The Define and Punish Clause and the Political Question Doctrine

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The Constitution gives Congress the power to "define and punish . . . Offences against the Law of Nations."[1] *Congress has used this power to enact various criminal statutes that proscribe certain violations of international law. In some cases, criminal defendants argue that these statutes are unconstitutional because Congress has incorrectly defined the law of nations. Federal courts routinely entertain this argument. But the political question doctrine prevents federal courts from resolving a question when the Constitution entrusts the political branches with providing an answer. The Define and Punish Clause gives Congress, not the courts, the power to define the law of nations. Accordingly, federal courts should be barred from determining whether Congress has properly defined international law. No court or scholar to date has pursued this argument in detail. This Article takes the first step.*

The Article begins by describing the historical underpinnings of the Define and Punish Clause and the contemporary version of the political question doctrine. The Article then explains why the proper definition of international law under the Define and Punish Clause is a political question. It reviews the Clause's text, structure, and history, applicable Supreme Court precedent, and a variety of practical arguments to illustrate why federal courts have no authority to second-guess Congress's definition of the law of nations. Finally, the Article concludes by situating its central thesis within the current framework of both constitutional and non-constitutional law. It explains that the Supreme Court has never used international norms to limit Congress's power under the Define and Punish Clause. It also argues that although Congress has the sole power to define the law of nations, legislative power will remain meaningfully limited, and courts will remain free to interpret other sources of international law.

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1. U.S. CONST. art. I, § 8, cl. 10.

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INTRODUCTION

Modern legal thought teaches that the two principal sources of international law are treaties and customary international law.[2] A treaty is "essentially a contract between or among sovereign nations,"[3] and its enforcement generally depends "on the interest and the honor of the governments which are parties to it."[4] By contrast, customary international law is law that "results from a general and consistent practice of states followed by them from a sense of legal obligation."[5] Although there is no written code of customary international law, commentators believe that it has the same binding force as treaty law.[6] To avoid repetition, I use

2. Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 817 (1997). This is the definition of public international law, which primarily governs the conduct of nation states. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 101 (AM. LAW. INST. 1987). By contrast, private international law generally deals with conflict of law principles. *Id.* § 101 cmt. c. This Article is concerned only with public international law.

3. Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 262 (1984).

4. Edye v. Robertson, 112 U.S. 580, 598 (1884).

5. RESTATEMENT (THIRD) § 102(2).

6. *Id.* § 102(2) cmt. j ("Customary law and law made by international agreement have equal authority as international law.").

"international law" and "customary international law" interchangeably throughout this Article.

The U.S. Constitution has two principal mechanisms for incorporating international law into federal law. One mechanism is the Treaty Clause, which empowers the President, "by and with the Advice and Consent of the Senate, to make Treaties . . . ."[7] Once a treaty has been properly ratified and executed, it becomes binding federal law under the Supremacy Clause.[8] The other way to incorporate international law into federal law is through the Define and Punish Clause. That constitutional provision gives Congress the power to "define and punish . . . Offences against the Law of Nations."[9] The law of nations was the Founding equivalent of what we view today as customary international law (although it may also include treaties).[10] A federal statute enacted under the Define and Punish Clause—like any other federal statute—is binding federal law.[11]

There has been an amplified focus on the Define and Punish Clause as of late.[12] Some scholars, for example, have recently explored the original meaning of the Clause and the roles that Congress and the courts play in defining the law of nations.[13] Nevertheless, there remains a dearth of scholarship addressing how the Clause fits within modern American jurisprudence.[14] While the historical understanding of the Clause is undoubtedly important, we should also explore how the Clause affects the jurisdictional rules that prescribe the power of federal courts. Essentially, we must not only know *who* gets to define international law,

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7. U.S. CONST. art. II, § 2, cl. 2.

8. *See id.* art. VI, cl. 2; Fellows v. Blacksmith, 60 U.S. (19 How.) 366, 372 (1856) ("[A] treaty, after executed and ratified by the proper authorities of the Government, becomes the supreme law of the land . . . ."). Presidents may also enter into executive agreements with foreign nations, which require "no ratification by the Senate or approval by Congress." Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 415 (2003). The Supreme Court has approved of these agreements because they are "particularly longstanding." *Id.*

9. U.S. CONST. art. I, § 8, cl. 10.

10. Bradley & Goldsmith, *supra* note 2, at 819; *see also* Sarah H. Cleveland & William S. Dodge, *Defining and Punishing Offenses Under Treaties*, 124 YALE L.J. 2202, 2211 (2015) ("[T]he eighteenth-century conception of the 'law of nations' was significantly different from the modern concept of customary international law and encompassed as many as four different categories of international law, including treaties.").

11. U.S. CONST. art. VI, cl. 2.

12. *See* Eugene Kontorovich, *Discretion, Delegation, and Defining in the Constitution's Law of Nations Clause*, 106 NW. U. L. REV. 1675, 1676 (2012) ("Never in the nation's history—at least not since the Neutrality and Alien Acts debacles of the 1790s—has the scope and meaning of Congress's power to 'define and punish . . . Offences against the Law of Nations' mattered as much." (internal citation omitted)).

13. *See, e.g.*, J. Andrew Kent, *Congress's Under-Appreciated Power to Define and Punish Offenses Against the Law of Nations*, 85 TEX. L. REV. 843 (2007).

14. *See id.* at 844 ("There are few scholarly works about the [Define and Punish] Clause; Congress, the Supreme Court, and the Executive Branch have seldom interpreted the Clause, and even then they have done so in a cursory and contradictory manner.").

but also *how* a federal court can answer that question as a matter of federal constitutional law.

An example might help crystallize the point. Suppose that a federal statute enacted under the Define and Punish Clause makes it unlawful to assault a foreign ambassador in the United States. Further suppose that a defendant prosecuted under this statute believes that it is unconstitutional because it incorrectly defines customary international law. To make his case, the defendant points the court to various sources of customary international law allegedly showing that he, rather than Congress, has properly defined the law of nations. If the court agrees with the defendant, then it will declare the federal statute unconstitutional because it is inconsistent with the judicial (and the defendant's) definition of international law. Can a federal court do this?

Some already have.[15] But the plain text of the Define and Punish Clause seems inconsistent with this practice. By virtue of its placement in Article I of the U.S. Constitution, the Clause provides that Congress, not the judiciary, has the power to define international law. Because the Constitution has explicitly allocated the power of definition to the legislature, federal courts should not be able to decide whether Congress's definition is correct. This conclusion is bolstered by the political question doctrine, which provides that federal courts have no authority to resolve a legal question "where there is 'a textually demonstrable constitutional commitment of the issue to a coordinate political department . . . .'"[16] By giving Congress the power to define the law of nations, the Constitution has textually committed the definition of international law to the legislature.[17] No court or scholar has linked the Define and Punish Clause and the political question doctrine in this way. This Article intends to fill that void.

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15. *See, e.g.*, Al Bahlul v. United States, 792 F.3d 1, 15 (D.C. Cir. 2015) ("Congress cannot, pursuant to the Define and Punish Clause, declare an offense to be an international war crime when the international law of war concededly does not."); United States v. Bellaizac-Hurtado, 700 F.3d 1245, 1247 (11th Cir. 2012) (concluding that because "drug trafficking is not an 'Offence[ ] against the Law of Nations' . . . . Congress cannot constitutionally proscribe [that] conduct under the [Define and Punish] Clause . . . .").

16. Zivotofsky *ex rel.* Zivotofsky v. Clinton, 132 S. Ct. 1421, 1427 (2012) (internal citations omitted).

17. This Article focuses only on federal courts because the political question doctrine does not apply to state courts. *See* Goldwater v. Carter, 444 U.S. 996, 1005 n.2 (1979) (Rehnquist, J., concurring) ("This Court, of course, may not prohibit state courts from deciding political questions, any more than it may prohibit them from deciding questions that are moot . . . ."). This remains true even in cases where state courts adjudicate federal claims arising under the U.S. Constitution. ASARCO Inc. v. Kadish, 490 U.S. 605, 617 (1989) ("We have recognized often that the constraints of Article III do not apply to state courts, and accordingly the state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law . . . ."). Nevertheless, state courts have previously applied their own version of the political question doctrine in certain cases. *See* Tara Leigh Grove, *The Lost History of the Political Question Doctrine*, 90 N.Y.U. L. REV. 1908, 1921–22 (2015).

Part I reviews the history of the Define and Punish Clause and the development of the political question doctrine. It explains that under the Articles of Confederation, the Founders were acutely aware of the federal government's inability to punish violations of customary international law. The absence of this authority became particularly troubling when the federal government could not remedy two assaults against foreign ambassadors that occurred on American soil. Of importance, as the Founders debated the propriety of the Define and Punish Clause, they generally thought that the remedy for international law's indefiniteness was to give Congress the power to define the law of nations. Part I then proceeds to trace the history of the political question doctrine. It describes the modest origins of the doctrine and how it has evolved into a far-reaching tool that regulates federal jurisdiction in multiple contexts. It also highlights that the doctrine has generally been invoked in cases that affect foreign relations—as any case involving the Define and Punish Clause would.

Part II argues that under the Define and Punish Clause, the proper definition of customary international law is a political question. It explains that this result follows logically from the Clause's text, structure, and history. If Congress has the sole power to define international law, then federal courts cannot redefine it in order to strike down a federal statute. Moreover, the two key Supreme Court cases that address the law of nations and the political question doctrine both underscore the fact that Congress should have the final say on the proper definition of customary international law. To complete the discussion, I offer four practical reasons why federal courts should avoid redefining international law once Congress has already done so. The discussion focuses on the institutional competence of the judiciary vis-à-vis customary international law, as well as the legal status of international law under the Supremacy Clause.

Part III situates the Article's central thesis within the existing framework of both constitutional and non-constitutional law. It explains that the Supreme Court has never used international norms to limit Congress's power under the Define and Punish Clause. It also argues that legislative power will remain meaningfully limited even if federal courts cannot review Congress's definition of international law. For example, Congress may use the Define and Punish Clause to enact only criminal legislation, and the political question doctrine does not prevent federal courts from policing the boundary between civil and criminal laws. What's more, Congress is subject to constitutional, political, and electoral checks that discourage it from abusing its authority under the Define and Punish Clause. All of these limits will continue to bind Congress whether or not the definition of international law is a political question. Part III then concludes by explaining that even if federal courts

cannot define international law once Congress has already done so, they remain free to interpret and apply other sources of international law.

I. Background

The Define and Punish Clause and the political question doctrine have never been analyzed in tandem. To best understand their relationship, this Part provides essential background. Subpart A summarizes the history of the Define and Punish Clause, with a focus on the events that led to its inclusion in the Constitution. Subpart B then describes the political question doctrine, paying special attention to how the Supreme Court has developed the doctrine over time.

A. The Define and Punish Clause

The federal government of the United States was first organized under the Articles of Confederation. That instrument gave the federal government modest authority over foreign relations, such as the "sole and exclusive" power of "sending and receiving ambassadors" and "entering into treaties and alliances."[18] But the Articles did not give the fledgling national government any power to proscribe and punish violations of international law.[19] While this omission might seem unimportant, it became particularly troublesome during the Longchamps affair.

In 1784, an agitator named Charles Julian de Longchamps physically assaulted the Consul General of France while he was traveling in Pennsylvania.[20] Under the Articles of Confederation, the federal government had neither the jurisdiction nor the resources to prosecute Longchamps, so he was tried for assault in a Pennsylvania state court.[21] Longchamps was convicted by a jury and sentenced to two years in prison, but France insisted on Longchamps's extradition so that he could be further reprimanded by French authorities.[22] Although French officials ultimately dropped their demand for extradition, they expressed their displeasure that the federal government could not guarantee the safety of foreign ambassadors.[23] The ambassador Longchamps assaulted even requested that Congress "pass Resolutions asserting the Rights of Ministers" and "recommending to the States to pass Laws to punish Violations of [said

18. Articles of Confederation of 1777, art. IX, para. 1.

19. Kontorovich, *supra* note 11, at 1692 ("The Articles of Confederation did not contain any reference to offenses against the law of nations.").

20. Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 Va. J. Int'l L. 587, 638 (2002).

21. *See* Respublica v. De Longchamps, 1 U.S. (1 Dall.) 111 (1784).

22. *Id.* at 115.

23. Kent, *supra* note 13, at 875–76.

Resolutions]."[24] Congress assented and passed resolutions that encouraged the states to enact criminal laws protecting ambassadors.[25] Few responded.[26]

The Longhcamps incident was not the last affront to an ambassador on American soil. In 1787, a New York constable broke into the Dutch ambassador's home and arrested one of his servants.[27] After the incident, John Jay had to defuse the situation and mollify Dutch government officials. Due to Jay's prodding, the Mayor of New York City arrested the constable so that he could stand trial.[28] Nevertheless, the Mayor warned that because "neither Congress nor our [State] Legislature have yet passed any act respecting a breach of the privileges of Ambassadors," the constable's punishment would depend solely on the common law.[29]

The assaults and affronts to foreign ambassadors in the United States highlighted one of the key deficiencies of the Articles of Confederation.[30] When the Framers met in Philadelphia to draft the Constitution, they thought that the federal government should be able to punish violations of international law.[31] Indeed, in proposing the Virginia Plan at the Constitutional Convention, Edmund Randolph criticized the Articles of Confederation because "they could not cause infractions of treaties or of the law of nations[] to be punished."[32] He bemoaned the fact that "[i]f the rights of an ambassador be invaded by any citizen it is only in a few States that any laws exist to punish the offender."[33]

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24. 29 JOURNALS OF THE CONTINENTAL CONGRESS (1774–1789) 598–99 (John C. Fitzpatrick ed., vol. XXIX 1785).

25. *Id.* at 654–55.

26. Charles D. Siegal, *Deference and its Dangers: Congress' Power to "Define . . . Offenses Against the Law of Nations,"* 21 VAND. J. TRANSNAT'L L. 865, 874 nn.38–39 (1988) (citing Letter from Edmund Randolph to the Speaker of the Va. House of Delegates (Oct. 10, 1787), *reprinted in* HERBERT J. STORING, THE ANTI-FEDERALIST 86, 88 (1981)).

27. *See* William R. Casto, *The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 494 (1986).

28. *Id.*

29. *See* Bradley, *supra* note 20, at 641.

30. Kontorovich, *supra* note 12, at 1692–93; Kenneth C. Randall, *Federal Jurisdiction over International Law Claims: Inquiries into the Alien Tort Statute*, 18 N.Y.U. J. INT'L L. & POL. 1, 24–25 (1986).

31. *See* Finzer v. Barry, 798 F.2d 1450, 1455 (D.C. Cir. 1986) ("The need for [the Define and Punish Clause] was, of course, one of the reasons a new constitution was desired, and the power was placed among the great powers granted to the new government. Implementation of the law of nations by the American government was seen as crucial to the conduct of our foreign relations, a subject of pervasive concern in the Constitution."), *aff'd in part, rev'd in part sub nom.* Boos v. Barry, 485 U.S. 312 (1988); Siegal, *supra* note 26, at 875–76.

32. I THE RECORDS OF THE FEDERAL CONVENTION OF 1787 19 (Max Farrand ed., 1966). It is worth noting that some scholars have questioned the accuracy of the records from the Constitutional Convention. The records are based on James Madison's notes, and he may have changed them over time to reflect his evolving views of the U.S. Constitution. *See generally* MARY SARAH BILDER, MADISON'S HAND: REVISING THE CONSTITUTIONAL CONVENTION (2015) (questioning the accuracy of James Madison's notes from the Constitutional Convention).

33. I THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 32, at 25.

Consequently, the delegates to the Convention set out to draft a clause that would give the federal government this badly needed authority.

The first version of what is now the Define and Punish Clause, drafted at the Constitutional Convention, gave Congress the power "[t]o declare the law and punishment of piracies and felonies committed on the high seas, and the punishment of counterfeiting the coin of the United States, and of offences against the law of nations . . . ."[34] The delegates were dissatisfied with this provision and subsequently engaged in multiple debates regarding the words "declare," "define," and "punish."[35] They decided to move the counterfeiting provision to a different clause and limit the Offenses Clause to piracies, felonies, and offenses against the law of nations. The revised draft gave Congress the power "[t]o define & punish piracies and felonies on the high seas, and 'punish' offences against the law of nations."[36]

In assessing the latest revision, Gouverneur Morris and James Wilson engaged in an important debate. Morris first moved to "strike out 'punish' before the words 'offenses agst. the law of nations[]' so as to let these be *definable* as well as punishable."[37] Wilson thought that this was ill-advised because "[t]o pretend to *define* the law of nations which depended on the authority of all the Civilized Nations of the World, would have a look of arrogance[] that would make us ridiculous."[38] Morris disagreed because "*define* is proper when applied to *offences* in this case; the law of ⟨nations⟩ being often too vague and deficient to be a rule."[39] Morris's motion passed with a vote of 6-5, meaning that Congress was empowered to define offenses against the law of nations.[40] The Clause, as finally adopted, gives Congress the power to "define and punish Piracies and Felonies committed on the High Seas, and Offences Against the Law of Nations[.]"[41]

The Clause received little attention during the state ratifying conventions.[42] The best discussion of it is likely Federalist Number 42. In that essay, James Madison placed the Define and Punish Clause among those powers "which regulate the intercourse with foreign nations."[43] It was important that these powers reside in the federal government because "[i]f we are to be one nation in any respect, it clearly ought to be

34. II THE RECORDS OF THE FEDERAL CONVENTION OF 1787 182 (Max Farrand ed., 1966).
35. Cleveland & Dodge, *supra* note 10, at 2225.
36. II THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 34, at 614.
37. *Id.*
38. *Id.* at 615.
39. *Id.*
40. *Id.*
41. U.S. CONST. art. I, § 8, cl. 10.
42. Siegal, *supra* note 26, at 877–79.
43. THE FEDERALIST NO. 42, at 231 (James Madison) (E.H. Scott ed., 1898).

in respect to other nations."[44] Madison also thought it was significant that the Clause gave Congress the power of definition. "Felony," Madison explained, was a term "of loose signification, even in the common law of England."[45] To account for this, Madison believed that "neither the common, nor the statute law . . . of any other nation" could define a "felony" for purposes of federal law "unless previously made its own by Legislative adoption."[46]

Madison's theory—that foreign law became binding federal law only through "legislative adoption"—was consistent with his notes from the Constitutional Convention. When debating an early version of the Define and Punish Clause, Madison remarked, "no foreign law should be a standard farther than is expressly adopted" by Congress.[47] He also argued that failing to give Congress the power to define felonies and offences would force individuals to rely on the "vague" common law.[48] Madison thought that the remedy for this problem was to "vest the power proposed by the term 'define' in the Natl. legislature."[49] According to Madison, international obligations did not become binding federal law until they were defined by Congress through its normal lawmaking procedures.[50]

We inevitably lean on Madison's comments because they are a rare example of the Founding generation explicitly discussing the powers (and limits) inherent in the Define and Punish Clause. Even the Supreme Court has yet to consider the Clause at length. Many scholars and federal courts cite *United States v. Arjona* as the most thorough exposition of the Clause, but that case actually said little about defining international law.[51] The central issue in *Arjona* was whether Congress could criminalize

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44. *Id.* at 232.

45. *Id.* at 233.

46. *Id.*

47. I THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 32, at 316.

48. *Id.*

49. *Id.*

50. The Supreme Court chipped away at this reasoning in *United States v. Smith*, 18 U.S. (5 Wheat.) 153 (1820). There, Congress enacted a criminal law that punished anyone who "upon the high seas, commit[s] the crime of piracy, as defined by the law of nations . . . ." *Id.* at 157. The defendant argued that the law was unconstitutional because it did not specify the elements of piracy, but rather defined the crime as generally understood by the law of nations. *Id.* at 158. The Court found no constitutional infirmity because the meaning of piracy was well-settled: "There is scarcely a writer on the law of nations, who does not allude to piracy as a crime of a settled and determinate nature . . . ." *Id.* at 161. *Smith*, however, is not necessarily inconsistent with Federalist Number 42, because Madison contemplated that piracy could be defined by reference to the law of nations. *See* THE FEDERALIST NO. 42, *supra* note 42, at 233 ("The definition of piracies might, perhaps, without inconvenience, be left to the law of nations . . . ."). Additionally, the Court in *Smith* carefully limited its holding to the definition of piracy, and it did not suggest that Congress could enact a criminal statute that simply prohibited all violations of international law. *See Smith*, 18 U.S. (5 Wheat.) at 161–62; *infra* note 368.

51. United States v. Arjona, 120 U.S. 479 (1887).

counterfeiting foreign securities as a violation of international law.[52] The Court held that it could, noting that every government must use "'due diligence' to prevent a wrong being done within its own dominion to another nation," and one such wrong was "counterfeit[ing] the money of another nation."[53] Given this principle, Congress could plainly use international law to punish anyone who produced counterfeit foreign securities within the United States. Indeed, the United States could oblige other nations to guarantee the integrity of American financial instruments abroad.[54] Therefore, it followed that other nations "may require" the same from the United States "because international obligations are of necessity reciprocal in their nature."[55]

Arjona, however, can hardly be viewed as the formative discussion of the Define and Punish Clause. The case applied settled principles of international law to facts that were not in dispute. The result was a holding that left few surprised and many questions unanswered. The Supreme Court has since discussed the Define and Punish Clause only tangentially in a few cases, and it has not seriously considered whether the Clause places any limits on Congress's power to define criminal violations of customary international law. Indeed, the Court has never considered whether the judiciary can decide if Congress has properly defined the law of nations. If the Supreme Court were to take up that question, it would inevitably confront the political question doctrine.

B. The Political Question Doctrine

The political question doctrine began where much of constitutional law began: *Marbury v. Madison*.[56] Toward the end of his term, President John Adams signed a commission that appointed William Marbury as justice of the peace for Washington County.[57] Marbury's commission, however, was never delivered to him.[58] Marbury thought that he was entitled to delivery and asked the Supreme Court to compel the

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52. *Id.* at 482–83.

53. *Id.* at 484.

54. *Id.*

55. *Id.* at 487.

56. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). Even before *Marbury*, Alexander Hamilton anticipated the political question doctrine in the Federalist Papers. *See* The Federalist No. 78, at 426–27 (Alexander Hamilton) (E.H. Scott ed., 1898) (arguing that "particular provisions in the Constitution" indicate that "the legislative body are themselves the constitutional judges of their own powers and that the construction they put upon them is conclusive upon the other departments"). And before he became Chief Justice of the Supreme Court, John Marshall argued on the floor of the U.S. House of Representatives that, "[b]y extending the judicial power to all cases in law and equity, the Constitution had never been understood to confer on that department any political power whatever." Speech of the Hon. John Marshall (Mar. 7, 1800), *printed in* 10 Annals of Cong. 606 (1800).

57. *Marbury*, 5 U.S. (1 Cranch) at 155.

58. *Id.*

Secretary of State to deliver his commission.[59] The Court held that Marbury had a vested legal right to his commission and that he was entitled to its delivery.[60] The Court also concluded that a writ of mandamus was warranted, and that a federal statute purported to give the Court jurisdiction to issue it.[61] But the key question was whether the federal statute providing mandamus jurisdiction was unconstitutional. The Court held that it was, thereby confirming the judiciary's ability to disregard laws that conflict with the Constitution.[62] In the words of Chief Justice John Marshall, "[i]t is emphatically the province and duty of the judicial department to say what the law is."[63]

Buried within *Marbury* is also the first acknowledgment of the political question doctrine. The Court noted that the Constitution vests the President "with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience."[64] While federal courts normally adjudicate "the rights of individuals," they cannot "enquire how the executive, or executive officers, perform duties in which they have [] discretion."[65] Hence, the Court held that decisions on "[q]uestions, in their nature political, . . . can never be made in this court."[66]

While *Marbury* recognized the basic contours of the political question doctrine, subsequent cases have refined and applied it to new circumstances. The doctrine has played a prominent role in cases involving the validity of governmental entities. In *Luther v. Borden*, for example, the Court was confronted with a case that involved rival government factions in Rhode Island.[67] Martin Luther sued Luther Borden for trespass because Borden and others broke into his home. Borden argued, however, that he could lawfully enter and search Luther's home because the state was under martial law.[68] Whether this

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59. *Id.*
60. *Id.*
61. *Id.* at 156–67.
62. *Id.* at 168–70.
63. *Id.* at 177.
64. *Id.* at 165–66.
65. *Id.* at 170.
66. *Id.* Some scholars believe that the political question doctrine is illegitimate. *See, e.g.*, Martin H. Redish, *Judicial Review and the 'Political Question,'* 79 Nw. U. L. Rev. 1031, 1060 (1984). Other scholars believe that political questions are really disguised determinations on the merits. *See, e.g.*, Linda Champlin & Alan Schwarz, *Political Question Doctrine and Allocation of the Foreign Affairs Power*, 13 Hofstra L. Rev. 215, 224–25 (1985). Despite these academic criticisms, I take the political question doctrine as given. *See* Grove, *supra* note 16, at 1916–39 (summarizing the deep roots of the traditional political question doctrine). Similarly, there is good reason to believe that deciding whether a case presents a political question is different than deciding the merits of a constitutional claim. *See* Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 Colum. L. Rev. 237, 245 n.20 (2002).
67. Luther v. Borden, 48 U.S. (7 How.) 1, 34–36 (1849).
68. *Id.* at 34.

defense was valid turned on which faction was the lawful government of Rhode Island. The Court held that deciding whether one state government had been displaced presents a political question.[69] Only political officials can resolve the legitimacy of state governments, and once they do, "the judicial department would be bound to take notice of [their decision] as the paramount law of the State . . . ."[70] The Court buttressed its holding by pointing to the Republican Guarantee Clause in the U.S. Constitution.[71] That Clause obligates the federal government to guarantee each state a "Republican Form of Government,"[72] and "Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not."[73] The lesson is that once Congress or a state government has designated an entity as the lawful sovereign, the judiciary is powerless to second-guess that decision.

The Court has also employed the political question doctrine in cases that involve the validity of legislative votes. In *Coleman v. Miller*, a group of Kansas legislators disputed whether the state legislature had actually ratified the proposed Child Labor Amendment to the U.S. Constitution.[74] The legislators argued that any ratification was invalid because too much time had passed between the Amendment's proposal and the state legislature's vote—more than thirteen years.[75] Chief Justice Hughes's opinion recognized that in proposing constitutional amendments, Congress "may fix a reasonable time for ratification."[76] That did not mean, however, that when Congress failed to specify a deadline, "the Court should take upon itself the responsibility of deciding what constitutes a reasonable time . . . ."[77] Determining how long is too long presented a political question because the deadline for adopting an amendment "lies within the congressional province."[78] Therefore, once Congress accepts a state's ratification as timely, its decision "would not be subject to review by the courts."[79]

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69. *Id.* at 39.

70. *Id.*

71. *See* U.S. CONST. art. IV, § 4.

72. *Id.*

73. *Luther*, 48 U.S. (7 How.) at 42; *see also* Pac. States Tel. & Tel. Co. v. Oregon, 223 U.S. 118, 133 (1912) (holding that a claim to enforce the Republican Guarantee Clause is "political in character, and therefore not cognizable by the judicial power").

74. Coleman v. Miller, 307 U.S. 433, 435–36 (1939).

75. *Id.* at 451.

76. *Id.* at 452. I use "Chief Justice Hughes's opinion" rather than "the Court" because it is unclear whether the opinion in *Coleman* commanded a majority of Justices. *See* Ariz. State Legislature v. Ariz. Independent Redistricting Comm'n, 135 S. Ct. 2652, 2696–97 (2015) (Scalia, J., dissenting); John Harrison, *Legislative Power, Executive Duty, and Legislative Lawsuits*, 31 J.L. & POL. 103, 137 n.51 (2015).

77. *Coleman*, 307 U.S. at 452–53.

78. *Id.* at 454.

79. *Id.*

By the time the Court decided *Coleman*, it had confronted the political question doctrine in numerous contexts. But it still had not provided a detailed explanation of which facts or circumstances generally triggered the doctrine. Devising a coherent theory of political questions is an admittedly delicate enterprise. Courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them," so they must be careful to ensure that the political question doctrine does not become a convenient excuse to duck difficult or controversial cases.[80] To provide federal courts with more guidance, the Supreme Court provided an extended discussion of the doctrine in *Baker v. Carr*.[81]

Baker involved the supposed mal-apportionment of legislative districts in Tennessee.[82] The Supreme Court had to decide whether the district court had subject matter jurisdiction and whether the case presented a nonjusticiable political question.[83] After concluding that the lower courts had jurisdiction, the Court stated that there were six factors that indicate whether a case presents a political question:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; [2] or a lack of judicially discoverable and manageable standards for resolving it; [3] or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; [4] or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; [5] or an unusual need for unquestioning adherence to a political decision already made; [6] or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[84]

The Court also emphasized that political questions often arise in cases that implicate foreign relations.[85] True, not every case that "touches foreign relations lies beyond judicial cognizance."[86] But cases related to foreign affairs frequently "turn on standards that defy judicial application,

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80. Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976).

81. Baker v. Carr, 369 U.S. 186 (1962).

82. *Id.* at 187.

83. Although the Court separately considered subject matter jurisdiction and the political question doctrine, it is well-settled today that the political question doctrine is a jurisdictional bar. *See, e.g.*, Massachusetts v. EPA, 549 U.S. 497, 516 (2007) ("It is therefore familiar learning that no justiciable 'controversy' exists when parties seek adjudication of a political question . . . ."); Spectrum Stores, Inc. v. Citgo Petroleum Corp., 632 F.3d 938, 948–49 (5th Cir. 2011); Carmichael v. Kellogg, Brown & Root Servs., Inc., 572 F.3d 1271, 1280 (11th Cir. 2009); Corrie v. Caterpillar, Inc., 503 F.3d 974, 980–81 (9th Cir. 2007).

84. *Baker*, 369 U.S. at 217. The Supreme Court has noted that "[t]hese tests are probably listed in descending order of both importance and certainty." Vieth v. Jubelirer, 541 U.S. 267, 278 (2004) (plurality opinion); *see also Spectrum Stores, Inc.*, 632 F.3d at 950 ("The dominant consideration in any political question inquiry is whether there is a 'textually demonstrable constitutional commitment of the issue to a coordinate political department.'" (quoting Saldano v. O'Connell, 322 F.3d 365, 369 (5th Cir. 2003)). Some scholars argue that the last four considerations in the *Baker* test should be abandoned altogether. *See* Barkow, *supra* note 66, at 332–34.

85. *Baker*, 369 U.S. at 211.

86. *Id.*

[] involve the exercise of a discretion demonstrably committed to the executive or legislature," or "uniquely demand single-voiced statement of the Government's views."[87] The Court ultimately ruled that the mal-apportionment of state legislative districts did not present a political question.[88] Today, the *Baker* framework remains the standard inquiry for assessing whether a case presents a political question.[89]

Since *Baker*, the Court has not returned to an in-depth discussion of the political question doctrine. Most of the Court's decisions in this area have been couched in the specific facts of individual cases. The Court has held, for example, that training the militia[90] and trying federal officers in the U.S. Senate after impeachment[91] present political questions, but that determining whether the U.S. House of Representatives properly excluded a member-elect does not.[92] Yet some of the Court's decisions have tried to create rules of general applicability in political question cases. One such rule is that the constitutionality of a federal statute generally does not present a political question. The Supreme Court briefly discussed this principle in two cases,[93] but it received enhanced attention in a recent case addressing the President's authority to recognize foreign countries.

In *Zivotofsky ex rel. Zivotofsky v. Clinton*,[94] a federal law allowed American citizens born in Jerusalem to list "Israel" as the place of birth on their passports. The Department of State, however, had a longstanding policy to abstain from recognizing whether Israel or Jordan exercised territorial sovereignty over Jerusalem.[95] The Department refused to follow the law because it believed that the statute infringed

87. *Id.*

88. *Id.* at 228–29.

89. Some scholars have argued that *Baker* represents a break from the past because it created an entirely new political question doctrine. For example, commentators argue that while early cases treated the political question doctrine as nonjurisdictional, *Baker* treated the presence of a political question as a jurisdictional defect warranting dismissal. *See* Grove, *supra* note 16, at 1967–69; *see also* John Harrison, *The Political Question Doctrines* 46 (Univ. Va. Sch. of Law, Pub. Law & Legal Theory Research Paper Series, Paper No. 59, Oct. 1, 2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2668374 (arguing that since *Baker*, lower courts "have seriously misunderstood the Supreme Court's political question doctrine" by treating it as a jurisdictional bar). Scholars also argue that while early political question cases treated the doctrine as reinforcing judicial restraint, the modern doctrine is a "vehicle for asserting [the judiciary's] supremacy over constitutional law." Grove, *supra* note 17, at 1970.

90. Gilligan v. Morgan, 413 U.S. 1, 10–11 (1973).

91. Nixon v. United States, 506 U.S. 224, 226 (1993).

92. Powell v. McCormack, 395 U.S. 486, 547–48 (1969).

93. *See* Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 230 (1986) ("[I]t goes without saying that interpreting congressional legislation is a recurring and accepted task for the federal courts."); INS v. Chadha, 462 U.S. 919, 941–42 (1983) ("No policy underlying the political question doctrine suggests that Congress or the Executive, or both acting in concert . . . can decide the constitutionality of a statute; that is a decision for the courts.").

94. Zivotofsky *ex rel.* Zifvotofsky v. Clinton, 132 S. Ct. 1421, 1424 (2012).

95. *Id.* at 1425.

the President's constitutional power to recognize which foreign nation exercises sovereignty over foreign territory. When individuals sued the Department for not following this law, the Department argued that the case presented a political question.[96] The Court disagreed. It emphasized that it could decide whether the statute was constitutional without playing politics: "The federal courts are not being asked to supplant a foreign policy decision of the political branches with the courts' own unmoored determination . . . ."[97] Rather, the plaintiff sought to enforce a "statutory right," and determining whether a statute is constitutional "is a familiar judicial exercise."[98] Some Justices concurred, however, to note their disagreement with this reasoning. Justice Sotomayor wrote that, while the political question doctrine did not apply in *Zivotofsky*, "[t]hat is not to say . . . that no statute could give rise to a political question."[99] Justice Alito made the same point.[100]

Overall, the recent development in *Zivotofsky* should not obscure how little the political question doctrine has evolved since *Baker*. Federal courts still use *Baker*'s six-factor test as the benchmark for the political question inquiry. And while it seems that federal courts can always adjudicate the constitutionality of a statute (political question doctrine notwithstanding), this development took shape only recently. All of this is to say that how the political question doctrine interacts with the Define and Punish Clause will be answered on a fairly clean slate.

II. The Power to Define International Law as a Political Question

Any analysis of whether a constitutional provision presents a political question must begin with the text of the provision. After all, *Baker* recognized that the clearest indication of a political question is "a textually demonstrable constitutional commitment" to a coordinate branch of government.[101] Nevertheless, the analysis would not be complete without also considering applicable Supreme Court precedent and the compelling practical considerations inherent in defining international law.[102] Accordingly, this Part proceeds in three Subparts. Subpart A analyzes the text, structure, and history of the Define and Punish

96. *Id.* at 1424–25.

97. *Id.* at 1427.

98. *Id.*

99. *Id.* at 1435 (Sotomayor, J., concurring in part and concurring in the judgment).

100. *Id.* at 1436 (Alito, J., concurring in the judgment) ("Under our case law, determining the constitutionality of an Act of Congress may present a political question . . . .").

101. Baker v. Carr, 369 U.S. 186, 217 (1962).

102. *See* Jamal Greene, *On the Origins of Originalism*, 88 Tex. L. Rev. 1, 8 (2009); Vicki C. Jackson, *Multi-Valenced Constitutional Interpretation and Constitutional Comparisons: An Essay in Honor of Mark Tushnet*, 26 Quinnipiac L. Rev. 599, 606–10 (2008).

Clause.[103] Subpart B then analyzes the key Supreme Court precedents on international law and the political question doctrine. Finally, Subpart C explains why practical concerns suggest that the proper definition of international law under the Define and Punish Clause is a political question.

A. Text, Structure, and History

The Constitution gives Congress the power to "define and punish . . . Offences against the Law of Nations."[104] Whether Congress has the exclusive power to define international law turns on the meaning of "define." In 1792, define meant "to explain a thing by its qualities" and "to circumscribe; to mark the limits."[105] The word means much the same today: "to discover and set forth the meaning" or to "fix or mark the limits."[106] The dictionary definitions of define indicate that the Constitution gives Congress the power to specify precisely what conduct violates international law. When Congress uses the Define and Punish Clause to enact criminal legislation, it "discover[s]" the contours of international law and "mark[s] the limits" of legal liability. The power to define, therefore, is an essential part of the process: no one can be punished for violating international law until Congress has explained what international law is.[107]

If federal courts can measure statutes against their own definition of international law, then Congress's power to define seems close to meaningless. Consider a typical example: a criminal defendant is charged with violating a statute that Congress enacted under the Define and Punish Clause. The defendant argues that the statute is unconstitutional because he believes that Congress has incorrectly defined customary international law. The court cannot address the defendant's argument without defining international law for itself. That is, the court can only decide whether Congress got it right by first identifying the precise rule of international

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103. I consider originalist evidence because all modern schools of constitutional interpretation use this evidence to some extent. *See* Kontorovich, *supra* note 11, at 1690 ("To be sure, the relevance of the text and the original meaning of a constitutional provision is common ground to all major schools of constitutional interpretation."); Andrew Kent, *A Textual and Historical Case Against a Global Constitution*, 95 Geo. L.J. 463, 472 (2007) ("Most ways of reading the Constitution begin with the text, purposes, and historical understandings . . . ."); Kent, *supra* note 13, at 858–61 and n.55.

104. U.S. Const. art. I, § 8, cl. 10.

105. *Define*, A Dictionary of the English Language (10th ed. 1792); *see also Define*, The Royal Standard English Dictionary 188 (1st U.S. ed. 1788) (define means "to explain, mark out; decide, determine").

106. *Define*, Merriam-Webster Dictionary Online, http://www.merriam-webster.com/dictionary/define (last visited Nov. 7, 2016).

107. *See* Al-Bihani v. Obama, 619 F.3d 1, 13 (D.C. Cir. 2010) (Kavanaugh, J., concurring in the denial of rehearing en banc) ("The important role Congress plays" in defining international law "is apparent from the text of the Constitution, which specifically authorizes Congress to 'define and punish . . . Offences against the Law of Nations.'" (quoting U.S. Const. art. I, § 8, cl. 10)).

law at issue. But this contravenes constitutional text, which places the power to define in Article I, not Article III.[108] This approach would turn statutory definitions of international law into placeholders for the judiciary—a result that flips the meaning of "define" on its head.[109]

Additionally, allowing federal courts to rewrite or cast aside the congressional definition of customary international law appears inconsistent with other textual clues in the Constitution. Recall that in the two constitutional provisions addressing foreign sources of law, the Constitution contemplates that Congress will play a substantial role. Under the Define and Punish Clause, it is Congress that must enact a statute that codifies customary international law.[110] Under the Treaty Clause, the U.S. Senate must approve any treaty before it can become binding federal law.[111] Both clauses indicate that the political branches of the federal government should decide which international legal norms will bind American actors. Allowing the judiciary to rewrite or invalidate Congress's definition of international law removes the legislature from this process. In practice, it has the same effect as taking away in its entirety Congress's power to define international law. As Judge Easterbrook has remarked, it is "contra-constitutional for the judiciary to insist that . . . the political branches of the national government[] conform to international norms and understandings that do not meet the requirements of the Treaty Clause or the Law of Nations Clause."[112]

Admittedly, this is an unusual outcome in constitutional law. It is well accepted that federal courts have the ultimate authority "to say what the law is."[113] When courts define key constitutional terms and thereby limit legislative power, few think that the judiciary has usurped constitutional authority. Take the Interstate Commerce Clause, for example. The Constitution gives Congress the power to "regulate Commerce . . . among the several States."[114] Under this provision, the Supreme Court has limited Congress to regulating the "channels" and

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108. Al Odah v. United States, 321 F.3d 1134, 1147 (D.C. Cir. 2003) (Randolph, J., concurring) (stating that the text of the Define and Punish Clause "makes it abundantly clear that Congress—not the Judiciary—is to determine, through legislation, what international law is and what violations of it ought to be cognizable in the courts."). Although Judge Randolph's opinion reaches the same conclusion as this Article, it does not tie its reasoning to the political question doctrine. Accordingly, his concurring opinion only partially considers how to fit the Define and Punish Clause within the existing body of U.S. constitutional law.

109. Frank H. Easterbrook, *Foreign Sources and the American Constitution*, 30 HARV. J.L. & PUB. POL'Y 223, 229 (2006) ("There is no [] power in the judiciary to make any norm of international law binding within the United States. . . . Why empower Congress to 'define' offenses against international law if judges do so in common-law fashion?").

110. U.S. CONST. art. I, § 8, cl. 10.

111. *Id.* art. II, § 2, cl. 2.

112. Easterbrook, *supra* note 109, at 229.

113. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

114. U.S. CONST. art. I, § 8, cl. 3.

"instrumentalities of interstate commerce," as well as "those activities having a substantial relation to interstate commerce."[115] By defining interstate commerce for purposes of constitutional law, the Court has cabined Congress's regulatory power to a limited subset of commercial activities. That is unremarkable—the Constitution does not give Congress a general power to define key constitutional terms.[116]

This default rule should give way, however, when interpreting the Define and Punish Clause. That Clause specifically mentions the power to define, and it is the only time that word appears in the Constitution.[117] While judicial review presumes that courts have the sole power to definitively interpret constitutional terms, that presumption is rebutted if the Constitution specifically allocates the power of definition.[118] Alexander Hamilton expressed this point in the Federalist Papers. He argued that the Constitution creates a "natural presumption" in favor of judicial review that could be rebutted by "particular [constitutional] provisions."[119] In the limited context of the Define and Punish Clause, judicial review has been rebutted by the Framers' conscious choice to give Congress the power to define customary international law. Of course, this is not a proposal to eliminate judicial review as we know it. Rather, this argument claims that the default rule of judicial review can be overcome if the Constitution tells us which governmental body should define the key constitutional terms.[120]

This reading of the Define and Punish Clause is also buttressed by structural inferences from the Constitution,[121] which lodges authority over foreign affairs primarily in the political branches.[122] The Supreme

115. United States v. Lopez, 514 U.S. 549, 558–59 (1995).

116. Ittai Bar-Siman-Tov, *The Puzzling Resistance to Judicial Review of the Legislative Process*, 91 B.U. L. REV. 1915, 1923–24 (2011) (noting that substantive judicial review requires courts to define key constitutional terms to determine "whether the content of legislation is in accordance with the Constitution"); *see also* Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887, 905–07 (2003) (explaining how courts must define key constitutional terms because the Constitution is enforceable federal law).

117. Kontorovich, *supra* note 11, at 1703.

118. THE FEDERALIST NO. 78, *supra* note 55, at 426–27.

119. *Id.*

120. Robert J. Pushaw Jr., *Judicial Review and the Political Question Doctrine: Reviving the Federalist Rebuttable Presumption Analysis*, 80 N.C. L. REV. 1165, 1196 (2002) ("The Constitution creates a powerful yet rebuttable presumption in favor of judicial review. This presumption can be overcome only when government officials exercise certain powers (e.g., the veto, impeachment, appointments, and military and foreign policy decisions) that do not fit within the usual framework of making, executing, and judging the law . . . ." (internal citation omitted)).

121. *Cf.* Steven G. Calabresi, *The Political Question of Presidential Succession*, 48 STAN. L. REV. 155, 157 (1995) ("[T]he argument for each and every political question exception to *Marbury*-style review must . . . be largely one of structural inference supported by history and tradition.").

122. U.S. CONST. art. I, § 8, cls. 3, 4, 5, 10, 11; *id.* art. II, § 2; Oetjen v. Cent. Leather Co., 246 U.S. 297, 302 (1918); Schneider v. Kissinger, 412 F.3d 190, 194 (D.C. Cir. 2005) ("Article I is richly laden with delegation of foreign policy and national security powers.").

Court acknowledged this shortly after the Founding. Chief Justice Marshall remarked that questions of foreign policy belong to the political branches, "who can place the nation in such a position with respect to foreign powers as to their own judgment shall appear wise; *to whom are entrusted all its foreign relations* . . . ."[123] The Court repeated this principle more than a century later: "The conduct of the foreign relations of our Government is committed by the Constitution to the executive and legislative—'the political'—departments . . . ."[124] The Court even acknowledged in *Baker* that political questions are usually found in cases "touching foreign relations."[125] While not all cases that theoretically affect foreign affairs present political questions, federal courts have repeatedly expressed an institutional aversion to meddling with foreign policy.[126]

The Court's decision in *Fong Yue Ting v. United States* highlights these structural considerations.[127] There, three Chinese laborers were arrested for not having certificates of residence.[128] To forestall removal from the United States, the laborers filed writs of habeas corpus, arguing that the statute allowing the President to remove them was unconstitutional.[129] The Court balked at their argument. It held that the power to "forbid the entrance of foreigners" or to "admit them" in certain circumstances "is vested in the national government, to which the constitution has committed the *entire* control of international relations, in peace as well as in war."[130] The Court arrived at this conclusion by drawing structural inferences from the Constitution's division of powers. It noted that the President is vested with the "executive power" and named the "commander in chief" of the armed forces.[131] The Court also listed the Article I powers that give Congress nearly plenary authority over international relations, including the Define and Punish Clause.[132] Although no constitutional provision spoke explicitly to removing aliens, the Court thought that removing aliens plainly "affect[ed] international relations."[133] Accordingly, the Court inferred from the Constitution's

123. United States v. Palmer, 16 U.S. (3 Wheat.) 610, 634 (1818) (emphasis added).

124. *Oetjen*, 246 U.S. at 302; *see also* United States v. Pink, 315 U.S. 203, 222–23 (1942) ("[T]he conduct of foreign relations is committed by the Constitution to the political departments of the Federal Government; . . . the propriety of the exercise of that power is not open to judicial inquiry . . . ."); Fong Yue Ting v. United States, 149 U.S. 698, 731 (1893); Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 575 (1840).

125. Baker v. Carr, 369 U.S. 186, 211 (1962).

126. *See* Haig v. Agee, 453 U.S. 280, 292 (1981) ("Matters intimately related to foreign policy . . . are rarely proper subjects for judicial intervention.").

127. *Fong Yue Ting*, 149 U.S. at 698.

128. *Id.* at 699.

129. *Id.* at 704.

130. *Id.* at 705 (emphasis added).

131. *Id.* at 711–12.

132. *Id.* at 712.

133. *Id.* at 713.

structure that the validity of the President's removal order presented a political question.[134]

The lesson from *Fong Yue Ting* is structural—the judiciary rarely adjudicates decisions that are intimately connected to foreign policy.[135] The Define and Punish Clause fits comfortably within the realm of international relations because it is difficult to separate the definition of customary international law from the substance of American foreign policy.[136] Given that the management of foreign affairs has been structurally committed to Congress and the President, the proper definition of international law is a political question.[137]

The historical underpinnings of the Define and Punish Clause further bolster this argument. Recall that at the Constitutional Convention, a question arose over whether Congress should have the power to "define" offences against the law of nations.[138] James Wilson argued that Congress had no power to define international law because only international consensus can create international obligations.[139] Gouverneur Morris disagreed because the law of nations, standing alone, was "often too vague and deficient to be a rule."[140] In other words, Morris believed that the morass of international policy, custom, and usage that compose customary international law could not supply binding legal obligations on its own. International law did not become binding federal law until Congress put pen to parchment. Morris's

134. *Id.* at 731.

135. *See* Barkow, *supra* note 65, at 329–30 ("[T]he theory of deference to the political branches that has been with us throughout our nation's history—a theory that, at its extreme, includes the political question doctrine—reflects not only the structure and text of the Constitution, but a very pragmatic determination that some questions should be decided by the political branches because of their accountability and institutional competence.").

136. Finzer v. Barry, 798 F.2d 1450, 1458–59 (D.C. Cir. 1986) ("Defining and enforcing the United States' obligations under international law require the making of extremely sensitive policy decisions, decisions which will inevitably color our relationships with other nations."); *see infra* notes 235–241 and accompanying text.

137. Much of this discussion has focused on the use of "define" as evidence of a textual commitment to a coordinate branch of government. But the ambiguity of international law also highlights that there is a "lack of judicially discoverable and manageable standards" for courts to use to define international law. Baker v. Carr, 369 U.S. 186, 217 (1962). *See* First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 788 (1972) (Brennan, J., dissenting) (finding "the existence of a 'political question'" based in part on "the absence of consensus on the applicable international rules"); Callejo v. Bancomer, S.A., 764 F.2d 1101, 1116–17 (5th Cir. 1985) ("[I]nternational law generally does not provide 'judicially discoverable and manageable standards for resolving' cases."). Here, the absence of judicially discoverable and manageable standards for defining international law only "strengthen[s] the conclusion that there is a textually demonstrable commitment to a coordinate branch." Nixon v. United States, 506 U.S. 224, 224 (1993).

138. II THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 34, at 614–15.

139. *Id.*

140. *Id.* at 615.

argument prevailed, giving Congress the power to define the law of nations.[141]

James Madison expressed similar thoughts both in Federalist Number 42 and at the Constitutional Convention. As discussed above, he wrote in the Federalist Papers that "Felonies" in the Define and Punish Clause was a "term of loose signification."[142] While foreign sovereigns defined felony in different ways, Madison argued that felony could not be defined by "the common [or] the statute law" of "any other nation" unless Congress implemented it through "Legislative adoption."[143] This parallels the arguments that he made at the Constitutional Convention. There, he said that when interpreting the Define and Punish Clause, "no foreign law should be a standard farther than is expressly adopted" by Congress.[144] Madison was evidently concerned about binding American citizens to international legal norms that were not ratified by U.S. constitutional actors.

Justice Story followed the same script in his Commentaries on the Constitution. Like Gouverneur Morris and James Madison, Justice Story

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141. Some courts and scholars argue that under the Define and Punish Clause, Congress cannot create new criminal violations of international law out of whole cloth. *See* United States v. Bellaizac-Hurtado, 700 F.3d 1245, 1250 (11th Cir. 2012); Kontorovich, *supra* note 11, at 1701–02 (arguing that "the specific power to enforce the law of nations [was] understood as needing to be consistent with an externally determined body of law"). Yet there is evidence from the Constitutional Convention that the Framers took a broad view of Congress's power to define the law of nations. Early drafts of the Define and Punish Clause did not give Congress the power of definition, so James Madison and Edmund Randolph moved to insert the word "define." II THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 34, at 315–16. In debating this motion, Gouverneur Morris said that he preferred "*designate* to *define*" because the latter is "limited to the preexisting meaning" of the common law. *Id.* at 316. Other delegates reassured Morris that "define" was not so limiting. They said that define is "applicable to the *creating of offences also*, and therefore suited the case both of felonies & of piracies." *Id.* (emphasis added). Everyone then agreed to insert the word "define" in the provision. *Id.* The juxtaposition between creating offenses and preexisting limitations is critical. It appears that the Framers chose the word "define" on the understanding that it would empower Congress to create offenses that had no support in a preexisting body of external law.

Moreover, even if Congress's definition of international law is limited by "an externally determined body of law," it is unclear how that limit should be enforced. Kontorovich, *supra* note 11, at 1702. Whether the Define and Punish Clause limits Congress is a separate question from whether federal courts can enforce that limit. That is, it is possible to believe that Congress is limited by an external body of law when defining the law of nations and also believe that federal courts cannot decide whether Congress exceeded that limit. There is some support for this position in James Madison's response to the Alien and Sedition Acts. In the 1790s, some legislators argued that the Alien and Sedition Acts were supported by the Define and Punish Clause. *Id.* at 1713. Madison disagreed. He thought that the Act's requirement to expel neutral aliens from the United States went "beyond the law of nations." *Id.* at 1713–14. To make his case, he drafted a resolution for the Virginia legislature that explained his reasoning in detail. *Id.* at 1714. In effect, Madison waged a *political* battle to convince others that Congress had disregarded a constitutional limit. Madison's choice provides some support for the argument that the proper definition of international law is a political question.

142. THE FEDERALIST NO. 42, *supra* note 43, at 233.

143. *Id.*

144. II THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 34, at 316.

saw international law as a fuzzy collection of norms and customs with little definite meaning. He wrote that the law of nations "cannot with any accuracy be said to be completely ascertained and defined, in any public code recognized by the common consent of nations."[145] Because "offences against the law of nations" resisted easy definition, Justice Story thought that there was a "peculiar fitness in giving to congress the power to define."[146] He also emphasized that the Framers thought carefully about the power of definition. The need for a uniform definition of international law "had very great weight with the convention[] in producing the phraseology of the clause."[147]

This historical evidence reveals that key Founders often thought of international law as too imprecise to provide legal rules with definite content. The cure for this ailment was to vest Congress with the power to define offenses against the law of nations. That choice is inconsistent with allowing the judiciary to override Congress's definition of international law. If a court wants to discover international law apart from federal treaties or federal statutes, where does it look? To the same muddle of international norms, customs, and policies that Gouverneur Morris and a majority of delegates to the Constitutional Convention thought was "too vague and deficient to be a rule."[148] The fact that international norms are often vague and indefinite is precisely why Congress was given the power to define customary international law in the first place. It makes little sense to believe that Congress needs the power to define international law because it is indefinite, and then conclude that federal courts can easily distill rules of international law that cabin Congress's constitutional authority. The more sensible reading of the Define and Punish Clause is that international law does not

145. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES VOL. II § 1163 (3d ed. 1858).

146. *Id.*

147. *Id.*

148. II THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 34, at 614–15. The historical evidence also indicates that the word "define" applies to "the law of nations" as well as "offences." Because the Define and Punish Clause empowers Congress to define "Offences against the Law of Nations," one might think that Congress has the sole power to define *offences*, but not the *law of nations.* Under this reading, Congress has unreviewable authority to decide which offenses are cognizable under federal law, but federal courts can decide whether Congress has improperly defined the elements of such an offense under customary international law. The historical evidence, however, suggests that this reading is untenable. When the delegates were debating the Define and Punish Clause at the Constitutional Convention, Gouverneur Morris argued that "*define* is proper when applied to *offences* in this case; *the law of (nations)* being often too vague and deficient to be a rule." *Id.* at 615 (third emphasis added). This argument was the basis for phrasing the Define and Punish Clause as it currently appears in the Constitution. As is evident from Morris's comments, the focus was on the ambiguity of international law, *not* offences. Because the delegates inserted the word "define" to account for indefiniteness, their concern that international law was vague and ambiguous indicates that the power to define includes both offenses and the law of nations.

become our law until Congress and the President incorporate it into a treaty or a federal statute.[149]

Of course, the Framers never explicitly considered whether international law under the Define and Punish Clause should be defined by judges or by legislators. When they had to choose, however, who would define customary international law, they only ever mentioned Congress.[150] Justice Story remarked that there was a "peculiar fitness in giving to *congress* the power to define" customary international law.[151] And in 1810, Congress debated a bill that would have delegated the power to define international law to the President.[152] It rejected the bill after Representative John Jackson of Virginia argued that the power to define the law of nations "is a legislative power, which we cannot transfer; and if we could, it would be inexpedient to do so."[153]

Concededly, there are some historical statements from the Founding generation that suggest that Congress is limited by an external body of international law when acting under the Define and Punish Clause.[154] In delivering a grand jury instruction, James Iredell stated that "[e]ven the Legislature cannot rightfully controul [the law of nations] . . . ."[155] James Wilson made a similar statement when he too instructed a grand jury: "no state or states can . . . alter or abrogate the law of nations . . . ."[156]

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149. *See* Al-Bihani v. Obama, 619 F.3d 1, 17 (D.C. Cir. 2010) (Kavanaugh, J., concurring in the denial of rehearing en banc) ("Customary-international-law norms become part of domestic U.S. law only if the norms are incorporated into a statute or self-executing treaty.").

150. *See, e.g.*, II THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 34, at 614–15; THE FEDERALIST NO. 42, *supra* note 43, at 233.

151. STORY, *supra* note 145, § 1163 (emphasis added).

152. 21 ANNALS OF CONG. 2021–22 (1810).

153. *Id.*

154. Kontorovich, *supra* note 12, at 1701–03.

155. James Iredell's Charge to the Grand Jury of the Circuit Court for the District of South Carolina, Gazette of the United States (May 12, 1794), *reprinted in* 2 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES: 1789–1800 467 (Maeva Marcus et al. eds., 1988) [hereinafter DOCUMENTARY HISTORY]. Professor Kontorovich cites this statement as support for using an external body of international law to limit Congress under the Define and Punish Clause. Kontorovich, *supra* note 12, at 1701. Iredell's statement, however, was far more ambiguous than Professor Kontorovich lets on. The full jury instruction read:

> Even the Legislature cannot rightfully controul [the law of nations], but if it passes any law on such subjects [it] is bound by the dictates of moral duty to the rest of the world in no instance to transgress them, although if it in fact doth so *it is entitled to actual obedience within the sphere of its authority.*

DOCUMENTARY HISTORY, *supra*, at 467 (emphasis added). The latter part of Iredell's jury instruction contemplates a sovereign's law that transgresses the law of nations. In that circumstance, Iredell appeared to believe that the law would remain binding within the sovereign's territory *despite* the fact that it was inconsistent with international law. In other words, even if a statute enacted under the Define and Punish Clause was inconsistent with the law of nations, the statute would remain binding federal law within the United States.

156. DOCUMENTARY HISTORY, *supra* note 155, at 179. As with Iredell's grand jury charge, Wilson's statement was somewhat ambiguous. *Cf.* Kontorovich, *supra* note 12, at 1701. Wilson did state that a

One reading of these sentiments suggests that some Framers thought that the Define and Punish Clause was limited by the existing body of customary international law.

There is reason, however, to give these views limited weight when interpreting the Define and Punish Clause. After all, James Wilson presented this very argument at the Constitutional Convention. After Gouverneur Morris moved to give Congress the power to define international law, James Wilson objected because, "[t]o pretend to *define* the law of nations which depended on the authority of all the Civilized Nations of the World, would have a look of arrogance[] that would make us ridiculous."[157] Wilson thought that Congress had no authority to define customary international law because it does not emanate from a single sovereign, but only from the collective will of the "Civilized Nations of the World."[158] Morris thought that this argument was deficient because international law was hopelessly ambiguous.[159] A majority of delegates agreed with Morris and voted to give Congress the power to define customary international law.[160]

Nonetheless, it is difficult to view the historical evidence as dispositive. The Founders undoubtedly had different opinions as to the effect of international law within the United States. But key statements from influential Framers suggest that the judiciary could not decide whether the legislative definition of international law complied with a set of international rules as determined by federal judges. While some contrary views persisted, they were aired and rejected in the key debate at the Constitutional Convention over the power to define international law. Combined with constitutional text and structure, the historical evidence lends support to the argument that the proper definition of international law under the Define and Punish Clause is a political question.

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single nation cannot alter or abrogate the law of nations, but he also said that this principle is not an inflexible rule:

> True it is, that, so far as the law of nations is *voluntary* or *positive*, it may be *altered by the municipal legislature of any state*, in cases affecting *only* its own citizens. True it also is, that, by a *treaty*, the voluntary or positive law of nations may be altered so far as the alteration shall affect *only* the contracting parties.
>
> But equally true it is, that no state or states can; by treaties or municipal laws, alter or abrogate the law of nations any farther.

DOCUMENTARY HISTORY, *supra* note 155, at 179 (third emphasis added). Wilson apparently thought that countries could alter or disregard the law of nations in relation to their own citizens. Thus, this grand jury charge does not suggest that Congress is limited by an external body of international law when it uses its powers under the Define and Punish Clause.

157. II THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 34, at 614–15 (emphasis in original).

158. *Id.*

159. *Id.*

160. *Id.*

B. U.S. Supreme Court Precedent

The Supreme Court has never addressed whether the proper definition of international law is a political question.[161] But, in 2004, the Court provided an extended discussion of the Alien Tort Statute ("ATS"), which gives federal district courts "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[162] When defining the meaning of "the law of nations" in the ATS, the Court discussed the relationship between Congress and the judiciary in defining international law.[163]

In *Sosa v. Alvarez-Machain*, the Drug Enforcement Administration coordinated the kidnapping of a Mexican citizen named Humberto Alvarez-Machain.[164] After he was kidnapped, Alvarez-Machain stood trial in the United States and was ultimately acquitted.[165] He then returned to Mexico and filed a lawsuit against the federal government agents that coordinated his kidnapping.[166] One of his claims sought damages for the kidnapping under the ATS.[167] The Ninth Circuit held that Alvarez-Machain properly stated a cause of action under the ATS because there was a "universally recognized norm prohibiting arbitrary arrest and detention."[168]

The Supreme Court reversed. After reviewing the statute's history, the Court concluded that the ATS was "intended . . . to furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations."[169] Indeed, the Court "assume[d]" that no development since Congress enacted the ATS "has categorically precluded federal courts from recognizing a claim under the law of nations as an element of common law."[170] As such, the Court held that it is appropriate, as a matter of federal common law, to create a limited number of causes of action under the ATS that are "based on the present-day law of nations."[171] Nevertheless, it concluded that the Ninth Circuit erred because the supposed right to be free from arbitrary arrest and detention was framed

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161. Only one reported decision has suggested that the proper definition of international law might present a political question, but that case dealt with the Alien Tort Statute (28 U.S.C. § 1350 (1948)), not the Define and Punish Clause. *See* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 775 (D.C. Cir. 1984) (per curiam); *id.* at 803 (Bork, J., concurring); *id.* at 823 (Robb, J., concurring).

162. 28 U.S.C. § 1350 (1948).

163. Sosa v. Alvarez-Machain, 542 U.S. 692, 698 (2004).

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. Alvarez-Machain v. United States, 331 F.3d 604, 620 (9th Cir. 2003) (en banc).

169. *Sosa*, 542 U.S. at 720.

170. *Id.* at 724–25.

171. *Id.* at 725.

so broadly that it "exceeds any binding customary rule having the specificity we require."[172]

The Court also accompanied its holding with repeated invocations of caution and restraint. It noted that "there are good reasons for a restrained conception of the discretion a federal court should exercise in considering a new cause of action" under customary international law.[173] The Court acknowledged that it has "no congressional mandate to seek out and define new and debatable violations of the law of nations . . . ."[174] The Court also listed "[a] series of reasons [that] argue for judicial caution when considering the kinds of individual claims" that would arise under the ATS.[175] These statements, coupled with the Court's historical observations, reveal the substantially unresolved tension in *Sosa*. Although the Court recognized a common law power to create new causes of action under international law, it indicated that this power should rarely (if ever) be invoked.

There is, however, a key statement in *Sosa* that bears on whether the Define and Punish Clause presents a political question. Although the Court insisted that federal courts have some residual authority to create new causes of action under international law, it recognized that Congress is the ultimate arbiter of international obligations:

> [N]othing Congress has done is a reason for us to shut the door to the law of nations entirely. It is enough to say that Congress *may do that at any time* (explicitly, or implicitly by treaties or statutes that occupy the field), just as it *may modify or cancel any judicial decision* so far as it rests on recognizing an international norm as such.[176]

The Court emphasized that federal courts may define international law only at the legislature's pleasure.[177] Congress may shut the door whenever it wants, and the Court stressed that it has no power to push the door ajar again. Most important, the Court held that Congress can modify or cancel any judicial decision "recognizing an international norm."[178]

Admittedly, *Sosa* was principally concerned with whether, as a matter of federal common law, courts could recognize a civil cause of action under international law that Congress has not yet articulated in a statute. The proposition that Congress retains final authority over the existence and scope of federal causes of action is unremarkable. Nevertheless, it is plausible that *Sosa*'s reasoning extends beyond this limited realm. Congress might, for example, implicitly overrule the

172. *Id.* at 738.
173. *Id.* at 694.
174. *Id.* at 728.
175. *Id.* at 725.
176. *Id.* at 731 (emphasis added).
177. *Id.*
178. *Id.*

Court's definition of international law (as represented in the cause of action it recognized) by enacting a criminal statute that redefines the applicable rule of decision under international law. In other words, by defining customary international law in response to a judicial ruling, Congress is either explicitly or implicitly "shut[ting] the door to the law of nations."[179] It would be unworkable, as a matter of federal statutory law, to believe that Congress's definition of the law of nations for creating a cause of action is unreviewable, but that the very same statutory definition used to specify criminal liability under the Define and Punish Clause may be disregarded by federal courts. Such a result is especially odd considering that the ATS—the statute the Court confronted in *Sosa*—is historically linked to the Define and Punish Clause.[180]

Justice Scalia's concurring opinion in *Sosa* provides some support for this claim.[181] His opinion, joined by Chief Justice Rehnquist and Justice Thomas, noted that while the majority cabined its discretion to recognize new causes of action, it "skip[ped] over the antecedent question of authority."[182] Federal courts have long refrained from using jurisdictional statutes as a springboard for crafting substantive law.[183] While the majority correctly identified the perils of creating causes of action under international law, Justice Scalia believed that these warning signs belied an absence of authority.[184] To him, no measure of caution and restraint can justify the exercise of power without authority.[185] Thus, international law could become binding federal law only after governmental branches subject to democratic election enact it.[186]

Although *Sosa* remains the seminal case on the role of Congress and the judiciary in defining international law, the Court did not address the political question doctrine. *Sosa*'s invocation of deference to the legislature, however, suggests that the proper definition of international law is committed to Congress. For purposes of the political question analysis, the key to this argument is the use of "define" in the Define and Punish Clause. Some might think that a political question cannot be

179. *Id.*
180. Cleveland & Dodge, *supra* note 10, at 2235.
181. *Sosa*, 542 U.S. at 739 (Scalia, J., concurring in part and concurring in the judgment).
182. *Id.* at 744.
183. *Id.* at 744–45.
184. *Id.* at 746–47.
185. *Id.* at 747.
186. *Id.* at 751.

premised on the meaning of a single word in the Constitution.[187] But that argument was endorsed by the Court in *Nixon v. United States*.[188]

Walter Nixon was a federal district judge who was convicted of making false statements to a grand jury.[189] After his conviction, the U.S. House of Representatives adopted three articles of impeachment against Nixon, and the U.S. Senate convicted him of the first two.[190] Nixon, however, believed that the Senate's procedure for receiving testimony during his impeachment trial was unconstitutional because the Constitution gives the Senate the "sole Power to try all Impeachments."[191] A Senate Rule charged a committee of Senators with "receiv[ing] evidence and tak[ing] testimony" in an impeachment trial.[192] Nixon believed that the entire Senate, not just a committee, had to receive evidence in order to "try" him in accordance with the Constitution.[193] Nixon filed suit in federal district court, arguing that the Senate's impeachment procedures were unconstitutional.[194] His case eventually made its way to the Supreme Court.

The Court held that the case presented a political question.[195] The Court thought that the dictionary definitions of "try" did not indicate whether evidence must be heard by a committee or the entire Senate.[196] Given the lack of guidance, the Court thought that it was futile to craft a "judicially manageable standard" for reviewing the Senate's impeachment procedures.[197] Additionally, the Court focused on the use of "sole" in the Senate Impeachment Clause. That word was of "considerable significance" because sole means to function "independently and without assistance or interference."[198] If courts "may review the actions of the Senate in order to determine whether that body 'tried' an impeached official," then the Senate would not be "functioning [ ] independently and without assistance or interference."[199]

The Court bolstered its reasoning by referencing history. It explained that during the Constitutional Convention, the Framers

187. *But see* Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 570–71 (1840) ("In expounding the Constitution of the United States, every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added.").

188. Nixon v. United States, 506 U.S. 224 (1993).

189. *Id.* at 226.

190. *Id.* at 226–28.

191. U.S. CONST. art. I, § 3, cl. 6.

192. *Nixon*, 506 U.S. at 227 (citing SENATE IMPEACHMENT RULE XI, *reprinted in* SENATE MANUAL, S. DOC. NO. 101-1, at 186 (1989)).

193. *Id.* at 228.

194. *Id.*

195. *Id.* at 237–38.

196. *Id.* at 229–30.

197. *Id.* at 230.

198. *Id.* at 230–31 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2168 (1971)).

199. *Id.* at 231.

thought carefully about which branch of government should try individuals for impeachment.[200] The Framers chose the Senate over the Supreme Court because the Court was "too small in number."[201] The Court also looked to the Federalist Papers, where Hamilton argued that Congress should wield the power of impeachment because "impeachment was designed to be the *only* check on the Judicial Branch by the Legislature."[202] If federal courts could review the Senate's impeachment procedures, then Congress's only check on the judiciary would be "eviscerate[d]."[203] Therefore, based on text, structure, and history, the Court held that the proper scope of the Senate's impeachment power presented a political question.[204]

Nixon is noteworthy for its interpretive methodology. It analyzed key words in the Senate Impeachment Clause and looked to dictionary definitions to illuminate their meaning. It also used those definitions to create counterfactuals, by asking whether the Senate would have the "sole" power to try impeachments if federal courts could review the structure of impeachment trials. Moreover, the Court looked to the Federalist Papers and the debates at the Constitutional Convention to better understand the original meaning of the Senate Impeachment Clause. It also used those historical sources to glean insight into the Constitution's structure. Read as a whole, *Nixon* suggests that text, structure, and history are the dispositive considerations when determining whether a constitutional provision presents a political question.[205]

Apart from methodology, *Nixon*'s reasoning tracks the argument that the proper definition of international law is a political question. *Nixon* focused on particular words in the Senate Impeachment Clause—"sole" and "try."[206] The same is true for the Define and Punish Clause—the use of "define" is important. If federal courts can disregard a statute because it is inconsistent with their definition of international law, then Congress does not wield the power of definition. Indeed, the Court in *Nixon* noted that the use of "sole" was significant because it appeared only twice in the Constitution[207]—so too with "define." In fact, the use of "define" is even more important under *Nixon*'s reasoning because it appears only once in the Constitution.[208] What's more, *Nixon* is also telling because of the historical evidence that it reviewed. When deciding whether the judiciary could review the Senate's impeachment

200. *Id.* at 233–34.
201. *Id.* at 234.
202. *Id.* at 235 (emphasis in original).
203. *Id.*
204. *Id.* at 237–38.
205. *Id.* at 229–35.
206. *Id.* at 231.
207. *Id.* at 230.
208. Kontorovich, *supra* note 12, at 1703.

procedures, the Court turned to the debates at the Constitutional Convention and the arguments in the Federalist Papers.[209] Those are the same historical sources that shed the most light on the Define and Punish Clause.[210]

The upshot is that *Nixon* and *Sosa* share an important similarity: they both reaffirmed the primacy of Congress. Although those cases confronted different subject matter, the Court held in both that a different branch of the federal government has the final say on questions of law. That similarity becomes particularly noticeable when analyzing the Define and Punish Clause and the political question doctrine. Together, they suggest that a federal court cannot declare a statute unconstitutional simply because the court would have defined international law differently than Congress.

C. Practical Considerations

Some believe that text, structure, history, and precedent are the only legitimate tools of constitutional interpretation.[211] Others find it helpful to discuss policy arguments and practical considerations when analyzing constitutional questions.[212] To make the analysis complete, this Subpart provides four practical reasons why the definition of international law under the Define and Punish Clause should be considered a political question.

First, international law is difficult to define. Scholars have called it "overly indeterminate and malleable,"[213] "relatively amorphous,"[214] "fogg[y],"[215] and "incompletely specified."[216] Louis Henkin famously described customary international law as having a "soft, indeterminate character."[217] Some federal judges have remarked that international law "is discerned from myriad decisions made in numerous and varied international and domestic arenas," and that the "relevant evidence of customary international law" is "generally unfamiliar to lawyers and

209. *Nixon*, 506 U.S. at 234–35.

210. *See supra* notes 137–158 and accompanying text.

211. *See* Ariz. State Legislature v. Ariz. Independent Redistricting Comm'n, 135 S. Ct. 2652, 2678 (Roberts, J., dissenting) ("The Court's position has no basis in the text, structure, or history of the Constitution," and relies on "naked appeals to public policy."); Greene, *supra* note 102, at 8; Jackson, *supra* note 102, at 606–10.

212. *See* Greene, *supra* note 102, at 14–18; Jackson, *supra* note 102, at 611–20; Ilya Somin, Book Review, *"Active Liberty" and Judicial Power: What Should Courts Do to Promote Democracy?*, 100 Nw. U. L. Rev. 1827, 1830–33 (2006).

213. Kent, *supra* note 13, at 846.

214. Bradley & Goldsmith, *supra* note 2, at 818.

215. Michael Stokes Paulsen, *The Constitutional Power to Interpret International Law*, 118 Yale L.J. 1762, 1800 (2009).

216. Kontorovich, *supra* note 12, at 1705.

217. Louis Henkin, International Law: Politics and Values 29 (1995).

judges."[218] Another federal judge noted that "[m]any international-law norms are vague, contested, or still evolving."[219] To further complicate matters, international law is often created by the general customs and practices of nation states.[220] This "constant churn of state practice and *opinio juris*" cannot be easily monitored or deciphered by judges.[221] While Congress and the President can stay abreast of state practice and international custom without much trouble,[222] defining international law requires federal courts to engage in a starkly foreign (no pun intended) task.[223]

The difficulty of defining international law is important. Courts regularly shy away from interpretive tasks when the "guideposts for responsible decisionmaking in [an] unchartered area are scarce and open-ended."[224] That is so because much of the judiciary's legitimacy hinges on the perception that it is performing a judicial task—the interpretation of legal texts based on neutral and reasoned principles.[225] The Supreme Court is aware of this: "The Court's power lies . . . in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands."[226] The judiciary's legitimacy is strained when it resolves sensitive questions of foreign policy that stretch beyond its ken.[227] The practical consequences in the short-term will be the cost of engaging in a

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218. Flores v. S. Peru Copper Corp., 414 F.3d 233, 247–48 (2d Cir. 2003).

219. Al-Bihani v. Obama, 619 F.3d 1, 40 (D.C. Cir. 2010) (Kavanaugh, J., concurring in the denial of rehearing en banc).

220. *Id.*

221. *Id.* at 6 (Brown, J., concurring in the denial of rehearing en banc).

222. Zivotofsky *ex rel.* Zivotofsky v. Kerry, 135 S. Ct. 2076 (2015) (cataloguing the President's broad authority over U.S. diplomatic affairs); Kevin L. Cope, *Congress's International Legal Discourse*, 113 MICH. L. REV. 1115, 1122–23, 1172 (2015) (cataloguing Congress's power to monitor and create international law); Tyler J. Harder, *Time to Repeal the Assassination Ban of Executive Order 12,333: A Small Step in Clarifying Current Law*, 172 MIL. L. REV. 1, 30 (2002) ("Congress is now more involved with foreign affairs and, if it chooses, intelligence activities.").

223. *Al-Bihani*, 619 F.3d at 7 (Brown, J., concurring in the denial of rehearing en banc) ("[C]onsulting international sources . . . is not something judges have in their interpretive toolbox."); John F. Coyle, *The Case for Writing International Law into the U.S. Code*, 56 B.C. L. REV. 433, 447–50 (2015); Bradley & Goldsmith, *supra* note 2, at 855 ("[International law] is often unwritten, the necessary scope and appropriate sources of 'state practice' are unsettled, and the requirement that states follow customary norms from a 'sense of legal obligation' is difficult to verify."); Harold G. Maier, *The Role of Experts in Proving International Human Rights Law in Domestic Courts: A Commentary*, 25 GA. J. INT'L & COMP. L. 205, 205 (1995) ("[M]ost judges in the United States . . . have, at the most, a superficial familiarity with the theory of law creation in the international legal system and only the vaguest notion of how the system functions.").

224. Washington v. Glucksberg, 521 U.S. 702, 720 (1997) (internal citation omitted).

225. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 866 (1992) (plurality opinion); *see also* Or Bassok, *The Sociological-Legitimacy Difficulty*, 26 J.L. & POL. 239, 242–53 (2011); Nancy Scherer, *Diversifying the Federal Bench: Is Universal Legitimacy for the U.S. Justice System Possible?*, 105 NW. U. L. REV. 587, 625–31 (2011).

226. *Planned Parenthood of Se. Pa.*, 505 U.S. at 865.

227. Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948).

difficult task.[228] The long-term implications could be much more serious. Repeated confrontations with the political branches over the definition of international law can significantly undercut the public's perception of the judiciary.[229]

Second, a judicial definition of international law is inconsistent with American principles of representative democracy.[230] A federal court that gives effect to international law apart from federal statutes and treaties is applying law that has not been made by American political actors. As previously noted, customary international law is defined by the customs and practices of the difficult-to-discern international community. The political actors in the international community "are neither representative of the American political community nor responsive to it."[231] It is one thing to use global norms to answer questions on which the American political branches have no opinion. But it is quite different for federal courts to use customary international law to disregard a federal statute—an enactment that has received the assent of *both* political branches.[232] If Congress and the foreign legal community disagree on a question of international law, American principles of representative democracy suggest that courts should adhere to the people's elected representatives.[233]

Third, federal courts should refuse to second-guess Congress's definition of international law because their rulings on the subject can engender grave foreign policy consequences. In *Sosa*, the Court recognized that the definition of international law is inextricably tied to the development of American foreign policy. The Court noted that defining international law can "raise risks of adverse foreign policy

228. *See* Bradley & Goldsmith, *supra* note 2, at 874–75.

229. Sosa v. Alvarez-Machain, 542 U.S. 692, 748 (2004) (Scalia, J., concurring in part and concurring in the judgment) (allowing the judiciary to define international law "leads us[] directly into confrontation with the political branches"); Jide Nzelibe, *The Uniqueness of Foreign Affairs*, 89 IOWA L. REV. 941, 990 (2004) ("[F]ar from getting popular support in the event of a confrontation with the political branches, it is more likely that the courts will face public criticism for intervening improperly in foreign affairs or jeopardizing national security."); *cf.* Dames & Moore v. Regan, 453 U.S. 654, 662 (1981) (noting the "never-ending tension" between the President and the judiciary in foreign affairs cases).

230. Bradley & Goldsmith, *supra* note 2, at 858–59.

231. Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665, 721 (1986).

232. *Id.*; *see also* Easterbrook, *supra* note 109, at 229 ("[I]t is quite something else for the judiciary to insist that the government *itself* is bound by norms from outside our borders, and which our elected representatives have not adopted and are not allowed to change.").

233. Al Odah v. United States, 321 F.3d 1134, 1148 (D.C. Cir. 2003) (Randolph, J., concurring) ("To have federal courts discover [customary international law] among the writings of those considered experts in international law and in treaties the Senate may or may not have ratified is anti-democratic and at odds with principles of separation of powers.").

consequences . . . ."[234] While federal courts normally "enforce constitutional limits" on American governments, it is "quite another [thing] . . . to claim a limit on the power of foreign governments over their own citizens . . . ."[235] That, however, is the stark consequence of defining legal obligations under international law. Federal courts would be well-served to recognize that the way in which the United States defines international law is equivalent to devising American foreign policy.[236]

The relationship between foreign policy and the definition of international law is not novel. The Framers understood it well and appreciated the concept. In his Commentaries on the Constitution, Justice Story remarked that defining the law of nations "has an intimate connection and relation with the power to regulate commerce and intercourse with foreign nations, and the rights and duties of the national government in peace and war . . . ."[237] In other words, judges cannot overrule Congress's definition of international law without disturbing the balance of power in American foreign affairs. That was true in 1789 and it remains true today.[238] Justice Story once again articulated that political reality quite well:

> As the United States are responsible to foreign governments for all violations of the law of nations, and as the welfare of the Union is essentially connected with the conduct of our citizens in regard to foreign nations, Congress ought to possess the power to define and punish all such offences, which may interrupt our intercourse and harmony with, and our duties to them.[239]

It should be plain, at this point, that a court's definition of international law can hamstring American diplomatic efforts.[240] These

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234. *Sosa*, 542 U.S. at 727–28; *see* THE FEDERALIST NO. 42, *supra* note 42, at 231 (arguing that the Define and Punish Clause is one of the constitutional powers "which regulate the intercourse with foreign nations").

235. *Sosa*, 542 U.S. at 727.

236. *See* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 805 (D.C. Cir. 1984) (Bork, J., concurring); Anthony J. Bellia Jr. & Bradford R. Clark, *The Law of Nations as Constitutional Law*, 98 VA. L. REV. 729, 802 (2012) (noting that enforcing rules of international law can create friction between nations); Kent, *supra* note 13, at 852 (arguing that the Define and Punish Clause was designed to give Congress the power to "punish foreign nations by deploying a wide range of national coercive powers"); Nzelibe, *supra* note 229, at 993 ("[T]he courts are incapable of predicting whether foreign nations may be affected by a judicial decision, or how such nations may react to such a decision.").

237. STORY, *supra* note 145, § 1165.

238. John M. Rogers, *The Alien Tort Statute and How Individuals "Violate" International Law*, 21 VAND. J. TRANSNAT'L L. 47, 58 (1988) ("Determining international law issues means, in effect, determining whether the United States or a foreign state has violated international law. Such a determination affects, at least indirectly, the conduct of foreign affairs.").

239. STORY, *supra* note 145, § 1165.

240. *See Tel-Oren*, 726 F.2d at 818 (Bork, J., concurring) ("Nations rely chiefly on diplomacy and other political tools in their dealings with each other, and these means are frequently incompatible with declarations of legal rights."); Donald J. Kochan, Note, *Constitutional Structure as a Limitation on the Scope of the "Law of Nations" in the Alien Tort Claims Act*, 31 CORNELL INT'L L.J. 153, 187 (1998)

grave consequences should give federal courts pause before they supplant Congress's definition of international law with their own.

Finally, federal courts should not use customary international law to invalidate federal statutes because customary international law is not binding federal law under the Supremacy Clause. Up to this point, the discussion has assumed that even if federal courts may disregard federal statutes that they think have wrongfully defined international law, there are compelling prudential reasons for the judiciary to avoid treating it as binding U.S. law. But what if customary international law is not binding? What if it is "not a true legal constraint," but "chiefly a policy consideration of international relations?"[241] Professor Michael Paulsen makes this argument, and it rests on a series of remarkably simple propositions.[242] The Supremacy Clause describes the supreme sources of law that bind American governmental actors: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States . . . ."[243] The Supremacy Clause does not mention customary international law. Standing alone, it can never supersede the Constitution, duly enacted federal statutes, or properly ratified and executed treaties.[244] Viewed in this light, federal courts have no power to invalidate federal statutes based on their interpretation of an international common law.[245]

Professor Paulsen specifically discusses the legal import of customary international law in the United States. As explained earlier, customary international law can become binding federal law only if it is incorporated into a treaty or a federal statute.[246] But international law, apart from a statute or a treaty, does not "supply a *binding* federal legal rule of decision in U.S. courts that ever prevails over other [federal] law."[247] That does not mean, however, that international law is irrelevant; the flagrant disregard of the law of nations could have serious consequences for American foreign policy. But those are policy considerations that the political branches consider when making

("If the judiciary looks to an 'international law,' not so defined by Congress, the risk exists that the judiciary will apply an international norm with which Congress disagrees . . . .").

241. Paulsen, *supra* note 215, at 1770.

242. *See id.* at 1771–73.

243. U.S. CONST. art. VI, § 2.

244. Paulsen, *supra* note 215, at 1771–73.

245. *Id.* at 1800–01.

246. *Id.*

247. *Id.* at 1801; *see* Kent, *supra* note 103, at 509 ("The primacy of the political branches [in defining international law] is seen in the fact that the Constitution expressly makes treaties—negotiated by the President and approved by the Senate—the supreme law of the land, while omitting any mention of customary international law.").

discretionary decisions.[248] International law cannot be "binding on the United States as a matter of U.S. constitutional law, because it is not part of the binding 'law' identified" in the Supremacy Clause.[249] The logical conclusion of this argument is blunt: international law is "international relations or international politics dressed up as law."[250]

This reasoning has substantial implications for statutes enacted under the Define and Punish Clause. Because customary international law is not binding on its own, judges may not use it to impose substantive limits on Congress's power to define and punish offenses against the law of nations. In other words, "the regime of international law may not dictate to Congress what those offenses may or must be."[251] This follows naturally from the inclusion of the Define and Punish Clause in the Constitution. If the Framers believed that customary international law legally bound American actors before it was incorporated into federal law, there would have been no need "to have granted Congress the power '[t]o define and punish . . . Offences against the Law of Nations.'"[252] Although this interpretation of the Clause vests Congress with seemingly sweeping power, that is the import of the Supremacy Clause.

At bottom, there are powerful reasons to believe that customary international law is not binding federal law of its own force. It may become binding federal law if it is codified in a treaty or a statute, "but not all international law obligations automatically constitute binding federal law enforceable in United States courts."[253] The corollary point is that federal courts have no authority to disregard federal statutes based on their interpretation of international custom, practice, and usage.[254] Of course, as catalogued above, there are practical reasons for courts to avoid defining international law under the Define and Punish Clause apart from whether they have the authority to do so. But the antecedent question of authority looms large after considering how our constitutional structure makes international law legally irrelevant. A straightforward reading of the Supremacy Clause leaves little room for federal courts to use their definition of customary international law to police the boundaries of the Define and Punish Clause.[255]

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248. Paulsen, *supra* note 215, at 1801.

249. *Id.*

250. *Id.* at 1804.

251. *Id.* at 1808.

252. *Id.* at 1831 (quoting U.S. CONST. art. I, § 8, cl. 10).

253. Medellin v. Texas, 552 U.S. 491, 504 (2008); *see also* Paulsen, *supra* note 215, at 1800.

254. *See* Kent, *supra* note 103, at 509 ("[T]he Constitution allows the political branches to 'punish' violations of the customary law of nations, but makes no explicit provision for the political branches to *be punished* by courts for violations of customary international law.").

255. *See id.*

III. PRECEDENT, LIMITS ON LEGISLATIVE POWER, AND OTHER SOURCES OF INTERNATIONAL LAW

Part II of this Article argued that the proper definition of international law under the Define and Punish Clause is a political question. This Part situates that argument within the existing framework of both constitutional and non-constitutional law. Subpart A explains that the Supreme Court has never used international norms to restrict Congress's power under the Define and Punish Clause. Subpart B describes why there will still be meaningful limits on congressional power even if the proper definition of international law is a political question. And Subpart C explains why courts can still apply treaties and other sources of international law even if they cannot define customary international law once Congress has already done so.

A. THE U.S. SUPREME COURT AND THE DEFINE AND PUNISH CLAUSE

When courts or scholars claim that the Supreme Court has limited Congress's power under the Define and Punish Clause, they point to two cases in particular. The first is *United States v. Furlong*.[256] There, the federal government charged John Furlong and other defendants with piracy.[257] Furlong's case presented unusual facts: he was a British subject charged with murdering another British subject aboard a British vessel.[258] Additionally, the statute he was charged under defined piracy to include robbery on the high seas *and* murder.[259] While piracy was traditionally defined as robbery on the high seas, it had not been thought to include murder.[260] The central dispute was whether Congress could punish a murder with no connection to the United States by calling it piracy.[261] The Court held that it could not.[262] All nations can punish robbery on the high seas without regard to the location of the crime because that "is considered as an offence within the criminal jurisdiction of all nations."[263] Murder, on the other hand, is "too abhorrent to the feelings of man" to fall within a sovereign's universal jurisdiction.[264] The apparent impetus for the Court's holding was its desire to limit the territorial reach of federal criminal law. "If by calling murder *piracy*, [Congress] might assert a jurisdiction over that offence committed by a foreigner in a foreign

256. United States v. Furlong, 18 U.S. (5 Wheat.) 184 (1820).
257. *Id.* at 185.
258. *Id.* at 195.
259. *Id.* at 184.
260. *See* United States v. Smith, 18 U.S. (5 Wheat.) 153, 162 (1820).
261. *Furlong*, 18 U.S. (5 Wheat.) at 194.
262. *Id.* at 197.
263. *Id.*
264. *Id.*

vessel, what offence might not be brought within [Congress's] power by the same device?"[265]

Federal courts have seized the latter language as authority to review Congress's definition of international law.[266] The key concern in *Furlong*, however, was preventing Congress from punishing crimes that have no connection to the United States. The Court worried that if piracy included murder, then Congress could punish murder "committed by a foreigner in a foreign vessel."[267] In other words, the Court was concerned with maintaining the territorial limits on the federal government's criminal jurisdiction. Most courts and scholars read *Furlong* as addressing only that issue.[268] Today, we think of *Furlong*'s concern as a due process problem. Federal courts have held that in order to apply a federal criminal statute extraterritorially—that is, to a foreigner in a foreign vessel outside U.S. territory—"there must be a sufficient nexus between the defendant and the United States" so that applying the criminal statute to him "would not be arbitrary or fundamentally unfair."[269] Thus, modern due process jurisprudence addresses the issue in *Furlong*, and the political question doctrine generally does not prevent federal courts from adjudicating a criminal defendant's due process claim (or any other claim based on an individual right).[270] If one accepts this reading of *Furlong*, then the opinion's relevance to the Define and Punish Clause is diminished.

Arjona is the second case that supposedly allows courts to review the legislative definition of international law.[271] Recall that the question there was whether Congress could punish counterfeiting foreign securities as a violation of international law. In considering the statute at issue, the Court stated that "[w]hether the offense as defined is an offense against the law of nations depends on the thing done, not on any

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265. *Id.* at 198.

266. *See* Al Bahlul v. United States, 792 F.3d 1, 15–16 (D.C. Cir. 2015); United States v. Bellaizac-Hurtado, 700 F.3d 1245, 1249 (11th Cir. 2012).

267. *Furlong*, 18 U.S. (5 Wheat.) at 198.

268. United States v. Cardales-Luna, 632 F.3d 731, 744 (1st Cir. 2011) ("[*Furlong*] held that Congress could not punish the murder of a foreigner by a foreigner on a foreign vessel in international waters."); John H. Knox, *A Presumption Against Extrajurisdictionality*, 104 AM. J. INT'L L. 351, 364 (2010) (describing *Furlong* as holding that "while piracy was within the acknowledged power of Congress to punish, as was murder by U.S. nationals committed on foreign ships, murder by foreigners on foreign ships on the high seas was not."); A. Mark Weisburd, *Due Process Limits on Federal Extraterritorial Legislation?*, 35 COLUM. J. TRANSNAT'L L. 379, 419 (1997) (arguing that *Furlong* addressed "whether a statute criminalizing piracies and felonies at sea should be read as applying to murders committed by aliens against alien victims upon non-American ships.").

269. United States v. Al Kassar, 660 F.3d 108, 118 (2d Cir. 2011); *see also* United States v. Brehm, 691 F.3d 547, 552 (4th Cir. 2012); United States v. Ibarguen-Mosquera, 634 F.3d 1370, 1378–79 (11th Cir. 2011); Untied States v. Davis, 905 F.2d 245, 248–49 (9th Cir. 1990).

270. *See* Boos v. Barry, 485 U.S. 312 (1988) (adjudicating First Amendment challenge to statute enacted under the Define and Punish Clause).

271. *See supra* notes 51–55.

declaration to that effect by congress."[272] Some courts invoke this statement as evidence that they can review whether Congress has properly defined international law under the Define and Punish Clause.[273] But that obscures what the Court actually said in *Arjona.* The Court was considering whether "it is necessary, in order 'to define' the offense against the law of nations, that it be declared in the statute itself to be 'an offense against the law of nations.'"[274] The Court held that this was unnecessary. The Court's statement in full is as follows:

> This statute defines the offense, and if the thing made punishable is one which the United States are required by their international obligations to use due diligence to prevent, it is an offense against the law of nations. Such being the case, there is no more need of declaring in the statute that it is such an offense than there would be in any other criminal statute to declare that it was enacted to carry into execution any other particular power vested by the constitution or its people by counterfeiting its money . . . . Whether the offense as defined is an offense against the law of nations depends on the thing done, not on any declaration to that effect by congress.[275]

Reading the language in context makes plain that *Arjona* did not limit legislative power. The Court was simply addressing the narrow argument presented in that case—whether a statute punishing a violation of international law had to specifically state that the conduct was punished as an offense against the law of nations. The Court sensibly refused to impose this requirement, and in reaching that conclusion, it showed Congress considerable respect by emphasizing that the legislature need not use magic words when defining customary international law. This highlights the pointed irony in citing *Arjona* as support for limiting Congress's power. The Court emphatically *refused* to place needless obstacles in front of Congress when it defines international law.

An important word of caution is also in order when discussing cases with substantial age. Older cases analyzing international law did so against the backdrop of a legal regime that viewed the law in a different light than we do today. From the time of the Founding through the early twentieth century, federal judges recognized and applied the general common law.[276] The general common law was a body of law "not attached to any particular sovereign," but that instead "existed by common practice and consent among a number of sovereigns."[277] The law of nations was considered part of the general common law, which meant

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

273. *See* Al Bahlul v. United States, 792 F.3d 1, 15 (D.C. Cir. 2015); United States v. Bellaizac-Hurtado, 700 F.3d 1245, 1249 (11th Cir. 2012).

274. *Arjona*, 120 U.S. at 488 (quoting U.S. CONST. art. I, § 8, cl. 10).

275. *Id.*

276. William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1517 (1984).

277. *Id.*

that international law was applied in federal courts of its own force as part of this nebulous body of unwritten law.[278] Critics of the general common law became increasingly vocal over time. For example, Justice Holmes said that the general common law perpetrated the "fallacy and illusion" that there was "a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute . . . ."[279]

The Supreme Court altered how federal courts treated general law in *Erie Railroad Co. v. Tompkins*. There, the Court held that, "[e]xcept in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. . . . There is no federal general common law."[280] This substantially changed how federal courts conceptualized the law. *Erie* stated that "law in the sense in which courts speak of it today does not exist without some definite authority behind it."[281] That definite authority is a sovereign government, and at least on matters governed by state law, *Erie* obligated federal courts to follow the applicable rule of decision adopted by state law, rather than the indefinite body of general law.[282]

The paradigm shift wrought by *Erie* should affect how we interpret older decisions applying international law. In some cases predating *Erie*, the Supreme Court suggested that customary international law was part of "our" law.[283] But these statements arose against a legal backdrop that considered the unwritten law of nations to be nearly as authoritative as federal statutes or treaties.[284] When earlier cases equated international law with federal law, they were likely making the (at the time) uncontroversial point that the general law of nations could apply in federal court of its own force.[285] This did not mean, however, that international law was a super-statutory body of law that courts could use

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278. *See, e.g.*, Oliver Am. Trading Co. v. United States of Mexico, 264 U.S. 440, 442–43 (1924); Huntington v. Attrill, 146 U.S. 657, 683 (1892); Swift v. Tyson, 41 U.S. (16 Pet.) 1, 19 (1842); Bradley & Goldsmith, *supra* note 2, at 824.

279. Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928) (Holmes, Brandeis, & Stone, JJ., dissenting); *see also* 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, 463 (2000) ("The Constitution was written by a prepositivist generation who believed that unwritten laws were binding on nations and individuals alike.").

280. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

281. *Id.* at 79.

282. *Id.*; *see also* Caleb Nelson, *The Persistence of General Law*, 106 COLUM. L. REV. 503, 506 (2006).

283. *See, e.g.*, The Paquete Habana, 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice . . . ."); The Antelope, 23 U.S. (10 Wheat.) 66, 122–23 (1825) (consulting "general law" to conclude that the slave trade was permitted by the law of nations, and therefore, that Congress could not pass a statute defining the slave trade as piracy).

284. Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1279–81 and n.169 (1996).

285. *Id.*; John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 98 n.382 (2001).

to disregard legislative enactments. To the contrary, it was widely acknowledged throughout the nineteenth century that statutes could always modify the general law.[286] As such, early cases discussing international law tell us little about the Define and Punish Clause, and even less about what the judiciary can do once Congress has defined an offense against the law of nations in a statute.[287]

Since *Erie* there have been only two Supreme Court cases that indirectly addressed the Define and Punish Clause: *Ex parte Quirin*[288] and *Yamashita v. Styer*.[289] Both cases grew out of prisoner-of-war controversies during World War II. *Yamashita* involved a captured Japanese army general who was charged with violating the law of war and was sentenced to death.[290] *Quirin* involved captured German spies who were also charged with violating the law of war and sentenced to death.[291] The petitioners in both cases filed writs of habeas corpus, arguing that the United States could not try them in military commissions for violating the law of war.[292]

Quirin did not address Congress's power to define the law of war (which is a subset of the law of nations more generally).[293] Instead, the focus there was on whether the *President* had complied with the law of war in authorizing military commissions. At the time, a collection of statutes known as the Articles of War authorized the President to use military commissions "as an appropriate tribunal for the trial and punishment of offenses against the law of war."[294] Through these statutes, Congress incorporated the law of war into federal law and "authorized trial of offenses against the law of war before such [military] commissions."[295] Against this backdrop, the question was *not* whether

286. Caleb Nelson, *A Critical Guide to* Erie Railroad Co. v. Tompkins, 54 WM. & MARY L. REV. 921, 925 (2013); Kent, *supra* note 103, at 508 ("[I]f it is true that the Founders viewed the law of nations as a form of general common law, to be applied by courts interstitially, it is significant that the Founders generally also believed that common law was subject to legislative modification or override.").

287. I have tried to avoid any suggestion that *Erie* ended the federal courts' reliance on unwritten law. That is, after all, the conventional summary of the case. *See, e.g.*, Louise Weinberg, *The Curious Notion That the Rules of Decision Act Blocks Supreme Federal Common Law*, 83 NW. U. L. REV. 860, 867 (1989) ("[P]ost-*Erie* positivism has cleansed American courts of law lacking an identifiable sovereign source . . . ."). As Caleb Nelson has demonstrated, this narrative over-reads *Erie*. *See generally* Nelson, *supra* note 282; *see also* Caleb Nelson, *The Legitimacy of (Some) Federal Common Law*, 101 VA. L. REV. 1 (2015). Instead, the principal takeaway from *Erie* for purposes of this Article is not that it delegitimized unwritten law, but that cases decided pre-*Erie* discussed international law as part of "our law" *only* because of how federal courts treated the general law.

288. *Ex parte* Quirin, 317 U.S. 1 (1942).

289. Yamashita v. Styer, 327 U.S. 1 (1946).

290. *Id.* at 5.

291. *Ex parte Quirin*, 317 U.S. at 6–7.

292. *Id.* at 9; *Yamashita*, 327 U.S. at 9.

293. Madsen v. Kinsella, 343 U.S. 341, 354 (1952).

294. *Yamashita*, 327 U.S. at 7.

295. *Quirin*, 317 U.S. at 29.

Congress had improperly defined the law of war. Rather, the question was whether the *President* had complied with the law of war because that was the legal standard selected by Congress in the governing statutes.[296] Indeed, when framing the case, the Court stated that the "[p]etitioners' main contention is that the *President* is without any statutory or constitutional authority to order the petitioners to be tried by military tribunal . . . ."[297] *Quirin* never held that an external body of law imposes judicially enforceable limits on the Define and Punish Clause.

Yamashita followed a similar path. As in *Quirin*, Congress authorized military commissions to try enemy combatants in accordance with the law of war.[298] The question was whether the military commission that tried the petitioner acted consistently with that body of law.[299] The Court reviewed various sources of international law to determine whether the petitioner's charge was supported by the law of war,[300] but it never held that Congress was limited by an external body of law. In fact, the Court said just the opposite: "We do not make the laws of war but we respect them so far as they do not conflict *with the commands of Congress* or the Constitution."[301]

One final point about the Supreme Court's jurisprudence bears mentioning. In *Zivotofsky*, the majority opinion suggested that deciding whether a statute is unconstitutional can never present a political question.[302] The import of this reasoning is that the constitutionality of a statute enacted under the Define and Punish Clause also cannot present a political question. For all intents and purposes, *Zivotofsky* announced this categorical rule. But not all Justices agree with it,[303] and there is some tension in the Court's cases that was not discussed in *Zivotofsky*.

Recall that in *Nixon*, a law directed a Senate committee, rather than the entire Senate, to collect evidence during impeachment trials.[304] Nixon argued that this law was unconstitutional because the Constitution's use of "try" meant that the entire Senate had to collect evidence.[305] Despite

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296. *Id.*

297. *Id.* at 24 (emphasis added).

298. *Yamashita*, 327 U.S. at 11.

299. *Id.* at 9–10.

300. *Id.* at 14–15.

301. *Id.* at 16 (emphasis added). Some scholars also cite *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), as a case where the Court used international law to limit Congress under the Define and Punish Clause. *See* Kontorovich, *supra* note 12, at 1737–39. *Hamdan*, however, did no such thing. The relevant question there was whether the law of war permitted the government to try the defendant for conspiracy. *Hamdan*, 548 U.S. at 600. The Court explicitly noted that it was not considering the Define and Punish Clause: "There is *no suggestion* that Congress has, in exercise of its constitutional authority to 'define and punish . . . Offences against the Law of Nations,' positively identified 'conspiracy' as a war crime." *Id.* at 601 (internal citation omitted) (emphasis added).

302. Zivotofsky *ex rel.* Zivotofsky v. Clinton, 132 S. Ct. 1421, 1427 (2012).

303. *See supra* notes 99–100.

304. Nixon v. United States, 506 U.S. 224, 227 (1993).

305. *Id.* at 228.

the fact that Nixon was challenging a written law as unconstitutional, the Court held that the case presented a political question.[306] Of course, the command in *Nixon* was embodied in a Senate Rule rather than a statute.[307] That, however, should make no difference for purposes of the political question doctrine. Whether the case involves a statute or a Senate Rule, the inquiry before a federal court is the same: is a written rule adopted by a separate branch of government unconstitutional? The fact that a decree is not formally codified in a statute says more about form than either substance or function. Likewise, consider the following puzzle. There is little doubt that the House and Senate could pass, and the President could sign, a statute that establishes the same procedure for impeachment trials as the Senate Rule in *Nixon*.[308] If that statute were challenged as unconstitutional, would the Court decide that it could *now* review the Senate's impeachment procedures because it was confronted with a statute? That result seems highly unlikely.

The tension between *Zivotofsky* and *Nixon* is even more pronounced if one considers *Gilligan v. Morgan*.[309] The plaintiffs there alleged that the training and deployment of the National Guard was unconstitutional.[310] The Court held, however, that their claim presented a political question.[311] It noted that the Constitution gives Congress the power "[t]o provide for organizing, arming, and disciplining, the Militia."[312] The Court thought that this provision was important because it indicated that Congress, not the judiciary, was ultimately responsible for managing the National Guard.[313] The Court even observed that Congress "has enacted appropriate legislation" to do just that.[314] This observation is significant. If the constitutionality of a statute cannot present a political question, then the Court would not have cited "appropriate legislation" to buttress its political question analysis. *Gilligan* breaks from *Zivotofsky*'s reasoning because it did not tie the justiciability of the case to whether it turned on the constitutionality of a statute. What mattered to the Court was that the plaintiffs challenged "the type of governmental action that was intended by the Constitution to be left to the political branches directly responsible—as the Judicial Branch is not—to the electoral process."[315] This broad theoretical

306. *Id.* at 237–38.
307. *Id.* at 227.
308. *See* Zivotofsky *ex rel.* Zivotofsky v. Clinton, 132 S. Ct. 1421, 1435 (Sotomayor, J., concurring).
309. Gilligan v. Morgan, 413 U.S. 1 (1973).
310. *Id.* at 3–4.
311. *Id.* at 11.
312. *Id.* at 6 (quoting U.S. CONST. art. I, § 8, cl. 16).
313. *Id.*
314. *Id.*
315. *Id.* at 10.

consideration—rather than the presence or absence of a statute—was at the center of *Gilligan*'s reasoning.

The upshot is that, considered together, *Nixon*, *Gilligan*, and *Zivotofsky* highlight an unresolved and unexplored tension in the Court's political question jurisprudence. That tension suggests that *Zivotofsky*'s holding might not be as inflexible or uncontroversial as it appears at first blush. If that is true, there may still be room in the Court's case law to hold that the proper definition of customary international law under the Define and Punish Clause is a political question.

B. Meaningful Limits on Legislative Power

Some might worry that if federal courts cannot review the legislative definition of international law, then Congress will use the Define and Punish Clause as the purported basis for *every* law that it enacts. This would make all federal statutes immune to challenges that Congress exceeded its Article I authority. Thus, the argument goes, giving Congress unreviewable authority to define customary international law under the Define and Punish Clause has the potential to dramatically narrow the scope of judicial review.[316]

That worst-case scenario, however, is not possible. Congress is permitted only to "define and *punish* . . . *Offences* against the Law of Nations."[317] The use of "punish" and "Offences" denote criminal legislation. The 1755 edition of Samuel Johnson's Dictionary of the English Language defines offence to be "crime."[318] Likewise, the same dictionary defines punish as "to chastise; to afflict with penalties or death for some crime."[319] To the Founding generation, offences and punishment garnered images of criminal activity. That meaning remains true today: Black's Law Dictionary defines offense to be "[a] violation of the law; a crime."[320]

The Constitution and the Bill of Rights also use "offence" and "punish" in provisions that relate only to criminal proceedings.[321] Apart from the Define and Punish Clause, "offence" appears in Article II's

316. *See* United States v. Bellaizac-Hurtado, 700 F.3d 1245, 1250 (11th Cir. 2012) ("If Congress could define any conduct as . . . an 'offence against the law of nations,' its power would be limitless and contrary to our constitutional structure."). *But see* Paulsen, *supra* note 215, at 1809 (arguing that the Define and Punish Clause gives Congress "the extraordinarily sweeping enumerated legislative power to enact federal laws defining and punishing what it fairly considers to be violations of *international natural law*.").

317. U.S. Const. art. I, § 8, cl. 10 (emphasis added).

318. *Offence*, Dictionary of the English Language (2d ed. 1755).

319. *Punish*, Dictionary of the English Language (2d ed. 1755).

320. *Offense*, Black's Law Dictionary (10th ed. 2014).

321. Ariz. State Legislature v. Ariz. Independent Redistricting Comm'n, 135 S. Ct. 2652, 2680 (2015) (Roberts, J., dissenting) ("When seeking to discern the meaning of a word in the Constitution, there is no better dictionary than the rest of the Constitution itself.").

pardon provision[322] and in the Fifth Amendment's Double Jeopardy Clause.[323] Both of those provisions apply only to criminal proceedings. One cannot be pardoned without the imposition of criminal penalties,[324] and the Double Jeopardy Clause only applies to sequential criminal prosecutions (or multiple punishments) for the same crime.[325] Likewise, the Constitution uses "punish" only when talking about criminal penalties. Article I states that an impeached federal officer "shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law."[326] The Constitution also gives Congress the power "[t]o provide for the Punishment of counterfeiting"[327] and the power "to declare the Punishment of Treason."[328] The constitutional link among treason, counterfeiting, and indicted federal officials is the presence of criminal liability.[329] Similarly, the Eighth Amendment's prohibition on "cruel and unusual punishments" is a limitation that applies only to criminal—not civil—proceedings.[330] In short, when the Constitution speaks of offences and punishments, it does so in the context of imposing criminal penalties.[331]

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

323. *Id.* amend. V ("No person shall be subject for the same offence to be twice put in jeopardy of life or limb.").

324. Schick v. Reed, 419 U.S. 256, 260 (1974) (stating that the power to pardon is the power "to commute *criminal* sentences" (emphasis added)); *see also Ex parte* Grossman, 267 U.S. 87, 111 (1925) (pardons available only for criminal, not civil, contempt); Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 842 (2013) ("[T]he Pardon Clause . . . concerns crimes, not civil violations.").

325. Hudson v. United States, 522 U.S. 93, 99 (1997) ("The [Double Jeopardy] Clause protects only against the imposition of multiple criminal punishments for the same offense . . . .").

326. U.S. CONST. art I, § 3, cl. 7.

327. *Id.* art. I, § 8, cl. 6.

328. *Id.* art. III, § 3, cl. 2.

329. *See* United States v. Comstock, 560 U.S. 126, 135 (2010) (noting that the Constitution "speaks explicitly about the creation of federal crimes . . . related to 'counterfeiting . . . .'" (quoting U.S. CONST. art. I, § 8, cl. 6)); Morissette v. United States, 342 U.S. 246, 265 (1952) (noting that "treason" is the "one *crime* deemed grave enough for definition in our Constitution" (emphasis added)); United States v. Isaacs, 493 F.2d 1124, 1142 (7th Cir. 1974) (stating that subjecting impeached federal officials to indictment and punishment was meant "to assure that after impeachment a trial on *criminal charges* is not foreclosed by the principle of double jeopardy" (emphasis added)).

330. U.S. CONST. amend. VIII; *see* Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 262 (1989) ("Given that the [Eighth] Amendment is addressed to bail, fines, and punishments, our cases long have understood it to apply primarily, and perhaps exclusively, to criminal prosecutions and punishments."); Marrero-Rodriguez v. Municipality of San Juan, 677 F.3d 497, 501 (1st Cir. 2012) (holding that Eighth Amendment claim was not viable because "this case does not involve a formal adjudication of guilt or a criminal prosecution . . ."); Schiavo *ex rel.* Schindler v. Schiavo, 403 F.3d 1289, 1295 (11th Cir. 2005) (holding that the Cruel and Unusual Punishments Clause "applies only to punishments inflicted after conviction for crimes").

331. *But see* U.S. CONST. art. I, § 5, cl. 2 ("Each House may . . . punish its Members for disorderly Behaviour . . . ."). Although it is not clear whether this reference relates only to criminal proceedings, courts have discussed it in the context of criminal prosecutions. *See, e.g.*, United States v. Traficant, 368

Limiting the Define and Punish Clause to criminal legislation finds further support in both history and precedent. During the constitutional ratification debates, the Anti-Federalists argued that the Constitution granted the federal government the extraordinary power to punish commonplace crimes.[332] The Federalists responded by noting that the new Congress could only punish a few "crimes," and pointed specifically to the Define and Punish Clause as an example.[333] Similarly, James Iredell argued that Congress has the power "to define and punish piracies and felonies committed on the high seas, and offences against the law of nations. They have no power to define *any other crime* whatever."[334] And in debating the constitutionality of the Alien Enemies Act, James Madison said that "referring the alien act to the power of Congress to define and *punish* offences against the law of nations" indicates "that the act is of a *penal*, not merely of a preventive operation."[335] All of these historical references link the Define and Punish Clause to criminal activity.

Precedent tells the same story. The Supreme Court recently reiterated that "[t]he term 'offense' is most commonly used to refer to crimes."[336] Justice Thomas has also explained that punishment at the time of the Founding was synonymous with criminal penalties.[337] Taken together, it should be no surprise that the Supreme Court has consistently referred to the Define and Punish Clause as a source for criminal legislation. The Court has said that the Constitution does not give Congress the power "to provide for the punishment of *crimes*, except piracies and felonies on the high seas, *offences against the law of nations*, treason, and counterfeiting the securities and current coin of the United States."[338] In discussing the criminal jurisdiction of the federal courts, the Court has said that Congress can punish only a "limited class of well known offences," including counterfeiting U.S. currency, treason, and offenses against the law of nations.[339] And in discussing "the extent of

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F.3d 646, 650 (6th Cir. 2004) (discussing whether punishment by the House of Representatives counts as a criminal prosecution for purposes of the Double Jeopardy Clause).

332. Kent, *supra* note 13, at 907.

333. *Id.* (providing additional citations to relevant sources at footnote 304).

334. Statement of James Iredell (July 29, 1788), *reprinted in* 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787 219 (Jonathan Elliot ed., 2d ed. 1891) (emphasis added).

335. *Id.* at 556 (emphasis added).

336. Kellogg Brown & Root Servs., Inc. v. United States *ex rel.* Carter, 135 S. Ct. 1970, 1972 (2015). A leading treatise makes the same point. *See* 22 C.J.S. CRIMINAL LAW: SUBSTANTIVE PRINCIPLES § 3 (2013) ("The terms 'crime,' 'offense,' and 'criminal offense' are all said to be synonymous, and ordinarily used interchangeably." (internal citation omitted)).

337. Wilkins v. Gaddy, 559 U.S. 34, 41 (2010) (per curiam) (Thomas, J., concurring in the judgment) ("At the time the Eighth Amendment was ratified, the word 'punishment' referred to the penalty imposed for the commission of a crime." (internal citation omitted)).

338. Logan v. United States, 144 U.S. 263, 283 (1892) (emphasis added).

339. United States v. Hall, 98 U.S. 343, 345 (1878).

power to punish *crime* expressly conferred" by the Constitution, the Court specifically referenced the Define and Punish Clause.[340] The Court's overall discussion of the Clause lends ample support to the claim that it can be invoked to support only criminal legislation.[341]

Unlike defining international law, courts can distinguish between civil and criminal laws without running afoul of the political question doctrine. There is no "textual commitment" of this question in the Constitution because the charter does not state who gets to decide whether a law is civil or criminal.[342] Likewise, courts have crafted an extensive body of judicially manageable standards to distinguish between civil and criminal penalties in various contexts.[343] What's more, there is little prudential reason to avoid deciding whether a law is civil or criminal—such an inquiry does not risk undermining American diplomatic efforts or jeopardizing American foreign policy in the way that defining international law does. The political question doctrine, then, does not bar federal courts from deciding whether a law qualifies as criminal legislation.

In addition to policing the criminal-civil divide, federal courts remain free to adjudicate other constitutional challenges to statutes enacted under the Define and Punish Clause. Courts can determine, for example, whether a statute that defines international law is inconsistent with the First Amendment or some other individual right.[344] Courts may also adjudicate a defendant's procedural objections that turn on the familiar requirements of the Fourth, Fifth, and Sixth Amendments. Yet all that being said, federal courts still remain powerless to disregard a criminal statute because a defendant believes that it improperly defines international law. It is not unusual, however, to say that federal courts lack the authority to entertain certain arguments raised by criminal defendants. In some instances, defendants lack standing to challenge the

340. Legal Tender Cases, 79 U.S. (12 Wall.) 457, 535–36 (1870).

341. Many scholars believe that the Define and Punish Clause cannot be used to support civil or regulatory legislation. *See, e.g.*, Kent, *supra* note 13, at 882 ("The conventional account of the text of the [Define and Punish] Clause is that its key terms ('punish' and 'offences') sound in individual criminal law."); Geoffrey R. Watson, *The Passive Personality Principle*, 28 TEX. INT'L L.J. 1, 33 (1993) ("The power to define and punish crimes against the 'Law of Nations' extends only to war crimes, genocide, and other especially serious crimes, not to simple murder, assault, and similar common crimes."); Siegal, *supra* note 26, at 867 (stating that the Define and Punish Clause permits Congress "to define violations of customary international law as domestic crimes"). *But see* Stephens, *supra* note 279, at 483–84 (arguing that the Define and Punish Clause can be used to enact non-criminal legislation).

342. Baker v. Carr, 369 U.S. 186, 217 (1962).

343. *Id.*; *see* Kansas v. Hendricks, 521 U.S. 346, 362 (1997) ("The existence of a scienter requirement is customarily an important element in distinguishing criminal from civil statutes."); Dep't of Revenue of Montana v. Kurth Ranch, 511 U.S. 767, 776–78 (1994) (distinguishing between civil and criminal laws for purposes of the Double Jeopardy Clause).

344. *See, e.g.*, Boos v. Barry, 485 U.S. 312, 315 (1988) (adjudicating free speech challenge to a federal statute that was enacted under the Define and Punish Clause).

validity of a search that turned up incriminating evidence.[345] In other instances, courts may not adjudicate a defendant's argument if he attempts to use collateral estoppel "to restrict the proof the government" might use at trial.[346] On still other occasions, federal courts have no authority to entertain a defendant's argument that Congress improperly defined customary international law under the Define and Punish Clause.

Nevertheless, Congress is unlikely to enact statutes that contain absurd definitions of international law because Congress is limited by our abiding system of checks and balances. The principal feature of this system is that the legislature remains constantly subject to structural checks from the President. If Congress abuses its power to define international law, the President may decline to enforce the statute.[347] The President may also undermine the legislature through his power to negotiate treaties, appoint ambassadors, and exercise broad authority over foreign commerce and international affairs.[348] All of these tools can disrupt the legislative plan for punishing violations of international law. Indeed, courts and scholars have recognized this dynamic: questions of foreign policy are rarely adjudicated by federal courts because the political branches are well equipped to erect roadblocks in front of one another.[349] The fact that federal judges cannot overrule Congress's definition of international law does not mean that the President is similarly handcuffed.

Perhaps even more meaningful than structural checks from the President are electoral checks from the people. Members from both houses of Congress must periodically seek their constituents' consent to continue governing.[350] If Congress has passed legislation imposing sweeping criminal liability for spurious violations of international law, then reelection becomes difficult. And if Congress uses the Define and Punish Clause to justify legislation with no rational connection to

345. Rakas v. Illinois, 439 U.S. 128, 129–30 (1978).

346. United States v. Wittig, 575 F.3d 1085, 1096 (10th Cir. 2009).

347. Morrison v. Olson, 487 U.S. 654, 711 (1988) (Scalia, J., dissenting) (providing that one check against the legislature is that "the executive can decline to prosecute under unconstitutional statutes"); United States v. Navarro-Vargas, 408 F.3d 1184, 1203 (9th Cir. 2005) ("[I]f the president or the attorney general determines that a law is either unwise or unconstitutional, he may decline to enforce the law . . . ."); Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 920–24 (1990). *See generally* Presidential Authority to Decline to Execute Unconstitutional Statutes, 18 U.S. Op. O.L.C. 199 (1994) (describing instances where the President may decline to enforce a statute he views as unconstitutional).

348. U.S. CONST. art. II, § 2; *see* Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 414 (2003) ("[T]he historical gloss on the 'executive Power' vested in Article II of the Constitution has recognized the President's 'vast share of responsibility for the conduct of our foreign relations.'").

349. *See* Schneider v. Kissinger, 412 F.3d 190, 418–20 (D.C. Cir. 2005); LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 32 (1972).

350. U.S. CONST. art. I, § 2, cl. 1; *id.* art. I, § 3, cl. 1.

international relations, reelection becomes more difficult still. It is not novel—nor should it be controversial—to suggest that periodic elections are a significant check on any congressional tendency to legislate without authority.[351]

Congress is also unlikely to exploit the Define and Punish Clause because of potential international ramifications. As should be clear, the definition of international law is an element of American foreign policy.[352] That means that Congress ignores global legal norms at its own peril.[353] The consequences of such ignorance can be dramatic: sanctions against the United States, diminished standing in the international community, and retaliation against American personnel stationed abroad.[354] Ignoring international norms also weakens the principle of reciprocity that lies at the heart of international law. If Congress makes a habit of thumbing its nose at international rules, then there is little reason for foreign sovereigns not to do the same to American interests.[355] Congress knows that its actions have consequences, and those consequences make it costly to wander astray from settled principles of international law.

The structural, electoral, and international checks that confront Congress are powerful forces. Even so, federal courts can hear plenty of challenges to statutes that were enacted under the Define and Punish

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351. Bogan v. Scott-Harris, 523 U.S. 44, 53 (1998) ("[T]he ultimate check on legislative abuse" is the "electoral process."); United States v. Bishop, 66 F.3d 569, 577 (3d Cir. 1995) ("[T]he primary check upon Congressional action is its direct responsibility to the will of the people."); Berkley v. Common Council of Charleston, 63 F.3d 295, 310 (4th Cir. 1995) (Wilkinson, J., dissenting) ("The democratic process relies on the voters, not the courts, as the first line of defense against legislative excess."); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 197 (1824) ("The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, . . . the sole restraints on which they have relied, to secure them from its abuse."); *cf.* Julie R. O'Sullivan, *The Interaction Between Impeachment and the Independent Counsel Statute*, 86 GEO. L.J. 2193, 2229 (1998) ("[E]lectoral accountability is the ultimate check by which Congress's abuse of its otherwise externally unchecked power of impeachment may be constrained.").

352. *See supra* notes 235–241 and accompanying text.

353. *See* Boos v. Barry, 485 U.S. 312, 323 (1988) ("[T]he United States has a vital national interest in complying with international law. The Constitution itself attempts to further this interest by expressly authorizing Congress '[t]o define and punish . . . Offenses against the Law of Nations.'").

354. *Id.* at 323–24 (protecting foreign ambassadors in the United States "ensures that similar protections will be accorded those that we send abroad to represent the United States, and thus serves our national interest in protecting our own citizens."); Al-Bihani v. Obama, 619 F.3d 1, 11 (D.C. Cir. 2011) (Kavanaugh, J., concurring in the denial of rehearing en banc).

355. *Boos*, 485 U.S. at 323 (noting "the concept of reciprocity that governs much of international law"); Michael P. Scharf, *International Law in Crisis: A Qualitative Empirical Contribution to the Compliance Debate*, 31 CARDOZO L. REV. 45, 64–65 (2009) ("If the United States ignores or interprets away a rule of international law, the precedent will be used by other States in the international community . . . thereby weakening the general rule of law and rendering the international system less stable."); FARHAD MALEKIAN, THE SYSTEM OF INTERNATIONAL LAW: FORMATION, TREATIES, RESPONSIBILITY 56 (1987) ("Common consent appears to be the main reason for obedience to the rules of international law. . . . In fact, it is a matter of reciprocal interest for states to obey the accepted rules.").

Clause. They can decide whether the statute actually imposes criminal penalties, and determine whether it unlawfully intrudes on individual constitutional rights. All of these limits demonstrate that legislative power will be meaningfully checked even if the proper definition of international law under the Define and Punish Clause is a political question.

C. Treaties and Other Sources of International Law

While the judiciary cannot declare a statute unconstitutional because it improperly defines customary international law, courts remain free to interpret and apply other sources of international law. As mentioned in the Introduction of this Article, one half of international law is customary international law. Congress can make those rules binding federal law by incorporating them into federal statutes. But international law also includes treaties, and treaties are different from customary international law in two important respects.[356] First, treaties are created through a specific constitutional mechanism separate and apart from the Define and Punish Clause.[357] Second, the Supremacy Clause explicitly lists treaties as supreme federal law (while saying nothing at all about customary international law).[358] These differences highlight that the ability to interpret customary international law is not tied to the judiciary's ability to interpret and apply treaties.[359]

This is especially true because treaties generally do not require federal courts to define international law. When a dispute turns on the interpretation of a treaty, a court reads the treaty as it would a contract to decipher the parties' intent.[360] Interpreting a legal text to determine what its signatories meant is something that federal courts do all of the time.[361] Indeed, contractual interpretation does not pose the same obstacles that defining customary international law does—the treaty itself will typically specify the binding rule of international law. The result is that any limitations inherent in the Define and Punish Clause should not affect how federal courts interpret treaties.

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356. Bradley & Goldsmith, *supra* note 2, at 817.

357. *See* U.S. Const. art. II, § 2, cl. 2.

358. *See id.* art. VI, cl. 2; Paulsen, *supra* note 215, at 1801.

359. *See* Karinne Coombes, *Universal Jurisdiction: A Means to End Impunity or a Threat to Friendly International Relations?*, 43 Geo. Wash. Int'l L. Rev. 419, 432 n.69 (2011); Siegal, *supra* note 26, at 892.

360. BG Grp. PLC v. Republic of Arg., 134 S. Ct. 1198, 1208 (2014) ("As a general matter, a treaty is a contract . . . . Its interpretation normally is, like a contract's interpretation, a matter of determining the parties' intent.").

361. *See* Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 230 (1986); Spectrum Stores, Inc. v. Citgo Petroleum Corp., 632 F.3d 938, 951 (5th Cir. 2011) ("Adjudication of the claims before us would require that we review the considered foreign policy of the political branches, which . . . is not codified in a treaty that we are merely asked to interpret."); Christopher A. Whytock, *Domestic Courts and Global Governance*, 84 Tul. L. Rev. 67, 105 (2009) ("U.S. courts routinely interpret treaties in transnational litigation.").

Courts may also continue to interpret a limited number of federal statutes that reference the law of nations as a rule of decision.[362] For example, one statute authorizes the President to detain a ship when there is reasonable cause to believe that it will assist ships "of a foreign belligerent nation in violation of the . . . obligations of the United States under the law of nations."[363] Many of these statutory references, however, do not contemplate that federal courts will "define" international law. Some statutes refer to "piracy as defined by the law of nations,"[364] which the Supreme Court held long ago is carefully limited to "robbery upon the sea."[365] Other statutes mention the law of nations as a source of jurisdiction for federal courts.[366] Another group of statutes reference the law of nations to indicate that they apply only during wartime.[367] And still other statutes reference international law to describe the President's regulatory authority.[368] Many of these statutes do not invite—or even require—federal courts to define a rule of international law.

Furthermore, even for those statutes that do call for the court to define international law, there is a meaningful difference between defining international law pursuant to a congressional mandate and disregarding a federal statute because the judiciary thinks that Congress got it wrong.[369] The Court in *Sosa* noted this distinction. It recognized

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362. *See, e.g.*, 18 U.S.C. §§ 756, 957, 967, 1651, 2274, 3058 (1948); 22 U.S.C. §§ 406, 462, 5605 (1917); 28 U.S.C. §§ 1350, 2241 (1948); 33 U.S.C. §§ 384, 385 (1948).

363. 18 U.S.C. § 967(a) (1948).

364. *See id.* §§ 1651, 3185(14); 33 U.S.C. §§ 384, 385.

365. United States v. Smith, 18 U.S. (5 Wheat.) 153, 162 (1820).

366. *See* 28 U.S.C. §§ 1350, 2241(c)(4) (1948).

367. *See* 18 U.S.C. § 756 (1942) (discussing prisoners of war who are interned in the United States "in accordance with the law of nations"); *id.* § 3058.

368. *See* 16 U.S.C. § 1435(a) (President must comply with international law when managing national marine sanctuaries); 22 U.S.C. § 462 (1917) (President can either detain or remove vessels that have violated "the law of nations or the treaties of the United States"); *id.* § 5605 (President may sanction foreign countries that have used chemical or biological weapons in violation of "international law"); 30 U.S.C. § 1421 (1980) (President must comply with international law when issuing permits for deepwater mining operations); 42 U.S.C. § 9119 (President must comply with international law when issuing permits for ocean thermal energy conversion facilities).

369. One might wonder whether federal courts may define international law under the Define and Punish Clause if Congress has not yet defined the precise rule of decision. This situation, however, is unlikely to ever arise. As explained previously, I believe that the Define and Punish Clause may be used to enact only criminal legislation. *See supra* Part III.B. If Congress has not codified the relevant rule of international law in a criminal statute, then there is no basis for imposing criminal liability. Indeed, it is bedrock law that federal courts may not impose criminal liability based on an unwritten rule, whether as part of the general law, federal common law, or customary international law. *See* United States v. Gooding, 25 U.S. (12 Wheat.) 460, 474 (1827); United States v. Hudson, 11 U.S. (7 Cranch) 32, 33–34 (1812); Screws v. United States, 325 U.S. 91, 152 (1945) (Roberts, J., dissenting) ("Federal prosecutions must be founded on delineation by Congress of what is made criminal. To base federal prosecutions on the shifting and indeterminate decisions of courts is to sanction prosecutions for crimes based on definitions made by courts. This is tantamount to creating a new body of federal criminal common law." (internal citation omitted)). Accordingly, if Congress has not enacted a statute

that "[w]e have no congressional mandate to seek out and define new and debatable violations of the law of nations."[370] But when a statute explicitly references the law of nations, it is plausible to suppose that Congress has given the judiciary a mandate to define international law in that limited circumstance. One criminal statute, for example, proscribes certain conduct that is "in violation of the rights and obligations of the United States under the law of nations."[371] The key point is that a statute's invitation to define international law for limited purposes does not relate to judicial review under the Define and Punish Clause.

Finally, it is significant that nearly all of the federal statutes that reference the law of nations were originally enacted before *Erie*.[372] That is unsurprising, because the pre-*Erie* legal regime viewed the law of nations as part of the general common law.[373] As such, jurists in the nineteenth century had substantial freedom to independently assess the meaning of the law of nations because of the unique status of general law.[374] Modern legal thought, however, insists that once a sovereign has prescribed a rule of decision—for example, by defining the elements of an offense against international law—judges may not undermine that rule by relying on a reservoir of non-constitutional unwritten law. Accordingly, one should be hesitant to rely on statutes enacted before *Erie* to resolve the proper role of Congress and the judiciary under the Define and Punish Clause.

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defining and punishing an offense against the law of nations, federal courts may not fill the void because they have no criminal common law powers.

370. Sosa v. Alvarez-Machain, 542 U.S. 692, 728 (2004).

371. 18 U.S.C. § 2274 (1948); *see also id.* §§ 957, 967. These statutes likely violate the Fifth Amendment's Due Process Clause. A criminal statute is unconstitutional if it is "so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." Johnson v. United States, 135 S. Ct. 2551, 2556 (2015). Criminal statutes that impose liability simply for violating the law of nations (or the United State's obligations there under) provide no description of what conduct is actually prohibited. A statute that refers only to rights and obligations under international law, without more, can hardly provide fair notice to ordinary people. *See* Hamdan v. United States, 696 F.3d 1238, 1250 n.10 (D.C. Cir. 2012) ("A general prohibition against violations of 'international law' or the 'law of nations' or the 'law of war' may fail in certain cases to provide the fair notice that is a foundation of the rule of law in the United States."), *overruled on other grounds by* Al Bahlul v. United States, 767 F.3d 1 (D.C. Cir. 2014) (en banc).

372. Act of Sept. 24, 1789, ch. 20, 1 Stat. 77 (codified as amended at 28 U.S.C. § 1350 (2006)); Act of Mar. 3, 1819, ch. 77, 3 Stat. 513 (codified as amended at 33 U.S.C. § 384 (2006)); Act of Aug. 5, 1861, ch. 48, 12 Stat. 314 (codified as amended at 33 U.S.C. § 385 (2006)); Rev. Stat. § 753 (1873–74) (codified as amended at 28 U.S.C. § 2241 (2006)); Act of Mar. 4, 1909, ch. 321, 35 Stat. 1091 (codified as amended at 22 U.S.C. § 462 (2006)); Act of June 15, 1917, ch. 30, 40 Stat. 220 (codified as amended at 18 U.S.C. § 2274 (2006)); *id.* 40 Stat. 221 (codified as amended at 18 U.S.C. § 967 (2006)); *id.* 40 Stat. 223 (codified as amended at 18 U.S.C. § 756 (2006)); *id.* (codified as amended at 18 U.S.C. § 3058 (2006)); *id.* 40 Stat. 225 (codified as amended at 22 U.S.C. § 406 (2006)); *id.* 40 Stat. 230 (codified as amended at 18 U.S.C. § 957 (2006)).

373. *See supra* notes 274–284 and accompanying text.

374. Nelson, *supra* note 282, at 505–06.

CONCLUSION

There is much to consider in deciding whether the proper definition of international law under the Define and Punish Clause is a political question. The analysis turns on principles of federal jurisdiction, the institutional competence of different branches of government, and the details of customary international law. All of these considerations must take place within a complex constitutional inquiry into the meaning of a clause that is rarely written about. In light of this, it should be unsurprising that no one has yet considered in detail the relationship between the Define and Punish Clause and the political question doctrine. Nevertheless, courts have invalidated federal statutes that they believe are not faithful to the "correct" definition of customary international law.

It is unclear why this practice has persisted. An obvious explanation is that the presence of judicial review creates a powerful presumption that federal courts can decide whether Acts of Congress are unconstitutional. This makes sense as a general proposition. *Marbury*'s declaration that federal courts must "say what the law is"[375] represents one of the pillars on which our constitutional tradition is built. But it is equally fundamental that there are some legal questions the judiciary cannot answer. As the Court has said, "[t]he judicial power of the United States . . . is not an unconditioned authority to determine the constitutionality of legislative or executive acts."[376] If a plaintiff lacks standing or a dispute turns on a political question, we do not see this as a problem in need of a solution. Rather, we say that there are some questions "the courts have no business deciding."[377]

In this Article, I have endeavored to show that the proper definition of international law under the Define and Punish Clause is a question that federal courts have no business deciding. This question will continue to resurface in federal courts given the explosion of human rights litigation and the increasingly common criminal prosecution of enemy combatants. In these cases, federal courts must refrain from deciding whether Congress has defined international law as the global community would have it. Adhering to this principle would bring clarity to the muddied issue of how international law binds American actors. It would also remain faithful to the legal hierarchy embodied in the Supremacy Clause. If supreme federal law consists only of the Constitution, federal statutes, and federal treaties, then international rules neither ratified nor adopted by the people's elected representatives are not really law in any sense of the word.

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375. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

376. Valley Forge Christian Coll. v. Am. United for Separation of Church and State, Inc., 454 U.S. 464, 471 (1982).

377. DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 341 (2006).