for robbery, it would also mean universal jurisdiction for the other crimes, which "are offences against the nation under whose flag the vessel sails, and within whose particular jurisdiction all on board the vessel are. . . . [A]nd no general words of a statute ought to be construed to embrace them when committed by foreigners against a foreign government."¹⁹⁶ Because "any persons" would lead to absurd results if taken literally with regard to most of the listed offenses, it would have to take a nonliteral meaning with regard to piracy itself.

Marshall never directly addressed the question of whether Congress had constitutional authority to apply the various provisions of section 8 universally. Instead, he merely held that Congress could not have intended to do so in the Crimes Act. Congress had no discernible interest in regulating revolts by foreign seamen on a foreign vessel. So statutory language notwithstanding, it presumably did not *try* to extend its jurisdiction to such purely foreign causes,¹⁹⁷ and this must mean that "any persons" means less than "any."

Still, Marshall's analysis borrowed heavily from his argument about Jonathan Robbins twenty years earlier, though in somewhat abbreviated form.¹⁹⁸ It seems safe to conclude from his reiteration of the same arguments and examples that the holding of *Palmer* was guided by his earlier

¹⁹⁴ *Id.* at 631–33.

¹⁹⁵ See Story, *supra* note 139, at 2–3.

¹⁹⁶ *Palmer*, 16 U.S. (3 Wheat.) at 632–33.

¹⁹⁷ *Id.* at 631–32. The example recalls the *Robins* case.

¹⁹⁸ Indeed, *Palmer* may allude directly to the speech. After giving various examples of how reading the Act's broad language to allow for universal jurisdiction would produce absurd results, Marshall concludes that the point "might be still farther illustrated by animadversions on other sections of the Act." *Id.* at 633. Of course, in his Robbins speech, he did draw examples from other sections of the Act, like section 6. See 10 ANNALS OF CONG. 603 (1800). Given the wide circulation of the speech, this may be why Marshall thought a recitation of all the examples would be "tedious" and "unnecessary." *Palmer*, 16 U.S. (3 Wheat.) at 633.

view that the Define and Punish Clause did not allow Congress to extend the jurisdictional status of piracy to municipal felonies.¹⁹⁹

One must appreciate how nonobvious and perhaps strained Marshall’s statutory construction was. It was clear to most observers that Congress had intended to punish piracy to the full extent sovereign nations punish it—universally.²⁰⁰ Indeed, the statute had in prior cases been used to hang foreign pirates for crimes committed on foreign vessels.²⁰¹ There was no evidence that Congress had wanted to depart from the general practice of nations in this regard. Rather, it had simply written an ungainly statute that inadvertently extended piracy jurisdiction to other crimes as well.²⁰²

The strain Marshall’s reading placed on the text and legislative intent drew extraordinarily sharp words from John Quincy Adams:

[The Court’s] reasoning is a sample of judicial logic—disingenuous, false, and hollow [I]f human language means anything, Congress had made general piracy, by whomsoever and wheresoever . . . cognizable by the Circuit Court.²⁰³

The inability to prosecute pirates universally was an “enormous hole in the moral garment of this nation made by this desperate thrust of the Supreme Court.”²⁰⁴

Marshall recognized that his reading of the statute was difficult. Any consistent reading of “any person” would frustrate one of Congress’s intentions. Marshall did not adopt the broader reading, even though it had more support in the text. His interpretation is an evident attempt to find a limiting construction. The textual difficulty and policy embarrassment created by the opinion show that there must have been a significant countervailing value that required Marshall’s “captious subtleties.”²⁰⁵

Indeed, Justice Johnson and the U.S. Attorney, who naturally argued for broad U.S. jurisdiction, thought that the Constitution itself imposed a limit on the reach of Congress’s jurisdiction over anything but piracy. Blake, the prosecutor, conceded that “all persons” could be taken literally as applied to the latter crimes in section 8. He suggested splitting the difference, reading “all persons” literally as applied to robbery, but reading it

¹⁹⁹ In explaining *Palmer* to a grand jury the next year, Justice Story reaffirmed that, according to the law of nations, only the piracy provision of the criminal statute could apply universally. See Story, *supra* note 139 (“[N]o nation can have any right by its own legislation to bind the subjects of foreign governments as to offences which fall within the exclusive cognizance of such government.”).

²⁰⁰ See 4 JOHN QUINCY ADAMS, MEMOIRS OF JOHN QUINCY ADAMS 363 (Charles Francis Adams ed., Philadelphia, J.B. Lippincott & Co. 1875).

²⁰¹ *Id.*

²⁰² See *supra* notes 141–142 and accompanying text.

²⁰³ ADAMS, *supra* note 200, at 363.

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 362–63.

Marshall's way with respect to the other crimes.²⁰⁶ What this lacked in elegance it would make up for in fidelity to Congress's intent. Moreover, he argued, the Constitution "conferred" upon Congress the power and "duty" to punish "real" piracy regardless of nexus.²⁰⁷ It did not, he agreed, give them such power over "[a] felony, which is *made a piracy* by municipal statutes."²⁰⁸ Finally, Justice Johnson's separate opinion²⁰⁹ apparently referred to limitations inherent in the Define and Punish power.²¹⁰ He argued that Congress is entirely disabled from exercising universal jurisdiction beyond what was permitted by international law; because international law was regarded as a presumptive but not absolute bar to contrary legislation, Johnson's statement suggests that he regarded the obstacle as constitutional.

2. *United States v. Klintonock*²¹¹.—Congress responded immediately to *Palmer* by passing a supplemental law clearly establishing universal jurisdiction over sea robbery.²¹² The clarifying statute expired at the end of the next year. Remarkably, legislation to extend the 1819 Act failed to do so because of the latter measure's own inarticulate draftsmanship.²¹³ In the end, the language of the 1790 Act remained the governing law, despite two attempts by Congress to make piracy universally cognizable.²¹⁴

Against this background the Court heard the case of Ralph Klintonock. The defendant was an American captain of a privateer in the service of an unrecognized Latin American rebel leader who had piratically attacked a Danish ship.²¹⁵ The case fell squarely within the purposes of Congress's

²⁰⁶ *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 617–618 (1818) (Argument of Mr. Blake for the United States).

²⁰⁷ *Id.* at 620.

²⁰⁸ *Id.* (emphasis added).

²⁰⁹ He wrote separately to differ on certain other points and to criticize Marshall for discussing issues not raised by the case. *Id.* at 636–37, 641 (Johnson, J.).

²¹⁰ *Id.* at 641–42 ("Congress can inflict punishment on offences committed on board the vessels of the United States, or by citizens of the United States, any where; but *congress cannot make that piracy which is not piracy by the law of nations, in order to give jurisdiction to its own courts over such offences.*" (emphasis added)). *But see* KENT, *supra* note 123, at 175 ("This decision [in *Palmer*] was according to the law and practice of nations . . ."). Kent's discussion of Congress's constitutional authority under Clause Ten is not clearly separate from his views on its authority under international law. *Id.* at 172–74.

²¹¹ 18 U.S. (5 Wheat.) 144 (1820).

²¹² Act of March 3, 1819, ch. 77, § 5, 3 Stat. 510, 513–14 (1819) (clarifying intent to assert universal jurisdiction over piracy through language stating "[i]hat if any person or persons *whatsoever*, shall, on the high seas, commit the crime of *piracy, as defined by the law of nations . . .*" (emphasis added)). *See generally* *United States v. Chapels*, 25 F. Cas. 399 (C.C.D. Va. 1819) (No. 14,782) (discussing background to the 1819 Act).

²¹³ The law provided that the 1819 Act would "continue in effect," which was intended to mean indefinitely, but the continuation was brief because, by its own terms, the 1819 statute's "effect" ended in 1820. 3 Stat. at 514.

²¹⁴ *United States v. Kessler*, 26 F. Cas. 766, 774 (C.C.D. Pa. 1821) (No. 15,528) (holding that the reauthorized Crimes Act still did not provide universal jurisdiction over piracy).

²¹⁵ *Klintonock*, 18 U.S. (5 Wheat.) at 144–45.

Define and Punish power—bringing Americans to justice for offenses against foreign countries. Yet for no readily apparent reason, the Certificate in *Palmer* had described jurisdiction as entirely depending on the nationality of the vessel.²¹⁶ Klintock’s lawyer seized on this to argue that *Palmer* controlled the case and thus prevented any jurisdiction over foreign vessels. And while it was clear from the 1819 amendment that Congress wished to reach purely foreign piracy, the conduct had occurred in 1818.²¹⁷

The Chief Justice found a way to sustain jurisdiction without explicitly overruling *Palmer*. While *Palmer* precluded punishing piracy on foreign vessels, it did not address the question of a vessel having no nationality—that is, of a ship “in possession of a crew acting in defiance of all law, and acknowledging obedience to no government whatever.”²¹⁸ This description happens to fit pirates to a tee, because they “renounced all the benefits of society and government.”²¹⁹ Thus the statelessness fiction allowed Marshall to get the best of both worlds, applying the Crimes Act to piracies against foreign vessels without universalizing other crimes. If Congress can punish piracy by any piratical vessel, then the mischief done by *Palmer* would be largely remedied simply by calling pirate ships “stateless.” The Court had to vindicate this power through the indirect route of “statelessness” because of the odd combination of artless drafting in 1790, the gloss put on those words by *Palmer*, and more artless drafting in 1819.

3. *United States v. Furlong*²²⁰.—*Furlong* involved multiple cases against multiple sets of defendants, certified from various circuit courts and decided together.²²¹ The crew of the privateer *Louisa*, apparently an American-owned vessel in the service of the self-styled “Republic of Bueneos Aryes,” forcibly seized their vessel and began a piratical cruise. Along the way, they attacked both American and foreign vessels. While most of the pirate crew was American, *Furlong* was an Irish national. Apart from various crimes committed against American vessels, he was charged with robbery and murder aboard an English ship.²²²

²¹⁶ *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 643 (1818) (“This court is further of opinion, that the crime of robbery, committed by a person on the high seas, on board of any ship or vessel belonging exclusively to subjects of a foreign state, on persons within a vessel belonging exclusively to subjects of a foreign state, is not a piracy within the true intent and meaning of the act, entitled, ‘an act for the punishment of certain crimes against the United States.’”). The opinion itself had discussed jurisdiction as being dependent on the nationality either of the parties or of the vessel, and the reason for the omission of the former basis from the Certificate is unclear. It is, however, in keeping with a statement Marshall made in the Robbins affair, though the basis for that statement is equally unclear. See Wedgwood, *supra* note 143, at 346 n.451.

²¹⁷ *Klintock*, 18 U.S. (5 Wheat.) at 148–49.

²¹⁸ *Id.* at 152.

²¹⁹ BLACKSTONE, *supra* note 51, at *71.

²²⁰ 18 U.S. (5 Wheat.) 184 (1820).

²²¹ *Id.*

²²² *Id.* at 185.

Again, Marshall's original construction of the original Crimes Act in *Palmer* would leave Furlong's crimes against the English vessel beyond the Court's reach, despite Congress's clear competence under the Constitution and international law to punish it. Furthermore, the Act of 1819 had shown that Congress desired to extend universal jurisdiction to classic piracy and probably had the same intention in the prior measure. Thus, Justice Johnson, writing for the Court, invoked the *Klintock* fiction of statelessness—the idea that piratical vessels lose the privileges of national protection—to backtrack from *Palmer*'s difficult conclusion that piracy could not be punished on a universal basis. The Court held in *Furlong* that a murder in which someone on a “stateless” vessel shot someone on a foreign vessel could be punished.²²³

Recognizing the confusion caused by the statelessness fiction, the Court turned to Furlong's final crime, a murder of a foreigner on a nonpiratical foreign vessel. Here, the Court laid down some clear lines. An “offence committed by a foreigner upon a foreigner in a foreign ship” is a matter in which Congress “ha[s] no right to interfere.”²²⁴ Such a case would go beyond the scope of “the punishing powers of the body that enacted it.”²²⁵ The Court distinguished between piracies at international law and other crimes. Only the former, when committed among foreigners, fell “within the acknowledged reach of the punishing powers of Congress.”²²⁶ This language seems to refer directly to Clause Ten, and the distinction between piracy and murder precisely tracks Clause Ten's “Piracies and Felonies” distinction:

There exist well-known distinctions between the crimes of piracy and murder, both as to constituents and incidents. Robbery on the seas is considered as an offence within the criminal jurisdiction of all nations. . . . Not so with the crime of murder. It is an offence too abhorrent to the feelings of man, to have made it necessary that it also should have been brought within this universal jurisdiction. And hence, punishing it when committed within the jurisdiction, or, (what is the same thing,) in the vessel of another nation, has not been acknowledged as a right.²²⁷

By this reasoning, the test of what Congress can make universally cognizable is the law of nations. Congress cannot expand its jurisdiction by calling crimes “piracies” when they do not have such a status in international law. Piracy and murder “are things so essentially different in their nature, that *not even the omnipotence of legislative power* can confound or identify

²²³ *Id.* at 194–95.

²²⁴ *Id.* at 197–98.

²²⁵ *Id.* at 196.

²²⁶ *Id.* at 197.

²²⁷ *Id.* at 196–97.

them.”²²⁸ It would be harder to find clearer language expressing the view that this limit is inherent and nonderogable.²²⁹

There are two parts to the Court’s opinion: one formal and the other structural. First, Congress has power over piracy; that power can thus be exercised only consistent with its “well-known . . . constituents and incidents.”²³⁰ Thus, presumably this special jurisdictional reach only extends to piracy and not to other crimes that Congress is authorized to punish. Treating as identical things known to be different would simply be an “absurdity.”²³¹ The second argument is a *reductio ad absurdum*. If Congress can punish anything universally by calling it piracy, “what offence might not be brought within their power by the same device?”²³² The notion that Congress could generally legislate as to crimes on foreign vessels was self-evidently impossible. This hearkened back to Marshall’s argument in the Robbins matter.

4. United States v. Holmes.—*Furlong*’s dictum that Congress could reach murder on a stateless vessel was confirmed a few weeks later in the case of Holmes, involving a murder committed by a pirate crew onboard a vessel they had seized.²³³ The defendants were of mixed nationalities, and the nationality of the victim was unclear. Justice Washington, in an exceedingly terse opinion, held that what *Klintock* had said about robbery on stateless vessels would be true of murder as well. In particular, the murder of a foreigner by foreigners would be cognizable upon a “piratical” ship, but not upon a foreign one.²³⁴ But *Furlong* had stressed that murder and robbery are quite different. The statelessness device in *Klintock* merely gave Congress universal jurisdiction over sea robbery, which it possessed in international law.

Holmes seems to use the statelessness device to expand Congress’s reach beyond what had been previously allowed. However, on its facts, it would be hard to say that *Holmes* lay outside traditional U.S. jurisdiction, and the entire universality discussion may have been unnecessary. Circumstantial evidence strongly suggested that the pirate vessels were American; the identity of the captured ship and murdered person also remain obscure, but the victim too may well have been an American.²³⁵

As a result of the scanty facts and reasoning, it is hard to know what to make of the *Klintock* and *Holmes* cases. The Court may have taken the view, perhaps held by Lee and Iredell, that murder on the high seas was

²²⁸ *Id.* at 198 (emphasis added).

²²⁹ See Weisburd, *supra* note 8, at 420.

²³⁰ *Furlong*, 18 U.S. (5 Wheat.) at 196–97.

²³¹ *Id.* at 198.

²³² *Id.*

²³³ United States v. Holmes, 18 U.S. (5 Wheat.) 412 (1820).

²³⁴ *Id.* at 416–17; *Furlong*, 18 U.S. (5 Wheat.) at 198.

²³⁵ *Holmes*, 18 U.S. (5 Wheat.) at 414–15.

universally cognizable under international law. However, this would make the cases hard to square with *Furlong* and *Palmer*, both of which seem to reject this view. *Klintock* and *Holmes* may represent a rather narrow exception to the requirement of a U.S. nexus, if they represent an exception at all. They may be about evidentiary rather than jurisdictional principles. If U.S. jurisdiction does not extend to purely foreign crimes, what happens in a case where one simply cannot tell if the locus or victim was American or foreign? Indeed, the Court explicitly explained its decision in *Holmes* as merely putting the burden of proof regarding foreign status on the defendants.²³⁶

Alternatively, if the ship were not American, *Holmes* could be an example of supplemental or pendent universal jurisdiction. A vessel only becomes stateless when it engages in piracy. That offense clearly falls within Congress's Piracies power. At the same time, pirates are quite likely to commit murder, and given that the United States has jurisdiction over much of their conduct already, prosecuting the murder as well might not be seen as the establishment of a separate jurisdiction. As piracy must be proven first, the jurisdiction over murder will generally be a moot question, given that a piracy conviction would promptly be fatal for the defendant.²³⁷ Moreover, the cases could be understood as being examples of "pendent party" jurisdiction, given that some defendants were clearly American. This would be consistent with the treatment of the *Hermione* mutineers tried in Trenton.²³⁸

D. Summary

Taken together, these cases show that Congress can only apply its universal jurisdiction to piracy, which was universally cognizable under the law of nations.²³⁹ Allowing universal jurisdiction for simple felonies would

²³⁶ *Id.* at 420.

²³⁷ *See Furlong*, 18 U.S. (5 Wheat.) at 193 (noting that having sustained piracy conviction against defendant, it would not be necessary to consider jurisdiction over murder conviction, "as this conclusion decides his fate").

²³⁸ *See supra* text accompanying notes 160–169.

²³⁹ *Furlong* and *Palmer* were apparently understood by contemporaries as constitutional holdings requiring a U.S. nexus for any prosecution under Clause Ten. *See United States v. Kessler*, 26 F. Cas. 766 (C.C.D. Pa. 1829) (No. 15,528) (declining universal jurisdiction over high seas murder). *United States v. Crawford*, 25 F. Cas. 692 (C.C.S.D.N.Y. 1843) (No. 14,890), involved an international law crime—mutiny—but not one that was universally cognizable. The Court noted that the "new constitution" has "gone further" than the Articles of Confederation by giving Congress power over "offenses against the law of nations" as well as "piracies and felonies committed on the high seas." *Id.* at 693. Yet this does not mean universal jurisdiction applies to the former: "[T]here can be no doubt that the character of the vessel must be proved to be American, and this court would not take jurisdiction of offences committed on board of foreign ships." *Id.* at 694; *see also* *Case of the Amistad—Surrender under Treaty with Spain*, 3 Op. Att'y Gen. 484, 489 (1839) ("[U]nquestionably, that any offence committed on board [a Spanish vessel with no U.S. nexus] is cognizable before the Spanish tribunals, and not elsewhere." (citing *Smith and Palmer*)).

expand the piracy power and blur the distinctions between the two categories. In *Palmer* and *Furlong*, the Court distinguished between Congress’s power with regard to piracy and other crimes. *Palmer* shows Marshall’s doubts about the nonrobbery provisions of the Crimes Act to have remained unchanged since he first expressed them in 1799, when he said a literal reading of the law would exceed Congress’s Define and Punish powers. *Furlong* held even more emphatically that Congress could not “extend the punishment for murder to the case of that offence committed by a foreigner upon a foreigner in a foreign ship.”²⁴⁰ Justice Johnson in both cases explained that Congress’s power to define had to have some correspondence to objective external definitions; Congress could not by fiat give the jurisdictional status of piracy to an offense, like murder, that while universally condemned, was not subject to universal jurisdiction under international law. A minority of jurists like Justice Iredell thought murder on the high seas was universally cognizable, though there was no support for this view in state practice. This suggests that using the universal jurisdiction authorized by the Constitution requires more than a mere claim that an offense is universally cognizable in international law.

The intermediate case of vessels without nationality has little bearing on the constitutional question. The Court’s statelessness rulings appear to be an end-run around earlier statutory interpretations, or at most, an extension of piracy’s universal jurisdiction to other crimes arising out of the same “common nucleus of operative fact.”²⁴¹ Statelessness was piracy by another name. The set of stateless vessels—those having cast off claims of national protection—that the Court dealt with was largely if not entirely congruent with the set of piratical vessels.²⁴² Thus, even after these decisions, Congress could not declare non-American vessels stateless for the purpose of acquiring jurisdiction over nonpiratical or nonuniversal crimes.

Indeed, subsequent courts saw *Palmer* as reading the statute in light of constitutional principles and did not understand *Holmes* to change these principles, even with regard to murder. One court, in discussing the Crimes Act, observed that “[i]n but few of its provisions can it be taken literally” because “this would lead us to the punishment of murders committed on rivers in the heart of foreign countries by their own citizens or subjects.”²⁴³ Such an outcome would be simply “absurd” because it exceeds the “jurisdiction of the United States.”²⁴⁴

²⁴⁰ *Furlong*, 18 U.S. (5 Wheat.) at 197.

²⁴¹ *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725 (1966) (describing the standard for supplemental jurisdiction over matters that would not otherwise fall within the scope of Article III).

²⁴² See *supra* Part IV.C.2–4.

²⁴³ Anonymous Case, 1 F.Cas. 999, 1003 (C.C.D. Mo. 1843) (No. 447).

²⁴⁴ *Id.*

V. THE SLAVE TRADE

A. *The Constitution in Congress*

A ban on the importation of slaves in America went into effect in 1808, the earliest date permitted by the Constitution.²⁴⁵ Beginning in 1807, Congress took increasingly severe measures against the trade. Bills against it enjoyed broad support. This came from an increased awareness of the cruelty with which the trade was carried on, even among those who did not desire abolition per se, as well as a robust “Baptists and bootleggers” coalition of Northern abolitionists and Southern slave owners not wanting to see the prices of their “property” undercut. At the same time, European powers, though slower to legislate against it, had begun to denounce the trade.

In 1820 Congress went further than it or any other nation had ever gone before by declaring the slave trade a form of piracy punishable by death.²⁴⁶ The statute applied to “any citizen of the United States” engaged in the slave trade on any vessel, or “any person whatever” engaged in the slave trade on a ship “owned in the whole or part . . . [by] any citizen or citizens of the United States.”²⁴⁷ Thus, while slavery had been dubbed piratical, Congress could only punish it to the extent that it had a demonstrable U.S. nexus.²⁴⁸ In other words, Congress extended jurisdiction almost to the point of universal jurisdiction—but not further.

The goal of the statute was two-fold. First, it increased the penalties for importation into the United States. Second, Congress had come to see the trade as an unmitigated evil, and American *involvement* in the trade hurt the “honor of the nation.”²⁴⁹ Thus, the statute also punished Americans trafficking slaves from Africa to other countries. Congress wanted to end the slave trade globally, out of humanitarian concerns, as the subsequent diplomatic and ultimately military history bears out. The report of the House Committee explained:

In proposing . . . to make such part of this offense as occurs upon the ocean, piracy, your committee are animated, not by the desire of manifesting to the world the horror with which it is viewed by the American people; but, by the

²⁴⁵ U.S. CONST. art. I, § 9; Act of March 2, 1807, ch. 22, 2 Stat. 426.

²⁴⁶ Act of May 15, 1820, ch. 113, §§ 4–5, 3 Stat. 600, 600–01.

²⁴⁷ *Id.*

²⁴⁸ Many of the cases brought under the Act revolved around whether either the citizenship or ownership requirements were satisfied. *See, e.g.,* United States v. Gordon, 25 F. Cas. 1364, 1368 (C.C.S.D.N.Y. 1861) (No. 15,231). Before passports, when much of the U.S. population was made up of first or second generation immigrants, determining a defendant’s nationality was not easy, especially if he wished to obscure it. Similarly, slave traders resorted to a variety of measures, such as fictitious sales and renaming, in order to hide their American connection. As an element of the offense, the United States had to prove the jurisdictional requirements, and thus, defendants relied heavily on this point.

²⁴⁹ 36 ANNALS OF CONG. 2209 (1820) (concerning the report of the Committee on the Slave Trade).

confident expectation of promising, by this example, its more certain punishment by all nations, and its absolute and final extinction.²⁵⁰

While the statute designated it as piracy, slave trading was clearly not a violation of international law at the time. It had not been recognized as universally cognizable, though several major maritime nations had banned it.²⁵¹ So in 1823 the House adopted, by a 131-9 majority and with the support of President Monroe, a resolution requesting the President

to enter upon and prosecute . . . such negotiations with the several maritime powers . . . for the effectual abolition of the African slave trade, and its ultimate denunciation as piracy, under the law of nations, by the consent of the civilized world.²⁵²

Congress dubbed slavery as piracy precisely to catalyze a progressive development in the law of nations, but understood that this development could take decades to mature. It was understood that without the general assent of nations, slave trading could be called piracy but could not take on its jurisdictional aspects.²⁵³ The next year, in negotiating an anti-slaving convention with Britain, Monroe made it an “indispensable condition” that Parliament label the trade as piracy.²⁵⁴

Congress wanted to legislate against the trade as far as it could. Indeed, to the extent that the goal was to abolish the global trade, a jurisdictionally limited law would ensure unusually severe punishments to fellow Americans, while simply shifting business to the fleets of other less scrupulous nations. To those who saw the death penalty as a steep but proper price to pay for the suppression of the trade, such a consequence would be hard on Americans without accomplishing the global goal.

International law had not yet made the trade universally cognizable and thus a broader and perhaps more effective jurisdiction was impossible. Despite its strong desire to do so, Congress felt that it could not legislate on a purely universal basis unless the offense had truly acquired the status of piracy through the practice of nations. The report on the bill from the House Committee on the Slave Trade demonstrates that this limitation was not seen as one deriving from international law *in proprio vigore*, but rather

²⁵⁰ *Id.* at 2209–10.

²⁵¹ *The Antelope*, 23 U.S. (10 Wheat.) 66 (1825); WHEATON, *supra* note 97, at 169 n.85. As late as the 1840s, with the formation of a U.S.-British naval squadron for interdicting slave ships off the coast of Africa, the Admiralty instructed British vessels only to board British vessels, or those of nations with whom London had particular treaties. “You are, however, to bear in mind,” the captains were instructed, “that Great Britain claims no rights whatever with respect to foreign ships engaged in that traffic.” Instructions for the Guidance of Her Majesty’s Naval Officers Employed in the Suppression of the Slave Trade, § 1, ¶ 1 (1844).

²⁵² 3 EXECUTIVE JOURNAL OF THE SENATE, 1789–1875, at 381 (Feb. 28, 1823).

²⁵³ *Id.*

²⁵⁴ *Id.* at 382.

from the enumerated powers in Article I.²⁵⁵ Charles Fenton Mercer of Virginia, the head of the committee and an indefatigable crusader against the slave trade, discussed the objection that the 1820 law could only effect a “partial” end to the slave trade. His report replied that “the *Constitutional power* of the Government has already been exercised in defining the crime of piracy” as far as it could, given that the slave trade had yet to become universally cognizable.²⁵⁶ It continued:

Such is the unavoidable consequence of any exercise of the authority of Congress, to define and punish this crime. The definition and punishment can bind the United States alone.²⁵⁷

This view was apparently supported by the Administration, which noted that the United States dubbed the slave trade piracy only “in relation to themselves,” because “they are bound, by the injunctions of their constitution to execute it, [only] so far as it respects the punishment of their own citizens”²⁵⁸ Congress’s failure to extend universal jurisdiction to slave trading is significant evidence of how it understood the constitutional limits on its Clause Ten powers. Congress obviously *desired* to treat the offense on a universal basis, and therefore the refusal to do so can be taken with the seriousness of a statement against interest.

Congress understood that simply calling an offense “piracy” could not give it the jurisdictional reach it had over piracy as defined by international law. It sought to eventually establish the trade as a violation of international law; already many nations had banned or condemned it.²⁵⁹ But in the meantime, Congress did not think it could exercise universal jurisdiction under the “Offenses” provision either, because the prohibition had not been firmly established in the law of nations. In short, only if the conduct were a universally cognizable offense in international law did the committee feel it could cast a universal net. Such legislative restraint, exercised by men who had seen the Constitution adopted in their lifetime, may be the best evidence available as to the clause’s scope.

However, even dubbing the trade “piracy” without punishing it universally raised some questions about the scope of the Define and Punish power. Some congressmen objected that piracy was an offense with well-defined elements; the slave trade was just a different offense. Thus, the latter could not be made equivalent to the former.²⁶⁰ This argument may be

²⁵⁵ See 36 ANNALS OF CONG. 2209 (1820).

²⁵⁶ *Id.* at 2210 (emphasis added).

²⁵⁷ *Id.*

²⁵⁸ Letter from John Quincy Adams to Stratford Canning (June 24, 1823), in 42 ANNALS OF CONG. 3015 (1823); see also WHEATON, *supra* note 94, at 109–10.

²⁵⁹ WHEATON, *supra* note 97, §§ 125–26, at 165–69.

²⁶⁰ See 40 ANNALS OF CONG. 1150 (1823) (statement of Rep. Mercer) (“[T]echnical objections have been urged, and sneers have been indulged against the legal accuracy of the application of the term piracy to this offense.”).

disingenuous, a rhetorical sally by a minority of Southern legislators fearful of any restrictions on the slave industry.²⁶¹ On its merits, the objection is silly. Just because Congress called the offense piracy in the statute does not mean it used its Piracies power: it did not make the slave trade universally cognizable, and thus did not actually treat it like piracy. The 1820 Act was an exercise of the Felonies power. It is hard to imagine that the Constitution restricts the names that Congress can attach to offenses.

B. The Antelope

The Antelope began with the seizure of Spanish and Portuguese slave ships by American warships.²⁶² Spain and Portugal sued in federal court for the restoration of the slaves, while the U.S. government sought to free them. The libellants argued that the United States could not liberate the slaves both because the trade did not violate international law and because such a seizure was not authorized by U.S. law. Congressman Charles Ingersoll, appearing on behalf of the Iberian states, made the constitutional argument explicit. Noting that Congress had not extended the Act of 1820 to foreigners on foreign vessels, he suggested that such an extension, if made, would exceed its constitutional powers.²⁶³ This of course was precisely what his colleague in the House, Representative Mercer, had said at the time.²⁶⁴

Chief Justice Marshall, writing for a unanimous Court, ruled for the libellants, but his discussion did not clearly disentangle the international and constitutional strands. Marshall’s opinion rested primarily on international law and general principles, which apply directly in maritime cases. As precedent, he primarily cited a recent British admiralty decision, *Le Louis*, involving similar facts. In the opinion, it was not clear whether the prohibition on universal jurisdiction came solely from international law or from the Constitution. While admitting the evil of the slave trade, he held that a prohibitory norm had not won the consent of all civilized nations.²⁶⁵ In particular, because slave trading had not become piracy in international law:

²⁶¹ This may be loosely inferred from the resurrection of this argument by Representative James Lindsay Seward of Georgia, shortly before the Civil War. He argued that the Define and Punish Clause could not have included the slave trade because the Constitution clearly accepted the legality of the slave trade, and it could hardly have tolerated piracy. But in criticizing the 1820 statute, he admitted that the statute’s piracy label was a slap at the South:

To declare the African slave trade piracy, is a reproach upon the institution itself. . . . As the law now stands, it can only be considered as the judgment of the nation against the institution itself. The South suffers under this reproach.

CONG. GLOBE, 35th Cong., 2d Sess. app. 248, 250 (1859) (Speech of Hon. J.L. Seward).

²⁶² 23 U.S. (10 Wheat.) 66, 67–68 (1825).

²⁶³ *Id.* at 104–05 (“The United States have done all in their power, consistently with their constitution, to abolish the trade.”).

²⁶⁴ See 36 ANNALS OF CONG. 2210 (1820).

²⁶⁵ See *Antelope*, 23 U.S. at 111–12.

It can be made so only by statute; and the obligation of the statute cannot transcend the legislative power of the state which may enact it.

If it be neither repugnant to the law of nations, nor piracy, it is almost superfluous to say in this Court, that the right of bringing in for adjudication in time of peace, even where the vessel belongs to a nation which has prohibited the trade, cannot exist.²⁶⁶

The reference to “the legislative power” could be understood as referring to Congress’s enumerated powers,²⁶⁷ but could also refer to the prescriptive jurisdiction of states in international law. But it is certain that, in the vigorously argued and much publicized case, no one contradicted Ingersoll’s view that if the slave trade was not universally cognizable in international law, Congress lacked the constitutional power to punish it.

CONCLUSION

Neither the “Felonies” nor the “Offenses against the Law of Nations” powers give Congress a blank check for universal jurisdiction legislation. They may allow universal jurisdiction over piracy alone, or at most, over offenses currently treated as universal by the law of nations. This conclusion is supported by the rulings of the Supreme Court in the few cases addressing the question, the elaborately expressed argument of John Marshall, the self-restraint of Congress in the criminalization of the slave trade, and numerous statements by leading jurists of the early Republic. Only two figures—Iredell and Lee—thought that universal jurisdiction could extend to other atrocious crimes on the high seas. Set against those two are Wilson, Marshall, Story, John Quincy Adams, St. George Tucker, and others. Certainly Marshall’s and Story’s views bear particular weight here, not only because of their stature in constitutional interpretation, but also because one cannot suspect them of hostility to sweeping interpretations of federal power. Furthermore, Iredell’s and Lee’s views can be understood as disagreements about what crimes were universally cognizable in international law or the acceptability of pendent universal jurisdiction. In any event, Marshall’s logic prevailed in Congress in 1799 and—due to his position on the Court—thereafter. There are no echoes of Iredell’s view in any judicial decision or in the period after 1800 generally. In the absence of explicit discussion of the clause’s jurisdictional scope in the drafting or ratification process, the support for Marshall’s position seems overwhelming.

What this means for the scope of universal jurisdiction under Clause Ten today depends on how one thinks terms in the Constitution that refer to international law should be understood when international law changes greatly over time. First, does the mention of piracy make it the only univer-

²⁶⁶ *Id.* at 122–23.

²⁶⁷ See U.S. CONST. art. I, § 1 (“All legislative powers herein granted shall be vested in a Congress . . .”).

sal jurisdiction offense Congress can ever create, or does it allow Congress to punish whatever the international law of the time makes universally punishable, and thus treats as a piracy? Because Clause Ten specifically names piracy, rather than referring to the concept of universal jurisdiction, a pure textualist or original meaning view would limit application of such jurisdiction under Clause Ten exclusively to piracy. To be sure, the Framers recognized that the law of nations could change over time. But this cuts both ways. If the expansion of universal jurisdiction to other crimes could be anticipated, the singling out of piracy could suggest a choice to limit universal jurisdiction to that crime. Such a result would not lead to absurd consequences. For one, Congress could still use treaties to achieve universal jurisdiction or something close to it; almost all legislation providing for universal jurisdiction has been enacted pursuant to recently signed multilateral conventions.²⁶⁸ Furthermore, universal jurisdiction is so rarely used by nations that such a jurisdictional limitation could hardly be thought of as a significant disability.

A broader view of Clause Ten would see it as limiting universal jurisdiction to those crimes that in the law of nations take on the then-unique jurisdictional character of piracy. In other words, “Piracies” need not lock the Constitution into the law of nations circa 1789. This would doom the Constitution to awkward anachronism, given that customary doctrines are *meant* to be organic. Updating “Piracies” would include offenses that today’s law of nations treats as universally cognizable, such as genocide and crimes against humanity.²⁶⁹ More generally, because this position takes the international law of the present day as its standard, it would allow punishment of Clause Ten crimes to track expanding international notions of jurisdiction. Today’s international rules of jurisdiction are considerably less formalistic and more effects-based than those of the eighteenth century. Thus, if international law has come to recognize a flexible territorial-effects jurisdiction or passive personality jurisdiction—which were unknown at the time of the Framing—that would define the new limit on Congress’s power over high seas felonies and crimes against the law of nations.

Some evidence from the early Republic supports the evolutionary understanding of international law terms. In enacting the 1820 law designating the slave trade as piracy, Congress thought that universal jurisdiction could not apply because it had not *yet* become a universal jurisdiction offense in international law. However, Congress and the Administration assumed that the United States could punish it universally after it got added to

²⁶⁸ See *supra* note 21 and accompanying text.

²⁶⁹ See Meyler, *supra* note 36, at 595–98 (arguing for updating meaning of common law terms found in the Constitution).

the international list of universal jurisdiction crimes.²⁷⁰ In 1822 and 1823 the House passed resolutions calling for the President to work towards obtaining the agreement of other nations to treat the trade as piracy. The implicit premise was that Congress could then punish it as a Clause Ten piracy.²⁷¹ This suggests a broadly shared understanding that piracy itself is not the only possible “piracy” for Define and Punish Clause purposes.²⁷²

One aspect of the debate muddies the lessons that can be learned from this episode. When it was urged that the slave trade could not be made equivalent to piracy by statute because it was not piracy by definition, the supporters of the statute responded that the slave trade *did* fit within the established international law definition of piracy. It involved robbery—the stealing of people—committed on the high seas.²⁷³ This response could be read to suggest that the statute’s supporters were not fully confident that the piracy power extended beyond classical piracy. But it was more likely a quick rejoinder to silence the critics, while still emphasizing the savagery of the slave trade. Because the statute purposefully did not make it universally recognizable, the criticism was weak and rejoinder unnecessary.

Colonel Mercer made a highly positivist argument that piracy can be whatever international law says it is: “The law of nations is in part natural; in part conventional. Its only sanction is to be found in the physical force, its legal authority in the . . . consent of nations. The consent of nations may make piracy of any offence upon the high seas.”²⁷⁴ The Monroe Admini-

²⁷⁰ See 36 ANNALS OF CONG. 2210 (1820) (noting that punishment of the slave trade as piracy would, “for a time at least,” be confined to U.S. citizens, and suggesting that once the offense became universally cognizable, it could be punished more broadly).

²⁷¹ 40 ANNALS OF CONG. 1149–50 (1823) (“Let the African slave trade be denounced to be piracy under the law of nations by the consent of the maritime powers of Europe and America, and . . . [a]ll nations will have authority to detect, to punish it, to hunt it down.”); Letter from John Quincy Adams to Stratford Canning, *supra* note 258 (suggesting that the United States would be able to treat the slave trade as piracy when it attains such status in international law); Letter from John Quincy Adams to Richard Rush (June 24, 1823), in 42 ANNALS OF CONG. 3020 (1824) (“The resolution . . . recommends negotiation, to obtain the consent of the civilized world to recognise it as piracy, under the law of nations. One of the properties of that description of piracies is, that those who are guilty of it may be . . . tried by the courts of every nation.”); Letter from A.H. Everett to Baron de Nagell (Nov. 7, 1823), in 42 ANNALS OF CONG. 3035 (1824) (making clear the U.S. desire to punish the offense universally when it achieved such status in international law).

²⁷² The efforts to establish universal jurisdiction over the slave trade, and their relation to British proposals to establish international courts for the offense, are discussed further in Eugene Kontorovich, *The Constitutionality of International Courts: The Forgotten Precedent of Slave Trade Tribunals* (Northwestern Pub. Law Research Paper No. 09-06, 2009), available at <http://ssrn.com/abstract=1340645>.

²⁷³ See 40 ANNALS OF CONG. 1150 (1823) (“And is it not robbery to seize, not the property of the man, but the man himself . . . ?”); 36 ANNALS OF CONG. 2209 (1820) (“Are [piracy and the slave trade] not united in this offence all that is most iniquitous in theft, most daring in robbery, and cruel in murder?”); see also Letter from A.H. Everett to Baron de Nagell, *supra* note 271, at 3034 (“In fact, this pretend commerce bears all the characteristics of piracy . . .”).

²⁷⁴ 40 ANNALS OF CONG. 1150 (1823).

stration, which in 1823 petitioned other nations to agree to making the trade piracy, also seemed to think that the United States would then be able to punish it.²⁷⁵ On the whole, most seemed to think it possible to use the Constitution’s Piracies power against new international crimes on the high seas.²⁷⁶

On the other hand, much constitutional tradition counsels against updating the content of “Piracies.” Many constitutional concepts lock in the common law at the time of the Founding. The question of when one gets a jury turns largely on eighteenth-century distinctions between law and equity that have long been abandoned in modern procedure.²⁷⁷ Habeas jurisprudence sees the Constitution as implicitly locking in the writ as it existed in the eighteenth century, even though one might imagine the common law evolving to change, and reduce, the availability of habeas. Instead, habeas with all its anachronisms—such as the requirement of, and limitation to, cases of confinement—is by and large maintained. Similarly, while the common law of nations in 1789 recognized broad sovereign immunity, one can imagine this changing over time. Indeed, today states enjoy broader immunity in certain respects than do foreign nations because the former’s immunity is locked in the often difficult to determine 1791 law, while the latter remains extra-constitutional common law, and thus subject to judicial and legislative limitation.²⁷⁸

A final “updating” question relates to the standard for determining whether an offense has become universally cognizable. The traditional definition of customary international law required clear, repeated, and near universal state practice to establish a norm. This standard may be higher than one under which offenses are dubbed “universal” in contemporary scholarship and some jurisprudence. Today, norms are often proclaimed as universal jurisdiction without broad state practice; proclamations and resolutions are used in place of longstanding national conduct.²⁷⁹ Here, the slave trade example cuts against updating. At the time, the slave trade was widely condemned by European nations through nonbinding proclamations.²⁸⁰ Thus there is nothing new about “soft law.” Yet Mercer’s report

²⁷⁵ See 42 ANNALS OF CONG. 3027–35 (1824).

²⁷⁶ Because Congress never did extend universal jurisdiction to the slave trade, this precedent is suggestive but hardly conclusive.

²⁷⁷ See *Beacon Theatres v. Westover*, 359 U.S. 500 (1959).

²⁷⁸ Compare *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Sch. Ed. Expense Bd.*, 527 U.S. 666 (1999) (holding that states retain sovereign immunity when participating in the market in commercial activity), with *Foreign Sovereign Immunities Act*, 28 U.S.C. § 1605(a)(2) (2006) (eliminating the immunity of foreign nations to suits “based upon a commercial activity carried on in the United States by the foreign state”).

²⁷⁹ See, e.g., *Filartiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980) (holding torture to be universally cognizable on grounds that all states condemned it, despite massive state practice to the contrary).

²⁸⁰ At the Congress of Vienna in 1815, Great Britain, Austria, France, Portugal, Prussia, Spain, and Sweden all denounced the slave trade in strong terms. Most of those nations, as well as Holland and the United States, had also begun banning the trade in various degrees, with several nations forbidding it

takes the position that Congress could only treat as a piracy conduct that nations universally *treated* as within universal jurisdiction.

Indeed, the degree of international consensus as to universal jurisdiction over piracy was complete, long-standing, and realized in practice. To be even roughly analogous, a modern international law crime should correspond on those dimensions. Yet the constitutional nature of the distinction between “Piracies” and other crimes suggests that it should take real state practice to render an act piracy. If the Supreme Court’s piracy cases stand for anything, it is that Congress cannot grant itself universal jurisdiction by calling an act piracy when such an act does not objectively enjoy such a status in international law. Obviously the freedom to call something universally cognizable based on soft law makes it easier for Congress to make “Offenses” into “Piracies.” Indeed, *Furlong*’s rejection of murder as piracy suggests that the Define and Punish clause requires more than just universal condemnation for universal jurisdiction.

* * *

Taking together the treaty power and a broad evolutionary view of “Piracies,” Congress could reach most of what it would likely want to punish through universal jurisdiction. Yet even here there are limits, such as when Congress tries to reach matters clearly of lesser concern to international law (like drug smuggling) or tries to anticipate the development of international law norms, and attaches universal jurisdiction to offenses where the relevant treaties or state practice has not done so. Each statute must be analyzed individually to determine whether the conduct is universally cognizable in international law, as well as the existence of other potential bases of congressional power.²⁸¹

Some statutes seem to have gone too far. The biggest (and only) font of universal jurisdiction prosecutions is the MDLEA. Yet drug trafficking is not generally understood to be a universal jurisdiction offense.²⁸² The new Narco-Terrorism Act extends American drug law to conduct with no U.S. nexus. Drug distribution is not an international crime at all, let alone a universally cognizable one.²⁸³ Furthermore, neither the relevant interna-

entirely and immediately. See WHEATON, *supra* note 97, §§ 125–26, at 165–69; see also *The Antelope*, 23 U.S. (10 Wheat.) 66, app. at 27 (1825) (describing European measures against the slave trade).

²⁸¹ See Kontorovich, *supra* note †.

²⁸² See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404 (1987) (not including drug trafficking in list of offenses recognized internationally as of universal concern); PRINCETON PRINCIPLES OF UNIVERSAL JURISDICTION 48 (Stephen Macedo ed., 2001) (explaining that drug crimes “were raised as candidates for inclusion” in the list of serious crimes subject to universal jurisdiction, but were not ultimately selected).

²⁸³ At least some observers have expressed doubts about Congress’s Article I power to exercise universal jurisdiction over narco-terrorism. See BRIAN T. YEH & CHARLES DOYLE, CONG. RESEARCH SERV., USA PATRIOT IMPROVEMENT AND REAUTHORIZATION ACT OF 2005: A LEGAL ANALYSIS 28

tional conventions nor state practice suggest that universal jurisdiction exists over the use of child soldiers.²⁸⁴ Finally, the Alien Tort Statute has been used as a basis of civil universal jurisdiction over a variety of wrongs with no connection to the United States. This Article shows Congress’s Article I authority under the Define and Punish Clause requires that the conduct it punishes either have some connection to the United States, or else be piracy or some other offense clearly treated as universally cognizable through the general consent of nations—if one accepts that clause’s meaning tracks changes in international law. Because the requirement that the conduct be universally cognizable under international law is a *constitutional* limitation in ATS cases, it suggests that courts should be surer of conduct’s universal jurisdiction status than perhaps would be necessary if the limitation was statutory or prudential.

n.110 (2006) (“In cases where neither the support, the drug offense, nor the terrorism have any connection to the U.S. other than the later presences of the offender here, paragraph 960A(b)(5) may exceed Congress’s legislative reach unless the benefit of a treaty obligation can be claimed.”).

²⁸⁴ See Child Soldiers Accountability Act of 2008, 18 U.S.C.A. § 2442(c)(3) (West 2008).

