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## Novel Perspectives on Due Process Symposium: Questioning the Constitutional Rights of Foreign Nations

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# QUESTIONING THE CONSTITUTIONAL RIGHTS OF FOREIGN NATIONS

*Donald Earl Childress III\**

## INTRODUCTION

In *The Due Process and Other Constitutional Rights of Foreign Nations*,<sup>1</sup> Professor Ingrid Wuerth boldly goes where few U.S. federal courts and scholars have gone before to advance a reading of the U.S. Constitution that provides constitutional protections for foreign nations when they are sued in U.S. federal courts. As she explains, treating foreign states and some foreign-state owned enterprises under current U.S. federal case law as categorically outside the Constitution, with their capacity to be sued governed by a statute—the Foreign Sovereign Immunities Act (FSIA)<sup>2</sup>—while treating foreign individuals, foreign corporations, and some foreign-state related corporate entities as enjoying full constitutional protections is logically inconsistent. In responding to this purported doctrinal incoherence, Professor Wuerth argues that the better reading of the law is that Article III of the Constitution, the Fifth Amendment, and separation of powers principles protect foreign states and some foreign-state enterprises just as these provisions and doctrines protect foreign individuals when they are sued in U.S. federal courts.

In Professor Wuerth’s reading of the Constitution, because Article III vests and extends to U.S. federal courts original jurisdiction over suits “between a State, or the Citizens thereof, and foreign States, Citizens or Subjects,”<sup>3</sup> denying foreign nations personal jurisdiction and notice is contrary to the “purpose” of Article III as understood during the founding era (which is to protect foreign nations from unfair proceedings and to prevent international discord).<sup>4</sup> As Wuerth puts it, “[h]aving created a federal forum for this purpose, it would be odd for those who enacted the Constitution to provide structural disadvantages to foreign sovereigns by creating litigation-related constitutional rights that benefitted only private parties.”<sup>5</sup>

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1. Ingrid Wuerth, *The Due Process and Other Constitutional Rights of Foreign Nations*, 88 *FORDHAM L. REV.* 633 (2019).

2. 28 U.S.C. § 1330 et seq. (2012).

3. U.S. CONST. art. III, § 2, cl. 1.

4. Wuerth, *supra* note 1, at 661.

5. *Id.*

The Constitution's vesting of "[t]he judicial Power of the United States" in Article III "in one supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish,"<sup>6</sup> in Professor Wuerth's reading, suggests a connection to personal jurisdiction and notice that protects foreign sovereigns in similar ways as private parties. As she develops the argument, the idea is that the exercise of Article III's "judicial power" necessarily depends on the parties, even foreign sovereign parties, being properly before a U.S. federal court. This requires a federal court to have personal jurisdiction because "subject matter jurisdiction is limited by personal jurisdiction."<sup>7</sup> In her view, the prevailing understanding that foreign nations are not protected by the Constitution disadvantages foreign states by granting them fewer protections than private litigants, and "[d]isadvantaging foreign sovereigns in this way seems contrary to the purpose of Article III during the founding period."<sup>8</sup> Furthermore, she argues that the federal judicial power requires notice as a condition for its exercise under Article III because, in her reading of the historical sources, notice is linked to the exercise of judicial power and "suggest[s] that the exercise of judicial power presupposed notice."<sup>9</sup> She maintains that Article III's vesting and extension of the federal judicial power on U.S. federal courts to cover certain cases involving foreign states necessarily requires personal jurisdiction and notice to all defendants, even foreign sovereigns.<sup>10</sup>

Professor Wuerth extends this line of argument to the Fifth Amendment. Because the Fifth Amendment protects a "person" from deprivations of "property" without "due process of law,"<sup>11</sup> she argues that the process due in federal court included certain process even as to foreign nations.<sup>12</sup> She maintains that the process protections of the Fifth Amendment extended to foreign states as such states would have been understood as "persons" under the Fifth Amendment at the time of the founding.<sup>13</sup> As she concludes, "[o]n textual and historical grounds, application of Fifth Amendment due process protections to foreign states is straightforward."<sup>14</sup>

Next, Professor Wuerth claims that separation of powers principles compel a similar conclusion. As she explains, "[s]eparation of powers principles were understood to protect entities other than individual 'persons.'"<sup>15</sup> In her view, "[t]here is no textual basis for concluding that foreign states" are not protected "by other separation of powers protections."<sup>16</sup>

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6 U.S. CONST. art. III, § 1.

7. *See* Wuerth, *supra* note 1, at 664.

8. *See id.* at 661.

9. *See id.* at 668.

10. *See id.* at 676.

11. U.S. CONST. amend. V.

12. *See* Wuerth, *supra* note 1, at 676.

13. *Id.* at 678.

14. *Id.* at 679.

15. *Id.* at 680.

16. *Id.*

Based on this analysis, Professor Wuerth concludes that foreign nations have Article III and due process rights and that they are protected by separation of powers principles.<sup>17</sup> She thus asserts that the analysis of the constitutional rights of foreign nations “should reject general theories of constitutional exclusion and inclusion” and instead “should take a right-by-right approach, and should generally provide to foreign states the same litigation-related rights that other defendants enjoy.”<sup>18</sup> She contends that foreign sovereigns are due certain process, which means a “territorially restricted power to compel attendance before the court” that duplicates “protections already provided to all defendants through separation of powers.”<sup>19</sup>

As Professor Wuerth recognizes, such a reading of the Constitution is not supported by current Supreme Court case law, most lower court case law, or the scholarly conventional wisdom, although she does note that it is supported by some lower court case law pre-dating the FSIA.<sup>20</sup>

Professor Wuerth’s analysis is not only novel but also potentially groundbreaking, if correct. It opens up new lines of argument for foreign sovereigns and foreign-state entities appearing before U.S. federal courts and challenges the foundation for the treatment of foreign sovereigns and their entities by federal courts. Indeed, Professor Wuerth’s argument might call into question parts of the FSIA.

This response evaluates whether Professor Wuerth’s reading of the Constitution is correct. In so doing, this response considers the original understanding of these provisions, the law of nations as understood during the founding era, and Supreme Court case law close to the time of the founding. As explained below, I conclude that it is questionable that the Constitution extends rights to foreign nations.

#### ORIGINAL UNDERSTANDING

In what follows, I examine Professor Wuerth’s claim that Article III and the Due Process Clause of the Fifth Amendment provide rights and protections for foreign states when they are sued in a U.S. federal court.<sup>21</sup> Based on my review of the text of these provisions, as well as the best founding-era picture we can construct from early Supreme Court case law and the understanding of the law of nations at that time, it is questionable that the Constitution grants constitutional rights to foreign states.

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17. *Id.* at 686.

18. *Id.*

19. *Id.* at 690.

20. *See id.* at 640–53.

21. Professor Wuerth goes on to consider the relationship between due process and separation of powers. *See* Wuerth, *supra* note 1, at 679. Because she concludes that there is an overlap and duplication between these doctrines as well as Article III, the analysis in this response calls into question whether separation of powers principles are engaged in the case of foreign states even though I do not directly consider her arguments based on separation of powers principles.

*A. Article III*

According to Professor Wuerth, because Article III vests U.S. federal courts with original jurisdiction and extends that jurisdiction to cases (and controversies) involving foreign states, this vesting (and extension) of the federal judicial power confers a benefit or right upon foreign states.<sup>22</sup> It also suggests, in her telling, that the “vesting of ‘judicial power’ itself . . . also brings with it personal jurisdiction-based limitations”<sup>23</sup> in cases involving foreign states because “Article III already required personal jurisdiction and notice.”<sup>24</sup>

While this is a novel claim, this is not, in my view, the best reading of the Constitution, especially in light of the Constitution’s text and background principles of law at the time of the founding. Rather, the law of nations and Supreme Court case law immediately after the founding provide little support for this conclusion and instead point to the conclusion that foreign states were only entitled to whatever rights the United States as a sovereign granted them in its sole discretion.

As to the text, Article III of the Constitution vests the “judicial Power” in “one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”<sup>25</sup> Article III goes on to establish that the federal government’s “judicial Power shall extend” to various categories of “Cases” and “Controversies,” including “Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.”<sup>26</sup> Sections 2 and 3 of Article III do not define what the “judicial Power” means. Section 2 merely describes the categories of cases where U.S. federal courts may exercise their judicial power whatever that may be. Section 3 takes up the distinct question of treason.

A plain reading of Article III reveals no affirmative grant of any right to foreign states, or, indeed, an affirmative grant of any right to any other party that may appear before a federal court exercising the federal “judicial Power.” Article III simply provides that federal courts have the “judicial Power” to hear certain cases—what we would call today subject matter jurisdiction—involving “foreign States” when a suit is brought by or against them and a “State, or the Citizens thereof” is opposite them. Article III thus provides jurisdiction for a federal tribunal to hear a case or controversy involving a foreign state in certain circumstances. It does nothing more. Article III does not tell U.S. federal courts what to do with those cases when they are brought. For instance, Article III does not tell U.S. federal courts what notice is due, what process is due, or what rules of decision should be employed by the federal court in considering the case at bar.

Article III’s silence on rules of decision is unsurprising because the unamended Constitution primarily addresses the structural organization of

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22. See Wuerth, *supra* note 1, at 664–65.

23. *Id.*

24. *Id.* at 669.

25. U.S. CONST. art. III.

26. *Id.*

the federal government. The discussion of a party's rights largely appears in the amendments to the Constitution. While there are some passages—such as Article III, Section 2's guarantee of a jury trial in criminal cases—that do speak in terms of what we might today call “rights,” all this proves is that “even before the drafting and ratification of the Bill of Rights, the framers knew how to draft the Constitution in terms of personal rights.”<sup>27</sup> The fact that the framers decided not to draft Article III to provide rights to foreign states, especially in light of the contrasting jury trial language in Article III, Section 2, strongly suggests that the text of Article III was not intended to confer any rights on foreign states.<sup>28</sup>

Recognizing that the text of Article III alone does not support her argument, Professor Wuerth details some statements from the founding era that, in her view, illustrate the “purpose” that Article III's foreign state provisions were drafted in part to protect foreign sovereigns, and that foreign sovereigns would be granted personal jurisdiction and notice protections to protect them.<sup>29</sup> Notwithstanding her gloss on the founding-era history, I am aware of no direct evidence (and she provides none) of anyone around the time of the founding suggesting that Article III was drafted to confer a right on a foreign state.

Professor Wuerth also argues that the case or controversy language in Article III imports into that article requirements of personal jurisdiction and notice.<sup>30</sup> In so claiming, she relies on a certain background understanding of what the case and controversy words in Article III meant. The understanding of these words is contested, as scholarly commentary shows.<sup>31</sup> The “consensus hold[ing is] that the two words reflect the difference between civil and criminal matters: the Constitution uses ‘Cases’ to include both sorts of proceedings, while it uses ‘Controversies’ to refer specifically to *civil* proceedings.”<sup>32</sup> Regardless of what these words meant, and I take no position on this important question here, these words do not clearly import rights for foreign states into Article III. Article III defined and limited the judicial power that was vested in the federal courts; it did not speak to the rules that should be employed to resolve cases brought in federal courts.

There certainly were background principles at the time of the founding that would inform a federal court's analysis of the Constitution's text and a federal court's approach to the rule of decision that should apply in a case involving a foreign state. These background principles have been described as “general law.” This includes common law and the law of nations.<sup>33</sup> The

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27. Peter B. Rutledge, *Arbitration and Article III*, 61 VAND. L. REV. 1189, 1198 (2008).

28. *See id.*

29. Wuerth, *supra* note 1, at Part II.A.3.

30. *See id.* at 668–69.

31. *See, e.g.*, Robert J. Pushaw, Jr., *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447 (1994).

32. Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559, 1585–86 (2002).

33. *See generally* Caleb Nelson, *The Persistence of General Law*, 106 COLUM. L. REV. 503 (2006).

law of nations was the “default source of rules of decision for federal courts to apply in cases and controversies before them”<sup>34</sup> involving foreign states. The better reading of the sources, in my view, is that these principles informed judge-made, common law rules and did not create constitutional rights for foreign states. So, rather than focusing on the Constitution for the rights of foreign states, as Professor Wuerth does, we need to look closely at the law of nations to determine what rights were due to a foreign nation.

At the time of the founding, a nation’s jurisdiction or power to declare law was viewed under the law of nations as an outgrowth of its sovereignty. As explained by Emer de Vattel in his treatise, *The Law of Nations*,<sup>35</sup> which was the most well-known work on the subject in America at the time of the founding,<sup>36</sup> all recognized sovereign nations enjoyed certain “rights” under the law of nations. Yet, “[o]f all the rights that can belong to a nation, sovereignty is, doubtless, the most precious, and that which others ought the most scrupulously to respect, if they would not do her an injury.”<sup>37</sup> As such, no “foreign power [may] take cognisance of the administration of that sovereign, to set himself up for a judge of his conduct, and to oblige him to alter it.”<sup>38</sup> From this principle of sovereignty, Vattel derived the idea that a sovereign’s control over its territory conferred absolute jurisdiction and power to declare law within that territory. In Vattel’s words, “[t]he empire united to the domain, establishes the jurisdiction of the nation in its territories, or the country that belongs to it.”<sup>39</sup> One nation should not usurp “the territory of another,” according to Vattel, and it “should also respect it, and abstain from every act contrary to the rights of sovereigns: for a foreign nation can claim no right to it.”<sup>40</sup>

Vattel spoke in the language of rights, but these were not constitutional rights. Rather, they were rules of decision derived from the law of nations that were to be applied by federal courts because the Constitution was silent on them. These background principles, which were known at the time of the founding, did not constitutionalize certain rights for foreign states. Instead, they left the rules of decision a federal court should apply in a case involving a foreign sovereign subject to judicial interpretation as part of the common law process. A federal court would be expected to consult the law of nations at the time of the founding to determine the rule of decision in a case involving a foreign sovereign. The law of nations left significant room for a nation and its courts to depart from Vattel’s understanding. At the time of the founding, a nation could choose to grant a foreign state immunity in its courts, but this was not done as a matter of legal obligation.

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34. Thomas H. Lee, *The Law of Nations and the Judicial Branch*, 106 GEO. L.J. 1707, 1709 (2018).

35. 1 EMER DE VATTEL, *THE LAW OF NATIONS* (London, J. Newberry et al. 1759).

36. Anthony J. Bellia Jr. & Bradford R. Clark, *The Law of Nations as Constitutional Law*, 98 VA. L. REV. 729, 749 (2012).

37. VATTEL, *supra* note 35, bk. II, § 54, at 138.

38. *Id.* § 55, at 138.

39. *Id.* § 84, at 147.

40. *Id.* § 93, at 151.

The Supreme Court's decision in *The Schooner Exchange v. McFaddon*<sup>41</sup> illustrates the idea. In that case, the Court considered a case brought by citizens of Maryland, claiming ownership in a ship that they argued had been unlawfully taken from them by French agents on the high seas.<sup>42</sup> When the ship, which was sailing as a public vessel of France, docked at Philadelphia, the claimants filed a libel, asking a federal court to attach the ship.<sup>43</sup> In an opinion by Chief Justice Marshall, the Court, in considering whether the federal courts had jurisdiction over a claim against a friendly foreign military vessel that took refuge during a storm in an American port, held that the libel should be dismissed.<sup>44</sup>

In so holding, it is telling that the Supreme Court does not begin its analysis with the Constitution or even consider at any point in its analysis any provision of the Constitution in resolving the question presented. In fact, Chief Justice Marshall concluded that the lower court had jurisdiction over the *Schooner Exchange* without citing any constitutional provision at all.<sup>45</sup> Article III and the Constitution had nothing to say, according to Chief Justice Marshall, in resolving the question. Chief Justice Marshall thus looked outside the Constitution—to the law of nations—as a rule of decision to answer the question. And, in so doing, the Court tells us that it did not think the Constitution itself spoke to the matter. This strongly calls into question Professor Wuerth's conclusion that Article III had inherent in it certain ideas of a foreign state's rights. Rather, the question of the amenability of a foreign nation to suit in a U.S. federal court was not a question that Article III, due process, or personal jurisdiction resolves, but rather was a question of sovereignty as informed by the law of nations as applied by U.S. federal courts.

In concluding, in *The Schooner Exchange*, that there was immunity from suit, Chief Justice Marshall relied on the “principle of public [international] law, that national ships of war, entering the port of a friendly power open for their reception, are to be considered as exempted by the consent of that power from its jurisdiction.”<sup>46</sup> As he explained, immunity for foreign warships in the United States could not derive its “validity from an external source” because “[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute.”<sup>47</sup> Chief Justice Marshall went on to explain that “[t]his full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extra-territorial power, would not seem to contemplate foreign sovereigns nor their sovereign rights

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41. 11 U.S. (7 Cranch) 116 (1812).

42. *Id.* at 117.

43. *Id.*

44. *Id.* at 137.

45. *See id.* at 133. The litigants also thought the Constitution was not engaged by the question presented. As the U.S. Attorney General argued, “[t]he constitution of the United States decides nothing—it only provides a tribunal, if a case can possibility exist.” *Id.*

46. *Id.* at 145–46.

47. *Id.*



as its object.”<sup>48</sup> Immunity from suit “must be traced up to the consent of the nation itself” in conformity with “those principles of national and municipal law by which it ought to be regulated.”<sup>49</sup> The rule of decision is not, therefore, part of or derived from the Constitution.

Chief Justice Marshall then went on to observe that the United States’ consent to provide immunity could be inferred from the practice of nations toward foreign warships—an “implication” that only “the sovereign power of the nation” could destroy.<sup>50</sup> On this point, Chief Justice Marshall was unconditionally clear: “[w]ithout doubt, the sovereign of the place [where suit is brought] is capable of destroying” the immunity suggested “by the law of nations.”<sup>51</sup> A nation “may claim and exercise jurisdiction either by employing force, or by subjecting such vessels to the ordinary tribunals.”<sup>52</sup> As understood by the Court, the basic principle does not appear to be that foreign nations have rights under the Constitution or indeed any rights under the law of nations. Instead, the idea was that the sovereign of the place where suit is brought had full jurisdiction within its territory, and it was free to offer immunity (or not) from suit through the express or implied waiver of its jurisdiction.<sup>53</sup> It was also free to withdraw such immunity in its discretion. Such immunity is not, in other words, conveyed by Article III. It is derived from the law of nations and may be rejected by the nation where suit is brought.

*The Schooner Exchange* also points to another conclusion: foreign sovereign immunity is not a right protected by the Constitution. Rather, it is more akin to a privilege conveyed by the forum nation that might be withdrawn by a nation where the suit is brought if that was perceived to be in the forum sovereign’s interest. Thus, because a foreign sovereign’s immunity from suit is not a constitutional command, it can be rejected by legislation or judicial decision in the courts of the forum nation where suit is brought.

Chief Justice Marshall’s opinion in *The Schooner Exchange* was not the only evidence of this approach that Professor Wuerth refers to as the “rights” of foreign states. Justice Joseph Story confirmed this understanding in the 1822 case of *The Santissima Trinidad*.<sup>54</sup> In reviewing the Court’s decision in *The Schooner Exchange*, Justice Story explained that the rule announced in that case was not founded upon any notion that a foreign sovereign had an absolute right, in virtue of its sovereignty, to an exemption of its property from the local jurisdiction of another sovereign, when it came within its territory; “for that would be to give [the foreign sovereign] sovereign power

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48. *Id.* at 136–37.

49. *Id.* at 135–36

50. *Id.* at 146.

51. *Id.*

52. *Id.*

53. Accord H. Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, 28 BRIT. Y.B. INT’L L. 220, 229 (1951).

54. 20 U.S. 283 (1822).

beyond the limits of his own empire.”<sup>55</sup> Rather, the rule “stands upon principles of comity and convenience, and arises from the presumed consent or license of nations.”<sup>56</sup>

Because such “consent and license is implied only from the general usage of nations, it may be withdrawn upon notice at any time, without just offence” by the forum sovereign or its courts.<sup>57</sup> Taking Justice Story’s interpretation of *The Schooner Exchange* decision at face value, this does not sound like a right embedded in the Constitution.

Justice Story’s interpretation of the Court’s decision in *The Schooner Exchange* and articulation of the rule in *The Santissima Trinidad* confirms that the Constitution itself does not dictate the result when a foreign sovereign is sued in a U.S. federal court, nor does the law of nations. A U.S. federal court would, to be sure, apply the Constitution’s vesting and extension of the judicial power in Article III to U.S. federal courts in light of the law of nations, but U.S. federal courts would still be required to follow the rules of comity and convenience announced by the United States as a sovereign in resolving a given case. To the extent that the United States did not wish to grant a foreign state immunity, personal jurisdiction, or notice, that would be the end of the matter. Of course, such a decision by the political branches might create international discord, but that would be up to the political branches, as opposed to U.S. federal courts, to resolve.

This understating of the law of nations immediately after the founding strongly supports the conclusion that foreign states were not granted any rights by the Constitution, except to the extent that the United States wished to afford a foreign state such rights under the law of nations in its discretion. And, in so doing, a U.S. federal court was not granting or interpreting a constitutional right, but a privilege conferred by the law of nations in light of political decisions made by the United States in its absolute discretion.

This case law interpreting the law of nations in close proximity to the founding points to the conclusion that the Constitution does not set forth any rights of a foreign state. Because a foreign state’s immunity from jurisdiction may be withdrawn by the United States, this means that immunity, personal jurisdiction, notice, or due process were not rights held by the foreign state. Instead, they were rights granted, if at all, by the United States or its courts in applying the law of nations in light of U.S. law to the case at bar in their discretion.

The Supreme Court’s 1838 decision in *Rhode Island v. Massachusetts* points to a similar conclusion.<sup>58</sup> In that case, which involved a boundary dispute between Massachusetts and Rhode Island, the Court considered its original jurisdiction over a suit in equity between two U.S. states. The Court

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55. *Id.* at 352.

56. *Id.*

57. *Id.* at 353.

58. 37 U.S. (12 Pet.) 657 (1838).

considered whether it had jurisdiction.<sup>59</sup> In weighing that question, it made reference to foreign nations. According to the Court,

[t]he founders of our government could not but know, what has ever been, and is familiar to every statesman and jurist, that all controversies between nations, are, in this sense, political, and not judicial, as none but the sovereign can settle them . . . . A sovereign decides by his own will, which is the supreme law within his own boundary; a court, or judge, decides according to the law prescribed by the sovereign power, and that law is the rule for judgment. The submission by the sovereigns, or states, to a court of law or equity, of a controversy between them, without prescribing any rule of decision, gives power to decide according to the appropriate law of the case; which depends on the subject matter, the source and nature of the claims of the parties, and the law which governs them.<sup>60</sup>

Put another way, the Constitution may provide a role in vesting and establishing a federal forum for disputes involving U.S. states or foreign nations, but it does not provide a rule for decision in such cases, which would include questions concerning the rights of foreign nations. Such rights would be derived from other sources, which would include the law of nations.<sup>61</sup> Such rights would take account and apply the rules articulated by the United States as a sovereign power, which could withdraw any rights in its sovereign discretion. The United States might offer a foreign state rights such as immunity, but it might not given the case.

It is highly unlikely, therefore, based on this reading of the Constitution, the law of nations at the time of the founding, and Supreme Court case law close to the founding that there were certain rights contained in the Constitution for foreign states. The Constitution itself does not permit such a picking and choosing of individual or sovereign rights by the federal government. If there were a right conferred by the Constitution or its amendments, it can only be waived by the defendant. Thus, because the federal government had the choice under the law of nations as to what rights were offered to foreign states, this weighs strongly against the conclusion that the Constitution established any such rights. It would be very odd indeed for the Constitution to establish rights for foreign states that could, in the federal government's sole and absolute sovereign discretion, be withdrawn from a foreign state. I am aware of no right in the Constitution or its amendments that permits the United States in its sole sovereign discretion to grant or withdraw such a right.

In sum, it is questionable that foreign nations had rights under the Constitution given that document's silence on the question, the law of nations, and Supreme Court case law following the founding. If, as Chief Justice Marshall observed, a sovereign had the power "to exercise its territorial powers in a manner not consonant to the usages and received

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59. *Id.*

60. *Id.* at 736–37.

61. *See id.* at 748.

obligations of the civilized world,”<sup>62</sup> it can hardly be said that a foreign sovereign has a “right” to anything except as granted by the United States in its sole discretion as that term is traditionally understood. It is questionable, therefore, that the original understanding of Article III supports Professor Wuerth’s claims.

### B. *The Fifth Amendment*

Professor Wuerth also argues that the Due Process Clause of the Fifth Amendment protects foreign states because such states, based on her reading of the history, were protected by process and were understood as persons.<sup>63</sup> Here again, I am not sure this is the best reading of the Constitution or its amendments.

As to text, the Due Process Clause of the Fifth Amendment provides: “nor shall any person . . . be deprived of life, liberty, or property, without due process of law.”<sup>64</sup> Professor Wuerth begins her analysis by considering what “process” means as it relates to a foreign state.<sup>65</sup> The Fifth Amendment is, however, not implicated unless the word “person” in that amendment includes a foreign state. There is no definition of the word “person” provided in the Constitution or its amendments. It seems unlikely that the framers of the Fifth Amendment would have viewed foreign states as persons given that foreign sovereigns were treated as completely immune from suit at the time of the founding.<sup>66</sup> Given this absolute immunity, foreign states would not need to be persons protected by any process under the Fifth Amendment because at that time they were absolutely immune from all process.

Such a view is suggested by Chief Justice Marshall’s opinion in *The Schooner Exchange*. As he explained,

[t]his full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being capable of conferring extra-territorial power, would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects. One sovereign being in no respect amendable to another . . . can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.<sup>67</sup>

In light of this statement, one would be hard pressed to argue that a foreign sovereign entitled to full immunity from suit would require the protection of the Due Process Clause of the Fifth Amendment.<sup>68</sup>

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62. *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 137 (1812).

63. See Wuerth, *supra* note 1, at Part II.B.2.

64. U.S. CONST. amend. V.

65. Wuerth, *supra* note 1, at 676.

66. Cf. THE FEDERALIST No. 81, at 548–49 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). “It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense, and the general practice of mankind.” *Id.*

67. *The Schooner Exchange*, 11 U.S. at 137.

68. See Joseph W. Glannon & Jeffery Atik, *Politics and Personal Jurisdiction: Suing*

The 1828 case of *Picquet v. Swan*<sup>69</sup> confirms this understanding. In that case, Justice Story riding circuit found jurisdiction to be lacking over a suit by a French citizen (residing in Paris) against an American citizen (also residing in Paris).<sup>70</sup> The question before the court was whether the attachment of the property of the nonresident U.S. defendant, even though permissible and conferring jurisdiction under Massachusetts state law, provided the federal district court with jurisdiction over the defendant.<sup>71</sup> After canvassing the Judiciary Act of 1789 as well as case law, Justice Story concluded that the Judiciary Act

proceeded upon the supposition, that, independent of some positive provision to the contrary, no judgment could be rendered in the circuit court against any person, upon whom process could not be personally served within the district. This was the natural result of the principles of the common law in relation to jurisdiction and process.<sup>72</sup>

Justice Story held that

by the general provisions of the laws of the United States, the circuit courts could issue no process beyond the limits of their districts. That independent of positive legislation, the process can only be served upon persons within the same districts. That the acts of congress, adopting the state process, adopt the forms and modes of service only so far as the persons are rightfully within the reach of such process, and did not intend to enlarge the sphere of jurisdiction of the circuit courts.<sup>73</sup>

Justice Story concluded that

the right to attach property to compel the appearance of persons can properly be used only in cases in which such persons are amenable to the process of the court in personam,—that is, where they are inhabitants, or found within the United States,—and not where they are aliens or citizens resident abroad at the commencement of the suit, and have no inhabitancy here.<sup>74</sup>

In so holding, Justice Story said nothing about any constitutional limit, whether found in the Due Process Clause of the Fifth Amendment or elsewhere in the Constitution. The process due to a person was not to be found in the Due Process clause but was to be ascertained through the common law. As such, Congress could override such law.

As Justice Story explained, Congress could provide for such jurisdiction, even though it would be contrary to general principles of law: “[i]f congress

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*State Sponsors of Terrorism Under the 1996 Amendments to the Foreign Sovereign Immunities Act*, 87 GEO. L.J. 675, 692 (1999).

69. 19 F. Cas. 609 (No. 11,134) (C.C.D. Mass. 1828) (Story, J.).

70. *Id.* at 616.

71. *Id.* at 613.

72. *Id.*

73. *Id.* at 615.

74. *Id.*

had prescribed such a rule, the court would certainly be bound to follow it, and proceed upon the law.”<sup>75</sup> As Justice Story makes clear,

a subject of England, or France, or Russia, having a controversy with one of our own citizens, may be summoned from the other end of the globe to obey our process, and submit to the judgment of our courts. Such an intention, so repugnant to the general rights and sovereignty of other nations, ought not to be presumed, unless it is established by irresistible proof.<sup>76</sup>

Congress could thus provide for exorbitant jurisdiction and U.S. federal courts would be bound to exercise such jurisdiction even if contrary to the law of nations. In considering the question of jurisdiction, therefore, the limits on a federal court’s jurisdiction were to be found outside of the Constitution and were subject to Congress’s seemingly limitless ability to revise the law of jurisdiction.<sup>77</sup> What this means is that whatever process was due to foreign states was not constitutional. Instead, it was subject to common law or legislation.<sup>78</sup>

Thus, even assuming that foreign states are “persons” who are entitled to certain “process,” which is debatable under U.S. case law, the Fifth Amendment itself cannot be read to convey any rights to a foreign state because such rights turn on questions of the common law and the law of nations and not on constitutional law. At the time of the founding, there was no constitutional constraint on personal jurisdiction. Therefore, a nation would have been free to exercise whatever jurisdiction it saw fit to exercise as to a foreign state, with the only constraint on such assertions of exorbitant jurisdiction being whether another nation would recognize and enforce the judgment and whether the exercise of jurisdiction gave offense to a foreign state. In the latter case, the political branches would be left to resolve the international implications.<sup>79</sup>

In sum, it is questionable that foreign nations had Fifth Amendment rights under the Constitution at the time of the founding.

#### CONCLUSION

Professor Wuerth has advanced a nuanced and novel claim regarding the constitutional rights of foreign states. While I do not think the Constitution’s text, original understanding, the law of nations at the founding, or Supreme Court case law close to the founding supports her argument, I do think that it

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75. *Id.*

76. *Id.*

77. See Stephen E. Sachs, *Pennoyer Was Right*, 95 TEX. L. REV. 1249, 1286–87 (2017).

78. *See id.*

79. Professor Wuerth goes on to consider the relationship between due process and separation of powers. *See* Wuerth, *supra* note 1, at 679. Because she concludes that there is overlap and duplication between these doctrines as well as Article III, my comments in the main text call into question whether separation of powers principles are engaged in the case of foreign states. *See id.*

is important to consider the ways in which foreign states are treated by U.S. federal courts.

As the above discussion details, the United States, whether through the Executive Branch or Congress, has significant latitude to hale foreign states before its courts. While Professor Wuerth's understanding of the text and purpose of the Constitution points to foreign nations having certain rights, the better reading of the Constitution in my view, at least at the time of the founding, points to foreign nations being subject to suit before U.S. federal courts to the extent the United States provides them with rights. On this understanding, Professor Wuerth's claim that the Constitution provides an answer to the rights of foreign states is questionable. Instead, the amenability of foreign nations to suit before U.S. federal courts is a question for the political branches to decide. To the extent the political branches are silent, U.S. courts, if following the tradition of the founding, would be expected to consult the law of nations to provide a rule of decision.