

## ARTICLE I AND EXTRATERRITORIALITY

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*Courts and scholars have increasingly taken the position that the Constitution implicitly limits Congress's power to punish crimes that lack a sufficient U.S. nexus. I refer to this as the "territoriality thesis." Courts have invoked the territoriality thesis to vacate convictions of foreign nationals engaged in international drug smuggling. The precise limits of the territoriality thesis are not entirely clear, but it is not hard to imagine it being invoked to check the political branches' use of legislation to address a wide variety of transnational problems.*

*This Article rebuts the territoriality thesis. I explain that the various textual sources in which courts and scholars have grounded the territorial thesis do not limit legislative power in any way, and nobody suggested they did before the late 20th century. I also show that the territoriality thesis reflects an anachronistic conception of international law. Although modern international law limits prescriptive jurisdiction today, it did not at the Framing. The historical sources territorial thesis advocates have relied on either (1) do not speak to this issue, or (2) were unpersuasive and likely affected domestic political considerations. There is, in short, no reason to constitutionalize international law limits into Congress's powers.*

### INTRODUCTION

In 2020, the United States Court of Appeals for the Eleventh Circuit invented a constitutional right that exclusively protects foreign drug smugglers.<sup>1</sup> *United States v. Davila-Mendoza* arose from a criminal prosecution of three foreign drug smugglers arrested in Jamaica's territorial waters for possession of 3,500 kilograms of marijuana. The government secured convictions under the Maritime Drug Law Enforcement Act ("MDLEA"). On appeal, the Eleventh Circuit unanimously held that that Congress lacked the constitutional power to punish foreign drug smugglers arrested in international waters because there was no "jurisdictional hook ... to tie wholly foreign extraterritorial conduct to the United States."<sup>2</sup>

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<sup>1</sup> *United States v. Davila-Mendoza*, 972 F.3d 1264 (11th Cir. 2020).

<sup>2</sup> *Id.* at 1275.

Many other judges have held or argued that Congress lacks the power to punish foreigners' conduct abroad, a position I refer to as "the territoriality thesis." But their rationales have differed. Several circuit courts of appeals have held or stated in dicta that the Fifth Amendment's Due Process Clause bars Congress from enacting legislation that targets foreigners with an insufficient nexus to the United States.<sup>3</sup> Several appellate court judges have argued that this limit on extraterritorial jurisdiction comes from the Define and Punish Clause. *Davila-Mendoza* was broader still, holding that none of the Article I powers the government invoked—the Define and Punish Clause, the Foreign Commerce Clause, or the Necessary and Proper Clause—could cover foreign drug smugglers who, at the time of their arrest, were in another country's territorial waters.

Scholars have overwhelmingly supported this emerging consensus.<sup>4</sup> This is surprising, given the thesis's potentially far-reaching implications. Almost all the above cases arose from MDLEA prosecutions for international drug smuggling. This is no accident: Congress usually does not write criminal statutes to cover purely foreign conduct with little connection to the United States. When it does, the conduct at issue tends to relate to pervasive transnational problems, like terrorism, money laundering, piracy, and drug smuggling. Giving the territoriality thesis more bite could easily threaten the United States' ability to prosecute some of these crimes.

This Article rebuts the territoriality thesis. It explains that the territoriality thesis rests on poor textual arguments; relies on poor structural analogies to federalism; and misreads precedents. There is simply no reason for courts to second-guess the political branches' exercise of jurisdiction abroad.

As background, the territoriality thesis borrows heavily from longstanding international rules governing prescriptive jurisdiction.<sup>5</sup>

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<sup>3</sup> *United States v. Clark*, 435 F.3d 1100, 1108-09 (9th Cir. 2006); *United States v. Yousef*, 327 F.3d 56, 111-12 (2d Cir. 2003); *United States v. Perez-Oviedo*, 281 F.3d 400, 402-03 (3d Cir. 2002); *United States v. Suerte*, 291 F.3d 366, 369-77 (5th Cir. 2002); *United States v. Cardales-Luna*, 168 F.3d 548, 552-53 (1st Cir. 1999).

<sup>4</sup> See, e.g., Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 Harv. L. Rev. 1217 (1992).

<sup>5</sup> Prescriptive jurisdiction refers to "the authority of a state to make law applicable to persons, property, or conduct," and is distinct from adjudicative jurisdiction ("the authority of a state to apply law to persons or things") and enforcement jurisdiction ("the authority of a state to exercise its power to compel compliance with the law"). RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW

As Sir James Crawford explains, there is a “presumption” in international law “that jurisdiction (in all its forms) is territorial, and may not be exercised extraterritorially without some specific basis in international law.”<sup>6</sup> There are, of course, many exceptions. States can generally exercise jurisdiction over extraterritorial conduct by their own nationals (this is sometimes called the “nationality” or “active personality principle”), or by foreigners who:

- threaten a state’s security (“protective principle”);
- harm a state’s nationals (“passive personality principle”); or
- cause harmful effects in the state (“effects principle”).<sup>7</sup>

The precise scope of these exceptions can prove controversial,<sup>8</sup> but “universal jurisdiction” is broader still. Universal jurisdiction is not tied to any specific territorial or personal nexus, but rather is tied to the character of the crime.<sup>9</sup> As formulated in the *Eichman* case, “every country” can prosecute “grave offenses against the law of nations itself.” It is generally accepted that states can exercise universal jurisdiction over at minimum piracy, slavery, genocide, crimes against humanity, and grave violations of the laws of war. Piracy in turn is widely regarded as the first universal jurisdiction crime.<sup>10</sup>

The territoriality thesis has, at various point, rested on different hooks. By the most sophisticated account, there is a purported “double redundancy” in the Constitution’s Define and Punish Clause, which empowers Congress to “define and punish ... piracies and

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§ 401(a)-(c) (2018).

<sup>6</sup> JAMES CRAWFORD, *BROWNLIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 440 (9th ed. 2019).

<sup>7</sup> *Id.* at 443-47.

<sup>8</sup> For example, Andreas Lowenfeld posited that the United States could likely exercise jurisdiction over a foreign cruise ship that picks up passengers in New York Harbor with “respect to the safety equipment that the ship must carry” but probably could not “prescribe the wages, hours, or vacation rights of the [ship’s] seamen.” Andreas F. Lowenfeld, *Public Law in the International Arena: Conflict of Laws, International Law, and Some Suggestions for Their Interaction*, 163 *COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW* 311, 327-28 (1979).

<sup>9</sup> *See, e.g.*, CRAWFORD, *supra* note 6, at 451 (“Defined simply, universal jurisdiction amounts to the assertion of criminal jurisdiction by a state in the absence of any other generally recognized head of prescriptive jurisdiction.”) (footnotes omitted).

<sup>10</sup> *See, e.g., id.* at 452 (“The original crime to which universal jurisdiction attached was that of piracy *jure gentium* ....”).

felonies on the High Seas, and offences against the Law of Nations.”<sup>11</sup> Piracy, after all, is both a “felony on the High Seas” and an “offense against the law of nations.” Piracy was a unique at the time of the Framing, so the argument goes, because it was the sole crime subject to universal jurisdiction. It follows that the Framers enumerated piracy to illustrate Congress cannot exercise universal jurisdiction over any other crimes. (There would presumably then be an open question whether Congress could exercise universal jurisdiction over crimes like genocide and slavery as international law has changed, or whether it is limited to piracy.)

This argument has received the greatest attention. In the early 2000s, courts rejected this argument out of hand.<sup>12</sup> But the tide shifted after Professor Eugene Kontorovich wrote a series of articles defending this view.<sup>13</sup> Just this year, the en banc First Circuit recently declined to reach whether “Congress’s power under the Define and Punish Clause is cabined by international law.”<sup>14</sup> Judge David Barron, a former head of the Justice Department’s Office of Legal Counsel and leading constitutional scholar,<sup>15</sup> argued in a concurrence that Congress’s power was territorially limited in this way.<sup>16</sup> So have Judge Juan Torruella of the First Circuit<sup>17</sup> and Judge Mark Davis of the Eastern District of Virginia.<sup>18</sup> The Fourth Circuit has also cited this argument favorably.<sup>19</sup> Secondary literature also repeatedly cites this

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<sup>11</sup> U.S. CONST. art. 1, sect. 8, cl. 10.

<sup>12</sup> See, e.g., *United States v. Suerte*, 291 F.3d 366, 374-75 (5th Cir. 2002);

<sup>13</sup> See, e.g., Eugene Kontorovich, *The “Define and Punish” Clause and the Limit of Universal Jurisdiction*, 103 Nw. L. Rev. 149 (2009);

<sup>14</sup> *United States v. Aybar-Ulloa*, 987 F.3d 1, 14-15 (1st Cir. 2021) (en banc).

<sup>15</sup> Consider, for example, David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb: Framing the Problem, Doctrine, and Original Understanding*, 121 Harv. L. Rev. 689 (2008), which Supreme Court justices have understood to be an authoritative treatment of Article II power. See *Free Enter. Fund v. PCAOB*, 130 S. Ct. 3138, 3181 (Breyer, J., dissenting); *Al-Bihani v. Obama*, 619 F.3d 1, 11 (Kavanaugh, J., concurring in the denial of rehearing en banc).

<sup>16</sup> *Aybar-Ulloa*, 987 F.3d at 15 (Barron, J., concurring in the judgment) (“There is a fair amount of support for the contention that Article I’s Define and Punish Clause is impliedly limited by the law of nations in ways that constrain Congress’s authority to rely on that Clause to subject foreign nationals to our criminal laws for conduct that they engage on while they are on foreign vessels — even when those vessels are on the high seas.”).

<sup>17</sup> *United States v. Aybar-Ulloa*, 913 F.3d 47, 59 (Torruella, J., dissenting) (“[T]he Define and Punish clause does not give Congress the ability to regulate Felonies on the high seas having no nexus to the United States.”); *United States v. Cardales-Luna*, 632 F.3d 731, 740-41 (2011) (Torruella, J., dissenting).

<sup>18</sup> *United States v. Hasan*, 747 F. Supp. 2d 599, 603-07 (E.D. Va. 2010).

<sup>19</sup> *United States v. Dire*, 680 F.3d 446, 454 (4th Cir. 2012).

argument favorably,<sup>20</sup> even when they disagree with its ultimate conclusion.<sup>21</sup> Nobody yet has debunked the argument.

Others have made more structural or historical arguments, insisting international law limits on legislative powers were baked into the Constitution, even though not expressly limited. This argument probably has the most force. Consider the following pieces of evidence. Starting in the early 1790s, state supreme courts began holding that they lacked the power to punish crimes committed outside their territories.<sup>22</sup> It would not be a stretch to argue that Congress lacked this power too. In 1793, Secretary of State Thomas Jefferson wrote that “[t]he laws of this country take no notice of crimes committed out of their jurisdiction.”<sup>23</sup> In 1800, then Congressman Marshall argued in a speech that “piracy ... alone is punishable by all nations,” and “[n]o particular nation can increase or diminish the list of offences thus punishable.”<sup>24</sup> At minimum, the Supreme Court seems to have taken the view that international law limited legislative powers at the time of the Framing. Its most recent opinion on the presumption against extraterritoriality traced the rule to the “medieval maxim *Statuta suo clauduntur territorio, nec ultra territorium disponunt*.”<sup>25</sup> And in *Kiobel v. Royal Dutch Petroleum Co.* (2013), it held that the presumption against extraterritoriality was ingrained into U.S. law as early as 1789.<sup>26</sup>

Parts I rebuts textual arguments for the territoriality thesis. The notion that the Constitution impose substantive limits on legislative power is not at all obvious from the Constitution’s text or drafting history. Although the Framers often said that Congress is a body of limited powers, they were referring to Congress’s power to enact domestic criminal legislation. No one ever suggested that Article I’s structure impliedly limits Congress’s power to regulate foreigners’

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<sup>20</sup> See, e.g., Anthony J. Colangelo, *A Unified Approach to Extraterritoriality*, 97 Va. L. Rev. 1019, 1022 (2011); Allyson Bennett, Note, *That Sinking Feeling: Stateless Ships, Universal Jurisdiction, and the Drug Trafficking Vessel Interdiction Act*, 37 Yale J. Int’l L. 433 (2012).

<sup>21</sup> See Aaron J. Casavant, *In Defense of the U.S. Maritime Drug Enforcement Act: A Justification for the Law’s Extraterritorial Reach*, 8 Harv. Nat’l Sec. J. 113 (2017); Austen L. Parrish, *Evading Legislative Jurisdiction*, 87 Notre Dame L. Rev. 1673, 1683 n.39 (2012).

<sup>22</sup> See, e.g., *Gilbert v. Steadman*, 1 Root. 403, 404 (Conn. 1792).

<sup>23</sup> 1 Am. State Papers 175.

<sup>24</sup> John Marshall, Speech, March 7, 1800.

<sup>25</sup> *WesternGeco LLC v. ION Geophysical Corp.*, 138 S. Ct. 2129, 2136 (2018) (citing ANTONIN SCALIA & BRYAN GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* § 43, at 268 (2012)).

<sup>26</sup> 133 S. Ct. 1659, 1667-68 (2013).

extraterritorial conduct. The real explanation for the Define and Punish Clause's "double redundancy," moreover, is more innocuous. The phrasing is largely a historical accident, based on the Framers borrowing various textual provisions from prior English statutes, and tacking on additional powers as needed. Nobody ever thought its phrasing had jurisdictional significance. Finally, the double redundancy argument creates real textual problems, as it assumes that Congress has a limited power to punish one unique universal jurisdiction crime: piracy. But that is not true. Congress has the power to "define ... piracies" plural. This significantly undermines the sole-universal-jurisdiction crime theory.

I next address the main Framing-era historical evidence that territorial thesis advocates have marshaled. I start by recounting what the leading public international law authorities said about territorial jurisdiction and point out that virtually all suggested that states had the right to punish foreigners who, after committing crimes abroad, took refuge in their territory. Many early American sources cited these authorities and were aware of these arguments. The few 1790s U.S. sources that took a contrary view are largely inconsistent with one another and largely fail to cite authority for their arguments. There was, to be sure, an emerging concern among U.S. residents about European powers exercising jurisdiction over U.S. nationals and residents. But many Americans who had these concerns supported a more expansive conception of U.S. criminal jurisdiction, because it could be used to undercut requests for extradition, which was far more controversial.

I conclude with some lessons regarding where the territorial thesis went wrong. The notion that Congress cannot enact extraterritorial criminal legislation caught on quickly, but nobody ever scrutinized it. History of course will always have a place in interpreting legal texts. But judges should require a significant amount of historical evidence before they use it to strike down legislation.

## I. THE CONSTITUTION'S TEXT

In this section, I rebut the argument, made by Kontorovich and several courts, that the Constitution implicitly limits Congress's power to punish crimes committed in other jurisdictions. I first note the facial implausibility of this theory. The Constitution does not expressly impose any such limits on Congress's powers, but instead seems to contemplate the possibility of some extraterritorial enforcement powers. In so doing, I address the argument, which has

taken hold among some courts and the Eleventh Circuit, that the phrase “the high seas” in the Constitution refers exclusively to international waters and does not allow for punishment of crimes in other countries’ territorial waters.

I then address Kontorovich’s “double redundancy” argument head-on, devoting most of this section to undermining it. I make three arguments against it. First, it is ahistorical: the supposed double redundancy argument did not occur to anyone until Kontorovich wrote his article. That should minimize its appeal as a reading of constitutional text. Second, the double redundancy argument fails to make sense of the Define and Punish Clause’s historical background. The first redundancy, between “piracies and felonies on the high seas,” was largely historical accident. The phrase was borrowed from Parliamentary jurisdictional statutes designed to transfer a wide range of crimes from admiralty to common law jurisdictions. The second redundancy, between “piracies” and “offences against the law of nations,” is also accidental. There was a sense that the federal government needed the power to punish such offences because the country would be held responsible for such crimes. The Framers included this power as a result and did not feel the need to delete the reference to “piracies.” Finally, I argue that Kontorovich’s argument has textual problems of its own, as it fails to account for the fact that the Constitution uses the plural “piracies,” not “piracy,” and gives Congress the power to define those offences. It is not plausible, as a result, to read the Define and Punish Clause as giving Congress the power to punish a single, already defined universal jurisdiction offense of piracy.

#### *A. The Lack of Express Territorial Limits on Congress’s Powers*

The Define and Punish Clause states: “Congress shall have the Power ... to define and punish piracies and felonies committed on the high seas, and offences against the law of nations.”<sup>27</sup> Scholars sometimes divide this clause into three, based on the three crimes listed: (1) piracies (“Piracies Clause”); (2) felonies on the high seas (“Felonies Clause”); and (3) offences against the law of nations (“Offences Clause”).

The Define and Punish Clause does not mention, on its own terms, any territorial limitation. This poses an immediate problem for the

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<sup>27</sup> U.S. CONST., art. I, sect. 8, cl. 10.

territoriality thesis. It would have been easy to write a territorial limitation into this Clause, or anywhere else into the Constitution. Congress's power to define and punish piracies and felonies is itself limited to those that take place "on the high seas." Yet no part of the Constitution states that Congress's power to punish is limited geographically to the territorial United States and the high seas.

If anything, the Constitution suggests the opposite. Article III, section 2, clause 3 contemplates that Congress can punish some extraterritorial crimes. It provides that all federal criminal trials must be "held in the state where the said crimes shall have been committed." If the crimes were "not committed within any state, the trial shall be at such place or places as the Congress may by law have directed." The Framers may have had crimes committed on the high seas or in U.S. territories on their minds when they wrote this Clause. But they did not write these limits into the Constitution.

The Define and Punish Clause also seems to rebut the territoriality thesis in two respects. First, there is virtually no dispute that Congress has the power to punish piracy that has no U.S. nexus.<sup>28</sup> This became a consensus view very quickly in the early Republic. In his *Commentaries on the Laws of England*, William Blackstone asserted that "every community hath a right" to punish pirates because they are enemies of all mankind, or "*hostis humani generis*."<sup>29</sup> James Wilson invoked this passage in a 1791 grand jury charge to the Circuit Court for the District of Virginia: "Piracy, as we have seen, is a crime against the universal law of society. By that law, it may be punished by every community."<sup>30</sup> Then-Congressman said the same thing in an 1800 speech: "A pirate under the law of nations, is an enemy of the human race. Being the enemy of all he is liable to be punished by all."<sup>31</sup> And Justice Joseph Story, writing for the Supreme Court in 1820, acknowledged that "piracy" is "an offence against the law of nations ... as an offence against the universal law of society, a pirate being

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<sup>28</sup> See, e.g., Kontorovich, *supra* note 13, at 152; Curtis A. Bradley, *Universal Jurisdiction and U.S. Law*, 2001 U. CHI. L. F. 323, 324 (2001) ("United States courts invoked universal jurisdiction in the nineteenth century to justify the regulation of piracy on the high seas.").

<sup>29</sup> 4 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* \*71.

<sup>30</sup> James Wilson's Charge to the Grand Jury of the Circuit Court for the District of Virginia, May 23, 1791, Richmond, Va., *printed in* 2 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, at 166, 178 (Maeva Marcus ed., 1988) ("DHRC").

<sup>31</sup> Speech, Washington, D.C., Mar. 7, 1800, *printed in* 4 Papers of John Marshall 82, 87.



deemed an enemy of the human race.”<sup>32</sup> There is, as we shall see, some question whether the phrases “enemy of all mankind” and “*hostes humani generis*” originally had a jurisdictional significance under English or international law, but this account became established wisdom very early in this country’s history. Congress, as a result, almost certainly has at least some authority to punish some crimes without a U.S. nexus.

Second, the Define and Punish Clause clarifies that it allows for punishment of crimes outside U.S. territory, “on the high Seas.” To be sure, courts have uniformly interpreted this phrase to give limited jurisdiction over crimes committed in international waters, not those in the territorial waters of other countries.<sup>33</sup> Indeed, this is partly what drove the Eleventh Circuit’s decision in *Davila-Mendoza* (discussed above). The Court held that drug smugglers arrested in the “territorial waters of” Jamaica could not be prosecuted under the Define and Punish Clause because “[t]he high seas lie beyond any nation’s territorial sea.”<sup>34</sup> But his prevailing wisdom is wrong. The “high seas” as used in the Define and Punish Clause refers to international waters, as well as the territorial waters of other states. Blackstone explained that “[t]he main or high seas” refers to the ocean beyond “the low-water mark.” He did not limit it to international waters.<sup>35</sup> Early U.S. court decisions accordingly interpreted “the words, ‘high seas,’” in Justice Story’s words, to “mean any waters on the sea coast, which are without the boundaries of low water mark; although such waters may be in a roadstead or bay within the jurisdictional limits of a foreign government.”<sup>36</sup>

There is admittedly some controversy as to whether the “high seas” included bays and rivers.<sup>37</sup> After surveying numerous legal authorities, he later ruled in *United States v. Grush* (1829), in his capacity as Circuit Justice, that bays, creeks, &c. within the narrow

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<sup>32</sup> *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 161 (1820).

<sup>33</sup> *United States v. Carvajal*, 924 F. Supp. 2d 219, 234 (D.D.C. 2013) (“Courts treat ‘the high seas’ as the waters not within any nation’s territorial seas—i.e., the high seas are the waters beyond the coastal state’s sovereignty, meaning those greater than twelve miles from the coast.”), *aff’d on other grounds sub nom.* *United States v. Miranda*, 780 F.3d 1185 (D.C. Cir. 2015); *see also, e.g.*, *In re Air Crash Off Long Island, New York*, on July 17, 1996, 209 F.3d 200, 206 (2d Cir. 2000).

<sup>34</sup> *United States v. Davila-Mendoza*, 972 F.3d 1264, 1269 n.2 (11th Cir. 2020).

<sup>35</sup> 3 BLACKSTONE, *supra* note 29, at \*110.

<sup>36</sup> *United States v. Ross*, 27 F. Cas. 899, 900 (No. 16, 196) (C.C.R.I. 1813) (Story, J.).

<sup>37</sup> *See, e.g.*, *United States v. Jackson*, 26 F. Cas. 558, 559 (C.C.S.D.N.Y. 1843) (Thompson, J.) (charging the jury that the “high seas” did not include Veracruz Harbor in Mexico).

headlands of the coast” were not included within the term.<sup>38</sup> The Supreme Court held in *United States v. Wiltberger* (1821) that the “high seas” did not extend to a ship located in China, thirty-five miles upriver.<sup>39</sup> Notably, the Crimes Act of 1790, the first criminal statute Congress ever enacted, punished maritime offenses not just on the “high seas,” but also “in any river, haven, basin, or bay, out of the jurisdiction of any particular State.”<sup>40</sup> This enumeration could be evidence that “bays,” “rivers,” and so on were not included within the term “high seas” at the time of the Framing. But the enumeration could also cut the other way: “high seas” in the Constitution arguably must have included “bays” and “rivers,” or else no part of the Constitution would have justified this jurisdictional nexus.

Regardless of this issue, there was never any question that it extended all the way to the ocean that “washes a [foreign] coast.”<sup>41</sup> The leading constitutional law treatises of the early Republic adopted this definition too. William Rawle’s *View of the Constitution* stated that the “high seas” referred to the “on the sea coast beyond the boundaries of low water mark, although in a roadstead or bay, within the jurisdiction or limits of one of the states or of a foreign government.”<sup>42</sup> Joseph Story agreed with this interpretation in his *Commentaries on the Constitution of the United States*, asserting that “the meaning of ‘high seas’ ... does not seem to admit of any serious doubt.”<sup>43</sup> Supreme Court opinions followed this view through the early 20th century.<sup>44</sup> The notion that “high seas” refers only to international waters seems to stem, at least in American law, from some dicta in late 19th century cases that passingly described the “high seas” as oceans “where the laws of no particular state has exclusive force.”<sup>45</sup>

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<sup>38</sup> 26 F. Cas. 4 (No. 15,268) (C.C. Mass 1829) (Story, J.)

<sup>39</sup> 18 U.S. (5 Wheat.) 76, 92.

<sup>40</sup> 1 Stat. 113.

<sup>41</sup> *Id.* at 94.

<sup>42</sup> WILLIAM RAWLE, *A VIEW OF THE CONSTITUTION* 107 (2d ed. 1829).

<sup>43</sup> 3 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES*, § 1159 (1833).

<sup>44</sup> *See, e.g.*, *The Manila Prize Cases*, 188 U.S. 254, 271 (1903) (“[H]igh seas include coast waters without the boundaries of low water mark, though within bays or roadsteads—waters on which a court of admiralty has jurisdiction.”).

<sup>45</sup> *See The Scotland*, 105 U.S. 24, 29-30 (1881) (“But if a collision occurs *on the high seas*, where the law of no particular state has exclusive force, but all are equal, any forum called upon to settle the rights of the parties would prima facie determine them by its own law as presumptively expressing the rules of justice; but if the contesting vessels belonged to the same foreign nation, the court would assume that they were subject to the law of their nation carried under their common flag, and would determine the controversy accordingly.”) (emphasis added).

To be sure, this does not necessarily mean that Congress has the power to prosecute all crimes that take place on all ships on the high seas. John Marshall later argued that a statute punishing crimes on “high seas” covered only crimes committed on U.S. ships.<sup>46</sup> But there is no textual basis for incorporating this limit into the Constitution. It would have to come from preexisting, unwritten conceptions of public law, which is discussed below.<sup>47</sup>

Finally, some have unpersuasively argued that such international limits on U.S. territorial powers are necessary because, at the time of the Framing, “Congress was widely seen as a body with limited and defined powers, with particularly narrow criminal jurisdiction.”<sup>48</sup> But this is a category error. Courts and commentators have argued that Congress has limited criminal jurisdiction powers to prevent it from regulating internal conduct subject to the states’ jurisdiction.<sup>49</sup> Similarly, some scholars have argued that the federal government should not be understood to have extra-constitutional powers that are not specifically enumerated in the Constitution.<sup>50</sup> But there’s little to no precedent suggesting that territorial limits should be implied into the Constitution to prevent Congress from infringing *foreign* states’ jurisdictions. (What little authorities do exist are discussed below.<sup>51</sup>)

In sum, there’s no obvious textual case for the territoriality thesis.

### B. The Double Redundancy Argument

Yet Kontorovich asserts that the Define and Punish Clause is the source of a territorial limit on Congressional power. This is so, he says, because “‘Piracies’ refers to a particular crime. ‘Felonies,’ in contrast, describes a broad category, as does ‘Offenses against the Law of Nations.’ Piracy is a subspecies of felony, and one that necessarily

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<sup>46</sup> *Infra* Part II(C).

<sup>47</sup> *Infra* Part II.

<sup>48</sup> Kontorovich, *supra* note 13, at 172; *see also, e.g.*, Curtis A. Bradley, *Universal Jurisdiction and U.S. Law*, 2001 U. Chi. Legal F. 323, 349 (2001) (“To the extent that constitutional restraints on Congress are desirable in this context, the most promising areas of limitation, contrary to the views of some commentators, are structural rather than individual rights-oriented.”).

<sup>49</sup> *See, e.g.*, *United States v. Lopez*, 514 U.S. 549, 557 (1995) (“[T]he scope of the interstate commerce power “must be considered in the light of our dual system of government ....”) (internal citations omitted).

<sup>50</sup> *See generally, e.g.*, Michael D. Ramsey, *The Myth of Extraconstitutional Foreign Affairs Power*, 42 *William & Mary L. Rev.* 379 (2000).

<sup>51</sup> *Infra* Part II.

occurs on the high seas. Moreover, piracy was an offense against the law of nations....<sup>52</sup> And “piracy was the only universal jurisdiction offense.”<sup>53</sup> So “the enumeration of ‘Piracies’ implies” that Piracy is the solve universal jurisdiction crime that Congress can punish.<sup>54</sup> By contrast, “if ‘Felonies’” or offenses against the law of nations “can be punished without regard to a U.S. nexus, then all distinction between [these offenses] and ‘Piracies’ falls away.”<sup>55</sup>

Beyond the problems mentioned above, this account suffers three defects. First, nobody at the time of the Framing endorsed this argument. Second, the double redundancy came about as a matter of historical accident. I trace that history, and flag throughout that it would be inconsistent with the history or structure of the Define and Punish Clause to read into it a territorial limitation. Third, Kontorovich’s reading is inconsistent with the Define and Punish Clause’s grant of the power to “define ... piracies.

### 1. Original Understanding

There is no direct originalist support for this double redundancy argument, a point that everyone seems to have overlooked. In a footnote, Kontorovich appears to concede this point. He acknowledges that his position is not “that the delegates at Philadelphia used the words ‘Piracies and Felonies’ for the particular purpose of limiting universal jurisdiction. Rather, the limitations are a consequence of the words they used, which had well established public meanings.”<sup>56</sup>

But there is no evidence that anybody at the time of the Framing (or really anyone until Kontorovich) understood that the Define and Punish Clause impliedly limited Congress’s extraterritorial powers. Nor did anyone at the Philadelphia Convention. While there may have been some suggestions in the 1790s that such territorial limits might exist, as discussed below, nobody ever suggested that these limits arose from the Define and Punish Clause wording or structure. That undercuts any argument as to “public meaning.”

This poses a substantial problem for the territoriality thesis. There is little serious question that modern lawyers should not focus on how

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<sup>52</sup> Kontorovich, *supra* note 13, at 163.

<sup>53</sup> *Id.* at 165.

<sup>54</sup> *Id.* at 167.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 156 n.32.

the Framers believed the Constitution “would accomplish” (Judge Frank Easterbrook calls this “expectationism”).<sup>57</sup> But most theories of original meaning focus on how linguistic communities understood words and phrases at the time they were written into law.<sup>58</sup> The fact that nobody thought the Define and Punish Clause prohibited extraterritorial application of U.S. law until Kontorovich’s article is strong evidence that the argument is wrong.

## 2. Origins of the Define and Punish Clause

The double redundancy theory should also be rejected because there’s no mystery as to how the double redundancy came about. The first redundancy between piracies and felonies emerged due to historical accident, as it was copied from various archaic Parliamentary statutes that granted jurisdiction over crimes at sea. The second redundancy came about thanks to a gap in the Articles of Confederation, and a last-minute edit in the Philadelphia Convention. There is, simply put, no reason to read the Define and Punish Clause as imposing a territorial limit on Congress’s powers.

### a. English Law

The Define and Punish Clause’s structure and redundant wording date back to various statutes that Parliament enacted in 1536 and 1700 that established courts for punishing crimes at sea. This section explains the origins of those laws and illustrates that there was never any historical understanding that “piracies” were considered a uniquely extraterritorial offense.

Dating back to the Norman Conquest, England relied on private ships to attack enemy vessels during times of war in exchange for a portion of the value of their prizes.<sup>59</sup> This made England a stronger

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<sup>57</sup> Frank H. Easterbrook, *Abstraction and Authority*, 59 U. Chi. L. Rev. 349, 359 (1992).

<sup>58</sup> See, e.g., John F. Manning, *Foreword: The Means of Constitutional Power*, 128 Harv. L. Rev. 1, 68 (2014); Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 Geo. Wash. L. Rev. 1119, 1122 (1998); Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 Geo. Wash. L. Rev. 1127, 1132 (1998) (“It follows that the Constitution should be interpreted in accordance with their understanding. This is the theoretical foundation of originalism. If the Constitution is authoritative because the people of 1787 had an original right to establish a government for themselves and their posterity, the words they wrote should be interpreted—to the best of our ability—as they meant them.”).

<sup>59</sup> R.G. Marsden, *Early Prize Jurisdiction and Prize Law in England*, 24 ENGLISH HIST. REV. 675, 675 (1909).

naval power than it otherwise would have been, as the King originally controlled very few fighting ships.<sup>60</sup> But these private sailors would sometimes attack friendly ships for profit or to revenge private wrongs, which could prompt diplomatic crises or even war.<sup>61</sup> England would traditionally punish crimes at sea in common law courts. Yet juries often refused to convict because piracies took place outside their county, and they lacked personal knowledge of the crime.<sup>62</sup>

England tried to fix this problem in 1360 by transferring jurisdiction over offenses at sea offenses to admiralty courts that lacked juries and applied civil law.<sup>63</sup> But this only created new problems. Admiralty courts did not accept circumstantial evidence, and thus could convict only if the accused confessed to the crime (and pirates would not confess unless they were tortured), or if witnesses testified to the crimes (which pirates could resolve by killing all witnesses).<sup>64</sup> As a result, admiralty courts do not appear to have convicted many pirates.<sup>65</sup>

The Offenses at Sea Act of 1536 tried to fix these problems by creating new commissions that had the power to set up courts of oyer

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<sup>60</sup> N.A.M. Rodgers, *The Naval Service of the Cinque Ports*, 111 ENGLISH HIST. REV. 636, 637-38 (1996).

<sup>61</sup> R.G. Marsden, *Early Prize Jurisdiction and Prize Law in England*, 24 ENGLISH HISTORICAL REV. 675, 677 (1909) (“The powerful and privileged organisation of the Cinque Ports gave the kings of England no small trouble by reason of their piratical habits and their readiness to redress on their own account their grievances against foreign enemies and domestic rivals.”). When undertaken for revenge, these attacks were known as “reprisals.” See GEOFFREY BUTLER & SIMON MACCOBY, *THE DEVELOPMENT OF INTERNATIONAL LAW 174-75* (1928) (“Reprisals here clearly mean forcible seizure of goods, and in exceptional cases of persons, from those who have made similar seizures unprovoked.”).

<sup>62</sup> *Id.* at 679.

<sup>63</sup> *Id.* at 681 (“[A]fter 1360 pirates were seldom, if ever, tried upon the criminal charge in any other court than his.”); MARK G. HANNA, *PIRATE NESTS AND THE RISE OF THE BRITISH EMPIRE, 1570-1740*, at 57 n.19 (2015).

<sup>64</sup> HANNA, *supra* note 63, at 31 (“Applying the civil law to try pirates led to a number of serious, unanticipated issues. For one, convictions could only come from confession—which frequently necessitated the threat of torture, if not torture itself—or from the testimony of independent witnesses, who were generally the pirates’ prisoners. This legal requirement encouraged pirates to murder their victims.”); L. M. Hill, *The Two-Witness Rule in English Treason Trials: Some Comments on the Emergence of Procedural Law*, 12 AM. J. LEGAL HIST. 95, 102. (1968).

<sup>65</sup> HANNA, *supra* note 63, at 681 (“No record has been found of a pirate having been hanged by the admiral before the sixteenth century ...”); see also *id.* at 684 (“[A]lthough the criminal jurisdiction was in theory transferred to the lord admiral, in practice it seems to have either fallen altogether into disuse or to have been wholly inefficient.”)

and terminer that would try pirates under common law rules.<sup>66</sup> Such commissions would have jurisdiction to punish “all Treasons, Felonies, Robberies, Murthers and Confederacies hereafter to be committed in or upon the Sea, or in any other Haven, River, Creek or Place where the Admiral or Admirals have or pretend to have Power, Authority or Jurisdiction.”<sup>67</sup>

This phrasing is striking in three respects. First, its structure parallels the Define and Punish Clause: It refers to felonies, and several other crimes committed on specific bodies of water. Second, it grants the new courts jurisdiction over a large list of crimes—murders, robberies, and felonies—but not piracy. The Act uses the word “pirates” in the preamble, though not in the operative text.<sup>68</sup> This is likely because “piracy” did not have a clear legal meaning as of the 1500s, but instead appears to have been used as a pejorative for any perceived illegitimate violence at sea.<sup>69</sup> Third, the statute uses the all-encompassing term “felonies,” as well as robberies and murders, which are felonies. But this reflects a historical anachronism. At the time the statute was written, murder and robbery were not felonies at common law unless there was a breach of trust between victim and offender.<sup>70</sup>

But the Offenses at Sea Act became antiquated because it directed that the courts hold the trials in England.<sup>71</sup> This may have served England well in the 1500s. By the 1600s, England had taken colonies in the Americas. This created new opportunities for piracy in under-governed regions, especially because England relied heavily on

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<sup>66</sup> *Id.* at 31.

<sup>67</sup> 28 Henry VIII c. 15 (1536).

<sup>68</sup> See ALFRED RUBIN, LAW OF PIRACY 38 (1988) (“The legal words of art did not include any reference to international law or Roman law or, indeed, any concept of ‘piracy’ except in the nontechnical recitation of the preamble; instead the words of art of the English Common Law of crimes were used. It is in that context that the word ‘felonyes’ makes sense; the distinction being drawn involved the technical English law of ‘high treason,’ ‘petit treason’ and Common Law crime, as yet incompletely distinguished from trespass, or tort actions.”).

<sup>69</sup> *Id.* at 17 (“[A]t least in the popular mind there was no distinction between privateering and ‘piracy;’ a ‘pyrate’ could make “lawful prize” of a captured vessel. It is possible, although not entirely clear, that the word was a pejorative used for privateers of any nationality who captured English vessels. The word appears to have slipped so quickly into the general pejorative vocabulary that whatever legal precision it might have derived from classical sources eroded by the late 16th century.”).

<sup>70</sup> *Id.*

<sup>71</sup> 28 Henry VIII c. 15, § I(3) (stating that the crimes “shall be inquired, tried, heard, determined, and judged, in such Shires and Places in the Realm”).

privateers.<sup>72</sup> Colonies that were more closely regulated by the King gave themselves the power to prosecute piracy themselves.<sup>73</sup> Colonies that selected their own leaders were more welcoming to pirates, who often laundered their captured salves, bullion, and luxury goods in friendly ports.<sup>74</sup>

This legal gap prompted international backlash. Two noteworthy examples The Spanish attacked Charles Town for harboring pirates in 1686.<sup>75</sup> And in the 1690s, the Mogul Empire threatened reprisals against the East India Company in response to piracies committed by British sailors operating out of Madagascar who sold their loot in the Americas.<sup>76</sup> Indeed, some of the colonial governors had even granted commissions to some of the Madagascar pirates.<sup>77</sup> European powers began including in their peace treaties promises that they close their American ports to pirates.<sup>78</sup>

Britain pressured the colonies to step up prosecution, but this just led to colonies acquitting the pirates they tried.<sup>79</sup> And some colonies simply did not criminalize piracy at all. For example, Captain William Kidd was sent to trial in London, after being arrested in Boston, because there was no Massachusetts law in place against piracy at the time.<sup>80</sup> Trying pirates in England was no better, as witnesses might refuse to cooperate just to avoid being sent to England for the trial.<sup>81</sup>

Parliament responded by enacting the More Effectual Suppression of Piracy Act of 1700 (or the “Piracy Act of 1700”).<sup>82</sup> This was a sweeping statute. It first authorized trials in the colonies in special

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<sup>72</sup> Carla Gardina Pestana, *Early English Jamaica without Pirates*, 71 *William & Mary Q.* 321, 337-38 (2014).

<sup>73</sup> P. Bradley Nutting, *The Madagascar Connection: Parliament and Piracy*, 1690-1701, 22 *Am. J. L. Hist.* 202, 203-04 (1978).

<sup>74</sup> HANNA, *supra* note 63, at 140, 152.

<sup>75</sup> *Id.* at 153.

<sup>76</sup> Nutting, *supra* note 73, at 207.

<sup>77</sup> *Id.* at 210.

<sup>78</sup> *American Treaty of Peace, good Correspondence, and Neutrality, between the Crown of Great Britain and France*, concluded at London, Nov. 16, 1686, art. XIV, reprinted in GEORGE GOSTLING, *EXTRACTS FROM THE TREATIES BETWEEN GREAT-BRITAIN AND OTHER KINGDOMS AND STATES OF SUCH ARTICLES AS RELATE TO THE DUTY AND CONDUCT OF THE COMMANDERS OF HIS MAJESTY'S SHIPS OF WAR* 26, 31 (requiring that governors in the Americas “punish pirates, all such, who shall fit out any ship or ships, without lawful commission and authority”).

<sup>79</sup> HANNA, *supra* note 63, at 261-62.

<sup>80</sup> *Id.* at 213.

<sup>81</sup> *Id.* at 289.

<sup>82</sup> *Id.* (citing 11 & 12 Wm. III, c. 7).



commissions of “all Piracies, Felonies, and Robberies committed in or upon the Sea, or in any Haven, River, Creek, or Place, where the Admiral or Admirals have Power.”<sup>83</sup> This phrasing, of course, is the immediate source of the reference to piracies and felonies in the Define and Punish Clause: the Constitution just cuts the word “Robberies” and limits jurisdiction to the high Seas. To the extent there was any difference between “piracies” and “felonies” specified in the Piracy Act of 1700, the difference was in punishment. Colonial vice admiralty courts would generally try small-time felonies on the high seas that were punishable by fines (like assaulting an officer). By contrast, piracies (which carried the death penalty) were tried only by the Piracy Act of 1700’s special courts.<sup>84</sup>

The Courts set up under the Piracy Act of 1700 were sometimes referred to as “special courts of admiralty” or “Justiciary Courts of Admiralty.”<sup>85</sup> People who aid and abet piracy by hiding pirates or receiving their ships or stolen goods could be tried as accessories to piracy in England.<sup>86</sup> This is most likely because Parliament assumed that many accessories would be influential in the colonies, making conviction difficult.<sup>87</sup> Several pirates were tried in the American colonies under these statutes. Samuel Quelch, a privateer who attacked Portuguese ships shortly after Britain signed a peace treaty with Portugal (Quelch claimed he did not know about the treaty when he took the prizes), was the first, and he was convicted.<sup>88</sup> This resulted in backlash throughout Massachusetts, based in part on a popular sense that Quelch was a privateer, coupled with longstanding resentment of Royal interference with the colonies’ affairs.<sup>89</sup> But eventually the formerly sympathetic colonists began to turn against pirates too, thanks in part to the Treaty of Utrecht ended the War of Spanish Succession in 1713.<sup>90</sup> Under this Treaty, British subjects accessed more commercial opportunities: they gained the right to sell slaves to the Spanish Empire, earned greater ability to cut “logwood” (a type of tree used for dyeing wool), and expanded their commercial

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<sup>83</sup> 11 & 12 Wm. III, c. 7, § 1.

<sup>84</sup> DOROTHY S. TOWLE, ED., RECORDS OF THE VICE-ADMIRALTY COURT OF RHODE ISLAND, 1716-1752, at 3-4 & n.3 (1936).

<sup>85</sup> CARL UBBELOHDE, THE VICE-ADMIRALTY COURTS AND THE AMERICAN REVOLUTION 17 n.18 (2012). Sometimes (but not always) these trials took place by jury. *Id.*

<sup>86</sup> 11 & 12 Wm. III, c. 7, § 10.

<sup>87</sup> HANNA, *supra* note 63, at 289.

<sup>88</sup> *Id.* at 336.

<sup>89</sup> *Id.* at 337-39.

<sup>90</sup> *Id.* at 362.

fishing.<sup>91</sup> The colonies had more to lose from piracy, as a result, and willingly cracked down on the new generation of pirates (most famously Blackbeard) that preyed on shipping following the Treaty of Utrecht through 1725.<sup>92</sup> After this, piracy played a much smaller role in the Americas, though it was still part of some of the colonists' public consciousness even when they declared independence.<sup>93</sup> Indeed, a twelve-year-old Benjamin Franklin had published (and sold) a ballad about Blackbeard's capture.<sup>94</sup>

Critically, there is no evidence that anyone, when they enacted the Piracy Act of 1700, believed that "Piracies" were subject to universal jurisdiction, while "Felonies" and "Robberies" required a jurisdictional hook. Such a reading of the statute would make little to no sense. The Piracy Act of 1700 was first English statute to use the word piracy or piracies as a term of art with a fixed meaning, and it also expanded the definition of piracy as it had been understood in prior court proceedings. Section 8 declared that any of the King's "natural-born Subjects, or Denizens of the Kingdom" who committed any "Piracy or Robbery" under a foreign state's commission were to be punished as "Pirates, Felons, and Robbers."<sup>95</sup> Section 9 made it piracy for "any Commander or Master of any Ship, or any Seaman or Mariner" to "betray his trust ... and piratically and feloniously run away with his or their Ship" or any goods on the ship, or to "yield them up voluntarily to any Pirate," or to "make or endeavour to make a Revolt in the Ship." This provision is not limited to subjects and denizens of Great Britain. (A few years later, Parliament expanded the definition of piracy further to include anyone who trades with pirates.<sup>96</sup>). The fact that Parliament had the power to expand the

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<sup>91</sup> *Id.* at 360-64.

<sup>92</sup> See generally COLIN WOODARD, *THE REPUBLIC OF PIRATES: BEING THE TRUE AND SURPRISING STORY OF THE CARIBBEAN PIRATES AND THE MAN WHO BROUGHT THEM DOWN* (2008).

<sup>93</sup> See, e.g., Matthew Norton, *Classification and Coercion: The Destruction of Piracy in the English Maritime System*, 119 *Am. J. Sociology* 1537, 1538 (2014) ("To briefly outline the case, between 1717 and 1726, after decades of failed attempts, agents of the British state successfully brought intense coercive power to bear on piracy throughout their maritime empire. Hundreds of pirates were hunted down, were hanged, were killed in action, or abandoned piracy for more lawful pursuits. Piracy had cyclically prospered and declined for centuries at the outskirts of the English maritime system.").

<sup>94</sup> HANNA, *supra* note 63, at 377.

<sup>95</sup> *Id.* § 8.

<sup>96</sup> 8 Geo. I c. 24. The Piracy Act also specified punishment for lesser offenses: any master of a merchant ship that left sailors behind on foreign trips could be imprisoned three months, for example, and sailors of merchant ships who desert their vessels would forfeit their wages. 11 & 12 Wm. III, c. 7, §§ 17-18. This statute

definition of piracy belies any notion that England had universal jurisdiction to punish a singular crime of piracy. It instead expanded the definition of piracy significantly.

Nor were there any legal background principles that would support the notion that piracies were subject to universal jurisdiction. To the contrary, Charles Molloy's influential *De Jure Maritimo et Navali* (1677) argued that England's jurisdiction over piracy was limited, not universal. It could prosecute only (1) English subjects, (2) foreigners who attacked English ships, or (3) foreigners who committed piracies in the British Seas, but notably, not foreigners who committed piracies on English pirate ships against other foreign vessels.<sup>97</sup> Just a hundred years later, of course, the United States would argue that they could exercise universal jurisdiction over piracy, but did not stem from longstanding English law principles.

This jurisdictional limitation noteworthy because Molloy characterizes pirates as "*host[er]s humani generis*" or "Enemies to all," but seventeenth and eighteenth century English sources did not mean this term to refer, as modern scholars do, to crimes subject to universal jurisdiction.<sup>98</sup> Rather, they seems to have meant only that any ships that overcame a pirate attack could "hang[] them up the main Yard" instead of "bring[ing] them to any Port."<sup>99</sup> "Justice may be done upon them by the Law of Nature...."<sup>100</sup> The formulation "*hostes humani generis*" appears for the first time as Edward Coke's truncation of a Latin passage by Cicero.<sup>101</sup> But Coke did not argue that England had universal jurisdiction over pirates.<sup>102</sup> Similarly, Sir Leoline Jenkins referred to pirates as "*hostes humani generis*" to make the point that

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was originally set to expire after seven years, but it was made permanent in 1729. *Id.* § 13; 2 Geo. II c. 27, § VII, reprinted in 16 DANBY PICKERING, *THE STATUTES AT LARGE, FROM THE SECOND TO THE 9TH YEAR OF KING GEORGE II. TO WHICH IS PREFIXED, A TABLE CONTAINING THE TITLES OF ALL THE STATUTES DURING THAT PERIOD* (1765). The Piracy Act of 1700 also included several piracy-suppressing provisions outside the criminal punishment context. Section 12, for example, granted a bounty to anyone who turned in pirates "for the better and more effectual Prevention of Confederacies." Section 15 also threatened to revoke the charters of colonial governors who failed to suppress piracy.

<sup>97</sup> CHARLES MOLLOY, *DE JURE MARITIMO ET NAVALI* 37-38 (1677).

<sup>98</sup> *Id.* at 36.

<sup>99</sup> *Id.* at 38.

<sup>100</sup> *Id.*

<sup>101</sup> RUBIN, *supra* note 68, at 55 n.61.

<sup>102</sup> 1 EDWARD COKE, *THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND CONCERNING HIGH TREASON, AND OTHER PLEAS OF THE CROWN, AND CRIMINAL CAUSES* 113 (1644).

they are “outlaw’d.”<sup>103</sup>

There were some 17th-century suggestions, to be sure, that England could exercise universal jurisdiction over pirates, but all are qualified, virtually all are dicta, and none distinguish between piracies and other felonies on the high seas. Later in his life, Jenkins endorsed a limited version for exercising some universal jurisdiction over pirates who lacked any commission, while denying universal jurisdiction over pirates who were accused of exceeding their commissions.<sup>104</sup> Jenkins offered little justification for this distinction. He just seems to have been trying to square a precedent in which the English had insisted on trying a French pirate (over France’s objections), with English objections to the Dutch trying Scottish privateers for exceeding their commissions. Likewise, Sir Charles Hedges, a judge on the high court of admiralty, charged a jury in *Rex v. Dawson* (1696) that England could prosecute “all piracies and robberies at sea, in the most remote parts of the world,” but he did not suggest that this jurisdiction was limited to piracy.<sup>105</sup> *Rex v. Dawson* also involved a prosecution of Englishmen (for piracies committed against the Mogul Empire), so it is a poor source of universal jurisdiction principles. Indeed, Professor Alfred Rubin notes that there is no evidence that there were any “‘pure’ universal jurisdiction” English piracy prosecutions in the 17th century.<sup>106</sup> And after Parliament’s enactment of the Piracy Act of 1700, there is no evidence that anyone distinguished between “piracies,” over which courts could exercise universal jurisdiction, and “felonies,” over which they could not.

All this history shows that the first redundancy, between “piracies

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<sup>103</sup> A Charge given at a Session of Admiralty within the Cinque Ports, Sept. 2, 1668, in 1 WILLIAM WYNNE, *THE LIFE OF SIR LEOLINE JENKINS* lxxxvi (1724).

<sup>104</sup> Jenkins seemed to repeat this sentiment, arguing that every state should “execute justice upon [pirates] wherever they can lay hold of them.” A Charge given at an Admiralty Sessions held at the Old-Bailey, in *id.* at xci. He also appeared to endorse a greater jurisdictional power to punish certain crimes, but it was not necessarily confined to piracy, nor was this jurisdiction universal. He asserted that England could prosecute “the Crimes of Piracy, Bloodshed, Robbery, and other Violences upon the Sea” committed against the King’s “Subjects, or upon his Allies or their Subjects.” *Id.* at xc-xci. In 1675, Jenkins twisted himself into even more knots when commenting on an incident where the Dutch tried Scottish privateers for exceeding their commissions (and thus committing piracies). 2 *id.* at 713. Although crimes should ordinarily be tried where they are committed, he explained, “Pirates, being reputed out of the Protection of all Laws and Privileges,” can “be tried in what Ports soever they are taken.” *Id.* at 714. Yet because

<sup>105</sup> 13 How. State Trials 451, 456.

<sup>106</sup> RUBIN, *supra* note 68, at 107-08.

and felonies committed on the high seas,” had no jurisdictional significance. The phrasing was a historical accident, arising out of various jurisdictional transferring provisions enacted in 1536 and 1700. These statutes were designed to suppress crimes that could produce tension with other countries. There would be no reason to exercise universal jurisdiction over only one class of offenses but not others. Nor were there any legal background principles under which “piracies” were subject to universal jurisdiction but felonies were not. To the contrary, before the Piracy Act of 1700, England does not appear to have prosecuted any foreigners for piracy committed outside its territorial waters. In short, piracy was not understood to be distinguishable from felonies as the sole universal jurisdiction offense when the Piracy Act of 1700 was written. Because this statute is the source of the Define and Punish Clause’s first redundancy, this history sharply undercuts Kontorovich’s thesis.

b. The Articles of Confederation and Piracy

This next section traces the Articles of Confederation’s drafting history to reiterate the point made before. The people who wrote the Articles simply borrowed the Piracy Act of 1700. They did so, almost certainly, because they believed the national government required the power to set up trials for piracies and felonies on the high seas, because such crimes could prompt retaliation from foreign powers. That would be true, no doubt, whether the crime was committed by an American, or a foreign national who simply took refuge in the United States. There is thus no reason to believe that the Articles of Confederation’s use of the phrase “piracies and felonies” was meant to carry any jurisdictional significance.

The power to regulate piracies and felonies on the high seas was one of the few powers entrusted to the national government under the Articles of Confederation. An earlier draft of the Articles that John Dickinson wrote authorized Congress to set up “Courts for the trial of all Crimes, frauds & piracies Committed on the high Seas (and) [or on any navigable River, not within the Body-of a County or Parish-Establishing Courts] for Receiving & Determining finally appeals in all (maritime Causes under Such Regulations as may be made by the union;).”<sup>107</sup>

This language is almost certainly borrowed from the Piracy Act of 1700. There’s no direct evidence on this point, but this seems fairly

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<sup>107</sup> Draft Articles of Confederation, June 17-July 1?, 1776 (brackets in original), reprinted in 4 Letters of Delegates to Congress 233.

evident based on the two provisions' text and structure. Just look at the wording side-by-side:

<b>Piracy Act of 1700</b>	<b>Articles of Confederation Draft</b>
...all Piracies, Felonies, and Robberies committed in or upon the Sea, or in any Haven, River, Creek, or Place, where the Admiral or Admirals have Power, Authority, or Jurisdiction, may be examined, inquired of, tried, heard and determined, and adjudged...	...Courts for the trial of all Crimes, frauds & piracies Committed on the high Seas (and) [or on any navigable River, not within the Body-of a County or Parish- Establishing Courts] for Receiving & Determining finally appeals in all (maritime Causes under Such Regulations as may be made by the union;).

The crimes listed are strikingly similar: "Piracies, Felonies, and Robberies" (Piracy Act of 1700) vs. "Crimes, frauds & piracies" (Articles Draft). So are the jurisdictional hooks: the Piracy Act of 1700 covers crimes committed on "the Sea, or in any Haven, River, Creek, or Place, where the Admiral or Admirals have Power, Authority, or Jurisdiction"; the Draft Articles covers crimes "Committed on the high Seas (and) [or on any navigable River, not within the Body-of a County or Parish." And both provisions authorize the creation of courts for the trial of these crimes.

This wording changed a little in the final Articles of Confederation, but not much. The first paragraph of Article IX of the Articles of Confederation gave the Continental Congress the power to "appoint[] courts for the trial of piracies and felonies committed on the high seas." There's no record as to why "piracies and felonies" replaced "Crimes, frauds & piracies"; perhaps there was a greater desire to adhere more closely to the Piracy Act of 1700's wording. Nor is there any explanation as to why the final Articles removed the authorization for the trial of crimes on "navigable River[s]." But presumably, it may have represented a small effort to reduce the power of the national government to set up courts may have been viewed as important because one of the colonists' chief complaints against the British was for trying them in British courts rather than in the United States. Indeed, one of the charges in the Declaration accused George III of "transporting us beyond the seas to be tried for pretended offences."<sup>108</sup>

<sup>108</sup> Sydney George Fisher, *The Twenty-Eight Charges Against the King in the Declaration of Independence*, 31 Penn. Magazine of Hist. & Biography 257, 291 (1907) ("This refers to two acts of parliament. The first had been passed in the reign of

This provision stands out because the Articles generally did not authorize Continental Congress to directly regulate individual citizens; instead, it regulated the states.<sup>109</sup> The piracy and felonies provision does not entirely break from that pattern, but it gets close by authorizing the national government to set up its own courts in case it did not trust the states' local judiciaries. This raises the question why the Articles' drafters felt the need to include this provision.

There is virtually no direct evidence on this question, but presumably, this was included as a tool to help the new country preserve its neutrality and good relations with other countries. This was one of the reasons Parliament enacted the Piracy Act of 1700—the statute the piracy and felonies provision is based on. When the colonies failed to try pirates themselves, it caused conflict with foreign countries, creating the risk of drawing Britain into conflict. The natural structural inference, then, is that the new national government might need the same power to set up local courts to prosecute piracy to maximize its control over foreign affairs.

This reading is supported too by the Articles of Confederation's structure. The paragraph containing the "piracy and felonies" clause is also the source of the Continental Congress's main foreign policy powers, including "the sole and exclusive right and power of determining on peace and war," "sending and receiving ambassadors," and "entering into treaties and alliances." Even more relevantly, this paragraph also gave Congress the power to "establish[] rules for deciding, in all cases, what captures on land or water shall be legal"; "grant[] letters of marque and reprisal in times of peace"; and "establish[] courts; for receiving and determining finally appeals in all cases of captures."

This last group of powers was intimately related to the power to

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Henry VIII. and provided that a person accused of treason without the realm could be brought to England for trial. Several trials and punishments had taken place in previous reigns under this act, and parliament in 1769 reminded the king that this old law could be applied to the disturbances in America; but no one was ever transported or tried under it. The other act was a recent one providing that any one charged with setting fire to his majesty's ships, docks, arsenals &c. could in like manner be taken to England for trial. Both acts were, of course, intended to prevent colonial juries acquitting such offenders; but no action was ever taken under either of them during the Revolution.").

<sup>109</sup> See, e.g., *Printz v. United States*, 521 U.S. 898 (1997) ("Under the Articles of Confederation the National Government had the power to issue commands to the several sovereign States, but it had no authority to govern individuals directly.").

punish piracy in the 1700s. Countries would use letters of marque to authorize private individuals to capture enemy ships. People sailing with letters of marque were called “privateers.” A privateer that exceeded the scope of his letter of marque when capturing enemy vessels could be punished as a pirate. But countries did not just rely on criminal punishment powers to control privateers. Privateers were required to submit their captured ships—or “prizes”—to prize courts that would adjudicate the legality of those prizes. Courts would rule on the legality of those captures. If the captures were illegal, the privateer could not take title of the ship, and would have to compensate the ship owner. This procedure was necessary because merchants would not purchase a ship from a privateer that had not been ruled legal by a prize court. Without a prize ruling, there was always a risk that the captured ship’s owner could assert title to the ship down the line. Merchants thus required a definitive ruling that the capture was legal before making such a major purchase.<sup>110</sup> Setting up courts to punish crimes at sea was thus almost certainly viewed a tool that the government could use to prevent private individuals from dragging the United States into conflict with foreign powers. Trying foreigners who took refuge in the United States after committing such crimes might well be a necessary step to prevent international offense.

This power would have seemed especially important to the Continental Congress when it drafted the Articles. The United States relied heavily on privateers during the Revolutionary War, and that of course raised the risk of piracy. General George Washington began issuing commissions to privateers as early as September 1775—almost a year before the Declaration of Independence.<sup>111</sup> Every state issued letters of marque to privateers during the Revolutionary War and set up their own admiralty courts of first resort to condemn prizes (the Articles prohibited them from doing so only in times of peace).<sup>112</sup> American privateers also played a significant role in disrupting British commerce during the Revolutionary War. By one account, the Continental Congress issued more than 600 letters of marque to Massachusetts vessels alone, and that the Massachusetts General Court issued thousands more.<sup>113</sup>

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<sup>110</sup> See generally William R. Casto, *The Origins of Federal Admiralty Jurisdiction in an Age of Privateers, Smugglers, and Pirates*, 37 *Am. J. L. Hist.* 117 (1993).

<sup>111</sup> EDWARD E. HALE, *THE NAVAL HISTORY OF THE AMERICAN REVOLUTION, IN NARRATIVE AND CRITICAL HISTORY OF AMERICA* 564 (Justin Winsor, ed.) (8th ed. 1884-1889).

<sup>112</sup> *Id.* at 565, 567.

<sup>113</sup> SAMUEL ELIOT MORRISON, *THE MARITIME HISTORY OF MASSACHUSETTS, 1783-1860*, at 29 (1924).



This privateering, though, went hand-in-hand with opportunities for piracy. The Continental Congress's Board of Admiralty tried to resolve this problem by requiring privateers to post a \$20,000 bond, which would be forfeit if they violated instructions, and directing them "not to infringe or violate the laws of nations, or the laws of neutrality."<sup>114</sup> It also tried to centralize the issuance of letters of marque.<sup>115</sup> But these efforts were not wholly successful. American ships lacking commissions—that is, pirates—attacked European commerce throughout the Revolutionary War.<sup>116</sup>

The Continental Congress also fielded complaints about privateers capturing ships without authority.<sup>117</sup> In 1779, for example, the Continental Congress condemned privateer Joseph Cunningham for seizing a Portuguese vessel, and requested that the states punish Cunningham for his "violation of the laws of nations," as required by "the rights of neutrality."<sup>118</sup> Similarly, in 1783, the Continental Congress received a complaint from Spain that two Massachusetts citizens (Church and Heydon; their first names are not recorded) had attacked a Spanish ship.<sup>119</sup> After a committee (which included Madison) investigated the complaint, the Continental Congress requested that Massachusetts criminally prosecute Church and Heydon, and help the Spanish ship owner "obtain legal satisfaction for the injuries alleged to have been done to him."<sup>120</sup>

Simply put, the Articles of Confederation included the power to create courts for trying piracies and felonies on the high seas to give the national government the power to preserve its neutrality and regulate was. This was a main rationale for Parliament's Piracy Act of 1700, the statute the clause is based on. Private violence at sea could drag states into conflict with one another. And private violence at sea

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<sup>114</sup> 16 JCC 1780, at 405-08.

<sup>115</sup> Fred S. Rulater, *Charles Thomson, "Prime Minister" of the United States*, 101 Penn. Magazine Hist. & Biography 322, 326 (1977) ("Because these letters were sometimes captured and used by British privateers, Thomson began to require a "minute description" of the captain and his first officer to be added to the letters under the seal of the governor. Enforcing state compliance with regulations was frequently difficult.").

<sup>116</sup> C. Kevin Marshall, *Putting Privateers in Their Place: The Applicability of the Marque and Reprisal Clause to Undeclared Wars*, 64 U. Chi. L. Rev. 953, 972 n.99 (1997).

<sup>117</sup> Letter from William Hooper to Robert Morris, Dec. 31, 1776, reprinted in 5 Letters of Delegates to Congress 713, 713-14 & n.1; Letter from Robert Morris to John Bradford, Feb. 7, 1777, reprinted in 6 *id.* at 234, 235

<sup>118</sup> 14 J. Cont'l Cong. at 867 (1908) ("JCC").

<sup>119</sup> 24 JCC 1783, at 227-28.

<sup>120</sup> *Id.* at 228.

was inevitable because the new country was heavily reliant on privateers. Because the national government was responsible for war and peace, it gave itself the power to set up courts for punishing piracy and other felonies on the high seas. There is no jurisdictional significance to the Articles of Confederation's phrasing. Nor would there have been any reason for Congress to limit its punishment powers over certain felonies committed by foreigners who later took refuge in the United States.

c. Defects under the Articles of Confederation

This explains the Framers' motivations for adopting what became the Define and Punish Clause. Many soon began to recognize that the national government needed not just the power to set up courts for the trial of piracies and felonies, but also the power to enumerate and punish those crimes. The same was true of several offenses against the law of nations that were not mentioned in the Articles of Confederation. There was never any sense, during this time, that the national government's power to prosecute any of these crimes should be jurisdictionally limited. Just the opposite: one of the major motivating reasons for including the power to punish offenses against the law of nations was that U.S. citizens were committing such crimes outside the jurisdiction of states. All of this is yet another strike against the double redundancy argument.

The piracies and felonies provision in the Articles ultimately was a dead letter. The Continental Congress never actually created new courts under this provision. Instead, it enacted an ordinance in 1781 calling upon states to try "any piracy or felony upon the high seas" before juries "according to the course of the common law, in like manner as if the piracy or felony were committed in one of these United States."<sup>121</sup> Apparently, the Continental Congress thought state courts could be trusted to try piracies and felonies on the high seas.

But many thought that the Continental Congress needed more power to define and punish piracies and felonies. In 1778, South Carolina proposed amending the Articles to give the Continental Congress the power to "declar[e] what acts committed on the high seas shall be deemed piracies or felonies."<sup>122</sup> The Congress voted against this amendment nine states to two.

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<sup>121</sup> Ordinance for establishing courts for the trial of piracies and felonies committed on the high seas, Apr. 5, 1781, *in* 19 JCC 1781, at 355.

<sup>122</sup> 11 JCC 1788, at 652, 655.

In September 1785, Charles Pinckney of South Carolina (perhaps the source of the 1778 motion) moved for Secretary of Foreign Affairs John Jay to draft “an Ordinance for instituting a court for the ... trial and punishment of piracies and felonies committed on the high seas in the same manner in all the states.”<sup>123</sup> The preamble of Pinckney’s motion explained why such courts would be necessary. “[I]t has been the policy of all civilized nations to punish crimes so dangerous to the welfare and destructive to the intercourse and Confidence of Society with death in an exemplary manner,” and “similar crimes should be punished in a similar manner.”<sup>124</sup>

The motion apparently passed, although there’s no record of this, because Jay produced a report just a few weeks later. Jay’s report traced the Articles’ piracies and felonies provision to the Offenses at Sea Act of 1536 and Piracy Act of 1700, as discussed above.<sup>125</sup> But he noted that Parliament’s legislation made the suppression of piracies and felonies “more extensive and effectual” by defining piracies and felonies, and that “the present Powers of Congress” did not include this power.<sup>126</sup> “[T]he Power given to Congress by the Confederation, is not to declare what is or shall be Felony or Piracy, nor to declare what Shall be the Punishment of either, but merely to *appoint Courts for the Trial of Piracies and Felonies committed on the high Seas.*” It “follow[ed]” from this that this provision in the Articles could not be used as justification to make “the Trial and Punishment of those Offences similar in all the States.”<sup>127</sup> But, Jay argued, the Continental Congress could “ordain[] ... the Punishment to be inflicted throughout the United States in Cases of Piracy.”<sup>128</sup> This was so, he argued, because “Piracy is war against all mankind, which is the highest Violation of the Laws of Nations,” and the “fœderal Government” was responsible for “the Conduct of the United States towards all their Enemies in open War against them.”<sup>129</sup> “This Reasoning however does not ... apply to Cases of Felony as distinguished from Piracy; and therefore” the Continental Congress could only direct that felonies “be tried (tho’ not *punished*) in like manner in all the States.”<sup>130</sup>

Jay appended to his report a draft “Ordinance for the Trial of

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<sup>123</sup> 29 JCC 1785, at 681.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 797.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 798.

<sup>129</sup> *Id.* at 797.

<sup>130</sup> *Id.* at 798.

Piracies and Felonies Committed on the High Seas.”<sup>131</sup> This draft Ordinance was largely designed to repeal the 1781 Ordinance by establishing federal courts for the trial of piracies and felonies and, consistent with his advice, directing that all pirates receive capital punishment.<sup>132</sup>

Jay’s report does not appear to have been all that persuasive. The Continental Congress never enacted his draft Ordinance. Eight months after he wrote his report, the Congress referred it to a committee (which included James Monroe),<sup>133</sup> which sat on the report for about a year.<sup>134</sup> The committee was renewed in February 1787, but never took any action.<sup>135</sup>

Jay’s argument as to why the Continental Congress had the power to punish piracy was also weak. Piracies and felonies upon the high seas were of course related to war and peace questions, but the Articles specifically enumerated that the Congress had only the power to establish courts for these offenses, not to set their punishments. It did not distinguish between piracies and other crimes committed on the high seas. The notion that pirates were at “war against all mankind” did not help much. Jay almost certainly borrowed this phrase from William Blackstone, whose *Commentaries on the Laws of England* is the only prior English source to describe pirates as “declaring war against all mankind.”<sup>136</sup> But Blackstone was just channeling Edward Coke’s description of pirates as *hostes humani generis* to make the point “that every community hath a right” to punish pirates.<sup>137</sup> This had nothing to do with whether powers over war and peace included the power to set punishments for pirates.

Perhaps because they found Jay’s solution unpersuasive (and perhaps inadequate), in 1786, a group of delegates proposed amending the Articles to give Congress more power over piracies and felonies on the high seas. This group, which included Pinckney (the original source of the amendment), William Samuel Johnson, and Nathan Dane (two members of the committee that considered Jay’s proposed ordinance) recommended that the Continental Congress be given a new “exclusive power of declaring ... what Offences shall be

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<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 798-805.

<sup>133</sup> *Id.* at 805 n.1.

<sup>134</sup> Charles Thomson to William Samuel Johnson, May 16, 1789, in 2 Letters of Delegates to Congress 526, 527.

<sup>135</sup> *Id.*

<sup>136</sup> 4 BLACKSTONE, *supra* note 29, at \*107.

<sup>137</sup> *Id.* (citing COKE, *supra* note 102, at 113).

deemed piracy or felony on the high seas and to annex suitable punishments to all the Offences aforesaid.”<sup>138</sup> But this too died on the vine.

Meanwhile, throughout the 1780s, many who later became delegates to the Philadelphia Convention expressed concern that the United States was failing to suppress violations against the law of nations.<sup>139</sup> In 1781, a Committee that included Edmund Randolph reported “[t]hat the scheme of criminal justice in the several states does not sufficiently comprehend offenses against the law of nations.”<sup>140</sup> This was a problem because foreign countries would distrust the United States “if regular and adequate punishment shall not have been provided against” private citizens who violated the law of nations.<sup>141</sup> Indeed, if the United States failed to punish such offenses, it might be required to “compensate” other countries “out of the public treasury” for any injuries “for the avoidance of war” or “reprisal[s].”<sup>142</sup> Based on these findings, the Continental Congress “recommended that the state legislature punish violations of safe conduct or passports, “acts of hostility against such as are in amity, league or truce with the United States,” “infractions of the immunities of ambassadors and other public ministers,” and “infractions of treaties and conventions to which the United States are a party.”<sup>143</sup> These crimes were, the resolution stated, “only those offences against the law of nations which are most obvious.”<sup>144</sup>

Likewise, Alexander Hamilton wrote a draft resolution in 1783 to call a convention to amend the Articles of Confederation in part because the national government needed the power “to pass all general laws in aid and support of the laws of nations.”<sup>145</sup> This was so, he argued, because “for the want of which authority, the faith of the United States may be broken, their reputation sullied, and their peace interrupted by the negligence or misconception of any

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<sup>138</sup> 31 JCC 1786, at 497.

<sup>139</sup> See, e.g., Alex H. Loomis, *The Power to Define Offenses Against the Law of Nations*, 40 Harv. J.L. Pub. Pol’y 417, 431-32 (2017).

<sup>140</sup> 21 JCC 1781, at 1136.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 1136-37.

<sup>144</sup> *Id.* at 1137.

<sup>145</sup> Alexander Hamilton, Continental Congress Unsubmitted Resolution Calling for a Convention to Amend the Articles of Confederation, July 1783, <https://founders.archives.gov/?q=infractions%20%22law%20of%20nations%22&sr=1111311111&sa=&r=4&sr=#ARHN-01-03-02-0272-fn-0003-ptr>.

particular state.”<sup>146</sup>

Perhaps most famously, in the 1784 “Longchamps Affair,” for example, Charles Julien de Longchamps, a French subject living in Philadelphia, assaulted the French consul Barbé de Marbois.<sup>147</sup> At first, Longchamps escaped detention, and the Continental Congress recommended that all the states offer a reward for his capture because assaulting foreign diplomats constituted a “violation of the laws of Nations.”<sup>148</sup> Longchamps was ultimately captured and convicted (though not initially sentenced) by a Pennsylvania court, but the French insisted that Longchamps be extradited to France for punishment.<sup>149</sup> This did not happen. Secretary of Foreign Affairs John Jay argued that because Longchamps had “violated the Laws of this Country” and was “legally condemned to Imprisonment for the same,” it was not required to extradite Longchamps.<sup>150</sup> French extradition demands only ignited popular protest.<sup>151</sup> Popular writers argued that giving into French demands would make the United States subservient to France and put American citizens at risk (Longchamps took an oath of U.S. citizenship the day after he assaulted Marbois).<sup>152</sup> As a result, many thought extradition incompatible with republican government.<sup>153</sup> Thanks, perhaps, to this backlash, Longchamps was ultimately sentenced to only a \$200 fine and two years in prison.<sup>154</sup>

The Longchamps Affair was probably one of the incidents that pushed the Framers to give Congress the power to define and punish offenses against the law of nations when they wrote the new Constitution. The Framers do not seem to have believed that Longchamps escaped justice, but the incident illustrated the points raised above: the United States needed the power to punish offenses against the law of nations because it would be held accountable for the violations. So when the First Congress enacted the Crimes Act of

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<sup>146</sup> *Id.*

<sup>147</sup> G.S. Rowe & Alexander W. Knott, *The Longchamps Affairs (1784-86), the Law of Nations, and the Shaping of Early American Foreign Policy*, 10 *Diplomatic Hist.* 199, 200 (1986).

<sup>148</sup> 27 JCC 1784, at 478.

<sup>149</sup> *Id.* at 502-03; Rowe & Knott, *supra* note 147, at 202-04.

<sup>150</sup> John Jay, Report on the Longchamps Affair, Feb. 16, 1785, <https://founders.archives.gov/?q=infractions%20%22law%20of%20of%20nations%22&s=1111311111&sa=&r=6&sr=>.

<sup>151</sup> See generally Rowe & Knott, *supra* note 147.

<sup>152</sup> *Id.* at 205-06 & n.25.

<sup>153</sup> *Id.* at 213.

<sup>154</sup> *Id.* at 207 & n.31.

1790, they assault of a foreign diplomat a federal crime punishable by three years imprisonment (just one year more than Longchamps received).<sup>155</sup> It also prompted legislative reform elsewhere. Thomas Jefferson, then Minister to France, complained to James Madison that Pennsylvania was too “indecisive” when handling Longchamps, and that Congress lacked “the power to interpose.”<sup>156</sup> He urged Madison to “introduce a bill [in Virginia] which shall be effectual and satisf[act]ory on this subject.”<sup>157</sup> And in 1785, Pinckney submitted a motion to the Continental Congress requesting that Secretary of Foreign Affairs Jay draft proposed legislation for the states that would “punish[] the infractions of the law of nations, and more especially [] secur[e] the privileges and immunities of public Ministers from foreign powers.”<sup>158</sup>

A perhaps larger problem that the states were faced with were citizens who left U.S. territory to commit hostilities against foreign countries. Virginians in particular would leave U.S. territory to attack Spanish and Native Americans without provocation.<sup>159</sup> “Several of us have been labouring much of late in the G. Assembly here,” James Madison wrote to James Monroe, “to provide for a case with which we are every day threaten’d by the eagourness of our disorderly Citizens for Spanish plunder & Spanish blood.”<sup>160</sup> In 1784, Virginia enacted a law (drafted by Madison) that authorized the extradition of people who committed crimes if “the law of nations, or any treaty ... required him to be surrendered to the offended nation.”<sup>161</sup> The same law authorized Virginia to prosecute any of its citizens for crimes committed outside the commonwealth’s territory.<sup>162</sup>

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<sup>155</sup> Crimes Act of 1790, ch. 9, § 28, 1 Stat. 112 (“Crimes Act of 1790”); see Rowe & Knott, *supra* note 147, at 219-20.

<sup>156</sup> Letter from Thomas Jefferson to James Madison (May 25, 1784), in 8 The Papers of James Madison 42, 43 (Robert A. Rutland & William M. E. Rachal eds., 1973) [hereinafter Madison’s Papers].

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

<sup>158</sup> 29 JCC 1785, at 655.

<sup>159</sup> Allan Nevins, *American States during and after the Revolution, 1775-1789*, at 343-44 (1924).

<sup>160</sup> Letter from James Madison to James Monroe, November 27, 1784, <https://founders.archives.gov/documents/Madison/01-08-02-0083>.

<sup>161</sup> 12 Hening’s Statutes at Large of Virginia 471.

<sup>162</sup> *Id.* at 472. That said, many have misinterpreted this incident. Scholars and courts have generally taken the view that the Longchamps Affair was Congress’s main motivating factor in enacting the Alien Tort Statute in 1789, which vests federal courts with jurisdiction over torts against the law of nations. See, e.g., *Kiobel v. Royal Dutch Shell Petrol.*, 569 U.S. 108, 120 (2013) (asserting that this was a motivating factor behind the ATS). This view appears to have originated with William Casto, who cited evidence showing that the Marbois Incident had an effect on many of the framers who participated in the Philadelphia Convention and took high-level

General George Rogers Clark's 1786-1787 seizure of Spanish property in the Northwest Territory was one such extraterritorial violation of the law of nations that the Framers were concerned about. In 1786, American traders began reporting to Clark, then the United States' Indian Commissioner, that British agents were encouraging Native American tribes to attack American settlements in the area.<sup>163</sup> In July of that year, Vincennes (in present-day Indiana) narrowly repelled an attack of 450 Native Americans.<sup>164</sup> Virginia, which had previously occupied this part of the Northwest Territory, authorized officials in the District of Kentucky to take action to defend Vincennes.<sup>165</sup> General Clark, who had originally taken Vincennes during the Revolutionary War, was appointed commander in chief of an expeditionary force made up of Kentucky militia.<sup>166</sup> Once he arrived in Vincennes, Clark confiscated property from various Spanish subjects (perhaps in retaliation for Spanish expropriation of Americans' property along the Mississippi and Yazoo Rivers).<sup>167</sup> This expropriation prompted significant backlash within the United States. A group of Virginians (including Thomas Marshall, John Marshall's

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positions in the new government. See William R. Casto, *The Federal Court's Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 Conn. L. Rev. 467, 491-94 (1986). Ever since, most have repeated this take. See, e.g., Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 Colum. L. Rev. 830, 859-60 (2006).

But there is reason to doubt this view. Casto cites no 1780s-1790s-era evidence linking the ATS to the Longchamps Affair. And the ATS would have been a poor remedy for the Longchamps Affair. The French wanted Longchamps extradited—they were not looking to sue him—and were concerned that he might be let off the hook with a light fine. See Rowe & Knott, *supra* note 147, at 204. It is not clear that authorizing a civil remedy for assaulting diplomatic officers like Longchamps would have served any useful foreign policy purpose. See Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 Va. J. Int'l L. 587, 641 (2002). Nor is it obvious that the Framers thought Longchamps was let off with too light a punishment. The opposite, in fact, seems to be true, given that the Crimes Act of 1790 set the punishment for assault of diplomats remarkably close to the punishment that Longchamps received (three years imprisonment vs. two). Finally, the Longchamps Affair's more immediate effect was to push French and American diplomats into negotiating a consular convention treaty that would give French consular officials jurisdiction over French citizens in some U.S. matters. Rowe & Knott, *supra* note 147, at 215-17. In sum, the notion that the Longchamps Affair exposed a need to authorize a civil remedy for violations against the law of nations just does not hold up to scrutiny.

<sup>163</sup> L.C. Helderman, *The Northwest Expedition of George Rogers Clark, 1786-1787*, 25 Mississippi Valley Hist. Rev. 317, 319-20 (1938).

<sup>164</sup> *Id.* at 324.

<sup>165</sup> *Id.* at 325-26.

<sup>166</sup> *Id.* at 326.

<sup>167</sup> *Id.* at 329-30.



father) wrote to the Virginia Council of State complaining of Rogers' conduct.<sup>168</sup> The Virginia Council condemned Rogers's seizure as an "Offence against the Law of Nations" and demanded "the institution of legal proceedings against all persons appearing to be culpable."<sup>169</sup> Governor Randolph urged Virginia's Attorney General to prosecute Clark, and Secretary of Foreign Affairs Jay recommended the Continental Congress adopt a resolution approving of such a prosecution.<sup>170</sup>

But Randolph soon got cold feet. He wrote to Madison expressing concern that it might not be possible to punish Clark for the expropriation in Indiana.<sup>171</sup> Although Randolph's letter is missing, his main concern seems to have been that Virginia lacked the power to prosecute Clark because he committed the expropriation in the Northwest Territory, not in Virginia.<sup>172</sup> Madison wrote back urging him to prosecute Clark under the 1784 Act, mentioned above, that Virginia passed in response to the Longchamps Affair, as that authorized the prosecution of Virginians for crimes they committed outside commonwealth territory.<sup>173</sup>

This Clark episode was almost certainly one of the main impetuses for giving Congress the power to define and punish offenses against the law of nations. Randolph's March 1787 letter to Madison seeking advice on the Clark prosecution brought up the Philadelphia Convention, which was set to begin in May.<sup>174</sup> Madison's response to Randolph also pivoted from Clark to his thoughts on what the new Constitution should contain.<sup>175</sup> And in the first week of the Convention, Randolph argued that Congress must have the power to punish "infractions of treaties or of the law of nations."<sup>176</sup> It seems almost certain that he had Clark on his mind when he spoke these words.

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<sup>168</sup> 32 JCC 1787, at 189-91 n.3.

<sup>169</sup> *Id.* at 190 n.3.

<sup>170</sup> *Id.* at 194-95.

<sup>171</sup> See Letter from James Madison to Edmund Randolph (Apr. 8, 1787), <https://founders.archives.gov/documents/Madison/01-09-02-0197> (referencing Randolph's letter). Randolph's letter is missing, but Madison refers to its content. See *id.* n.1.

<sup>172</sup> Madison writes: "In a former [letter] you ask what Tribunal is to take cognizance of Clarke's offence? If our own laws will not reach it, I see no possibility of punishing it." *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 19 (Max Farrand, ed. 1907) ("FARRAND'S RECORDS").

d. The Define and Punish Clause's Final Form

I now turn to the Philadelphia Convention and the Constitution's ratification history to explore the origins of the Define and Punish Clause. The reasons for its wording and structure are entirely innocuous. Nobody, as a result, during the ratification attached any jurisdictional significance to its phrasing.

Four days after the Philadelphia Convention began, Randolph presented the Virginia Plan, a series of 15 resolutions concerning a new proposed government that Madison had drafted days earlier. Resolution 9 stated that "a National Judiciary" should "be established" with jurisdiction over, among other things, "all piracies & felonies on the high seas."<sup>177</sup> This was entirely uncontroversial, given that it preserved the status quo. On June 15, William Patterson presented his New Jersey Plan, which likewise provided for a "federal Judiciary" with jurisdiction over, among other things, "all cases of piracies & felonies on the high seas."<sup>178</sup>

The next changes came in the Committee of Detail's draft. The Committee of Detail was supposed to just collate the resolutions that the Convention approved, but its ultimate draft, which Randolph wrote, was substantial.<sup>179</sup> The Committee of Detail's draft gave Congress several criminal punishment powers. Congress had the power "to declare the law and punishment of piracies and felonies committed on the high seas, and the punishment of counterfeiting the coin of the United States, and of offences against the law of nations."<sup>180</sup> These powers seem to have been listed together because they were, with the exception of treason (listed in the next clause), the sole crimes the draft expressly authorized Congress to punish.

On August 17, the Committee of the Whole amended this clause to replace "declare the law and punishment of piracies and felonies" with "define and punish piracies and felonies."<sup>181</sup> The main motivation for doing so was to ensure that Congress had the power not just to punish these crimes, but also to decide what would qualify as felonies and piracies. James Madison and Edmund Randolph led

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<sup>177</sup> *Id.* at 21.

<sup>178</sup> *Id.* at 244.

<sup>179</sup> MICHAEL KLARMAN, *THE FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION* 147 & n. (2016).

<sup>180</sup> 2 FARRAND'S RECORDS 168.

<sup>181</sup> *Id.* at 314, 315-316.

the push to give Congress the power to “define” these offenses.<sup>182</sup> Joseph Wilson and John Dickinson pushed back, arguing that “felonies” were “sufficiently defined by Common law.”<sup>183</sup> Madison disagreed. “[F]elony at common law is vague,” he asserted, and “also defective.”<sup>184</sup> Madison then objected to incorporating English law or relying on the states to supply legal standards. As for England, Madison insisted that “no foreign law should be a standard farther than is expressly adopted.”<sup>185</sup> Nor could Congress rely on state law, as then “the citizens of different States would be subject to different punishments for the same offence at sea.”<sup>186</sup> “The proper remedy for all these difficulties was to vest the power proposed by the term ‘define’ in the Natl. legislature.”<sup>187</sup> Gouverneur Morris advocated replacing the word “define” with “designate” because he thought “define” would not allow Congress to innovate on the “preexisting meaning” of felonies and piracies.<sup>188</sup> “[O]thers” disagreed with Morris’s interpretation, who maintained that “define” would give Congress the power to “creating of offences also, and therefore suited the case both of felonies & of piracies.”<sup>189</sup> The Convention then voted to add the word “define.”<sup>190</sup> Thus, the Convention settled on the phrase “define and punish” only after deciding that it gave Congress the power to invent new crimes that could qualify as piracies and felonies on the high seas.

The Committee of Style made the next change to the Define and Punish Clause. The power to punish counterfeiting was separated from the other three, and the Define and Punish Clause was written as follows: “To define and punish piracies and felonies committed on the high seas, and punish offences against the law of nations.”<sup>191</sup> The Committee of Style had no authority to make substantive changes, but was empowered only “to revise the stile of and arrange the articles which had been agreed to.”<sup>192</sup> The Supreme Court, as a result, has often stated that revisions added late by the Committee of Style presumptively lack legal significance.<sup>193</sup> The decision to list the

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<sup>182</sup> *Id.* at 316.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 595.

<sup>192</sup> *Id.* at 553.

<sup>193</sup> See, e.g., *Powell v. McCormack*, 395 U.S. 486, 539 (1969).

piracies and felonies committed upon the high seas alongside offences against the law of nations, but not counterfeiting, thus probably carries no jurisdictional consequences.<sup>194</sup>

The Define and Punish Clause reached its final form on September 14, three days before the Constitution was published. Morris moved to strike “punish” before “offences against the law of nations,” so that Congress would have the power to define these crimes as well.<sup>195</sup> James Wilson, a future Supreme Court Justice, argued against Morris’s motion: “To pretend to define the law of nations which depended on the authority of all the Civilized Nations of the World, would have a look of arrogance, that would make us ridiculous.”<sup>196</sup> “The word define,” Morris responded, “is proper when applied to offences in this case; the law of nations being often too vague and deficient to be a rule.”<sup>197</sup> Morris’s motion passed by six states to five (the Convention voted by state delegation).<sup>198</sup>

No ratification-era publications comment on the double redundancy. *Federalist No. 42* (Madison) gives the most attention to the Define and Punish Clause, and it largely focuses on the power to define. It argues that the Define and Punish Clause was a “great[] improvement on the articles of Confederation,” because “[t]he power to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations, belongs with equal propriety to the general government.” Without the power to punish offenses against the law of nations, Madison warned, “any discreet member [could] embroil the Confederacy with foreign nations.” Madison further explained that the power to define “felonies on the high seas [was] evidently requisite” because Congress should not (or could not) be limited to preexisting understandings of felonies.

Felony is a term of loose signification, even in the common law of England; and of various import in the statute law of that kingdom. But neither the common nor the statute law of that, or of any other nation, ought to be a standard for the proceedings of this, unless previously made its own by legislative adoption. The meaning of the term, as defined in the

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<sup>194</sup> To the extent there were any such consequences, it is worth noting that Morris, who had pushed to ensure that Congress could innovate upon the meaning of “piracies” and “felonies,” bore primary responsibility for writing the Committee’s draft. KLARMAN, *supra* note 179, at 15 n. \*.

<sup>195</sup> 2 FARRAND’S RECORDS 614.

<sup>196</sup> *Id.* at 615.

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

<sup>198</sup> *Id.*

codes of the several States, would be as impracticable as the former would be a dishonorable and illegitimate guide. It is not precisely the same in any two of the States; and varies in each with every revision of its criminal laws. For the sake of certainty and uniformity, therefore, the power of defining felonies in this case was in every respect necessary and proper.”<sup>199</sup>

Madison is the only person to have commented on the Define and Punish Clause’s redundancy during the ratification debates, and he attached virtually no importance to it. “In compositions of this kind,” he explained at the Virginia Convention, “it is difficult to avoid technical terms which have the same meaning.”<sup>200</sup> He gave as an example the Define and Punish Clause, which authorizes punishment of:

felonies and piracies committed on the high seas. Piracy is a word which may be considered as a term of the law of nations.—Felony is a word unknown to the law of nations, and is to be found in the British laws, and from thence adopted in the laws of these States. It was thought dishonorable to have recourse to that standard. A technical term of the law of nations is therefore used, that we should find ourselves authorised to introduce it into the laws of the United States.

At best then, Madison argued that the Constitution includes the redundant reference to piracy to make clear that “felonies” are not limited by British law or common law.<sup>201</sup> There is no evidence that he, or anyone else, thought that this redundant structure created implied territorial limits on Congress’s power to punish certain crimes.

The Define and Punish Clause was otherwise uncontroversial. Future Supreme Court Justice James Iredell, writing as *Marcus*, listed “piracies and felonies on the high seas” as crimes that “affect[] the

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<sup>199</sup> *Id.*

<sup>200</sup> *Debates*, 10 DHRC 1412, 1413 (“An attention to this may satisfy Gentlemen, that precision was not so easily obtained as may be imagined. I will illustrate this by one thing in the Constitution.—There is a general power to provide Courts to try felonies and piracies committed on the high seas.—Piracy is a word which may be considered as a term of the law of nations.—Felony is a word unknown to the law of nations, and is to be found in the British laws, and from thence adopted in the laws of these States. It was thought dishonorable to have recourse to that standard. A technical term of the law of nations is therefore used, that we should find ourselves authorised to introduce it into the laws of the United States.”).

<sup>201</sup> See generally Loomis, *supra* note 139.

security, the honor or the interest of the United States at large.”<sup>202</sup> And opponents of the Constitution conceded that the power to punish piracies and felonies as one appropriately confined in the federal government.<sup>203</sup> The New York Convention thus recommended amendments to limit Congress’s powers, but they conceded that it should have the ability to create federal courts with anything “other than appellate jurisdiction, except such as may be necessary for the trial of causes of admiralty and maritime jurisdiction, and for the trial of piracies and felonies committed on the high seas.”<sup>204</sup>

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The above history traces the Define and Punish Clause’s purported double redundancy from the earliest English statutes governing piracy through the Constitution’s drafting. There is literally not one shred of evidence across this centuries-long period in support of the notion that the phrase “piracies and felonies committed on the high seas” was ever intended to imply that “piracies” referred to a limited universal jurisdictional offense, in contrast to “felonies” of limited jurisdiction. Nor is there evidence from the Articles of Confederation period through the ratification debates that “piracies” were considered distinct from “offences against the law of nations” either. To the contrary, many of the offences against the law of nations that the Framers were most concerned about took place outside U.S. territory. In sum, there is no historical basis to accept the double redundancy thesis.

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<sup>202</sup> 616. Marcus IV, Norfolk & Portsmouth J., 12 Mar. 1788, *reprinted in* 16 DHRC 379, 381; *see id.* at 161 (explaining that “Marcus” letters were written by James Iredell).

<sup>203</sup> Brutus VII, N.Y.J., 3 Jan. 1788, *reprinted in* 20 DHRC 566, 566-67 (“It is true this system commits to the general government the protection and defence of the community against foreign force and invasion, against piracies and felonies on the high seas, and against insurrection among ourselves.”). Samuel Chase made a series of objections to the Constitution in the Maryland Convention. But he conceded that some powers were properly vested in the national government. Included within this were “the power of war;—and the means to carry it on—i.e. to raise money, to maintain troops and to provide a navy: and it includes the jurisdiction of piracies and felonies on the high seas and of all offences against the law of nations.” Samuel Chase: Objections to the Constitution, 24-25 April 1788, *reprinted in* 12 DHRC 631, 641; Agrippa XII, Mass. Gazette, 15 Jan. 1788, *reprinted in* 5 DHRC 720, 725 (proposing a far more limited set of legislative powers, including that “Piracies and felonies committed on the high seas shall also belong to the department of Congress for them to define, try, and punish, in the same manner as the other causes shall be defined, tried, and determined. All the before mentioned causes shall be tried by jury, and in some seaport town.”).

<sup>204</sup> 818-B. Recommendatory Amendments, Poughkeepsie Country J., 12 Aug. 1788, *reprinted in* 18 DHRC 301, 304.

### 3. Textual Problems with the Double Redundancy Thesis

The double redundancy account is also impossible to square with the Define and Punish Clause's plain text. Kontorovich's argument necessarily assumes that Congress has only the power to punish "piracy," and that "piracy" had a singular definition that Congress could not depart from. Otherwise, any territorial limits would be illusory, because Congress could just label a crime "piracy" and exercise universal jurisdiction over it. This account cannot be right, as a result, because the Constitution does not give Congress a limited power to "punish piracy." Instead, it gives Congress the power to "define and punish *piracies*" plural. This is an important but often overlooked point. Most scholars and judges in recent years seem to have implicitly assumed that piracy had a singular definition under international law, and that the Piracies Clause gives Congress only the power to punish that offense. This is wrong. There were several ambiguities in the law of piracy at the time of the Framing, and states relied heavily on legislation to enumerate specific offenses that qualified as piracy under municipal law. There is every reason to suppose that, by giving Congress the power to "define ... Piracies," the Constitution endows Congress with the same powers, not a limited power to punish a single, universal jurisdiction crime.

We have already seen that the Framers understood the word "define" to give Congress significant creative powers.<sup>205</sup> There were efforts throughout the Articles period to give the Continental Congress the power to enumerate these crimes, the Philadelphia Convention decided to give Congress the power to "define" these crimes only after extensive debate, and Madison singled out and defended this power to define in *Federalist No. 42* and the Virginia Convention. The notion that the power to "define" includes creative powers to invent new piracies, felonies, and offences against the law of nations is also supported by other parts of the Constitution. The Constitution gives Congress the power to punish counterfeiting and treason but does not give Congress the power to define those crimes.<sup>206</sup> So if "define" meant nothing, then its inclusion in the Define and Punish Clause would be surplusage.<sup>207</sup> Indeed, the Constitution specifically defines "treason." This was necessary, James Madison explained in *Federalist No. 43*, because if it had failed to do so, then

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<sup>205</sup> See generally *id.*

<sup>206</sup> U.S. Const. art. I, sect. 8, cl. 6; *id.* art. III, sect. 3, cl. 1.

<sup>207</sup> *Id.* at 420-22.

Congress could create “new-fangled and artificial treasons.”<sup>208</sup> Congress should thus be able to create new-fangled and artificial piracies.

This understanding of “define” is also buttressed by the fact that the Constitution gives Congress the power to define and punish “Piracies” plural, not “Piracy” singular. This reflects that “piracy” was a vague, or at least evolving concept in several respects in the 18th century that required legislative supplementation.

Most scholars today assume that “piracy” had a single and clear definition under international law. At first glance, this seems correct. Surveying dozens of authorities, Joseph Story wrote for the Supreme Court in 1820 that piracy was defined as “robbery upon the sea.”<sup>209</sup> To mention just a few examples, Coke defined “pirate” as a “rover and robber on the sea.”<sup>210</sup> In *Rex v. Dawson*, discussed earlier, Sir Charles Hedges declared that “piracy is only a sea-term for robbery, piracy being a robbery committed within the jurisdiction of the Admiralty.”<sup>211</sup> Blackstone agreed in 1770 that piracy was just “robbery and depredation on the high seas.”<sup>212</sup> The international law publicist Georg Friedrich von Martens defined pirates in 1801 as “those who, without public authority, plunder indiscriminate.”<sup>213</sup> And in his 1806 treatise on maritime law, Domenico Azuni stated: “A pirate is one who roves the sea, in an armed vessel, without any commission or passport from any prince or sovereign state, but solely on his own authority.... For this reason, pirates have always been compared to robbers ....”<sup>214</sup>

But this definition, however universal, is vague in its applications. Consider three issues the definition produces.

*First*, it’s not clear that “robbery” was a necessary element. Pirates were generally interested in attacking merchants for the sake of robbery, but presumably, if they attacked ships without any intent to

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<sup>208</sup> Federalist No. 43 (Madison).

<sup>209</sup> *United States v. Smith*, 18 U.S. (5 Wheat.) 71, 75; *see also id.* at 74 n.a (collecting authorities).

<sup>210</sup> COKE, *supra* note 102, at 113.

<sup>211</sup> *Rex v. Dawson*, 4 State Trials 217, 217 (1696).

<sup>212</sup> 4 BLACKSTONE, *supra* note 29, at \*71.

<sup>213</sup> M. DE MARTENS, AN ESSAY ON PRIVATEERS, CAPTURES, AND PARTICULARLY ON RECAPTURES, ACCORDING TO THE LAWS, TREATIES, AND USAGES OF THE MARITIME POWERS OF EUROPE 2 n.b (1801).

<sup>214</sup> 2 M.D.A. AZUNI, THE MARITIME LAW OF EUROPE, chap. V, art. III, § 3, at 351 (William Johnson, tr. 1806).



rob, they would still be considered pirates. This was the Supreme Court's conclusion in 1844. Writing for the Court, Joseph Story held that when a ship "willfully sinks or destroys an innocent merchant ship, without any other object than to gratify his lawless appetite for mischief, it is just as much a piratical aggression, in the sense of the law of nations ... as if he did it solely and exclusively for the sake of plunder, *lucri causa*."<sup>215</sup> This came more than a half century after the Framing, to be sure, but Blackstone also seemed to define piracy more broadly than robbery. At common law, he explained, piracy consisted of "those acts of robbery and depredation upon the high seas which, if committed upon land, would have amounted to felony there."<sup>216</sup> As of the late 18th century, this definition would have included felonies like murder committed on the high seas.<sup>217</sup> Yet (as we shall see), most Framers later disputed that this qualified as piracy under the law of nations.

*Second*, not all robberies committed on a ship necessarily qualified as piracy under international law. As Madison pointed out at the Philadelphia Convention, any captain who stole his ship and cargo committed only a "breach of trust" at common law (the proper term for this offense, though Madison did not use it, was "barratry").<sup>218</sup> This became piracy and a felony only when Parliament enacted a statute making it so.<sup>219</sup> But there is little evidence that it was considered a crime subject to universal opprobrium at the time of the Framing. Indeed, during the Revolutionary War, the British and the Americans would declare as lawful prize the ship of enemy sailor who absconded with his vessel and cargo.<sup>220</sup> Just a few months after the

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<sup>215</sup> *United States v. Brig Malek Adhel*, 43 U.S. (2 How.) 210, 232 (1844).

<sup>216</sup> 4 BLACKSTONE, *supra* note 29, at \*71.

<sup>217</sup> Murder of strangers was not traditionally a felony in the Middle Ages, but it had long been so by the time Blackstone wrote his *Commentaries*. RUBIN, *supra* note 68, at 60 n.165. Blackstone was also probably not referring to this pre-Edward I era as piracy was not a defined crime at the time. FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I*, at 489 n.66 (Liberty Fund ed., 2012) (1895).

<sup>218</sup> 2 JCC 1787, at 315-316; RUBIN, *supra* note 68, at 101.

<sup>219</sup> 4 BLACKSTONE, *supra* note 29, at \*71.

<sup>220</sup> 9 JCC 1777, at 802 ("Whereas, the British nation have received into their ports, and condemned in their courts of admiralty, as lawful prize, several vessels and their cargoes belonging to these states, which the masters and mariners, in breach of the trust and confidence reposed in them, have betrayed and delivered to the officers of the British crown: and whereas such contract is contrary to that good faith and honour which all men ought to preserve inviolate, and repugnant to the practice of the commercial and civilized nations of Europe: Resolved, therefore, That any vessel or cargo, the property of any British subject, not an inhabitant of Bermuda or any of the Bahama islands, brought into any of the ports or harbours of any of these United States by the master or mariners, shall be adjudged lawful prize, and divided

Continental Congress announced this policy, its President Henry Laurens crowed about a British crew that “dispossessed the Master of Command” and piloted the ship to Charles Town, South Carolina.<sup>221</sup>

To take another example in 1787, a French captain, Joseph Anne Marie Ferrier, embezzled his ship and cargo and landed at Norfolk, Virginia.<sup>222</sup> A Continental Congress committee that included Alexander Hamilton acknowledged that under French law, Ferrier’s offense “amounts to piracy,” and recommended he be arrested and delivered to France.<sup>223</sup> Yet Governor Randolph of Virginia concluded that he lacked any power to arrest Ferrier for piracy committed against France.<sup>224</sup> The French were unconvinced, threatening to cut off the United States’ commercial advantages,<sup>225</sup> and deriding Randolph’s points as “sophisticated arguments by an attorney, who claimed to argue from the ambiguous texts of peculiar laws of a recently-formed State, and who had not yet had the time to become acquainted with what are the true relations between nations.”<sup>226</sup> “The crime which Captain Ferrier is guilty of,” the French minister to the United States insisted to John Jay, “is a kind of piracy, which is not, as is attempted to be insinuated, punishable only by the *laws of France*, but which is severely censured by the laws of all commercial nations, and the prosecution of which is prescribed by the rights of nations.”<sup>227</sup> (The French had a point: as noted above, Randolph did have the power to turn over Ferrier under Virginia’s 1784 statute authorizing extradition.)

Consider too the case of a crew who mutiny against their captain and take the ship and its cargo to a foreign port. This would seem to

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among the captors in the same proportion as if taken by any continental vessel of war.”).

<sup>221</sup> Letter from Henry Laurens to James Duane, Dec. 24, 1777, in 2 *Letters of the Members of the Continental Congress* 597, 597 (1923).

<sup>222</sup> Letter from Comte de Moustier to Congress, May 28, 1788, in 3 *EMERGING NATION: A DOCUMENTARY HISTORY OF THE FOREIGN RELATIONS OF THE UNITED STATES UNDER THE ARTICLES OF CONFEDERATION, 1780-1789*, at 780 (1996) (“DHFRUS”).

<sup>223</sup> Thursday, June 12, 1788, 34 *JCC* 212, 212.

<sup>224</sup> Letter from Edmund Randolph to John Jay, July 2, 1788, in *id.* at 810, 810-11.

<sup>225</sup> Julian P. Boyd, *Two Diplomats Between Revolutions: John Jay and Thomas Jefferson*, 66 *Va. Magazine of Hist. & Biography* 131, 136 (1958).

<sup>226</sup> Letter from Comte de Moustier to Comte de Montmorin, Jan. 19, 1789, in *DHFRUS* at 915, 917.

<sup>227</sup> Letter from Comte de Moustier to John Jay, Oct. 18, 1788, in 1 *DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES OF AMERICA, FROM THE SIGNING OF THE DEFINITIVE TREATY OF PEACE, 10TH SEPTEMBER 1783, TO THE ADOPTION OF THE CONSTITUTION, MARCH 4, 1789*, at 270, 271 (1837).

include elements of robbery and murder, at the very least, and should thus qualify as piracy. Sir Charles Hedges thought so: his charge to the jury in *Rex v. Dawson* stated: “If the mariners of any ship shall violently dispossess the master, and afterwards carry away the ship itself, or any of the goods, or tackle, apparel or furniture, with a felonious intention, ... this is also robbery and piracy.”<sup>228</sup> Yet in 1800, then-Congressman John Marshall insisted in a famous speech that a mutineer could not be tried for piracy under the law of nations.<sup>229</sup> (More on that speech below.). This was, at minimum, a controversial subject in the 18th century.

*Third*, the division between “piracy,” “privateering,” and war was often vague in the eighteenth century. Countries would grant letters of marque and reprisal to private individuals (or “privateers”) to authorize them to capture enemy ships.<sup>230</sup> A privateer who exceeded the scope of his letter of marque when capturing enemy vessels could generally be punished as a pirate. This was the basis for England’s famous prosecution of William Kidd, who had a letter of marque authorizing him to attack French vessels but could not produce proof that the ship he had attacked was French.<sup>231</sup>

Consider too commissions issued by improper authorities. In the Dutch Revolt against the Spanish Hapsburgs (1566-1648), the Spanish labeled the Dutch “Sea Beggars” pirates, on the grounds that their commissions were issued by the Stadtholder William of Orange, who was not a sovereign, but just the leader of a rebellious region.<sup>232</sup> Similarly, when William and Mary deposed the Stuart Monarchy, James II issued commissions to private vessels authorizing them to attack English vessels, and England prosecuted these privateers for piracy.<sup>233</sup> The King’s Advocate for Admiralty, Dr. William Oldys, protested that the sailors did not qualify as pirates because of their “commission[s].”<sup>234</sup> The Crown fired Oldys, rejected his argument,

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<sup>228</sup> *Rex v. Dawson*, 14 How. State Trials 217, 217 (1696); see also RUBIN, *supra* note 68, at 86.

<sup>229</sup> See generally Speech, Washington, D.C., Mar. 7, 1800, printed in 4 Papers of John Marshall 82.

<sup>230</sup> See, e.g., ROBERT C. RITCHIE, CAPTAIN KIDD AND THE WAR AGAINST THE PIRATES 23 (1986) (“In wartime the privateering commission or letter of marque permitted privately financed warships to attack enemy shipping; in peacetime the letter of reprisal allowed merchants to recover their losses due to piracy.”).

<sup>231</sup> RUBIN, *supra* note 68, at 96-97.

<sup>232</sup> VIRGINIA W. LUNSFORD, PIRACY AND PRIVATEERING IN THE GOLDEN AGE NETHERLANDS 10 (2005); MARTENS, *supra* note 213, at 38.

<sup>233</sup> *Id.* at 69.

<sup>234</sup> *Id.* at 70.

and continued the prosecutions, on the theory that the commissions were “void or null” because James II was no longer King.<sup>235</sup>

Invoking the same argument, the British insisted during the Revolutionary War that American privateers and naval officers were pirates and should be treated as such.<sup>236</sup> This prompted protest and threats of retaliation when Britain arrested American sailors on charges of piracy.<sup>237</sup> Britain ultimately declined to prosecute any Americans as pirates, but instead detained them on charges of high treason (Britain had suspended habeas corpus in 1777, and renewed the suspension each year of the war). Britain did this because it wanted to preserve the option of punishing the sailors at the end of the war but did not want to risk retaliation against British prisoners.<sup>238</sup> But it still pressured other European states to treat American sailors as pirates. Perhaps most famously, British ambassador to the Hague Sir Joseph Yorke insisted in 1779 that Amsterdam arrest John Paul Jones for piracy because his naval commission was not “granted by a sovereign power.”<sup>239</sup> Yorke first sent an agent to arrest Jones on behalf of the British, only to be, in his words, “thwarted by the High Bailiff, who said that ... it was not in his power, as the affair would immediately become a political one.”<sup>240</sup> Yorke then appealed to Dutch political authorities but was rebuffed again.<sup>241</sup> This drove a wedge between the Dutch and Britain, two nominal treaty allies, which is almost certainly what Jones intended, and ultimately contributed to the Dutch recognizing U.S. independence and siding with it during the war.<sup>242</sup>

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<sup>235</sup> Matthew Tindall, *An Essay Concerning the Law of Nations and the Rights of Sovereigns* (1696), in 2 A COLLECTION OF STATE TRACTS PUBLISHED DURING THE REIGN OF KING WILLIAM III, at 462, 472 (1706).

<sup>236</sup> HALE, *supra* note 111, at 573-74; MARTENS, *supra* note 213, at 39.

<sup>237</sup> Letter from Richard Henry Lee to Patrick Henry, May 6, 1777, *reprinted in* 7 Letters of Delegates to Congress 32, 33; Letter from Marine Committee to John Beatty, June 2, 1779, *reprinted in* 13 *id.* 13, 14 & n.2.

<sup>238</sup> CARLTON F.W. LARSON, *THE TRIALS OF ALLEGIANCE* 57-58 (2019).

<sup>239</sup> Letter from Joseph Yorke, Oct. 29, 1779, *reprinted in* JOHN HENRY SHELBURNE, *THE LIFE AND CHARACTER OF JOHN PAUL JONES, A CAPTAIN IN THE UNITED STATES NAVY DURING THE REVOLUTIONARY WAR* 129, 130 (1851).

<sup>240</sup> Quoted in BARBARA W. TUCHMAN, *THE FIRST SALUTE* 111 (1988)..

<sup>241</sup> *Id.* at 101 (“Popular songs were composed in Jones’s honor, and ballads celebrating his presence in Amsterdam were sold in the streets.”); SAMUEL FLAGG BEMIS, *THE DIPLOMACY OF THE AMERICAN REVOLUTION* (1957).

<sup>242</sup> BEMIS, *supra* note 241. The Dutch and the British had been treaty allies since the 1600s. But Britain never invoked its treaty to coerce the Dutch to intervene on its side during the war. Moreover, relations between the two states had deteriorated during the war. The Dutch interests in maintaining its commercial shipping with all states across Europe conflicted sharply with British interests in suppressing contraband that could aid the colonists (and later the French).

Finally, dating back to the 1686 Treaty of Peace between France and the United Kingdom, European countries would sometimes declare in peace treaties that any of their subjects who took commissions to fight one another could be hanged as pirates by the other.<sup>243</sup> All this goes to show that the supposed unity in piracy definitions before the nineteenth century was more illusory than real.

As a result, European powers enacted statutes that delineated piracy. For example, in France's Marine Ordinance of 1681, France declared that anyone who carried multiple letters of marque.<sup>244</sup> And as we have already seen, the Piracy Act of 1700 and subsequent legislation expanded the definition of piracy under English law significantly. Blackstone summarized all of this legislation in his *Commentaries* as well.<sup>245</sup>

There is every reason to believe that the Framers intended the Define and Punish Clause to give Congress the same power to define piracies that Parliament had exercised. Madison comes close to saying as much in *Federalist No. 42*. After conceding that piracy's definition "might, perhaps without inconveniency, be left to the law of nations," he pointed out that "a legislative definition of them is found in most municipal codes." That suggests that he thought Congress had the same power to create legislative definitions of piracies, just as every other European power did. Attorney General Edmund Randolph was even more explicit in his 1790 report on the scope of the federal judicial power. The Define and Punish Clause, he wrote, "comprehends the whole of criminal sea law."<sup>246</sup>

Moreover, during the Revolutionary War, several states enacted legislation criminalizing several different crimes as piracy that did not necessarily align with the international law definition. A 1780

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<sup>243</sup> *American Treaty of Peace, good Correspondence, and Neutrality, between the Crown of Great Britain and France*, concluded at London, Nov. 16, 1686, art. XV, reprinted in GEORGE GOSTLING, *EXTRACTS FROM THE TREATIES BETWEEN GREAT-BRITAIN AND OTHER KINGDOMS AND STATES OF SUCH ARTICLES AS RELATE TO THE DUTY AND CONDUCT OF THE COMMANDERS OF HIS MAJESTY'S SHIPS OF WAR* 26, 31 ("No subjects of either king shall apply for or take any commission or letters of mart for arming any ship or ships to act as privateers in *America*, whether *Northern* or *Southern*, from any prince or state, with which the other shall be at war; and if any person shall take such commission or letters of mart, he shall be punished as a pirate.")

<sup>244</sup> Butler & Maccobby, *supra* note 61, at 165-66.

<sup>245</sup> BLACKSTONE, *supra* note 29, at \*71-72.

<sup>246</sup> Edmund Randolph, *Judiciary System: Opinion of the Attorney General on the Plan of the House*, in 37 *Am. State Papers: Miscellaneous* 22, 23.

Pennsylvania statute made it “piracy” for any “subject[] of this state, or any of the united states of America, to commit “any piracy or robbery, or any act of hostility” against any U.S. citizens under a foreign commission.”<sup>247</sup> But then it went further, declaring that any “mariner” (without apparent regard to nationality who commits barratry, collaborates with pirates, or commits mutiny is also a “pirate, felon, and robber.”<sup>248</sup> This of course closely tracked British law. 1779 Rhode Island and Connecticut statutes also set up courts for trials of piracies and felonies, seemingly just importing the British understanding of the term.<sup>249</sup>

Finally, the United States’ Crimes Act of 1790 was similarly expansive.<sup>250</sup> Section 8 made it piracy for:

- any “person”—not just U.S. citizens—to commit “murder or robbery, or any other offence which if committed within the body of a county, would by the common laws of the United States be punishable with death”;
- “any captain or any mariner of any ship or other vessel” to “piratically and feloniously run away with such ship or vessel, or any goods or merchandise to the value of fifty dollars”; or
- “any seaman” to “lay violent hands upon his commander ... to hinder and prevent his fighting in defence of ship or goods” or to commit mutiny.<sup>251</sup>

Section 9 made it a crime for any U.S. citizen to “commit any piracy or robbery aforesaid, or any act of hostility against the United States, or any citizen thereof,” even when done “under colour of any

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<sup>247</sup> A Supplement to the act, intitled “An Act for regulating and establishing admiralty jurisdiction” § 3 (1780), in Thomas McKean, *Acts of the General Assembly of the Commonwealth of Pennsylvania, Carefully Compared with the Originals* 399, 400 (1782). By one account, Pennsylvania convicted 6 people of piracy during the Revolutionary War. Anne M. Ousterhout, *Controlling the Opposition During the American Revolution*, *Penn. Mag. of Hist. & Biography* 3, 23 (Jan. 1981).

<sup>248</sup> *Id.* § 4, *in id.* at 401.

<sup>249</sup> An Act empowering the Superior Court of Judicature, Court of Assize and General Gaol-Delivery, within and for this State, to take Cognizance of All Acts of Piracy and Felony Committed Upon the high sea (R.I. Sept. 1779); An act empowering the Superior Court, to try and determine Piracies, Felonies, and Robberies committed on the high seas, &c (Oct. 14, 1779).

<sup>250</sup> An Act for the Punishment of certain Crimes against the United States, 1 Stat. 112 (1790) (“Crimes Act of 1790”).

<sup>251</sup> *Id.* § 8, 1 Stat. at 113-14.

commission from any foreign prince.”

Thus, the fact that the Define and Punish Clause gives Congress the power to “Define and Punish ... Piracies,” rather than the power to punish just “piracy,” is no accident. The Clause gives Congress the power to define piracies plural because piracy was not a thoroughly delineated concept in international law, and required in practice more express enumeration by states. The Framers intended to give Congress the same power to define Piracy, as shown by their own words, the wording they chose, and the statutes they enacted before and after the Framing. It is thus just not plausible, as a matter of text or history, to read the Define and Punish Clause as giving Congress the power to punish a single, narrowly-defined universal jurisdiction crime of piracy.

### *C. Summary*

This Section has rebutted several textual arguments in support of a bar against extraterritoriality. It noted that the Constitution seems, in places, to contemplate the punishment of extraterritorial crime without a jurisdictional nexus to the United States. It argued too that the notion that the phrase “high seas” limits jurisdiction in other countries’ territorial waters is ahistorical. Nor should the fact that Congress has limited internal powers affect its ability to regulate matters abroad. Finally, it devoted most of its space to rebutting the “double redundancy” argument put forward by Eugene Kontorovich. After explaining that nobody accepted the double redundancy argument at the time of the Framing, or even for hundreds of years after, I traced the history of the Define and Punish Clause’s redundant phrasing, showing how territorial limits are not implicit in the Define and Punish Clause, and if anything, are somewhat inconsistent with that history. I then argued that the double redundancy argument creates textual problems on its own, as it fails to account for the fact that the Constitution gives Congress the power to “define ... piracies,” not the power to punish a singular crime of piracy. There is, in short, no textual basis to read any sort of territorial limitations into Congress’s Article I powers.

### III. FREE-FLOATING ORIGINAL UNDERSTANDING

Textualism alone does not necessarily undermine the territoriality thesis, though, as courts have read into the Constitution atextual limits on Congressional power. To list just a few examples, the Supreme Court has recently held that “[i]nterstate sovereign

immunity is [] integral to the structure of the Constitution,” even though it is mentioned nowhere in the text;<sup>252</sup> legislation “commanding state and local law enforcement officers to” enforce federal laws “violate[s] the Constitution,” even though “there is no constitutional text speaking to this precise question”<sup>253</sup>; and the President has the exclusive power to recognize foreign states.<sup>254</sup> The Supreme Court also sometimes reads generally innocuous words in the Constitution to carry substantial consequences. The Court’s jurisprudence limiting removal restrictions on executive branch officials fits this pattern, as it largely stems from the meaning of the term “Executive power.”<sup>255</sup> Likewise, Article III’s vesting of the “judicial Power of the United States” in Article III courts has been construed to limit Congress’s power to create Article I bankruptcy courts.<sup>256</sup> There are, to be sure, objections to many of these atextual, structural limits on the legislative powers.<sup>257</sup>

One could easily reframe the territoriality thesis the same way. Suppose that, at the time of the Framing, there were a strong background assumption that it was improper—either as a matter of international law or the Anglo-American legal tradition—to exercise criminal jurisdiction over foreign nationals for crimes committed abroad. It would not be hard to breathe such limits, assuming they were universally accepted, into otherwise innocuous parts of the Constitution or its overall structure. One could argue, for example, that punishing foreigners’ crimes committed abroad is inconsistent with due process of law if everyone, at the time of the Framing, agreed that no countries had the right to exercise jurisdiction over those crimes.<sup>258</sup> Likewise, one could channel John Quincy Adams’s 1839 structural argument that “[t]he legislative powers of Congress are ... limited to specific grants contained in the Constitution itself, all restricted on one side by the power of internal legislation within the separate States, and on the other, by the laws of nations.”<sup>259</sup> If international law prohibited extraterritorial jurisdiction, it would

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<sup>252</sup> *Franchise Tax Bd. of Calif. v. Hyatt*, 139 S. Ct. 1485, 1498 (2019).

<sup>253</sup> *Printz v. United States*, 521 U.S. 898, 902, 905 (1997).

<sup>254</sup> *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015).

<sup>255</sup> *See, e.g., Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183, 2191-92 (2020).

<sup>256</sup> *See, e.g., Stern v. Marshall*, 564 U.S. 462 (2011).

<sup>257</sup> *See, e.g., John F. Manning, Separation of Powers as Ordinary Interpretation*, 124 Harv. L. Rev. 1939 (2011); John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 Yale L.J. 1663 (2004).

<sup>258</sup> This would support the argument made in Brilmayer & Norchi, *supra* note 4.

<sup>259</sup> JOHN QUINCY ADAMS, *THE JUBILEE OF THE CONSTITUTION* 71 (1839); *see also* Kontorovich, *supra* note 13, at 158.



follow from this Adams argument that Congress is structurally prohibited from punishing certain extraterritorial crimes. And as noted in the Introduction, there is some historical support for this reading of international law.<sup>260</sup>

In this Part, I rebut these arguments. I do so by showing that international law did not place any limits on countries punishing extraterritorial crimes committed by foreigners at the time of the Framing. To the contrary, virtually all the leading international law sources expressly said that punishment of such offenses was either allowed or, in some instances, required. I then rebut the notion that this was an ingrained part of Anglo-American law at the time of the Framing as well. None of the Framers who suggested there might be international law limits on Congress's punishment powers connected their arguments to Anglo-American legal traditions. Instead, they made international law arguments that were often expressly rebutted by the sources they cited. Several people pointed this out in the 1780s and 1790s; even Joseph Story did too in the 1830s. Moreover, the rationales that U.S. government officials offered for such bans on extraterritorial legislative powers changed over time. All that sharply undermines the notion that there was a coherent understanding of international law that imposed territorial limits on state power when the Constitution was ratified. These various international law assertions are better explained by political controversies of the day. All of this sharply undercuts, as an historical matter, any notion that the Constitution prohibits Congress from exercising jurisdiction over crimes that lack a sufficient nexus to the United States.

#### A. Criminal Jurisdiction in the 1780s

The territoriality thesis hinges on the notion that piracy was the sole universal jurisdiction crime in 1788, and that punishing other crimes was prohibited by international law. This account is anachronistic. Although modern international law limits states' power to criminally prosecute crimes with which they lack a connection, this was not true at the time of the Framing. The leading "publicists," or international law treatise writers at the time—Grotius, Vattel, Pufendorf, Burlamaqui, and so on—generally took the view that international law allowed or even required punishment of certain extraterritorial crimes committed by foreigners.<sup>261</sup>

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<sup>260</sup> *Supra* notes 20-26 and accompanying text.

<sup>261</sup> David L. Sloss, et al., "International Law in the Supreme Court to 1860," *printed in* INTERNATIONAL LAW IN THE U.S. SUPREME COURT 8 (David Sloss, et al., eds., 2011) ("For the content of the law of nations, early Americans relied heavily on

The leading international law publicists of the seventeenth and early eighteenth centuries did believe that international law barred states from trying foreigners for crimes committed abroad. Hugo Grotius argued that states could punish extraterritorial crime because, in short, criminals deserved to be punished, no matter where they committed their crimes.<sup>262</sup> In some cases, moreover, he believed that international law required states to punish extraterritorial crimes. If a man committed a crime in England and then fled to France, France was “obliged” to “deliver” the criminal to England or “punish him” itself.<sup>263</sup>

To be sure, Hugo Grotius’s treatise was published more than a hundred years before the Framing, but his conclusions were still influential among the leading eighteenth century publicists. Jean-Jacques Burlamaqui’s international law treatise effectively quoted Grotius’s reasoning on this subject verbatim. “[A] sovereign renders himself guilty of the crime of another,” he explained, by “allowing a retreat and admittance to the criminal, and skreening him from punishment.”<sup>264</sup> This treatise was highly influential in the United States in the late 1700s and was part of Harvard College’s curriculum before the American Revolution.<sup>265</sup>

Samuel Pufendorf, by contrast, stated that punishing foreigners’ extraterritorial crimes was not legally required, though it was still permissible.<sup>266</sup>

Georg Friedrich von Martens agreed with Pufendorf.<sup>267</sup> “A

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European treatise writers (‘publicists’), including Grotius, Pufendorf, Bynkershoek, Burlamaqui, Wolff, and Rutherford. Of the publicists, they turned most often to Vattel.”).

<sup>262</sup> 2 HUGO GROTIUS, *THE RIGHTS OF WAR AND PEACE* ch. 21, § III(1)-(2), at 1061-62 (Richard Tuck ed. 2005) (1625).

<sup>263</sup> *Id.* § IV(1), at 1062. Grotius acknowledged, though, that “in most parts of Europe, this Right of demanding fugitive Delinquents to Punishment, has not been insisted upon, unless their Crimes be such as to affect the State, or are of a very heinous and malignant nature.” *Id.* § V(5), at 1074.

<sup>264</sup> 2 JEAN-JACQUES BURLAMAQUI, *THE PRINCIPLES OF NATURAL LAW AND POLITICAL LAW*, part 4, § 23, at 473 (Thomas Nugent tr. 2006) (1763); *see also id.* §§ 24-29, at 473-75.

<sup>265</sup> Sheldon S. Cohen, *Harvard College on the Eve of the American Revolution*, 59 *Publications of the Colonial Society of Massachusetts* 172, 175 (1982).

<sup>266</sup> 1 SAMUEL PUFENDORF, *ELEMENTORUM JURISPRUDENTIAE UNIVERSALIS LIBRI DUO*, book I, def. XXI, § 12, at 206 (William Abbott tr. 1934).

<sup>267</sup> GEORG FRIEDRICH VON MARTENS, *SUMMARY OF THE LAW OF NATIONS, FOUNDED ON THE TREATIES AND CUSTOMS OF THE MODERN NATIONS OF EUROPE*,

sovereign can punish foreigners, whether they have committed a crime in his dominions, or whether having committed it in a foreign a foreign country, they seek shelter in his dominions.”<sup>268</sup> Martens suggested a sovereign might not be “perfectly obliged” to punish such crimes, but should not “refuse[.]” to punish crimes that threaten “the safety” of other states.<sup>269</sup> Martens stated elsewhere that “[t]he criminal power [is] confined to the territory,” but all he meant by that was that states cannot “pursu[e]” or arrest a criminal “on a foreign territory, without permission from the sovereign.”<sup>270</sup> Martens’ view on this subject is especially noteworthy because he purported to base his conclusions on how states practiced international law, rather than Martens’ view of natural law.

Publicists began taking the view that states’ criminal jurisdiction was limited only in the middle of the eighteenth century, and this never fully caught on. Christian Wolff<sup>271</sup> and Thomas Rutherford<sup>272</sup> thus argued in their 1750s treatises that states could not punish any crimes that took place in other states. (Rutherford, though, argued that extradition was necessary in such circumstances.)

Only Emer de Vattel, who published his *Law of Nations* around the same time as Rutherford and Wolff, suggested that jurisdiction should vary by crime. Generally, he conceded, “it does not belong to the nation in which he has taken refuge, to punish him for that fault committed in a foreign country.”<sup>273</sup> But this was not true for crimes

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WITH A LIST OF THE PRINCIPAL TREATIES, CONCLUDED SINCE THE YEAR 1748 DOWN TO THE PRESENT TIME, INDICATING THE WORKS IN WHICH THEY ARE TO BE FOUND § 22, at 107 (William Cobbett tr. 1795).

<sup>268</sup> GEORG FRIEDRICH VON MARTENS, *FOUNDED ON THE TREATIES AND CUSTOMS OF THE MODERN NATIONS OF EUROPE: TO WHICH IS ADDED, A COMPLETE LIST OF ALL THE TREATIES, CONVENTIONS, COMPACTS, DECLARATIONS, &C. FROM THE YEAR 1731 TO 1788, INCLUSIVE, INDICATING THE SEVERAL WORKS IN WHICH THEY ARE TO BE FOUND*, lib. 3, § 22, at 108 (William Cobbett tr. 1802).

<sup>269</sup> *Id.* § 23, at 110.

<sup>270</sup> *Id.* § 24, at 111.

<sup>271</sup> CHRISTIAN WOLFF, *THE LAW OF NATIONS TREATED ACCORDING TO THE SCIENTIFIC METHOD* § 151, at 118 (Thomas Ahmert tr. 2017) (“[A]lthough the right to punish is a part of the civil power, and consequently belongs to the nation against which any one has offended or committed some crime, nevertheless one nation cannot on this account punish him who has offended against another nation or committed some crime against it.”).

<sup>272</sup> 2 THOMAS RUTHERFORTH, *INSTITUTES OF NATURAL LAW BEING THE SUBSTANCE OF A COURSE OF LECTURES ON GROTIUS DE JURE BELLI ET PACIS READ IN S. JOHNS COLLEGE CAMBRIDGE*, ch. 9, § 12, at 519 (1754) (“The nation, in whose territories he is, cannot justly punish him, if what he has done, though it is a crime by the law of nature or of nations, is not forbidden by its own civil law.”).

<sup>273</sup> EMER DE VATTEL, *THE LAW OF NATIONS* §§ 67, 232, at 227 (Béla Kapossy &

that “violate all public security.”<sup>274</sup> Thus, not only “pirates,” but also “[p]oisoners, assassins, and incendiaries”—that is, agitators—could “be exterminated wherever they are seized.”<sup>275</sup>

Importantly, Rutherford, Wolff, and Vattel’s shift towards a more restrictive theory of criminal jurisdiction has little to do with modern restrictions on criminal jurisdiction. All three based their arguments on natural law principles about the limits of legitimate state power, not state practice or concerns about infringing the sovereignty of other states. Vattel thus argued that most crimes committed in a foreign state were not punishable because “nature does not give to men or to nations any right to inflict punishment, except for their own defence and safety.”<sup>276</sup> Rutherford and Wolff sounded similar themes. This likely reflects Enlightenment shifts about the limited justifications for criminal punishment, but it does not appear to have caught on. Martens’ contrary take, after all, was published in 1789, and purported to reflect common European practice.

Some have argued, in the context of the Alien Tort Statute, that principles against extraterritoriality were embedded in the Dutch conflict-of-laws scholar Ulrich Huber’s conflict-of-law principles, which were extremely influential in the United States in the 1790s.<sup>277</sup> Although nobody seems to have extended this argument to criminal legislation, there would be considerable force in doing so. Huber’s first maxim is that “[t]he laws of each state have force within the limits of that government and bind all subjects to it, but not beyond.”<sup>278</sup> It would seem to follow that states lack the power to punish crimes

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Richard Whatmore eds. 2008).

<sup>274</sup> *Id.* § 233, at 227-28.

<sup>275</sup> *Id.* Vattel refers to agitators throughout the law of nations as those “who incite the people to revolt.” *Id.* § 290, at 493; *see also id.* § 32, at 93 (“If any nation is dissatisfied with the public administration, it may apply the necessary remedies, and reform the government. But ... I am very far from meaning to authorise a few malcontents or incendiaries to give disturbance to their governors by exciting murmurs and seditions.”). Vattel said that not only pirates could be summarily punished, but anyone who lacks “a commission from their sovereign.” *Id.* § 52, at 451.

<sup>276</sup> *Id.* § 232, at 227-28.

<sup>277</sup> See Supplemental Br. of Chevron Corp., et al. at 15-16, *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491 (U.S. Aug. 8, 2012) (“In the late eighteenth and early nineteenth centuries, sovereignty was a rigid concept and law was conceived in strict territorial terms. American jurists during this period were deeply influenced by a well-known 1689 essay by Ulrich Huber that maintained that the ‘laws of each state have force within the limits of that government and bind all subjects to it, but not beyond.’”)

<sup>278</sup> Ernest G. Lorenzen, *Huber’s De Conflictu Legum*, 13 *Ill. L. Rev.* 199, 200 (1919).

committed by other states' subjects outside their territories. And there is also no question that Huber was highly influential in the 1790s. His 1689 chapter "De Conflictu Legum Diversarum in Diversis Imperium," began influencing English courts in the late 1700s,<sup>279</sup> probably by way of Scottish jurists.<sup>280</sup> Alexander Dallas translated a large portion of Huber in a footnote of his *Reports of Supreme Court opinions*.<sup>281</sup> And Joseph Story wrote in his 1834 *Commentaries on the Conflict of Laws* that Huber "possessed an undoubted preference over other continental jurists as well in England as in America."<sup>282</sup>

But it does not follow from Huber's emphasis on sovereignty that states were prohibited from exercising extraterritorial criminal powers. The central point of Huber's first maxim was that forum states were not obligated to apply "foreign law" unless they chose to do so as a matter of comity.<sup>283</sup> This contrasts Huber's comity-based approach with the prior "statutist" account, under which, "in certain situations a local court would be *bound* to apply foreign statutes or customs."<sup>284</sup> Perhaps most famously, Lord Mansfield relied on this doctrine when holding in *Somerset's Case* that a slave was entitled to habeas corpus. English law did not recognize slavery, and English law must govern the issue, Mansfield explained, because "an act of dominion must be recognized by the country where it is used."<sup>285</sup> Huber's maxims thus provide a poor basis for reading into the Constitution a territorial limitation on Congress's powers. Other countries might not be required to apply U.S. law to extraterritorial events, but international law did not prevent the United States from enforcing such laws itself.

Indeed, Huber himself maintained that a state could prosecute any criminal found within its territory, even if he committed the crime abroad.<sup>286</sup> He recounted the example of a man who "struck a man on

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<sup>279</sup> See D.J. Llewelyn Davies, *The Influence of Huber's De Conflictu Legum on English Private International Law*, 18 Brit. Y.B. Int'l L. 49, 52 (1937).

<sup>280</sup> See, e.g., Kurt H. Nadelman, *The Comity Doctrine: An Introduction*, 65 Mich. L. Rev. 1, 1-2 (1966).

<sup>281</sup> *Emory v. Greenough*, 3 U.S. (3 Dall.) 369, 370-77 n\* (1797).

<sup>282</sup> JOSEPH STORY, *COMMENTARIES ON THE CONFLICT OF LAWS* § 31, at 32 (1834).

<sup>283</sup> See, e.g., ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* 83-84 (1975).

<sup>284</sup> See Arthur Nussbaum, *Rise and Decline of the Law-of-Nations Doctrine in the Conflict of Laws*, 42 Colum. L. Rev. 189, 189 (1942) (emphasis added).

<sup>285</sup> *Somerset v. Stewart*, 98 Eng. Rep. 499, 510 (1772).

<sup>286</sup> See Lorenzen, *supra* note 278, at 393 ("Huber likewise holds that the state in which a criminal is apprehended may prosecute him for a crime committed abroad, for whoever is found within a territory is, according to him, subject to its criminal jurisdiction.").

the head” in Friesland and then escaped to, and was tried and acquitted by Transylvania.<sup>287</sup> Huber did not suggest there was anything wrong with Transylvania trying the criminal for an act that took place outside its territory, but he suggested that Friesland need not respect the acquittal.<sup>288</sup> Huber also stated that “[a] sentence pronounced in any place or a pardon of a crime granted by one having that jurisdiction has effect everywhere ....”<sup>289</sup>

This more universalistic conception of crime might seem strange to modern readers, but criminal law was generally not seen as local in 18th century Europe, but rather as reflecting universal principles, as reflected in Roman, canon, and customary law.<sup>290</sup> To be sure, Huber and other Dutch conflict theorists’ conflict of law theories were in part up in opposition to this longstanding view; they wrote after the Dutch secured independence and no longer had any basis to apply Imperial law.<sup>291</sup> But the notion that certain crimes were universally recognized subject to universal jurisdiction persisted throughout the eighteenth century.<sup>292</sup> Many held this view in the United States through the 1790s.<sup>293</sup>

Indeed, this may help explain the source of early federal common law prosecutions. The Supreme Court ultimately held in 1812 that such prosecutions were unconstitutional.<sup>294</sup> But throughout the 1790s, with the exception of Supreme Court Justice Samuel Chase, every

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<sup>287</sup> See translation in *Emory v. Greenough*, 3 U.S. (3 Dall.) 369, 370-72 n\* (1797).

<sup>288</sup> *Id.*

<sup>289</sup> *Id.* at 68.

<sup>290</sup> Marc Ancel, *The Collection of European Penal Codes and the Study of Comparative Law*, 106 U. Penn. L. Rev. 329, 342 (1958) (“Case law and especially doctrine were quite naturally of an international character.”).

<sup>291</sup> See Nussbaum, *supra* note 284, at 190; see also, e.g., Note, *American Slavery and the Conflict of Laws*, 71 Colum. L. Rev. 74, 81-82 (1971).

<sup>292</sup> See, e.g., Ziv Bohrer, *International Criminal Law’s Millennium of Forgotten History*, 34 L. & Hist. Rev. 393, 427 (2016).

<sup>293</sup> See, e.g., Ruth Wedgwood, *The Revolutionary Martyrdom of Jonathan Robbins*, 100 Yale L.J. 229, 240-41 (1990) (“A lingering view saw the law of nations as *jus gentium* as well as *jus inter gentes*, a law governing domestic life as much as international relations. Municipal law could be seen as mere publication and specification of penalty for a code of conduct common to nations. In such a view, it would not subject a person to inconsistent obligations nor surprise him in his primary conduct were any nation to punish even land-locked crime under the common standards of this law of nations. We will see a view (in men so diverse as James Wilson and Charles Lee) that any nation might be able to punish common crimes at sea—even where the conduct did not occur on a flag vessel or nor involve nationals as offenders or victims, and had no immediate impact on the interests of the nation.”).

<sup>294</sup> *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 (1812).

single federal judge had stated in various grand jury charges that courts did have the power to prosecute common law offenses.<sup>295</sup> So a 1790 jury had the power to convict defendants of piracy (not yet then a statutory offense), Chief Justice John Jay argued, because “[t]he laws of nations make a part of the laws of the United States.”<sup>296</sup> There do not appear to have been any prosecutions against foreigners for extraterritorial conduct (there were never many federal common law prosecutions to begin with). But the principles underlying both common law and extraterritorial prosecutions are similar: crimes are universally indictable and thus can be prosecuted anywhere, even without affirmative legislative authorization.

Early American sources acknowledge many of these points. In a footnote, Joseph Story’s *Commentaries on the Conflict of Laws* (1834) acknowledges that “Martens deems it clear, that a Sovereign, in whose dominions a criminal has sought refuge, may, if he chooses, punish him for the offence, though committed in a foreign country; though he admits, that the more common usage in modern times is to remand the criminal to the country, where the crime was committed.”<sup>297</sup> He then cites, in addition to Martens, Vattel, Burlamaqui, and Grotius. Story also quotes Paul Voet, a Dutch conflicts contemporary of Huber, as maintaining “that crimes committed in one state, may, if the criminal is found in another state, be upon demand punished there.”<sup>298</sup> Perhaps channeling these views, Chief Justice Taney, writing for four justices (including Justice Story), asserted as late as 1840 that states of the union, “may, if they think proper, in order to deter offenders in other countries from coming among them, make crimes committed elsewhere punishable in their Courts, if the guilty party shall be found within their jurisdiction.”<sup>299</sup>

There is some early American authority that takes a different view of international law, but most are unpersuasive. In 1792 notes regarding a potential extradition treaty with Spain (discussed below), Jefferson offered his understanding of extraterritorial criminal

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<sup>295</sup> Gary D. Rowe, Note, *The Sounds of Silence: United States v. Hudson & Goodwin, The Jeffersonian Ascendancy, and the Abolition of Federal Common Law Crimes*, 101 Yale L.J. 919, 920 n.9 (1992).

<sup>296</sup> John Jay, Charge to Grand Jury for the District of New York (Apr. 4, 1790); see also Stewart Jay, *The Origins of Federal Common Law: Part One*, 133 U. Pa. L. Rev. 1003, 1040-41 (1985).

<sup>297</sup> JOSEPH STORY, *COMMENTARIES ON THE CONFLICT OF LAWS* § 625, at 519 n.6 (1834).

<sup>298</sup> *Id.* at 519.

<sup>299</sup> *Holmes v. Jennison*, 39 U.S. 540, 568-69 (1840) (opinion of Taney, C.J.); see also, e.g., *Wedgwood*, *supra* note 293, at 241 n.30.

power.<sup>300</sup> His notes begin by asking rhetorically, “Has a nation a right to punish a person who has not offended itself?” Jefferson responds, without citation that “[w]riters on the law of nature agree that it has not. That on the contrary, Exiles and Fugitives are to them as other strangers. And have a right of residence, unless their presence would be noxious. e.g. infectious persons.”<sup>301</sup> As we’ve seen, the opposite was true: there were no such limits on state power. Jefferson then cites Vattel as stating that states may exercise extraterritorial jurisdiction only over “Pirates, Murderers [presumably he is referring here to Vattel’s poisoners and assassins], and Incendiaries,” but he misinterprets “Incendiaries” to mean arsonists (when Vattel meant insurrectionists)<sup>302</sup> and brushes aside arson as “so rare” that there is no reason to include it within an extradition convention.<sup>303</sup>

A 1791 grand jury charge by Justice James Wilson likewise offers a more limited understanding of extraterritorial powers, but its reasoning and conclusion are a little obscure.<sup>304</sup> Wilson’s grand jury charged every crime that Congress had enumerated, concluding with piracy. Wilson then shifted to expressing “some doubts which arise in my mind, upon this part of the law” criminalizing piracy, though with “the greatest degree of diffidence.” Wilson noted that “Piracy ... is a crime against the universal law of society,” and thus “may be punished by every community.” But the Crimes Act of 1790 (like the Piracy Act of 1700) had declared that “*murder or robbery or any other*” crime subject to capital punishment on land is, if committed at sea, piracy. This posed a conflict-of-laws problem, Wilson thought, because the maritime law formulation of piracy as robbery on the high seas was part of the law of nations. And “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.” Wilson thus questioned the jury whether a foreign national “who shall commit a murder upon the seas” could be tried as a “pirate and felon” under the Crimes Act. Wilson never answered his own question, instead posing two more: (1) whether it was Congress’s “intention” to extend the definition of piracy; and (2) whether Congress could enact such a law “consistently with the predominant authority of the law of nations, and of the universal law of society.”

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<sup>300</sup> See Thomas Jefferson, Considerations on a Convention with Spain, Mar. 22, 1792, <https://founders.archives.gov/documents/Jefferson/01-23-02-0275>.

<sup>301</sup> *Id.*

<sup>302</sup> *Supra* note 275.

<sup>303</sup> Thomas Jefferson, Considerations on a Convention with Spain, Mar. 22, 1792, <https://founders.archives.gov/documents/Jefferson/01-23-02-0275>.

<sup>304</sup> James Wilson’s Charge to the Grand Jury of the Circuit Court for the District of Virginia, May 23, 1791.



This is a more sophisticated (or at least a less error-filled) take than Jefferson's, but it is hard to put too much weight on it. Wilson never explains why he thought the law of nations prohibited the United States from trying foreign nationals for murder on the high seas. Such trials may not have been common, but they were not impermissible under international or even English law, which (again) certainly authorized for the trial of at least some foreign nationals.<sup>305</sup> Wilson also fails to explain why "Piracy" should be viewed as a unique "crime against the universal law of society," while "murder" should not. Indeed, Jefferson thought murder was universally cognizable based on his interpretation of Vattel. Supreme Court Justice James Iredell likewise asserted in a 1796 grand jury charge that "piracy and murder committed on the high seas" both constitute a "a violation of that law of nature" and are "equally punishable by any nation into whose country the criminals may afterwards arrive."<sup>306</sup> While there is little authority that England was in the habit of exercising universal jurisdiction, this Iredell view makes more sense, given that England had long declared that all felonies on the high seas were piracy, and did not distinguish between robbery and murder. All this goes to show that while there were some early American sources departing from the publicists cited above, they were largely inconsistent with one another, misinterpreted international law sources, or failed to justify their analysis at all.

As a result, there is no good argument that international law prohibited states from prosecuting foreigners for crimes committed abroad in 1789. Most leading international sources are to the contrary. There are a few exceptions, but all make purely natural law arguments, and do not appear to reflect actual state practice.

#### *B. Potential Anglo-American Limits on Criminal Jurisdiction*

I now consider and ultimately reject the possibility that English or American law implicitly limited extraterritorial criminal power. There is, to be sure, significant evidence that such prosecutions were, at best, extremely rare (if any even happened). But this appears to result from historical procedural requirements for criminal cases that, almost certainly, would not apply to the United States' federal government. I also discuss the possibility that historical objections to British trials of colonists in English courts may have provided the

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<sup>305</sup> *Supra* notes 108-110 and accompanying text.

<sup>306</sup> James Iredell's Charge to the Grand Jury of the Circuit Court for the District of Pennsylvania, Apr. 12, 1796.

source for such a rule, but ultimately conclude that there is no evidence supporting this position. While early state court cases held that state legislative power could not extend to conduct committed in other states, the rationales underlying those decisions would not necessarily apply to the United States. Finally, I consider, but reject the notion that pre-Independence concerns with Parliament exceeding its jurisdiction by regulating internal colonial affairs could be the source of such concerns about extraterritorial legislation. All of these rationales, though, illustrate political undercurrents in the 1780s and 1790s that could help explain why early American leaders expressed concern about extraterritorial enforcement.

England rarely, if ever, prosecuted foreigners for extraterritorial crimes.<sup>307</sup> We've already seen that England was not in the habit of prosecuting foreign pirates for their crimes. But the reasons for this are a little obscure. By one account, English courts could not try extraterritorial criminal offenses because at common law, the trial had to be held in, and jurors had to be selected from the county where the crime was committed.<sup>308</sup> (This is referred to as the venue and vicinage requirements.) But this would serve as a poor basis for limiting Congress's extraterritorial powers. Before the American Revolution, Parliament had departed from the common law by enacting more than a dozen statutes authorizing criminal trials in different venues than the place where the crime was committed.<sup>309</sup>

These laws, to be sure, were controversial in the colonies around Independence. Britain enacted two such laws in the run up to the American Revolution, prompting protests throughout the colonies.<sup>310</sup> After colonists in Rhode Island burned the British schooner *Gaspee* and shot its commander in 1772, for example, the British threatened to try those responsible in England, prompting protests that this violated their right to trial by a jury of their peers.<sup>311</sup> This was a hot-

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<sup>307</sup> See, e.g., Bohrer, *supra* note 292, at 427.

<sup>308</sup> Henry Wade Rogers, *The Element of Locality in the Law of Criminal Jurisdiction*, 37 A.L.R. 22, 29 (1889); Lawrence Preuss, *American Conception of Jurisdiction with Respect to Conflicts of Law on Crime*, 30 Transactions of the Grotius Soc'y 184, 191-92 (1944).

<sup>309</sup> William Wirt Blume, *Place of Trial of Criminal Cases: Constitutional Vicinage and Venue*, 43 Mich. L. Rev. 59, 61-62 (1944).

<sup>310</sup> Drew L. Kershen, *Vicinage*, 28 Okla. L. Rev. 801, 806-07 (1976).

<sup>311</sup> Sarah Kinkel, *The King's Pirates? Naval Enforcement of Imperial Authority, 1740-76*, 71 William & Mary Q. 3, 24-25 (2014); Peter C. Messer, *A Most Insulting Violation: The Burning of the HMS Gaspee and the Delaying of the American Revolution*, 88 New England Q. 582, 585-86 (2015); William R. Leslie, *The Gaspee Affair: A Study of Its Constitutional Significance*, 39 Mississippi Valley Hist. Rev. 233 (1952).

button issue before Independence. The First Continental Congress's Petition to the King of 1774 objected to Parliament trying crimes committed in the United States in Great Britain or other colonies. "In the last sessions of Parliament an Act was passed .... empowering the Governour of the Massachusetts Bay to send persons indicted for murder in that Province, to another Colony, or even to Great Britain, for trial, whereby such offenders may escape legal punishment."<sup>312</sup> They also were opposed to trying "Colonists ... in England for offences alleged to have been committed in America."<sup>313</sup> One of the charges in the Declaration accused George III of "transporting us beyond the seas to be tried for pretended offences."<sup>314</sup> And four (Georgia, Maryland, Massachusetts, and New Hampshire) of the original thirteen colonies included within their Constitutions a requirement that crimes be tried in the venue where the crime was committed.<sup>315</sup>

If these principles influenced early state court opinions recognizing limits on the extraterritorial exercise state power, though if so, they did so only indirectly.<sup>316</sup> American states began holding in the 1790s that they lacked the power to punish crimes committed outside their borders, but they did not track this explanation. In *Gilbert v. Steadman* (1792), the Connecticut Supreme Court stated without explanation that it lacked "jurisdiction" over a crime "committed in the state of Massachusetts."<sup>317</sup>

The North Carolina Supreme Court came to a similar conclusion in 1799 and gave some theoretical backing for it.<sup>318</sup> "Crimes and

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<sup>312</sup> The Petition of Congress To the king's Most Excellent Majesty, 1 JCC 1774, at 47.

<sup>313</sup> *Id.*

<sup>314</sup> Sydney George Fisher, *The Twenty-Eight Charges Against the King in the Declaration of Independence*, 31 Penn. Magazine of Hist. & Biography 257, 291 (1907) ("This refers to two acts of parliament. The first had been passed in the reign of Henry VIII. and provided that a person accused of treason without the realm could be brought to England for trial. Several trials and punishments had taken place in previous reigns under this act, and parliament in 1769 reminded the king that this old law could be applied to the disturbances in America; but no one was ever transported or tried under it. The other act was a recent one providing that any one charged with setting fire to his majesty's ships, docks, arsenals &c. could in like manner be taken to England for trial. Both acts were, of course, intended to prevent colonial juries acquit ting such offenders; but no action was ever taken under either of them during the Revolution .").

<sup>315</sup> Kershen, *supra* note 310, at 807.

<sup>316</sup> See, e.g., Robert A. Leflar, *Extrastate Enforcement of Penal and Governmental Claims*, 46 Harv. L. Rev. 193, 198 (1932) ("[H]istorical explanations drawn from medieval times, however correct they may be, are not very satisfying.").

<sup>317</sup> 1 Root. 403, 404 (Conn. 1792).

<sup>318</sup> *State v. Knight*, 1 N.C. (1 Taylor) 65 (1799).

misdemeanors committed within the limits of each, are punishable only by the jurisdiction of that state where they arise; for the right of punishing being founded upon the consent of the citizens, express or implied, cannot be directed against those who never were citizens; and who likewise committed the offence beyond the territorial limits of the state claiming jurisdiction.”<sup>319</sup> If North Carolina were to fail to adhere to these limits, “our own citizens [might] be harassed under the operation of similar laws enacted in other states.”<sup>320</sup>

These are solid policy argument as to why states should generally decline to exercise extraterritorial punishment powers, but it’s a weak constitutional one. Presumably, the legislature and executive branches could weigh the risk that other states might try to prosecute their own citizens. The notion of consent is a better argument applied to the states exercising jurisdiction over citizens of other states, as such prosecutions might seem to upset the Constitutional compact. But the notion that courts should protect foreign nationals from federal government legislation is a harder pill to swallow. After all, constitutional protections usually benefit citizens, not foreigners. Moreover, any foreigner who committed a crime abroad and took refuge in the United States arguably consents to being tried according to its laws, including for conduct he committed abroad. And the United States might well have a strong interest in ensuring that foreign criminals are imprisoned, to prevent them from committing crimes against its own citizens.

By the late 19th century, most leading treatises recognized that states cannot prosecute extraterritorial crimes.<sup>321</sup> (Though as we’ve seen, four Supreme Court justices asserted otherwise in *Talbott v. Jensen* as late as the 1840s.). But there was no straightforward constitutional explanation for this limit, and the few explanations that did exist would not apply to the federal government. By one account, extraterritorial punishment by states is inconsistent with Article IV, section 2 of the Constitution, which requires states to honor one another’s extradition requests, as that “provision clearly presupposes that criminals are to be tried and punished in the State wherein they commit offenses.”<sup>322</sup> This explanation, though, would not translate to limits on federal constitutional power, as there are no similar

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<sup>319</sup> *Id.* at 66.

<sup>320</sup> *Id.*

<sup>321</sup> THOMAS M. COOLEY, TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWERS OF THE STATES OF THE AMERICAN UNION 127 (1868).

<sup>322</sup> DAVID RORER & LEVY MAYER, AMERICAN INTER-STATE LAW 228 (1879).

extradition guarantees between the United States and foreign states. The same treatise also suggested that the rule against extraterritorial punishment dates back to the colonists' Revolutionary War complaint of being tried in England for crimes committed in America.<sup>323</sup> But that explanation too does not translate to an extraterritorial limit on federal power. As discussed above, Constitution specifically authorizes Congress to prosecute crimes for offenses committed outside the territory of the United States in a district of its choosing.<sup>324</sup> Indeed, Thomas Cooley's treatise stated that states could not punish offenses on "the high seas beyond State lines" because the federal government had exclusive jurisdiction there.<sup>325</sup>

Finally, concerns about territorial jurisdiction may have stemmed from Revolutionary War-era concerns that Parliament had exceeded its jurisdiction by enacting laws regulating internal colonial affairs. The Declaration of Independence thus emphasized that the colonists had "warned" their "British brethren" "from time to time of attempts by their legislature to extend an unwarrantable jurisdiction over us."

Many of the future leaders of new federal government made these arguments in the run up to Independence. In 1774, Thomas Jefferson argued that Britain never obtained sovereignty over the colonies. This was so, he argued, because "America was conquered, and her settlements made and firmly established, at the expence of individuals, and not of the British public."<sup>326</sup> It followed from this that "all the lands within the limits which any particular society has circumscribed around itself are assumed by that society, and subject to their allotment only."<sup>327</sup> Thus, "his majesty has no right to land a single armed man on our shores; and those whom he sends here are liable to our laws for the suppression and punishment of Riots, Routs, and unlawful assemblies, or are hostile bodies invading us in defiance of law."<sup>328</sup>

Alexander Hamilton, in *Farmer Refuted*, took a less extreme, but similar view. He conceded that the colonists "hold our lands in America by virtue of charters from British Monarchs," but used that to argue that it owed "no obligations" to Parliament as a result.<sup>329</sup> The

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<sup>323</sup> *Id.*

<sup>324</sup> *Supra* at 8.

<sup>325</sup> COOLEY, *supra* note 321, at 128.

<sup>326</sup> *Draft of Instructions to the Virginia Delegates in the Continental Congress*, reprinted in 1 *The Papers of Thomas Jefferson* 121, 122 ("TPJ").

<sup>327</sup> *Id.* at 133.

<sup>328</sup> *Id.*

<sup>329</sup> Alexander Hamilton, *The Farmer Refuted, &c.*, Feb. 23, 1775,

colonies were “British dominions,” meaning they were “countries subject to the King of Great Britain,” but not Parliament.<sup>330</sup> None of the colonial charters made “the least reservation [] of any authority to parliament. The colonies are considered in them, as entirely without the realm, and consequently, without the jurisdiction of its legislature.”<sup>331</sup> Likewise, John Adams asserted: “We are not then a part of the British kingdom, realm or state; and therefore the supreme power of the kingdom, realm or state, is not upon these principles, the supreme power over us.”<sup>332</sup> “Massachusetts is a realm, New-York is a realm, Pennsylvania another realm, to all intents and purposes, as much as Ireland is, or England or Scotland ever were. The king of Great Britain is the sovereign of all these realms.”<sup>333</sup> “[T]he laws of England, and the authority of parliament, were by common law confined to the realm and within the four seas, so was the force of the great seal of England.”<sup>334</sup>

But these arguments also provide a poor basis for a supposed territorial limitation on Congress’s power. As originally expressed, the colonists developed these arguments not to gain “independence” from the “crown of England”—which John Adams deemed “a slander” as late as March 1775—but to “keep their old privileges” to “tax themselves, and govern their internal concerns.”<sup>335</sup> In *Farmer Refuted*, Hamilton likewise stressed that the Continental Congress still “professed allegiance to the British King.”<sup>336</sup>

Most importantly, as we’ll see below, none of the early American sources relied on these bespoke Anglo-American traditions when arguing in favor of extraterritorial criminal jurisdiction. Instead, they tried to ground their arguments in traditional international law principles, no doubt because they wanted to appeal to foreign countries. The problem is these arguments were wrong and often were inconsistent with one another. This is not to say that these

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<https://founders.archives.gov/documents/Hamilton/01-01-02-0057>.

<sup>330</sup> *Id.*

<sup>331</sup> *Id.*

<sup>332</sup> John Adams, VII. To the Inhabitants of the Colony of Massachusetts, Mar. 6, 1775, in 2 Papers of John Adams 307, 315.

<sup>333</sup> John Adams, VIII. To the Inhabitants of the Colony of Massachusetts, Mar. 13, 1775, in *id.* 327, 329.

<sup>334</sup> John Adams, IX. To the Inhabitants of the Colony of Massachusetts-Bay, Mar. 27, 1775, in *id.* 346, 353.

<sup>335</sup> John Adams, VIII. To the Inhabitants of the Colony of Massachusetts, Mar. 13, 1775, in *id.* 327, 336.

<sup>336</sup> Alexander Hamilton, *The Farmer Refuted, &c.*, Feb. 23, 1775, <https://founders.archives.gov/documents/Hamilton/01-01-02-0057>.

arguments were unimportant. They show that the early United States was concerned with the source of legislative sovereignty, and sensitive to extraterritorial jurisdiction. But these were likely just political concerns that influenced the legal debates of the day, rather than legal principles baked into American conceptions of legislative power.

### C. Extradition and Extraterritorial Punishment

This next Section discusses how extraterritorial punishment connected with extradition. Throughout the 1790s, and even dating back to the 1780s, many Americans expressed concern about Europeans punishing crimes committed by U.S. citizens and residents. This section explores many such controversies and concludes with a longer discussion of the United States' extradition of Thomas Nash (or Jonathan Robbins), the backlash it produced, and John Marshall's speech to the House of Representatives defending the extradition. That speech contains the more sophisticated argument against applying legislation to extraterritorial offenses. It was persuasive at the time, and still is today. But as I show, it broke ground on multiple fronts. It should not be understood as a restatement of longstanding legal principles, but rather as an ingenious political defense of Marshall's political ally, John Adams.

There was a strong sense after Independence that the United States (and perhaps England before it) was an asylum where people persecuted by European powers could flee and have a new life. Coke had argued that extradition was impermissible under English law.<sup>337</sup> "It is holden, and so it hath been resolved, that divided kingdoms under several kings in league with another are sanctuaries for servants or subjects flying or safety from one kingdom to another, and upon demand made by them, are not by the laws and liberties of kingdoms to be delivered...."<sup>338</sup> Extradition became even more sensitive in the United States based on a sense that many Europeans came to the United States to flee unjust laws and adopt a new country. As Gordon Wood explains, "most Americans necessarily accepted the right of expatriation."<sup>339</sup> That again is partly why there was popular backlash to French requests to extradite Longchamps for his assault on Marbois: Longchamps purported to take U.S. citizenship, and American writers warned that extraditing Longchamps would leave

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<sup>337</sup> 3 Institutes 180.

<sup>338</sup> *Id.*

<sup>339</sup> GORDON S. WOOD, *EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789-1815*, at 248 (2009).

every American at risk of trial in a foreign monarchy. This too was why there was so much backlash to Virginia's 1784 statute authorizing extradition.<sup>340</sup>

Other authorities were also initially divided on whether extradition was appropriate under U.S. law. As we've seen already, Randolph asserted that he lacked the authority to extradite Ferrier, but he was wrong (a statute specifically authorized Ferrier's extradition).<sup>341</sup> Randolph may have been just succumbing to popular pressure against extradition, rather than making a considered legal judgment (recall that he dragged his feet when punishing Clark under the same statute).

Judicial authorities reflected this divide too. Chancellor James Kent, a highly influential scholar in early U.S. law, declared in *In re: Washburn* (1819), consistent with the international law authorities I cited above, that: "It is the law and usage of nations, resting on the plainest principles of justice and public utility, to deliver up offenders charged with felony and other high crimes, and fleeing from the country in which the crime was committed, into a foreign and friendly jurisdiction."<sup>342</sup> But over the following decades, most courts took the opposite view that extradition was improper unless a treaty specifically authorized it.<sup>343</sup>

Jefferson also made a version of this argument in 1791 and 1792. Governor Charles Pinckney of South Carolina had written to President Washington requesting their help in securing the extradition of two counterfeiters had recently fled South Carolina for Spanish Florida.<sup>344</sup> The Governor of Spanish Florida had suggested that he might be inclined to extradite the fugitives if the United States signaled that it would extradite Spanish refugees.<sup>345</sup> Jefferson, then Secretary of State, advised against it. Jefferson acknowledged that many countries had signed extradition treaties, but he insisted that "England has no such Convention with any nation" and had never extradited fugitives as a result.<sup>346</sup> "England has been the asylum ... of

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<sup>340</sup> *Supra* notes 114-16 and accompanying text.

<sup>341</sup> *Id.*

<sup>342</sup> 4 John's Chanc. 106, 108 (1819).

<sup>343</sup> See, e.g., *Ex parte dos Santos*, 7 F. Cas. 949 (No. 1,835) (C.C. Va. 1835).

<sup>344</sup> See Letter from Thomas Jefferson to George Washington, Nov. 7, 1791, in 9 Papers of George Washington 148, 149 n.1 (editor's note).

<sup>345</sup> *Id.*; see also Letter from Charles Pinckney to George Washington, Aug. 18, 1791, in 8 Papers of George Washington 436, 437.

<sup>346</sup> Letter from Thomas Jefferson to George Washington, Nov. 7, 1791, in 9 Papers of George Washington 148, 149.



the most atrocious offenders as well as the most innocent victims.... The laws of the United States like those of England receive every fugitive, and no authority has been given to our Executives to deliver them up."<sup>347</sup> Because "it is extremely difficult to draw the line between those and acts rendered criminal by tyrannical laws only," countries needed to agree in advance (by treaty) as to what crimes they were willing to extradite.<sup>348</sup> A few decades later, Secretary of State James Monroe also invoked this principle to argue against British efforts to impress American sailors (who had emigrated from Britain). "Offenders, even conspirators, cannot be pursued by one power into the territory of another, nor are they delivered up by the latter, except in compliance with treaties, or by favor."<sup>349</sup>

But there are two problems with using this "asylum" theory as a basis for limits on extraterritorial jurisdiction. First, the asylum argument does not seem to have been fully baked into U.S. law. They were instead based on poor interpretations of international law. Second, this asylum argument was used almost exclusively to argue against extradition, not against extraterritorial punishment. To the contrary, punishment of extraterritorial crimes was often advocated in the early Republic as an alternative to extradition. This was almost certainly based on a sense that U.S. courts were more likely to acquit or let off easy foreign criminals.

Both points are illustrated by the U.S.-France consular convention that the United States negotiated over the course of the 1780s. French sailors visiting the United States often deserted, and the United States, to France's annoyance, refused to arrest them.<sup>350</sup> In exchange for recognition and alliance, the United States had promised to negotiate a consular convention to give French consular officials some enforcement powers over French subjects in the United States (a common form of treaty meant to facilitate commercial interactions at the time). But the United States delayed negotiations throughout the

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<sup>347</sup> *Id.* Jefferson mentioned the "La Mottes," who fled to England after impersonating Marie Antoinette in a bid to defraud the crown jewelers of a diamond necklace. See generally, e.g., FRANTZ-FUNCK BRENTANO, *THE DIAMOND NECKLACE, BEING THE TRUE STORY OF MARIE-ANTOINETTE AND THE CARDINAL DE ROHAN* (1901). He also cited Charles Alexandre de Calonne, a former French government official who fled to London after being dismissed by Louis XVI.

<sup>348</sup> *Id.* at 149-50.

<sup>349</sup> James Monroe, *Instructions &c, in MESSAGE FROM THE PRESIDENT OF THE U.S. TRANSMITTING COPIES OF THE INSTRUCTIONS GIVEN TO THE MINISTERS OF THE U.S. APPOINTED TO NEGOTIATE A PEACE WITH GREAT BRITAIN* 14 (1814).

<sup>350</sup> Julian P. Boyd, *Two Diplomats Between Revolutions: John Jay and Thomas Jefferson*, 66 *Va. Magazine of Hist. & Biography* 131, 136 (1958).

1780s, based in part on American suspicions of applying French law in the United States.<sup>351</sup> Ultimately, thanks in part to the Longchamps Affair and French protests over Virginia's failure to extradite Ferrier, the United States and France ratified a convention in 1789 that authorized French consular officers to arrest and extradite deserters with the assistance of local courts.<sup>352</sup> All this shows that although the United States may have been seen as an asylum from European powers, this was a notion marshalled for political arguments, but was not hard-wired into U.S. law.

This is also the takeaway from Jefferson's exchange with Pinckney over the proposed extradition treaty with Spain. Jefferson eventually seems to have caved in response to Governor Pinckney's (far more persuasive) arguments. Pinckney disagreed with Jefferson's analysis of international law, conceding that countries have "*no right to demand extradition,*" but insisting that it is good practice for states to agree to extradition requests.<sup>353</sup> There might well be certain political offenses where "there is a difficulty in drawing the line between such as are acknowledged generally to be crimes & such as are only rendered so by tyrannical Laws."<sup>354</sup> But that is not true for the vast majority of "*felonies.*" "[H]owever they may vary in their modes of trial, the opinions of all civilised nations are generally the same with respect to the nature & extent of the Crimes of Murder, Piracy, Barratry, Forgery & others equally destructive to the order of Society—particularly Piracy, Barratry & Forgery, on the preventing of which by the strict & regular punishment of offenders must very much depend the intercourse necessary between trading Nations."<sup>355</sup> And in fact "most of the adjoining European Nations" had negotiate extradition treaties, not least because they wished "to protect their inhabitants" from foreign criminals.<sup>356</sup> Pinckney acknowledged that the United States had not extradited Longchamps, but pointed out that it had punished the man instead.<sup>357</sup> Finally, Pinckney pointed out that Britain had repeatedly pressured other countries to extradite

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<sup>351</sup> *Id.* at 137-38.

<sup>352</sup> Convention Defining and Establishing the Functions and Privileges of Consuls and Vice Consuls, signed at Versailles November 14, 1788, arts. I-II, IX; see also David Golove, *The New Confederation: Treaty Delegations of Legislative, Executive, and Judicial Authority*, 55 *Stanford L. Rev.* 1697, 1743-44 (2003).

<sup>353</sup> Letter from Charles Pinckney to George Washington, Jan. 8, 1792, in 9 *Papers of George Washington* 406, 407.

<sup>354</sup> *Id.*

<sup>355</sup> *Id.*

<sup>356</sup> *Id.* at 408.

<sup>357</sup> *Id.* at 409.

forgers to Britain.<sup>358</sup> These arguments prompted Jefferson draft a Convention allowing for the extradition of murderers, though it was never ratified.<sup>359</sup>

These lingering debates over extradition and extraterritorial punishment came to a head in the Jonathan Robbins (or rather, Thomas Nash) Affair of 1799-1800. Nash was a sailor on the British frigate *Hermione*. In 1797, the *Hermione's* crew had mutinied and murdered its officers.<sup>360</sup> The crew took the ship to a Spanish port.<sup>361</sup> The Spanish paid the mutineers \$10 apiece, and equipped the *Hermione* to serve as a Spanish ship.<sup>362</sup> In 1798, three *Hermione* sailors, William Brigstock, John Evans, and Joannes Williams, had been previously arrested, tried, and acquitted for piracy and murder in the Circuit Court for the District of New Jersey.<sup>363</sup> In 1799, Nash was recognized in South Carolina and jailed on the request of the British consul.<sup>364</sup> The British requested Nash's extradition under the Jay Treaty to try Nash for murder and piracy. Under Article 27 of this Treaty, the United States and Britain agreed to extradite to one another "all Persons who being charged with Murder or Forgery committed within the Jurisdiction of either, shall seek an Asylum within any of the Countries of the other."<sup>365</sup> The Jay Treaty had been extraordinarily controversial when it was negotiated. Among other things, the Treaty required the United States to pay Britain for impairment of British subjects' debts, and the House of Representatives came only a few votes shy of blocking appropriations to bring this article into effect.<sup>366</sup> But the extradition article received barely any objections during these debates.<sup>367</sup>

Judge Bee and the District Attorney opined that Presidential

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<sup>358</sup> *Id.* at 409-10.

<sup>359</sup> Letter from Thomas Jefferson to George Washington, Mar. 22, 1792, in 10 Papers of George Washington 143, 144 n.1.

<sup>360</sup> NOEL MOSTERT, *THE LINE UPON A WIND: THE GREAT WAR AT SEA, 1793-1815*, at 215-16 (2007).

<sup>361</sup> *Id.* at 216.

<sup>362</sup> *Id.*

<sup>363</sup> Wedgwood, *supra* note 93, at 263-65.

<sup>364</sup> Copy of a note from Robert Liston, Esq. Envoy Extraordinary and Minister Plenipotentiary of his Britannic Majesty, to Timothy Pickering, Secretary of State of the United States, May 23, 1799, in 2 Am. State Papers: Foreign Relations 284, 284.

<sup>365</sup> Treaty of Amity Commerce and Navigation, between His Britannick Majesty; and The United States of America, by Their President, with the advice and consent of Their Senate, Nov. 19, 1794.

<sup>366</sup> Wedgwood, *supra* note 93, at 263-65.

<sup>367</sup> *Id.* at 266-67.

approval was necessary before Nash could be extradited.<sup>368</sup> Days later, Secretary of State Timothy Pickering wrote Judge Bee conveying that President Adams had approved the extradition because he had committed “*piracy and murder*” on the British ship and thus “with the jurisdiction” of the United Kingdom under Article 27 of the Jay Treaty, which authorized<sup>369</sup>

Nash insisted on his innocence, arguing that he was not Nash but was instead a native of Danbury, Connecticut named Jonathan Robbins.<sup>370</sup> His attorneys played up this angle, arguing against extradition on the grounds that (1) mutiny was a political offense or a form of self-defense, and thus Nash lacked criminal intent, (2) the United States had jurisdiction to prosecute Nash’s offenses because he was an American, and (3) that extraditing him would undermine his right to a trial by a jury of his peers.<sup>371</sup> Judge Bee dodged most of these issues by finding that Nash had not produced enough information that he was an American or that he had been impressed.<sup>372</sup> (The Board of Selectmen and former town clerk of Danbury later denied that anyone named Jonathan Robbins had ever lived there, though this happened after Nash had already been extradited.<sup>373</sup>) Judge Bee did not dispute that the United States had the right to try Nash itself, but found that this did not matter because Nash’s offense came within the Jay Treaty. Judge Bee ultimately authorized the extradition of Nash,<sup>374</sup> and the British reported that they had court-martialed and hanged him in September 1799.<sup>375</sup> Nash purportedly confessed to have been lying about being an American named Robbins, and about impressment shortly before his execution.

Nash’s extradition prompted resulted in significant backlash. Thanks in part to widespread British impressment of American sailors (including by the *Hermione*), the Republican press cheered on British mutineers and criticized British court-martials.<sup>376</sup> And days after Nash’s extradition, many of these same sources began ginning up

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<sup>368</sup> *Id.*

<sup>369</sup> Letter from the Secretary of State to Judge Bee, June 3, 1799, *in id.*

<sup>370</sup> Letter from Timothy Pickering to John Adams, Feb. 6, 1800, *in id.*

<sup>371</sup> Wedgwood, *supra* note 293, at 295-97.

<sup>372</sup> *United States v. Robins*, 27 F. Cas. 825, 833 (D.S.C. 1799).

<sup>373</sup> Enclosure No. 4, in 2 AM. STATE PAPERS: FOREIGN RELATIONS 284, 285.

<sup>374</sup> Letter from Thomas Bee, Esq., to the Secretary of State, July 1, 1799, *in id.* at 284.

<sup>375</sup> Extract of a letter from Admiral Sir Hyde Parker to Robert Liston, Esq. Envoy Extraordinary and Minister Plenipotentiary of His Britannic Majesty to the United States, Sept. 9, 1799, *in id.* at 285.

<sup>376</sup> Wedgwood, *supra* note 293, at 283-85.

outrage.<sup>377</sup> In the months after, the Republican candidate used anger over Nash's extradition to win the Pennsylvania governor's race.<sup>378</sup> Republicans sought to leverage their win, and in December 1799, moved to censure President Adams.

Most of the debates focused on the President's power to extradite Nash without implementing legislation, but a subsidiary issue was whether the United States had jurisdiction to prosecute itself.<sup>379</sup> John Marshall's Speech of March 7, 1800, spent a significant amount of time arguing that the United States had no jurisdiction over Nash. Marshall rejected the notion "all nations have jurisdiction over all offences committed at sea. On the contrary," he asserted, "no nation has any jurisdiction at sea, but over its own citizens or vessels, or offences against itself."<sup>380</sup> Here, he cited Rutherford, one of the very few international law writers (as we have seen) to have argued in favor of limits on state extraterritorial power. Marshall argued that states only had power to punish crimes committed on their own territory or by their own citizens, plus "general piracy." "General piracy," Marshall explained (he seems to have invented this term), referred to piracy under the law of nations (robbery at sea), and this could not be "confound[ed]" with piracy by statute." Here, Marshall sounded much like Wilson in his grand jury charge: "A statute may make any offence piracy, committed within the jurisdiction of the nation passing the statute, and such offence will be punishable by that nation. But piracy under the law of nations, which alone is punishable by all nations, can only consist in an act which is an offence against all." Marshall disputed that Nash's mutiny qualified as piracy because a mutiny is "an offence against a single nation" only, but even if the mutiny itself were triable in the United States, Nash's murder of his superior officers could not be; he would have to be extradited to England for this offense eventually. Marshall did not, however, argue that Congress lacked the constitutional authority to punish Nash. Instead, he argued that the Crimes Act of 1790 should be "restrained to objects within the jurisdiction of the legislature passing the act." As a result, the provisions defining and punishing crimes on the high seas should be construed to apply only to U.S. ships. Because those provisions could not reach Nash, trying him "would have been mere mockery," and if a U.S. court had "condemned and executed him, the court having no jurisdiction, would have been murder."

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<sup>377</sup> *Id.* at 323-24.

<sup>378</sup> *Id.* at 325-26.

<sup>379</sup> *Id.* at 335-38.

<sup>380</sup> John Marshall, Speech, Mar. 7, 1800.

Marshall's speech is well argued, but it would be a mistake to use it to read territorial limits into Article I, for four reasons. First, the politicized context of this speech is impossible to ignore. Marshall made his speech in defense of a President facing a censure motion in an election year. In the year following this speech, Marshall would be promoted to Secretary of State and then Chief Justice. This political context calls into question whether Marshall's analysis was all that objective, or rather was a product of political expediency.

Second, Marshall never actually argues that Congress lacks the constitutional power to punish Nash's crimes. His jurisdictional arguments were a build-up to his construction of the Crimes Act of 1790, which he interpreted not to apply to crimes on foreign ships.

Third, Marshall's speech was novel. His contrast of "general piracy," over which states can exercise universal jurisdiction, from "piracy by statute" is novel. The only prior source making a similar argument is Wilson's equivocal grand jury charge, discussed above, and unlike Marshall, Wilson thought that the Crimes Act of 1790 should be construed not to apply to foreign nationals (rather than foreign ships). English law does not appear to have made jurisdictional distinctions between whatever maritime piracies it tried before the Piracy Act of 1700 and the new ones that statute created. Marshall implicitly assumes throughout his speech too that the international law conception of piracy was well defined, which (as we have seen) was not true. This is evidenced alone by Marshall departing from the charge in *Rex v. Dawson* in arguing that mutiny did not qualify as piracy under the law of nations. Marshall's response—that mutiny was only a crime against a single nation, while piracy was a crime against all nations—in turn reflects a poor historical understanding of piracy.<sup>381</sup> As we've seen, the American experience with "pirates" and "piracies" largely revolved around private individuals who captured enemy or neutral ships at sea without the proper authority. And of course, this was true before the Revolution as well.<sup>382</sup>

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<sup>381</sup> Edwin D. Dickinson, *Is the Crime of Piracy Obsolete?*, 38 Harv. L. Rev. 334, 336 (1925) ("Piracy as an international crime, moreover, has been associated in times past with the activities of those bold adventurers who have taken the character of outlaws and plundered all commerce without discrimination. There has been a tendency to assume, in consequence, that only those are true international pirates and the subjects of universal jurisdiction who maraud as the enemies of all mankind.").

<sup>382</sup> HANNA, *supra* note 63, at 9 ("During most of the early modern period, few English mariners who committed acts of piracy actually self-identified as pirates; they were conscious of, and quite concerned about, their reception and image on

Indeed, in the months surrounding Nash's extradition, many U.S. leaders reached conclusions completely at odds with Marshall's. Again, Judge Bee thought that the United States could exercise jurisdiction over Nash, but that the Jay Treaty required extradition. Secretary of State Timothy Pickering took a similar view. He conceded "the offence committed on board the *Hermione* to have been a most atrocious act of piracy accompanied with murder: that all nations having jurisdiction in this case, if the pirates be found within their dominions, any of them may try & punish them."<sup>383</sup> But, given that the United States would lack "the full evidence" for trying Nash, "it would seem reasonable, and essential to the due administration of justice, that the culprits be delivered up to" Britain.<sup>384</sup>

The arguments in favor of exercising jurisdiction over Nash were also sophisticated. In his notes on Marshall's speech, Jefferson disagreed with Marshall that Nash's "crime "was a Pyracy by the law of nations, & therefore cognizable by our courts."<sup>385</sup> He did not buy Marshall's argument that Nash would have to be extradited to England for murder at the very least. That point, Jefferson argued, turned on Nash being a British subject. If in fact Nash were an American that had been impressed (which could allow him to plead self-defense), then the United States would have every reason to try him in its own courts.<sup>386</sup> In an essay published a few months earlier, Charles Pinckney made a similar point, arguing that it made little sense to extradite criminals like Nash "in times of war, and particularly in revolutions, when different nations hold such opposite opinions upon what are piracy or murder, and what [counts as] justifiable resistance to tyranny and oppression."<sup>387</sup>

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land. Most English sea marauders of the seventeenth century selectively attacked targets to avoid upsetting political leaders in colonial ports. The fluid conditions on the high seas generated a range of designations—privateers, corsairs, private men-of-war, freebooters, interlopers, buccaneers, and smugglers as much as pirates—sometimes applied loosely and other times very specifically. From the 1590s to the 1730s, the popular use and understanding of these terms developed in relation both to the changing nature of English piracy ....").

<sup>383</sup> Letter from Timothy Pickering to John Adams, May 15, 1799, <https://founders.archives.gov/documents/Adams/99-02-02-3513>.

<sup>384</sup> *Id.*

<sup>385</sup> Notes on John Marshall's Speech, 7 Mar. 1800, in 31 PTJ 421, 421.

<sup>386</sup> *Id.* Jefferson conceded to James Madison that Marshall "distinguished" himself "greatly" in his speech, but he believed that Congressmen Livingston, Nicholas, and Gallatin did as well. Letter from Thomas Jefferson to James Madison, Mar. 4 & 8, 1800, in 31 PTJ 407, 408.

<sup>387</sup> CHARLES PINCKNEY. THREE LETTERS, WRITTEN, AND ORIGINALLY PUBLISHED, UNDER THE SIGNATURE OF A SOUTH CAROLINA PLANTER 14 (1799).

Finally, Marshall's speech fails to grapple with the many international law sources under which it was acceptable to prosecute a foreign national for extraterritorial crimes. Marshall cherry-picked Rutherford for the notion that international law restricted the United States' punishment powers, but this was very much a minority view. Indeed, in a March 1798 opinion, Attorney General Charles Lee had summarily opined that U.S. courts were fully competent to try the three *Hermione* mutineers who had been arrested before Nash, even though some of them may have been foreigners and their crimes had been committed against a British ship.<sup>388</sup> Lee went on to say that trial in the United States was preferable. One of three prisoners (Brigstock) was "a citizen of the United States," and "it is not to be reasonably expected that his country will not exercise the right of trying him."<sup>389</sup> As for the other two prisoners, even if they were foreigners (Lee said he did not know), it would be "more becoming the justice, honor, and dignity of the United States, that the trial should be in our courts."<sup>390</sup> Lee had no concern about the British judiciary "(whose system of jurisprudence is humane, fair, and just,) but" was concerned about extraditing future criminals to "French, Spanish, or Prussian" courts.<sup>391</sup>

#### D. Summary

This Section has rebutted the notion that territorial limits were baked into Congress's Article I powers. This was not true as a matter of international law, English law, or early American law. The many debates over extradition in the 1780s and 1790s, moreover, show that many in the United States preferred to try foreigners' extraterritorial crimes over extradition. There were counterarguments to this view, but they were generally inconsistent with one another and made historical and legal errors.

#### CONCLUSION

I've argued in this Article that there is no good case for reading territorial limits into Congress's Article I powers. The Constitution's text does not support such limits, and neither do the background public law principles in place at the time of the Constitution's ratification. I conclude now with some reflections on what the

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<sup>388</sup> Extradition., 1 U.S. Op. Atty. Gen. 83, 83 (1798).

<sup>389</sup> *Id.*

<sup>390</sup> *Id.* at 84.

<sup>391</sup> *Id.*



territoriality thesis illustrates about the use of history in legal analysis.

At least with regards to the double redundancy version of the territoriality thesis, there has been inadequate attention to whether odd textual arguments were endorsed at the time of the Framing. There's no question that such original understandings considerations should be, at minimum, relevant to textualist readings of the Constitution, yet this issue has escaped the notice of every single judge and scholar to comment on the double redundancy argument.

Many of the flaws in the various iterations of the territoriality thesis stemmed from anachronistic readings of 18th century sources. We've seen this in modern misinterpretations of the "high seas," the lack of attention to the origins of the phrase "piracies and felonies," the default assumption of many that modern rules limiting extraterritorial jurisdiction applied at the time of the Framing, and even in Marshall's misinterpretation of pirates as being "enemies of all mankind."

In fleshing out the territoriality thesis, there's been a lack of attention to other tools of constitutional construction. The scholars and judges endorsing it have emphasized the reasons why it might be useful to avoid the extraterritorial application of law (or at least require a clear statement from Congress before authorizing such an application). But there's been no attention as to why the Framers would have wanted the judiciary to impose *mandatory* limits on the political branches, which have primary responsibility for managing relations with foreign countries.

These vices in the territoriality thesis may illustrate a potential problem in constitutional theories that over-emphasize history at the expense of other tools. The first two flaws in the territoriality thesis reflects, no doubt, that lawyers are not trained as historians. Its acceptance by courts probably has a lot to do with limits on lawyers' time. Judges hearing appeals regarding novel constitutional issues sometimes receive amici briefing, but not always, and this topic is an obscure one that few scholars have explored. History will of course always be an important tool in interpreting the Constitution, but courts confronted with bare historical argument should be far more careful before striking down or limiting laws enacted by the political branches.