

5-15-2019

Tribal Nations and Congress's Power to Define Offences Against the Law of Nations

John H. Dossett

Panelist, Distinguished Practitioner in Residence, Fall 2016, Cornell Law School; Adjunct Professor, Northwestern School of Law at Lewis & Clark

Follow this and additional works at: <https://scholarship.law.umt.edu/mlr>



Part of the [Law Commons](#)

Recommended Citation

John Hayden Dossett, *Tribal Nations and Congress's Power to Define Offences Against the Law of Nations*, 80 Mont. L. Rev. 41 (2019).

This Article is brought to you for free and open access by The Scholarly Forum @ Montana Law. It has been accepted for inclusion in Montana Law Review by an authorized editor of The Scholarly Forum @ Montana Law.

**TRIBAL NATIONS AND CONGRESS’S POWER TO
DEFINE OFFENCES AGAINST THE
LAW OF NATIONS**

John Hayden Dossett*

CONTENTS

I. INTRODUCTION	41	
II. THE CONCERN WITH PLENARY POWER	46	R
III. TRIBAL NATIONS CONSIDERED “NATIONS” BY THE FRAMERS AND THROUGHOUT UNITED STATES HISTORY	49	R
IV. OFFENCES AGAINST THE LAW OF NATIONS AND TRIBAL NATIONHOOD IN THE UNITED STATES	56	R
V. SCOPE OF THE OFFENCES CLAUSE INCLUDES CIVIL REMEDIES AS WELL AS CRIMINAL PUNISHMENT	59	R
VI. THE INDIAN CHILD WELFARE ACT AS AN EXPRESSION OF CONGRESS’S POWER TO DEFINE OFFENCES AGAINST THE LAW OF NATIONS	62	R
VII. COMPARISON TO FEDERAL LAW ON INTERNATIONAL CHILD CUSTODY AND CITIZENSHIP	64	R
VIII. CONCLUSION	66	R

I. INTRODUCTION

The Framers of the Constitution founded the United States on a principle that the federal government has limited, enumerated powers. Discounted for much of the twentieth century, the resurgence of this principle raises new questions about the source of constitutional authority for many federal laws. Some of this scrutiny is focused on the Indian Child Welfare Act (ICWA) of 1978, a federal law designed to counter the widespread practice of states removing Native American children from their families. Now more than ever, it is worthwhile to reexamine the text and history of the Constitution to more fully understand the authority of the federal government to enact beneficial laws in Indian affairs. The inquiry also sheds light on the sovereignty of tribal nations in the context of child custody decisions.

This Article advances the Offences Clause as an additional, and important, source of federal authority in Indian affairs, particularly for the Indian Child Welfare Act. The Constitution grants Congress the power to define

* Distinguished Practitioner in Residence, Fall 2016, Cornell Law School; Adjunct Professor, Northwestern School of Law at Lewis & Clark. I am grateful to Stephanie Parent, Sam Hirsch, and Samantha Dossett for their thoughtful comments and to Cornell Law School for supporting this research.

and punish “Offences against the Law of Nations.”¹ This clause provides enumerated authority for Congress to regulate both civil and criminal matters that arise between sovereigns, such as the citizenship and custody of children.² Just as Congress has authority to enact the International Child Abduction Remedies Act,³ it also holds power to address the custody of children of tribal citizens. The Offences Clause provides a response to claims that the Indian Child Welfare Act exceeds congressional authority, such as those brought by the State of Texas in current litigation.⁴ Contrary to those claims, ICWA is an exercise of the well-established authority of Congress to pass laws under its enumerated powers and involves little more than an application of the Supremacy Clause’s provision that federal law “shall be the supreme Law of the Land,”⁵ enforceable in every state.⁶

Although the Offences Clause does not specifically reference indigenous tribal nations, there is considerable evidence that it was intended to authorize Congress to regulate relationships with tribal nations as well as foreign governments. Much like the Treaty Clause and the Territory Clause, the Framers wrote the Offences Clause with a broad scope to include both foreign powers and tribal nations within its reach.⁷ Just as Scotland and Wales are within Great Britain, the Framers considered tribal nations to be distinct national jurisdictions within the boundaries of the United States.⁸

1. U.S. CONST. art. I, § 8, cl. 10. This article retains the original spelling of the term “offences” because it is in the text of the Constitution, it is an acceptable variant in modern U.S. dictionaries, and it is the preferred spelling in most of the English-speaking world. The original spelling also emphasizes its use as a constitutional term of art, and not its ordinary sense of a “criminal offense.”

2. See generally Andrew Kent, *Congress’s Under-Appreciated Power to Define and Punish Offenses Against the Law of Nations*, 85 TEX. L. REV. 843 (2007). Professor Kent’s textual analysis and dive into Founding-era history provides a primer on the relevance of the Offences Clause to current foreign affairs debates.

3. 22 U.S.C. §§ 9001–9011 (2018).

4. Notice of Appeal, *Brackeen v. Bernhardt*, <https://perma.cc/CN7CPPQW> (N.D. Tex. Nov. 30, 2018) (No. 4:17-CV-0868-O).

5. U.S. CONST. art. VI, § 2.

6. See *New York v. United States*, 505 U.S. 144, 178–79 (1992) (“Federal statutes enforceable in state courts do, in a sense, direct state judges to enforce them, but this sort of federal ‘direction’ of state judges is mandated by the text of the Supremacy Clause.”).

7. See, e.g., Kent, *supra* note 2 (reviewing the history and scope of the Offences Clause). Vigorous academic analysis of the Offences Clause is a recent development in legal scholarship. For further background, see Beth Stephens, *Federalism and Foreign Affairs: Congress’s Power to “Define and Punish . . . Offenses Against the Law of Nations,”* 42 WM. & MARY L. REV. 447, 449, 452 (2000); Michael T. Morley, *The Law of Nations and the Offences Clause of the Constitution: A Defense of Federalism*, 112 YALE L.J. 109, 111, 129, 138 (2002); Eugene Kontorovich, *Discretion, Delegation, and Defining in the Constitution’s Law of Nations Clause* 48 (Nw. Pritzker Sch. of Law, Working Paper No. 220, 2012); ANTHONY J. BELLIA JR. & BRADFORD R. CLARK, *THE LAW OF NATIONS AND THE UNITED STATES CONSTITUTION* xix–xvii (2017).

8. The initial U.S. boundaries were established by the 1783 Treaty of Paris “to the river Mississippi,” although most of that territory was occupied by independent tribal nations. See Treaty of Peace, Sept. 3, 1783, 8 Stat. 80. Arthur St. Clair, the first Governor of the Northwest Territory, in 1788 described the reaction of tribal leaders to the U.S. territorial claim. “Our pretensions to the country they

R

It is important to consider additional sources of constitutional authority for federal laws because the growing trend in both the Supreme Court and Congress is to consider the overriding objective of the Constitution as limiting the powers of the federal government. Every law Congress passes must fall within one of the enumerated authorities, or be “necessary and proper” for the implementation of such a power.⁹ The Tenth Amendment explicitly limits Congress by providing that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”¹⁰

After the New Deal, it seemed as if the limits on federal power had been discarded and nearly any federal law could be upheld as an exercise of authority under the Commerce Clause or the Equal Protection Clause of the Fourteenth Amendment.¹¹ This began to change in the mid-1990s with three Supreme Court decisions: *United States v. Lopez*,¹² *City of Boerne v. Flores*,¹³ and *United States v. Morrison*.¹⁴ Collectively, these cases signaled the Court’s intent to more narrowly construe congressional powers. More recently, the Court addressed the Commerce Clause in *NFIB v. Sebelius*,¹⁵ regarding the individual mandate in the Affordable Care Act. Focusing on *Lopez*’s requirement that Congress regulate only commercial activity rather than inactivity, the Court held that the individual mandate could not be enacted under the Commerce Clause.¹⁶

As a result of these decisions, more advocates and scholars are questioning the source of authority for existing federal laws that do not spring plainly from an enumerated power. This scrutiny is now focused on ICWA, a federal law that applies to state court domestic-relations proceedings and directs the outcomes of child custody decisions for the children of tribal

inhabit has been made known to them, in so unequivocal a manner, and the consequences are so certain and so dreadful to them, that there is little probability of there ever being any cordiality between us . . . our British neighbors at the same time they deny the cession of Country made by them, suffer them not to forget for a moment the claim that is founded upon it.” 2 Territorial Papers of the United States 119, U.S. Govt. Printing Office (1934).

9. U.S. CONST. art. I, § 8, cl. 18 (“The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . .”).

10. U.S. CONST. amend. X.

11. Craig L. Jackson, *The Limiting Principle Strategy and Challenges to the New Deal Commerce Clause*, 15 U. PA. J. CONST. L. 11, 29–38 (2012); Karen M. Tani, *Administrative Equal Protection: Federalism, the Fourteenth Amendment, and the Rights of the Poor*, 100 CORNELL L. REV. 825, 844–49 (2015); see *Wickard v. Filburn*, 317 U.S. 111 (1942) (setting the precedent for an expansive reading of the Commerce Clause, and dramatically increasing the regulatory authority of the federal government).

12. 514 U.S. 549 (1995).

13. 521 U.S. 507 (1997).

14. 529 U.S. 598 (2000).

15. 567 U.S. 519 (2012).

16. *Nat’l Fed’n of Indep. Bus.*, 567 U.S. at 558.

nation citizens.¹⁷ *Brackeen v. Zinke*¹⁸ is the latest and most successful constitutional challenge, but the effort has been building for several years, particularly since the Supreme Court's 2013 decision in *Adoptive Couple v. Baby Girl*.¹⁹

ICWA was enacted in 1978 in response to the widespread practice of state child welfare departments removing custody of Indian children from their families, tribes, and cultures.²⁰ The House Resources Committee stated in its report on ICWA that “[t]he wholesale separation of Indian children from their families is perhaps the most tragic and destructive aspect of American Indian life today.”²¹ Congress sought to stop this practice,²² and ICWA continues to serve this purpose today.

Those who challenge ICWA often do so by arguing that family law is not an enumerated federal power and is generally understood to be a matter of state law. State legislatures define what constitutes a family and enact laws that regulate marriage, divorce, parentage, child custody, adoption, child welfare, and family support obligations. State courts generally decide family law cases.²³

However, family law is also a long-established matter of tribal government law and federal preemption. The Supreme Court long ago laid down the rule that tribal domestic relations are not subject to state law.²⁴ The extensiveness of tribal authority over matters of domestic relations was set forth by Justice Van Devanter in *United States v. Quiver*:²⁵

At an early period it became the settled policy of Congress to permit the personal and domestic relations of the Indians with each other to be regulated, and offenses by one Indian against the person or property of another Indian to be dealt with, according to their tribal customs and laws.²⁶

ICWA reinforces this rule, stating that tribal governments have exclusive jurisdiction over child custody proceedings involving an Indian child domi-

17. 25 U.S.C. § 1901 (1978).

18. No. 4:17-CV-86800868-O, 2018 WL 4927908 (N.D. Tex. Oct. 4, 2018).

19. 570 U.S. 637 (2013).

20. DOI BUREAU OF INDIAN AFFAIRS, GUIDELINES FOR IMPLEMENTING THE INDIAN CHILD WELFARE ACT 5 (2016).

21. ESTABLISHING STANDARDS FOR THE PLACEMENT OF INDIAN CHILDREN IN FOSTER OR ADOPTIVE HOMES, TO PREVENT THE BREAKUP OF INDIAN FAMILIES, AND FOR OTHER PURPOSES, H.R. REP. NO. 95-13896, at 9 (1978).

22. H.R. REP. NO. 95-13896, at 19 (1978).

23. See generally *Sosna v. Iowa*, 419 U.S. 393, 404 (1975) (“The durational residency requirement under attack in this case is a part of Iowa’s comprehensive statutory regulation of domestic relations, an area that has long been regarded as a virtually exclusive province of the States. Cases decided by this Court over a period of more than a century bear witness to this historical fact.”).

24. See, e.g., *Carney v. Chapman*, 247 U.S. 102 (1918); *United States v. Jarvison*, 409 F.3d 1221 (10th Cir. 2005).

25. 241 U.S. 602 (1916).

26. *Id.* at 603–04.

ciled within the reservation of such tribe.²⁷ However, ICWA goes further and applies to state courts when tribal citizens and their children reside outside of reservation boundaries.²⁸ The argument that ICWA exceeds Congress's authority generally arises in this off-reservation context.

In the enactment of ICWA, Congress cited the Indian Commerce Clause as its source of authority and asserted that “through this and other constitutional authority, Congress has plenary power over Indian affairs . . . [and] through statutes, treaties, and the general course of dealing with Indian tribes, [Congress] has assumed the responsibility for the protection and preservation of Indian tribes and their resources.”²⁹ Professors Matthew Fletcher and Wenona T. Singel have presented a strong argument that ICWA is constitutional as a matter of the original understanding of the Indian Commerce Clause.³⁰

Yet many continue to challenge the constitutionality of ICWA. Justice Thomas fueled these efforts with his 2013 concurrence in *Adoptive Couple v. Baby Girl*:³¹

The ICWA asserts that the Indian Commerce Clause, and “other constitutional authority” provides Congress with “plenary power over Indian affairs.” The reference to “other constitutional authority” is not illuminating, and I am aware of no other enumerated power that could even arguably support Congress’ intrusion into this area of traditional state authority.³²

Justice Thomas argues that “neither the text nor the original understanding of the Clause supports Congress’ claim to such ‘plenary’ power.”³³

In the *Brackeen* litigation, the State of Texas cited Justice Thomas’s argument that ICWA is unconstitutional, contending that the law intrudes into state domestic relations and “children are not articles of commerce, nor can their placement be said to substantially affect commerce with Indian nations.”³⁴ The district court decision, which is on appeal,³⁵ avoided the direct challenge to the source of constitutional authority, instead concluding that ICWA’s use of ancestry to determine the eligibility of children for tribal citizenship is an unlawful racial classification and that ICWA comman-

27. 25 U.S.C. § 1911(a) (2018).

28. *Id.* § 1911(b).

29. *Id.* § 1901.

30. MATTHEW L. M. FLETCHER & WENONA T. SINGEL, THE INDIAN CHILD WELFARE ACT AT 30: FACING THE FUTURE 39–41 (2008); see also Matthew L. M. Fletcher, *On Indian Children and the Fifth Amendment*, 80 MONT. L. REV. 202, 612–17 (2019).

31. 570 U.S. 637 (2013) (Thomas, J., concurring) (citations omitted).

32. *Id.* at 657–59.

33. *Id.* at 659.

34. Pl.’s Am. Compl. at 59, *Brackeen v. Zinke*, <https://perma.cc/K92Z-AS58> (N.D. Tex. Mar. 22, 2018) (No. 4:17-CV-00868-O).

35. Notice of Appeal, *Brackeen v. Bernhardt*, <https://perma.cc/CN7C-PPQW> (N.D. Tex. Nov. 30, 2018) (No. 4:17-CV-0868-O).

deers the state legislative process in violation of Commerce Clause principles.³⁶ Nevertheless, the constitutional-authority question underlies every argument raised by the state and will be considered by the Fifth Circuit.

This Article puts forth the Offences Clause as a response to the challenges raised by Justice Thomas and the State of Texas,³⁷ including concerns about racial classification or overreach of commerce clause authority. Contrary to these claims, ICWA is in a well-established category of federal laws addressing citizenship, nationality, and immigration. Section two addresses the problems with relying on the plenary power doctrine as a source of authority for congressional action in Indian affairs. Section three describes how indigenous governments in the United States were understood to be “nations” in early U.S. history and within the scope of the Offences Clause. Section four traces the Framers’ understanding of the law of nations, and its grounding in the work of Emer de Vattel, the eighteenth-century jurist whose work heavily influenced the drafting of the Constitution. The fourth section demonstrates how the Offences Clause was intended for civil remedies as well as criminal punishment. Section five describes the close fit between Vattel’s natural law principle that the citizenship of children follows the parents, and the purpose of ICWA in regulating the citizenship and custody of children born to tribal citizens. The final section compares federal authority over child custody and citizenship in the foreign affairs context.

II. THE CONCERN WITH PLENARY POWER

Federal authority in Indian affairs is readily traced to two sources in the Constitution. Article I’s Commerce Clause empowers Congress “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”³⁸ Article II, section 2 of the Constitution gives the President the power “to make Treaties, provided two thirds of the Senators present concur.”³⁹ In 1871, Congress signaled it would no longer ratify In-

36. *Brackeen v. Zinke*, No. 4:17-CV-0868-O, 2018 WL 4927908, at *1, 7 (N.D. Tex. Nov. 30, 2018).

37. This Article is an offshoot of my exploration of the Territory Clause as an additional source of power for federal laws in “Indian country.” John H. Dossett, *Indian Country and the Territory Clause: Washington’s Promise at the Framing*, 68 A.M. U. L. REV. 205, 207–10 (2018). The text of the Territory Clause is also broad, authorizing Congress to make needful rules and regulations “respecting” the territory or other property belonging to the United States. The federal government has adopted a trust responsibility to protect tribal lands as homelands for tribal cultures and tribal self-government. For this reason, the Territory Clause can also be considered as authority for a range of matters affecting Indian tribes, including the Indian Child Welfare Act.

38. U.S. CONST. art. I, § 8, cl. 3.

39. *Id.* art. II, § 2, cl. 2.

dian treaties, ending the nearly 100-year-old practice, and would instead unilaterally regulate Indian affairs by statute.⁴⁰

Following the end of the treaty-making period, the Supreme Court developed a new federal authority in Indian affairs: a “plenary” power not found in the text of the Constitution but drawn from the intrinsic authority of the United States.⁴¹ Beginning in 1886 with *United States v. Kagama*⁴² and running to *United States v. Lara*⁴³ in 2004, a string of Supreme Court decisions developed a congressional authority over Indian affairs based in “preconstitutional powers necessarily inherent in any Federal Government.”⁴⁴

In the late nineteenth and early twentieth centuries, the Court developed the plenary power doctrine to justify federal laws that confiscated tribal lands and intruded on tribal self-government.⁴⁵ But attitudes towards tribal rights have shifted remarkably, and since the late twentieth century Congress has frequently enacted laws supporting tribal self-government, such as ICWA. Today, federal laws governing tribal nations and their citizens cover subjects as varied as tribal government organization, tribal courts, civil rights, law enforcement, health care, education, housing, and cultural resources.⁴⁶ In the twenty-first century, these laws are commonly subjected to a question: if the federal government has limited powers under the Constitution, and the commerce authority is construed narrowly, where did Congress derive the authority to enact this broad range of federal laws related to Indian tribes and native peoples? Although the Supreme Court historically deferred to Congress on this question, more recently, some members of both the Court and Congress are inclined to limit federal power to its enumerated sources and question whether Congress has any power in Indian affairs other than regulating commerce.

Specifically, Justice Thomas is unreceptive to the notion of an unenumerated plenary power. He first expressed his views in 2004, with a concurrence in *United States v. Lara*, a decision on the scope of tribal criminal jurisdiction.⁴⁷ Justice Thomas has raised questions with plenary power in four subsequent decisions: *Adoptive Couple v. Baby Girl*, *Puerto Rico v.*

40. 25 U.S.C. § 71 (2018).

41. NELL JESSUP NEWTON ET. AL., COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 5.01 (Nell Jessup Newton et al. eds., 2012).

42. 118 U.S. 375 (1886).

43. 541 U.S. 193 (2004).

44. *Id.* at 200–01.

45. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 564–68 (1903).

46. *See generally* Title 25 of the United States Code and Chapter 53 of Title 18 of the United States Code.

47. *Lara*, 541 U.S. at 215 (Thomas, J., concurring).

Sanchez Valle,⁴⁸ *United States v. Bryant*,⁴⁹ and most recently *Town of Vernon v. United States*.⁵⁰ Legal scholars have long questioned whether Congress has plenary authority to take tribal lands and restrict tribal rights.⁵¹ Justice Thomas has reversed the question. Does Congress have authority for federal laws that recognize and support tribal rights?⁵²

Some members of Congress have picked up Justice Thomas's argument, and are also questioning plenary power, creating a new obstacle to legislation that would address problems in Indian country and strengthen tribal self-government. For example, in 2013 Congress acted to recognize tribal authority to prosecute domestic violence crimes committed by non-Indians⁵³ to cure problems created by the Supreme Court's decision in *Oliphant v. Suquamish Indian Tribe*.⁵⁴ This legislation faced opposition from some members of Congress who questioned the source of congressional authority to recognize and restore tribal criminal jurisdiction.⁵⁵

In this context, it is important to reexamine the sources of federal authority in Indian affairs. Plenary power in Indian affairs is both too strong and too weak. It is too strong because it purports to authorize the federal government to do virtually *anything* to Indian tribes and native people: take tribal lands, assimilate tribal children, forbid tribal religions and languages, terminate tribal existence—all this is fair game under a boundless and nebulous plenary power doctrine.⁵⁶

48. 136 S. Ct. 1863, 1877 (2016).

49. 136 S. Ct. 1954, 1967–68 (2016).

50. Order Denying Cert., *Town of Vernon v. United States*, 2017 WL 566097 (Nov. 27, 2017) (Nos. 16-1320, 17-8) (Thomas, J., dissenting).

51. See, e.g., Nell Jessup Newton, *Federal Power Over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195 (1984) (“The judiciary’s frequent invocation of federal plenary power over Indian affairs is curious since the Constitution does not explicitly grant the federal government a general power to regulate Indian affairs.”); Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31, 35 (1996) (Plenary power’s “inconsistency with the most fundamental of constitutional principles—the McCulloch understanding that Congress ordinarily possesses only that authority delegated to it in the Constitution—is an embarrassment of constitutional theory.”).

52. *Bryant*, 136 S. Ct. at 1967–68; *Sanchez Valle*, 136 S. Ct. at 1877; *Baby Girl*, 570 U.S. at 565–66.

53. 25 U.S.C. § 1304 (2013). This section is an amendment to the Indian Civil Right Act.

54. 435 U.S. 191 (1978).

55. See Paul J. Larkin, Jr. & Joseph Luppino-Esposito, *The Violence Against Women Act, Federal Criminal Jurisdiction, and Indian Tribal Courts*, 27 B.Y.U. J. PUB. L. 1, 5–7 (2012). The questions arose from members of Congress who follow the writings of the Heritage Foundation. For generations, Congress has been content to rely on an atextual plenary power when *restricting* the rights of Indian tribes. Now, in an era where it is possible to contemplate restoring tribal authority, Congress’s power is sharply questioned. However, this is not unique to Indian affairs. There is generally an increased focus on strict adherence to enumerated constitutional authorities. During Republican majorities, the Rules of the House of Representatives require that every bill include a Constitutional Authority Statement citing the constitutional power granted to Congress. H.R. Doc. No. 113-181, at 629 (2015).

56. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978) (“... Congress has plenary power to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess.”);

Plenary power is too weak because it is not enumerated in the text of the Constitution. When tribal leaders ask Congress to address problems in Indian country, the legislation is vulnerable to questions about the source of federal authority. Even if Congress can be convinced, federal courts will search for a source of enumerated authority among centuries of inconsistent precedents. Plenary power's lack of a clear textual source becomes a justification for tribes to lose whenever the stakes are high. With these concerns in mind, the National Congress of American Indians and the Native American Rights Fund have testified to Congress that "[t]here is perhaps no area of domestic law that needs more revision than that of plenary power."⁵⁷

Plenary power remains entrenched in Supreme Court precedent, and more recent statements from the Court describe it as drawn from multiple provisions in the Constitution: the Indian Commerce Clause,⁵⁸ the Treaty Clause,⁵⁹ the Territory Clause,⁶⁰ the Indians Not Taxed Clauses,⁶¹ the Necessary and Proper Clause,⁶² and the Supremacy Clause.⁶³ Collectively, the argument goes, these constitutional provisions establish in Congress the power to broadly regulate Indian affairs.⁶⁴ The purpose of this Article is to place one more enumerated power under consideration: the Offences Clause. This source of enumerated authority bears considerable weight on its own for the regulation of important matters between tribal nations and states, such as the citizenship and custody of children.

III. TRIBAL NATIONS CONSIDERED "NATIONS" BY THE FRAMERS AND THROUGHOUT UNITED STATES HISTORY

The Offences Clause grants Congress the power to define and punish "Offences against the Law of Nations."⁶⁵ There is little doubt that the Framers considered the indigenous peoples of the United States to be "nations" within the scope of the "law of nations" because they repeatedly used these terms in laws, treaties, and official correspondence relating to Indian af-

Frickey, *supra* note 51, at 35; Robert N. Clinton, *There is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 163 (2002).

57. *Setting the Standard: Domestic Policy Implications of the U.N. Declaration on the Rights of Indigenous Peoples: Hearing on S. 112-174 Before S. Comm. on Indian Affairs*, 112th Cong. 93 (2011) (joint prepared statement of the Nat'l Cong. of Am. Indians and the Native Am. Rights Funds).

58. U.S. CONST. art. I, § 8, cl. 3.

59. *Id.* art. II, § 2, cl. 2.

60. *Id.* art. IV, § 2, cl. 2.

61. *Id.* art. I, § 2, cl. 3; U.S. CONST. amend. XIV, § 2.

62. *Id.* art. I, § 8, cl. 18.

63. *Id.* art. VI, cl. 2.

64. *United States v. Lara*, 541 U.S. 193, 200 (2004) (citing the Commerce Clause, the Treaty Clause, the Territory and Property Clause, and "preconstitutional" powers).

65. U.S. CONST. art. I, § 8, cl. 10.

fairs.⁶⁶ During the time of drafting and ratification of the Constitution, the United States was engaging with tribal nations on a sovereign basis, fighting wars and negotiating treaties all along the western frontier from the Northwest Indian Confederacy to the Cherokee and Creek wars in the South.⁶⁷ With their British and Spanish allies, tribal nations posed a serious threat to the fledgling United States government.⁶⁸ One of the primary purposes of the Constitutional Convention and the Offences Clause was to transfer authority over both Indian affairs and foreign affairs from the states to the federal government.⁶⁹

After the Revolutionary War ended in 1783, white settlers and land speculators pushed farther into the frontier and triggered violent conflict with the western tribal nations.⁷⁰ Indians “killed or captured as many as three thousand Anglo-Americans between 1783 and 1790—two-thirds as many as had died fighting in the Revolution.”⁷¹ Left unrecorded is the number of Native Americans who were slaughtered. John Jay, later the first Chief Justice, wrote to Thomas Jefferson in December 1786: “Indians have been murdered by our People in cold Blood and no satisfaction given, nor are they pleased with the avidity with which we seek to acquire their Lands.”⁷² As George Washington wrote, “[T]he settle[en]t of the Western Country, and making a Peace with the Indians, are so analogous, that there can be no definition of the one, without involving considerations of the other.”⁷³ Indian affairs were on the front foot during this critical period of U.S. history.

The Articles of Confederation fed the chaos on the western frontier. The seven “landed” states, relying on colonial charters that purported to stretch all the way “from the Atlantick . . . to the South Sea,”⁷⁴ laid claim to the trans-Appalachian lands and were reluctant to cede them to the central government.⁷⁵ Article IX granted Congress “the sole and exclusive right

66. See, e.g., 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed., 1911) [hereinafter 1 RECORDS]; see Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L. J. 1012, 1061, 1066–67 (2015). Professor Ablavsky has written compellingly about Washington, Knox, and others among the Founders who understood Indian tribes as sovereigns subject to the Law of Nations. His analysis stops short of claiming the Offenses Clause as a source of federal authority in Indian affairs.

67. See generally REGINALD HORSMAN, EXPANSION AND AMERICAN INDIAN POLICY 1783–1812, 4–39 (1967); Gregory Ablavsky, *The Savage Constitution*, 63 DUKE L.J. 999, 1009–38 (2014).

68. HORSMAN, *supra* note 67, at 69, 78.

69. 1 RECORDS, *supra* note 66, at 594.

70. Ablavsky, *supra* note 67, at 1009–38.

71. *Id.* at 1039.

72. 10 THE PAPERS OF THOMAS JEFFERSON 599 (Julian P. Boyd et al. eds., 1954).

73. Ablavsky, *supra* note 67, at 1014.

74. *Commw. v. City of Roxbury*, 75 Mass. 451, 503 (1857).

75. HORSMAN, *supra* note 67, at 68–71; COLIN G. CALLOWAY, THE INDIAN WORLD OF GEORGE WASHINGTON 193–94, 278–79 (2018) (describing the various violent clashes between Indians and set-

R

R

R

R

R

and power of . . . regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated”⁷⁶—language that James Madison mocked as “obscure and contradictory,” if not “absolutely incomprehensible.”⁷⁷ Seizing on the Articles’ ambiguity, several states proceeded to strong-arm Indians into ceding land and signing treaties, sometimes directly clashing with federal treaty negotiators.⁷⁸

As the Framers gathered in Philadelphia in the summer of 1787, “Congress was deluged with bad news regarding Indian affairs.”⁷⁹ War Secretary Henry Knox concluded that the government was “utterly unable to maintain an Indian war with any dignity or prospect of success.”⁸⁰ The only hope for peace on the frontier was a nationwide “policy of justice toward the Indians and protection of their rights and property against unscrupulous traders, avaricious settlers, and ubiquitous speculators.”⁸¹

Virginia Governor Edmund Randolph opened the Constitutional Convention with a speech describing a primary defect in the Articles of Confederation as Congress “could not cause *infractions of treaties or of the law of nations*, to be punished: that particular states might by their conduct provoke war without controul.”⁸² John Jay applied these concerns explicitly to Indian wars in the Federalist No. 3.

So far, therefore, as either designed or accidental *violations of treaties and the laws of nations* afford JUST causes of war, they are less to be apprehended under one general government than under several lesser ones Not a single Indian war has yet been produced by aggressions of the present federal government, feeble as it is; but there are several instances of Indian hostilities having been provoked by the improper conduct of individual States, who, either unable or unwilling to restrain or punish *offenses*, have given occasion to the slaughter of many innocent inhabitants.⁸³

John Rutledge of South Carolina, who chaired the Committee of Detail during the Constitutional Convention, wrote “Indian Affairs” next to “the Law of Nations” in his copy of the draft constitution.⁸⁴ How much can be made of these margin notes? A great deal of weight is placed on Madison’s

tlers pushing westward); Merrill Jensen, *The Cession of the Old Northwest*, 23 MISS. VALLEY HIST. REV. 27, 34 (1964).

76. ARTICLES OF CONFEDERATION, art. IX, § 4.

77. THE FEDERALIST NO. 42, 268–69 (James Madison) (Clinton Rossiter ed., 1961).

78. Ablavsky, *supra* note 67, at 1018–33.

79. HORSMAN, *supra* note 67, at 39.

80. 33 JOURNALS OF THE CONTINENTAL CONGRESS: 1774–1789 388–89 (Roscoe R. Hill ed., 1936).

81. 1 FRANCIS PAUL PRUCHA, THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS 46 (1984).

82. 1 RECORDS, *supra* note 66, at 19 (describing Madison’s notes of Randolph’s speech) (emphasis added).

83. THE FEDERALIST NO. 3, 44 (John Jay) (Clinton Rossiter ed., 1961) (emphasis added).

84. 1 RECORDS, *supra* note 66, at 143.

R
R

R

R

Records of the Federal Convention, although they were heavily revised and not published until 60 years afterwards.⁸⁵ Even more weight is placed on the Federalist Papers, although they were drafted after the Constitutional Convention as advocacy for state ratification.⁸⁶ Rutledge's margin notes have the advantage of being a simultaneous, eye-witness account of the intent of the Framers as they drafted the text of the Constitution. In 1789, President George Washington appointed Rutledge as one of the inaugural Associate Justices of the Supreme Court of the United States.⁸⁷ Serving as both Chairman of the Committee of Detail, and as one of the most trusted legal minds of his era, significant weight can be placed on his notes as evidence of the Framers' intentions.

Further, it is reasonable to assume that the Framers intended the term "Nation" in the Offences Clause to include tribal nations because they used it in this sense in their contemporaneous expressions. In July of 1789, two months after Washington's inauguration, Secretary of War Knox wrote to the President with his plan for Indian affairs: "The independent nations and tribes of Indians ought to be considered as foreign nations, not as the subjects of any particular state"⁸⁸ Two months later, President Washington wrote to the Senate in reference to "the treaties with certain Indian nations."⁸⁹ Washington counseled, that "all treaties and compacts formed by the United States with other nations whether civilized or not, should be made with caution, and executed with fidelity" He urged that foreign treaties and Indian treaties should be ratified by the Senate in the same manner, "so that our national proceedings in this respect may become uniform, and be directed by fixed and stable principles."⁹⁰

In fact, the very first treaty ratified by the Senate during the First Congress was the Treaty of Fort Harmar with the "Wyandot, Delaware, Ottawa, Chippewa, Pattewatima, and Sac Nations."⁹¹ The Senate ratified this treaty in September of 1789, while state ratification of the Constitution was still pending in North Carolina and Rhode Island.⁹² The second was the Treaty

85. See MARY SARAH BILDER, *MADISON'S HAND: REVISING THE CONSTITUTIONAL CONVENTION* 179–81, 187–89, 223–24, 327 (2017).

86. See, e.g., *Stern v. Marshall*, 564 U.S. 462, 518 (2011) (Breyer, J., dissenting); *Powell v. McCormack*, 395 U.S. 486, 539–40 (1969).

87. 1 HAMPTON L. CARSON, *THE HISTORY OF THE SUPREME COURT OF THE UNITED STATES; WITH BIOGRAPHIES OF ALL THE CHIEF AND ASSOCIATE JUSTICES* 138 (1902).

88. 3 *THE PAPERS OF GEORGE WASHINGTON, PRESIDENTIAL SERIES*, 15 JUNE 1789–5 SEPTEMBER 1789 34–41 (Dorothy Twohig et al. eds., 1989).

89. 4 *THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES SEPTEMBER 1789–JANUARY 1790* 51–53 (W.W. Abbot et al. eds., 1993) [hereinafter 4 WASHINGTON PAPERS].

90. *Id.* at 51–53.

91. 2 *INDIAN AFFAIRS: LAWS AND TREATIES* 18–23 (Charles J. Kappler, ed., 1904) [hereinafter 2 INDIAN AFFAIRS].

92. 4 WASHINGTON PAPERS, *supra* note 89, at 113–14.

of New York in 1790, which proclaimed “perpetual peace and friendship between all the citizens of the United States of America, and all the individuals, towns and tribes of the Upper, Middle and Lower Creeks and Semanories composing the Creek Nation of Indians.”⁹³ Both of these treaties repeatedly use the term “nation” to describe tribal governments and demonstrate the intent of the First Congress and the Framers to treat with them as with other nations. As discussed below in section five, the Framers relied on Vattel’s Law of Nations for first principles of statecraft, and as Vattel noted, “[p]ublic treaties can only be made by the superior powers, by sovereigns who contract in the name of the state.”⁹⁴ In this way, the early treaties are in and of themselves evidence of the Framers’ recognition of tribal nationhood.

Thomas Jefferson was serving as the first Secretary of State in 1790 when he wrote a legal opinion to President Washington regarding the State of Georgia’s sale of Indian land and subsequent disputes with the Chickasaw and Choctaw Nations.⁹⁵ In it, he described the federal control over Indian land policy as an aspect of the law of nations:

If the country, instead of being altogether vacant, is thinly occupied by another nation, the right of the natives forms an exception to that of the new comers; that is to say, these will only have a right against all other nations except the natives: consequently they have the exclusive privilege of acquiring the native right by purchase, or other just means. this is called the right of pre-emption; & is become a *principle of the law of nations*, fundamental with respect to America.⁹⁶

Treaties with foreign nations also used the term. In 1795, the Senate ratified the Pinckney Treaty with Spain, wherein “both Parties oblige themselves expressly to restrain by force all hostilities on the part of the Indian nations living within their boundary.”⁹⁷

A digital search of the text of all Indian treaties reveals the term “nation” or “nations” used 517 times to describe the various tribal nations, the last one with the “Navajo Nation” in 1868.⁹⁸ Even the federal law that ended treaty-making used the term:

93. 2 INDIAN AFFAIRS, *supra* note 91, at 25.

94. EMER DE VATTEL, THE LAW OF NATIONS, OR CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS §§ 154, 158, 192 (Joseph Chitty ed., 6th Am. ed. 1844) [hereinafter VATTEL 1844]. Vattel distinguishes public treaties from those between sovereigns respecting private affairs, and those between a sovereign and a private person.

95. 5 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES, 16 January–June 1790 379–81 (Dorothy Twohig et al. eds., 1996) [hereinafter 5 WASHINGTON PAPERS].

96. *Id.* (emphasis added).

97. 2 TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA 138–52 (Hunter Miller ed., 1931).

98. U.S. GOV’T PUBLISHING OFFICE, <https://www.gpo.gov> (click “Explore and Research,” then click “govinfo,” then click “A to Z,” then scroll down to “Kappler’s Treaties;” then click “Volume 2” then search “nation,” “nations,” and “Navajo Nation”) (last visited Jan. 24, 2019).

No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March third, eighteen hundred and seventy-one, shall be hereby invalidated or impaired.⁹⁹

Although no President has attempted to negotiate an Indian treaty since that time, this action did not override the language of the Constitution or the original intent of the Framers to include tribal nations within the scope of the Offences Clause.

Congress has used the term “nation” to describe tribal nations throughout U.S. history. In July of 1775, soon after the Battle of Bunker Hill, and as George Washington assumed command of the Continental Army, the Continental Congress wrote a missive to the “Six” Iroquois “Confederate Nations” begging for peace.¹⁰⁰ In 1786, the Continental Congress enacted a comprehensive ordinance for regulating Indian affairs, stating that “the safety and tranquility of the frontiers of the United States do in some measure depend on the maintaining a good correspondence between their citizens and the several nations of Indians”¹⁰¹ In 1834, Congress enacted the bedrock Trade and Intercourse Act whereby “no purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.”¹⁰² This is still the law today.¹⁰³

These are but a few examples. There are hundreds of references to “Indian Nations” in the correspondence among the Framers.¹⁰⁴ There are even more references to specific tribal nations. For example, a search of the National Archives online repository reveals 549 references to the confederacy of the “Six Nations,” and 72 to the “Five Nations,”¹⁰⁵ 173 references to

99. 25 U.S.C. § 71 (2018).

100. 2 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1779: MAY 10–SEPTEMBER 20, 1775 177–183 (Worthington Chauncey Ford, ed., Washington, DC: Government Printing Office, 1905).

101. 30 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789: JANUARY 2–JULY 31, 1786 369 (John C. Fitzpatrick ed., 1934).

102. An Act of June 30, 1834 to Regulate Trade and Intercourse with the Indian Tribes, and to Preserve Peace on the Frontiers, Pub. L. No. 23-161, § 10, 4 Stat. 729 (1834).

103. 25 U.S.C. § 177 (2018).

104. National Archives, *Founders Online*, FOUNDERSARCHIVES, <https://founders.archives.gov> (last visited Feb. 2, 2019). This website repository contains correspondence and other writings in an online database of thousands of records from George Washington, Benjamin Franklin, Alexander Hamilton, John Adams, Thomas Jefferson, and James Madison. A search for the term “Indian Nations” reveals 168 uses. The terms “Indian” and “nation” occur near each other 906 times (within ten words).

105. The Iroquois or Haudenosaunee Confederacy were known as the Five Nations, comprising the Mohawk, Onondaga, Oneida, Cayuga, and Seneca. After 1722, they accepted the Tuscarora into their confederacy and became known as the Six Nations.

“Cherokee Nation,” 233 to the “Creek Nation,” 27 to the “Chickasaw Nation,” 28 to the “Choctaw Nation,” 18 to the “Delaware Nation,” 12 to the “Oneida Nation,” and 6 mentions of the “Wyandot Nation.”¹⁰⁶ There are many more references with variations in syntax and spelling, but all reveal consistent usage of the term “nation” to refer to the indigenous governments that preceded the United States.

In the ensuing years of frontier violence, the Offences Clause served as the basis for federal laws addressing diplomatic relations among Indian and foreign governments,¹⁰⁷ as well as border conflicts known as depredations.¹⁰⁸ For example, in 1834, Congress enacted the Depredations Act to require any tribe “in amity” with the United States to “make satisfaction,” upon demand by the United States, for property offenses against non-Indians outside Indian country.¹⁰⁹ The depredations laws addressed frontier violence by permitting each nation to punish offenses by their respective citizens, even when committed on the other’s territory.¹¹⁰

After the Modoc Indian War of 1873, the Attorney General opined that prisoners accused of killing military officers under a flag of truce were subject to the “law of nations” under the Offences Clause and could be tried by a military commission.¹¹¹ The Attorney General concluded that:

[A]s they have been recognized as independent communities for treaty-making purposes, and as they frequently carry on organized and protracted wars, they may properly, as it seems to me, be held subject to those rules of warfare which make a negotiation for peace after hostilities possible, and which make perfidy like that in question punishable by military authority.¹¹²

106. See National Archives, *Founders Online*, FOUNDERSARCHIVES, <https://founders.archives.gov> (search listed terms under “Over 182,000 Searchable Documents”) (searches performed Feb. 6, 2019).

107. An Act Erecting Louisiana into Two Territories, and Providing for the Temporary Government Thereof, Pub. L. 8-38, § 15, 2 Stat. 283, 289 (1804) (encouraging the President to exchange eastern tribal lands for those west of the Mississippi, and providing that tribes “will not hold any treaty with any foreign power, individual state, or with the individuals of any state or power”); An Act for the Preservation of Peace with the Indian Tribes, Pub. L. 6-5, 2 Stat. 6 (1800) (prohibiting any person to “carry on a correspondence, by letter or otherwise, with any foreign nation or power to excite any Indian nation, tribe or chief, to war against the United States . . .”).

108. 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1907 104 (James D. Richardson ed., 1908) (Washington reported he had used the military against hostile Indian tribes to “punish their depredations”).

109. See 25 U.S.C. § 229 (2018) (codifying R.S. § 2156) (from Acts June 30, 1834, Pub. L. No. 23-161, § 17, 4 Stat. 731 (1834); An Act to Regulate Trade and Intercourse with the Indian Tribes, and to Preserve Peace on the Frontiers, Pub. L. No. 23-161, 4 Stat. 729, 731 (1834); Feb. 28, 1859, Priv. L. No. 23-66, § 8, 4 Stat. (1834); An Act Making Appropriations for the Current and Contingent Expenses of the Indian Department, and for Fulfilling Treaty Stipulations with Various Indian Tribes, for the Year Ending June Thirtieth, Eighteen Hundred and Sixty, Pub. L. No. 35-29, 11 Stat. 388, 401 (1859)); see also *Montoya v. United States*, 180 U.S. 261, 262 (1901).

110. See Act March 3 (1891), Priv. L. No. 51-538, § 5, 26 Stat. 851 (1891).

111. See *The Modoc Indian Prisoners*, 14 Op. Att’y Gen. 249 (1873).

112. *Id.* at 253.

This understanding of indigenous peoples as “nations” within the scope of the “law of nations” is not confined to the past. As recently as 2001, in considering the constitutionality of military tribunals for terrorists, the Department of Justice relied on the precedent that Tribal Nations are “domestic dependent nations” subject to the laws of war and adjudication of hostilities by military tribunals.¹¹³ As recently as this term, the Supreme Court found that the State of Washington’s fuel tax is pre-empted by a treaty reservation of rights to the “Yakama Nation.”¹¹⁴

The Framers of the Constitution considered the indigenous peoples of the United States to belong to “nations,” and that the principles of the law of nations applied to their intergovernmental relations. We turn next to a brief review of these principles, and how tribal nations, though sovereign, were considered subject to the overriding authority of the United States.

IV. OFFENCES AGAINST THE LAW OF NATIONS AND TRIBAL NATIONHOOD IN THE UNITED STATES

What is the law of nations? When considering the Framers’ intentions, reference is often made to Emer de Vattel’s seminal work *The Law of Nations* first published in 1758, which set out the “natural laws” governing the rights and obligations involving intercourse between sovereigns, including navigation, trade, war, diplomacy, and citizenship.¹¹⁵ Vattel’s text is said to be “unrivalled among such treatises in its influence on the American Founders.”¹¹⁶

In 1775, Charles F. W. Dumas sent three copies of *The Law of Nations* to Benjamin Franklin. Franklin’s letter to Dumas acknowledging receipt of those copies reads as follows:

Philadelphia, December 19, 1775

Dear Sir:

I am much obliged by the kind present you have made us of your edition of Vattel. It came to us in good season, when the circumstances of a rising State make it necessary frequently to consult the law of nations. Accordingly, that copy which I kept (after depositing one in our own public library here, and sending the other to the College of Massachusetts Bay, as you directed) has been continually in the hands of the members of our Con-

113. Legality of the Use of Military Commissions to Try Terrorists, 25 Op. O.L.C. 238, 265–66 (Nov. 6, 2001) (citing *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831)).

114. *Washington State Dept. of Licensing v. Cougar Den, Inc.*, No. 16-1498, 2019 WL 1245535 (U.S. Mar. 19, 2019).

115. EMER DE VATTEL, *THE LAW OF NATIONS, OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS, WITH THREE EARLY ESSAYS ON THE ORIGIN AND NATURE OF NATURAL LAW AND ON LUXURY* (Richard Whatmore et al. eds., 1797) [hereinafter *VATTEL 1797*] available at <https://perma.cc/2UHQ-CMPA>.

116. PETER AND NICHOLAS ONUF, *FEDERAL UNION, MODERN WORLD, THE LAW OF NATIONS IN AN AGE OF REVOLUTIONS, 1776–1814* 11 (1993).

gress now sitting, who are much pleased with your notes and preface, and have entertained a high and just esteem for their author¹¹⁷

At the outset, Vattel’s *The Law of Nations* sets forth a broad definition of “nation” that encompasses the indigenous tribal nations in North America. “Nations or states are bodies politic, societies of men united together for the purpose of promoting their mutual safety and advantage by the joint efforts of their combined strength.”¹¹⁸ Vattel also set out the concept used for the federal organization of the United States government:

[S]everal sovereign and independent states may unite themselves together by a perpetual confederacy, without ceasing to be, each individually, a perfect state. They will together constitute a federal republic: their joint deliberations will not impair the sovereignty of each member, though they may, in certain respects, put some restraint on the exercise of it, in virtue of voluntary engagements.¹¹⁹

Vattel’s most significant influence on the early American relationship with the indigenous inhabitants may have been his views on the obligation of nations to engage in agriculture and cultivate the soil. Vattel believed that the densely populated nations with too little land had a natural right to take possession of lands that were used for hunting and subsistence, thus “the establishment of many colonies on the continent of North America might, on their confining themselves within just bounds, be extremely lawful. The people of those extensive tracts rather ranged through than inhabited them.”¹²⁰ From this, the Framers developed their view that because the native populations were not engaged in intensive agriculture in the same manner as European settlers, they did not fully own the land but held only a right of occupancy while the United States held the right of preemption won from Great Britain in 1783. Thomas Jefferson, as the first Secretary of State, declared, “What did I understand to be our rights in the Indian soil? 1. A right of preemption in their lands; that is to say the sole and exclusive right of purchasing from them whenever they should be willing to sell.”¹²¹

Vattel’s work also influenced the Framers and the Supreme Court’s understanding of the relationship between the United States and tribal nations, where tribal nations retain their inherent sovereignty within the framework of a trust relationship. Vattel wrote extensively of the rights and obligations of nations in trust relationships or “unequal alliance.”¹²²

117. 2 FRANCIS WHARTON, THE REVOLUTIONARY DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES 64 (1889).

118. VATTEL 1884, *supra* note 94, at § 1.

119. VATTEL 1797, *supra* note 115, at § 10.

120. *Id.* at § 81 (“The cultivation of the soil, a natural obligation . . .”).

121. 1 THE WRITINGS OF THOMAS JEFFERSON 197 (Paul Leicester Ford ed., 1892); 1 JUNE TO 31 DECEMBER 1792 30 (John Catanzariti ed., 1990) (Thomas Jefferson, Notes of a Conversation with Mr. Hammond, June 3, 1792).

122. *See* VATTEL 1884, *supra* note 94, at 200–04.

R
R

R

We ought, therefore, to account as sovereign states those which have united themselves to another more powerful, by an unequal alliance The conditions of those unequal alliances may be infinitely varied. But whatever they are, provided the inferior ally reserve to itself the sovereignty, or the right of governing its own body, it ought to be considered as an independent state, that keeps up an intercourse with others under the authority of the law of nations.¹²³

In 1832, the Supreme Court applied this understanding of the law of nations as the basis for recognizing inherent tribal sovereignty. In *Worcester v. Georgia*,¹²⁴ Chief Justice Marshall cited Vattel in reasoning that the power of tribal governments to make treaties was premised on the power of self-government. “The very term ‘nation,’ so generally applied to them, means ‘a people distinct from others.’”¹²⁵ His opinion explained:

The very fact of repeated treaties with them recognizes it; and the settled doctrine of the *law of nations* is, that a weaker power does not surrender its independence—its right to self-government, by associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state. Examples of this kind are not wanting in Europe, “Tributary and feudatory states,” says Vattel, “do not thereby cease to be sovereign and independent states, so long as self-government and sovereign and independent authority are left in the administration of the state.”¹²⁶

In his seminal legal opinion *The Powers of Indian Tribes*, Felix Cohen relied on the same passages from Vattel and *Worcester* as the authority for his argument that tribal nations exercise inherent sovereignty; they “exercise powers of self-government, not by virtue of any delegation of powers from the Federal Government, but rather by reason of their original tribal sovereignty.”¹²⁷ The law of nations and the Offences Clause lie at the heart of the federal Indian law principle that tribal nations possess inherent sovereignty, limited only by treaty and trust relationships with the United States.¹²⁸

Vattel’s *The Law of Nations* had a profound influence on the Framers, and this included their conception of the legal relationship between the United States and tribal nations. Because of this, the Constitution was drafted specifically to grant Congress the authority to define the law of nations between sovereigns, including tribal nations.

123. *Id.* § 5.

124. 31 U.S. 515, 559 (1832).

125. *Worcester*, 31 U.S. at 559.

126. *Id.* at 560–61 (emphasis added).

127. 1 OPINIONS OF THE SOLICITOR OF THE DEPARTMENT OF THE INTERIOR RELATING TO INDIAN AFFAIRS 1917–1974 448 (1979).

128. Dossett, *supra* note 37, at 260 (explaining the origin of the federal trust responsibility).

V. SCOPE OF THE OFFENCES CLAUSE INCLUDES CIVIL REMEDIES
AS WELL AS CRIMINAL PUNISHMENT

The Framers intended the term “offence” in its broad sense, to include not only criminal offences, but any transgression or injury that could lead to conflict between nations. The purpose of the clause was to shift control over international relationships from the states to the new federal government and for the United States to avoid military reprisals for the misconduct of its citizens.¹²⁹ In this nation-to-nation context, sanctions for “offences” more frequently involve reparation of damages rather than criminal penalties, because nations are capable of war and peace, paying damages, and transferring custody of persons or property, but cannot be placed in prison or punished in a corporal sense.

This broad understanding of the term “offence” is supported by dictionaries available at the time,¹³⁰ as well Vattel’s treatment of the word. He stressed that offences are committed by one nation against another and can include a broad range of insults and injuries: “Nothing is more opposite to the duties of humanity, nor more contrary to that society which should be cultivated by nations, than offences, or actions which give a just displeasure to others: every nation therefore should carefully avoid giving any other nation real offence.”¹³¹ Vattel emphasized the importance of civil remedies for offences against the law of nations: “But if there is question of obtaining reparation of the damage done, together with adequate satisfaction for the offence, we must apply to the sovereign of the delinquents; we must not pursue them into his dominions, or have recourse to arms, unless he has refused to do us justice.”¹³² Blackstone also included within the law of nations “civil transactions and questions of property between the subjects of different states.”¹³³

The full text of the Offences Clause is “to define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations.”¹³⁴ During the Convention, the terms “define” and “punish” were subject to substantive debate by the Committee of Detail. Gouverneur Morris moved to strike the word “punish” as it stood alone before the phrase “the law of nations,” so that the law would “be definable as well as punishable . . .”¹³⁵ When James Wilson argued that the United States could not

129. See *infra* note 130.

130. SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 1395 (1755).

131. VATTEL 1797, *supra* note 115, § 19.

132. *Id.* § 43.

133. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 67 (U.K., Clarendon Press 1769).

134. U.S. CONST. art. I, § 8, cl. 10.

135. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 316 (Max Farrand ed., 1937).

R

R

“pretend to define” the law of nations, Morris replied: “The word define is proper when applied to offenses in this case; the law of nations being often too vague and deficient to be a rule.”¹³⁶ The change was accepted by a vote, and the clause adopted as it now stands.¹³⁷ This discussion indicates that the “Law of Nations” refers to a body of principles, not set in stone, and it is for Congress to define these principles by providing specific laws that will be enforced within the United States. In this way, Morris, an ally of George Washington and other Federalists who favored a strong central government, secured broad federal authority to regulate international affairs.

A question may arise from the text “define and punish.” May Congress simply define the law of nations in a civil context without also imposing criminal punishment? Yes, the power to “define and punish” offences against the law of nations is the power to both define offences and to punish offences. The construction does not limit Congress to only criminal punishment, but is open-ended to permit Congress to define offences that have only a civil remedy. Many clauses in the constitution are constructed the same way, as inclusive lists of related powers or rights. For example, the power to “raise and support” armies permits Congress to take separate actions to both raise armies and support armies. The power to provide for “organizing, arming, and disciplining” the militia is a list of three separate but related powers. The Second Amendment protects the right of the people “to keep and bear Arms” which is the right to both keep arms and bear arms, and does not imply that the people must always bear the arms they keep. In the same way, the powers to “define and punish” offenses are two separate powers related to the law of nations.

The most powerful affirmation of the civil purpose of the Offences Clause comes from Congress itself. The First Congress enacted the Alien Tort Claims Act (ATCA) in 1789, granting federal courts “original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”¹³⁸ In 2004, the Supreme Court affirmed the civil purpose of ATCA, which should be “read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time.”¹³⁹ In two more recent statutes, Congress has cited the Offences Clause in support of the power to regulate civil liability: the authority to determine when foreign sovereigns can be

136. *Id.* at 614–15.

137. *Id.* at 615.

138. Judiciary Act of 1789, Pub. L. No. 1-20, § 9(b), 1 Stat. 73, 76–77; *see* 28 U.S.C. § 1350. ATCA has been subject to increased attention in the federal courts in recent years as foreign citizens seek remedies for human rights violations. *See, e.g.*, *Daimler AG v. Bauman*, 571 U.S. 117, 122 (2014).

139. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

sued in United States courts,¹⁴⁰ and the power to create civil liability for certain international human rights violations.¹⁴¹ As discussed below, congressional enactment of the International Child Abduction Remedies Act can be traced to no other source of enumerated authority other than the Offences Clause.¹⁴²

Professor Beth Stephens has reviewed the historical development of the Offences Clause in detail and concluded that its original purpose was to empower Congress to enact a broad range of legislation including civil and criminal matters arising between nations.¹⁴³ In 1781, a resolution of the Continental Congress detailed the States’ failure to address “Offences against the Law of Nations”¹⁴⁴ and recommended that state legislatures “authorise suits to be instituted for damages by the party injured, and for compensation to the United States for damage sustained by them from an injury done to a foreign power by a citizen.”¹⁴⁵ Only Connecticut responded, and in 1785 the Continental Congress again recommended that the states provide penalties for violations of the law of nations.¹⁴⁶ The genesis of the Offences Clause was this effort to provide civil remedies for offences against the law of nations. As discussed above, concerns over treaty violations and violations of the law of nations were a moving force behind the Constitutional Convention; and state conflict with tribal nations was a chief example of these concerns.

There is general agreement among Congress, the Supreme Court, and legal scholars that the scope of the Offences Clause includes both civil and criminal sanctions.¹⁴⁷ We turn next to how this enumerated power is a

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

141. See S. REP. NO. 102-249, at 5–6 (1991) (listing the Offences Clause as the basis of Congress’s power to enact the Torture Victim Protection Act).

142. See *infra* note 160 (discussing constitutional authority in Offences Clause); see also *infra* Part VI (discussing federal law on international child custody and citizenship).

143. Stephens, *supra* note 7, at 461–462, 469.

144. Report to Congress, Edmund Randolph et al. (1781), *reprinted* in 3 THE FOUNDERS’ CONSTITUTION 66 (Philip Kurland & Ralph Lerner eds., 1987).

145. *Id.*

146. See 29 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789 654-55 (John C. Fitzpatrick ed., U.S. Gov’t Printing Office 1933).

147. Stephens, *supra* note 7, at 454 (“A close examination of the text of the Offenses Clause, the historical context in which it was drafted, and the constitutional structure of which it is a key part, demonstrates that the Clause was not—and should not be—limited to criminal prosecutions.”); Morley, *supra* note 7, at 111 n.18 (2002) (“I agree with Professor Stephens that the Clause permits both civil and criminal sanctions.”); Eugene Kontorovich, *Discretion, Delegation, and Defining in the Constitution’s Law of Nations Clause*, 106 NW. U.L. REV. 1675, 1742 (2015) (“To be sure, the ATS is not a criminal statute. The Offenses Clause’s punishing power encompasses civil liability.”). To the extent there is scholarly disagreement, the debate is whether Congress can use the clause to incorporate international agreements that address purely domestic matters into federal law, or is limited to governing actual

R

R

R

R

source of authority for defining the citizenship of children, and the Indian Child Welfare Act.

VI. THE INDIAN CHILD WELFARE ACT AS AN EXPRESSION OF
CONGRESS'S POWER TO DEFINE OFFENCES AGAINST
THE LAW OF NATIONS

The Indian Child Welfare Act was enacted to keep native families intact because families are as essential to tribal nations' continued existence as they are to any society. ICWA was the product of rising concern in the mid-1970s over the consequences to American Indian and Alaska Native children, families, and tribes of abusive child-welfare practices. These practices resulted in the separation of large numbers of children from their families and tribes through adoption or foster care placement, usually in non-Indian homes.¹⁴⁸ Congress heard evidence that "25–35% of American Indian and Alaska Native children had been separated from their families and placed in foster homes, adoptive homes or institutions."¹⁴⁹ Congress specifically found that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children . . ."¹⁵⁰ This concern was also expressly reflected in the floor statements of the principal sponsor in the House, Representative Morris Udall, who stated that "Indian tribes and Indian people are being drained of their children and, as a result, their future as a tribe and a people is being placed in jeopardy."¹⁵¹ As the National Indian Tribal Chairman's Association testified during the 1978 hearing:

Culturally, the chances of Indian survival are significantly reduced if our children, the only real means for the transmission of the tribal heritage, are to be raised in non-Indian homes and denied exposure to the ways of their people. Furthermore, these practices seriously undercut the tribes' ability to continue as self-governing communities. Probably in no area is it more important that tribal sovereignty be respected than in an area as socially and culturally determinative as family relationships.¹⁵²

The primary mechanism used by Congress to address this crisis was to "curtail state authority" and to strengthen tribal authority over child welfare

interactions with citizens of other nations. The application of the Offences Clause to tribal nations is unaffected by this debate because tribal citizens were, and are, understood to be citizens of other nations.

148. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989).

149. *Id.* at 55 n.1 (Stevens, J., dissenting).

150. 25 U.S.C. § 1901(3) (2018).

151. *Holyfield*, 490 U.S. at 34 n.3 (citations omitted) (describing statements made on the house floor).

152. *To Establish Standards for the Placement of Indian Children in Foster or Adoptive Homes, to Prevent the Breakup of Indian Families, and for Other Purposes: Hearings on S. 1214 Before the Subcomm. on Indian Affairs and Pub. Lands of the H. Comm. on Interior and Insular Affairs*, 95th Cong., 2 (1978), 193 (1981).

matters.¹⁵³ ICWA “is based upon the fundamental assumption that it is in the child’s best interest that its relationship to the tribe be protected . . .”¹⁵⁴ The Act establishes exclusive tribal jurisdiction over reservation-domiciled Indian children,¹⁵⁵ provides for the transfer of off-reservation state court proceedings to tribal court,¹⁵⁶ recognizes the right of American Indian and Alaska Native tribes to intervene in state court,¹⁵⁷ and recognizes, as a matter of federal law, tribally-established placement preferences for state placements of American Indian and Alaska Native children.¹⁵⁸ ICWA includes a number of other provisions designed to keep families together or ensure placement with extended family or tribal members.¹⁵⁹ Together, these provisions serve to protect the relationship between tribal nations and the children and families that are their foundation.

Despite the fundamental importance of this law to the future of tribal nations, ICWA faces significant challenges to its constitutionality as discussed above. Because ICWA is critical to native children, their families, and the continued existence of tribal nations, it is important to consider additional sources of enumerated authority in the Constitution.

The Offences Clause provides ample constitutional authority. Vattel recognized the citizenship and custody of children as a subject of the law of nations:

As the society cannot exist and perpetuate itself otherwise than by the children of the citizens, those children naturally follow the condition of their fathers, and succeed to all their rights. The society is supposed to desire this, in consequence of what it owes to its own preservation; and it is presumed, as matter of course, that each citizen, on entering into society, reserves to his children the right of becoming members of it.¹⁶⁰

The purpose of the Indian Child Welfare Act fits closely with Vattel’s natural law theory. In its findings, the Act states “that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe.”¹⁶¹ The Framers would have understood the widespread confiscation of native children from their families by state governments as

153. *Holyfield*, 490 U.S. at 45 n.17.

154. *Id.* at 37, 50 n.24 (citations omitted).

155. 25 U.S.C. § 1911(a) (2018).

156. *Id.* § 1911(b).

157. *Id.* § 1911(c).

158. *Id.* § 1915(c).

159. *Id.* §§ 1901–1963.

160. VATTEL 1844, *supra* note 94, at 100–02 (“By the law of nature alone, children follow the condition of their fathers, and enter into all their rights; the place of birth produces no change in this particular, and cannot of itself furnish any reason for taking from a child what nature has given him.”).

161. 25 U.S.C. § 1901(3) (2018).

an offence against the law of nations, and that ICWA, or any law regulating the citizenship and custody of children between sovereign nations, was within the scope of federal authority under the Offences Clause. Indeed, these laws are common in federal law and throughout the world.

VII. COMPARISON TO FEDERAL LAW ON INTERNATIONAL CHILD CUSTODY AND CITIZENSHIP

Understanding ICWA as an expression of congressional power over citizenship and the law of nations addresses the State of Texas's claim (which was adopted by the district court in *Brackeen*) that "deferring to tribal membership *eligibility* standards based on ancestry, rather than *actual* tribal affiliation, the ICWA's jurisdictional definition of 'Indian children' uses ancestry as a proxy for race and therefore 'must be analyzed by a reviewing court under strict scrutiny.'"¹⁶² ICWA's use of ancestry is comparable to federal laws regulating the citizenship of children in the international context. If ICWA's use of ancestry is unlawful, so is much of the Immigration and Naturalization Act relating to the children of U.S. citizens born abroad. Foreign-born children are analogous to tribal citizens born outside of tribal jurisdiction in that they frequently do not become citizens automatically upon birth but must demonstrate ancestry or parentage.

First, it is worth noting that the federal law regarding nationality at birth contains a special provision to include "a person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe."¹⁶³ This reflects the Snyder Act of 1924, which admitted all tribal citizens born in the U.S. to full U.S. citizenship.¹⁶⁴ The Texas argument that tribal ancestry is an unlawful racial classification may prove too much, in that the U.S. citizenship of over four million Native Americans is based on a similar ancestral classification.

Second, the more general provisions for foreign-born children of U.S. citizens are filled with ancestral qualifications with unique provisions when both parents are citizens of the United States and when only one parent is a U.S. citizen.¹⁶⁵ The law relating to children born out of wedlock requires "a blood relationship between the person and the father is established by clear

162. *Brackeen*, 2018 WL 4927908, at *26 (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995)).

163. 8 U.S.C. §1401(b) (2018).

164. An Act to Authorize the Secretary of the Interior to Issue Certificates of Citizenship to Indians, Pub. L. No. 68-233, 43 Stat. 253 (1924).

165. 8 U.S.C. § 1401 (2018).

and convincing evidence.”¹⁶⁶ The use of ancestry to determine citizenship is long-established in federal law.

More generally, the use of ancestry to determine citizenship is a well-recognized principle of international law. Although every nation has its own laws regarding citizenship, there are two main categories. In the first one, “*jus sanguinis*,” or the principle of blood, descent and heritage play a pivotal role in defining who can become a citizen.¹⁶⁷ The second, “*jus soli*,” defines citizens as those born within the country, regardless of the citizenship of the parents.¹⁶⁸ Federal law in the United States incorporates both principles, and the use of ancestral classifications in ICWA should be given similar deference.¹⁶⁹

The federal immigration and nationality laws reflect Congress’s power under Article I, Section 8, clause 4 (also referred to as the Nationality Clause), which reads: Congress shall have Power “To establish a uniform Rule of Naturalization.” But the same cannot be said of the Hague Convention on the Civil Aspects of International Child Abduction¹⁷⁰ and its federal implementing statute, the International Child Abduction Remedies Act (ICARA).¹⁷¹ The Hague Convention is a multilateral treaty that provides a set of principles for the return of children abducted from one country to another.¹⁷² ICARA is the federal law that implements the Hague Convention in the United States, and requires both state and federal courts to hear petitions for return of a child to their habitual country of residence. Because the Hague Convention and ICARA are unrelated to naturalization laws, they are a clearer example of congressional authority to define the law of nations regarding the custody of children, and to impose that law in state courts.

The 1980 Hague Convention’s stated goals are straightforward: “to secure the prompt return of children wrongfully removed or retained in any Contracting State, and to ensure that the rights of custody and access under the laws of one Contracting State are effectively respected in the other Contracting States.”¹⁷³ The Convention does not seek to determine the merits of custody issues or determine citizenship, only to reestablish the status quo

166. *Id.* § 1409. Note that the Supreme Court has addressed the gender inequality aspects of this law in *Sessions v. Morales-Santana*, 137 S. Ct. 1678 (2017).

167. *Jus sanguinis*, BLACK’S LAW DICTIONARY (10th ed. 2014).

168. See Kristin A. Collins, *Illegitimate Borders: Jus Sanguinis Citizenship and the Legal Construction of Family, Race, and Nation*, 123 YALE L.J. 2134, 2152–53 (2014).

169. 8 U.S.C. §§ 1401, 1409 (2018).

170. Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11, 670, 1343 U.N.T.S. 89 [hereinafter Hague Convention].

171. 22 U.S.C. §§ 9001–9011 (2018).

172. *Id.* § 9001(4).

173. Hague Convention, *supra* note 170, at art. 1.

and return jurisdiction to the country of habitual residence where the merits of the custody dispute can be resolved. In this manner, ICARA—like ICWA—removes traditional state authority over child custody in certain cases, and subjects state courts to federal law. The Hague Convention is the “law of nations,” a body of principles established by international agreement. With ICARA, Congress defined these principles by providing specific laws that will be enforced within the United States. In this way, both ICWA and ICARA are examples of Congress using its Offences Clause power to define the law of nations applicable to state court child custody proceedings.

Foreign affairs are like federal Indian law in that the Supreme Court has often asserted the federal government has inherent “plenary” power.¹⁷⁴ As reliance on unenumerated authority has fallen into disfavor, the original purpose of the Offences Clause for regulating matters relating to both foreign nations and tribal nations deserves greater attention. The parallels in matters of child custody and citizenship demonstrate this connection between the fields of foreign affairs and Indian affairs.

VIII. CONCLUSION

The United States Constitution originated in significant part because the Articles of Confederation created competition and conflict between the states over both foreign affairs and Indian affairs. The Framers, as part of a comprehensive displacement of state sovereignty over foreign and tribal relations, stripped away the states’ powers to conclude treaties and to regulate foreign and Indian commerce and vested those powers in Congress and the President. The Offences Clause also was intended by the Framers to authorize Congress alone to define and punish offenses against the law of nations, a source of authority for regulating the intercourse between sovereign nations, including tribal nations. The Framers relied heavily on the work of Emer de Vattel, who recognized the citizenship and custody of children as a proper subject of the law of nations. The Indian Child Welfare Act secures the rights of native families to protect the custody of their children and the rights of tribal nations to preserve their societies. With its firm anchor in Vattel’s conceptual work, the Offences Clause offers a textual source of authority for the Indian Child Welfare Act as well as other relationships among sovereigns, including tribal nations.

174. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 315–16 (1936); Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 *TEX. L. REV.* 1, 10–11 (2002).