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Novel Perspectives on Due Process Symposium: Rights, Immunities, and Sovereigns

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RIGHTS, IMMUNITIES, AND SOVEREIGNS

*Katherine Florey**

INTRODUCTION

Professor Wuerth’s provocative article identifies a seemingly stark incongruity: courts have held that foreign corporations are “persons” subject to constitutional protections, while generally concluding that foreign sovereigns are not. This seems jarring, particularly when—as Professor Wuerth points out—the legal difference between a foreign corporation and a foreign government is often technical rather than meaningful.¹ To address this disparity, Professor Wuerth proposes a new understanding of the Constitution—particularly Article III and due process protections—as encompassing not just non-sovereign entities like the “Daimler Corporation and the Palestinian Liberation Organization” but nations such as Germany and Israel.²

While adopting this interpretation could have sweeping implications,³ Professor Wuerth’s primary focus is on protections associated with personal jurisdiction,⁴ and her proposed new framework would not, she argues, require a radical change in current law. Rather than locating the specific content of protections for foreign nations in the Constitution itself, she argues that personal jurisdiction standards for foreign nations could be set by Congress—and, further, that they could reasonably be very modest.⁵ The important aspect of such protections, she emphasizes, would be their consistent application.⁶

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1. See Ingrid Wuerth, *The Due Process and Other Constitutional Rights of Foreign Nations*, 88 *FORDHAM L. REV.* 633, 644 (2019) (noting that “[state-owned enterprises] are not treated as the equivalent of foreign states unless a high ‘alter ego’ standard is met”).

2. *Id.* at 635.

3. Professor Wuerth notes, for example, that some scholars have “worried that affording due process rights to foreign states could hamstring U.S. responses to a foreign policy crises.” *Id.* at 686. Wuerth is sympathetic to these concerns and believes that a narrower understanding of foreign nations’ due process rights is therefore appropriate. *See id.* at 686–87.

4. While Article III is not generally regarded as encompassing personal jurisdiction protections, Professor Wuerth challenges that view. *See id.* at 673–74. Note, however, that Wuerth also argues that while “[t]he Constitution might require personal jurisdiction . . . international or general law might set out the actual rules of personal jurisdiction.” *See id.* at 648.

5. *See id.* at 684–85 (discussing how a view of sovereigns as constitutionally protected could be incorporated fairly seamlessly into current doctrine).

6. *Id.* at 682.

So what's not to like about a change that would, without greatly disrupting current doctrine, perhaps ground it on a more solid foundation? In many respects, nothing. When it comes to certain basic due process and separation of powers protections, Professor Wuerth makes a compelling case that it is not only illogical but inconsistent with courts' actual decision-making to hold foreign nations outside their sway.⁷

At the same time, a notable omission hangs over Professor Wuerth's proposed new understanding. Since the Constitution's inception, the main avenue of protection for foreign nations has been not constitutional due process but foreign sovereign immunity. Until the State Department's adoption of the "restrictive theory" of sovereign immunity, the shield provided by foreign sovereign immunity was generally more potent than current minimum-contacts-based personal jurisdiction protections.⁸ Further, as Professor Wuerth discusses, sovereign immunity and personal jurisdiction were for many years closely linked concepts.⁹ While current doctrine does not fully reflect this close link,¹⁰ foreign sovereign immunity continues to safeguard substantially the same interests that personal jurisdiction limits do. The Foreign Sovereign Immunities Act, passed in its original form in 1976,¹¹ ensures that there are few circumstances under which foreign nations without significant commercial contacts with the United States can be compelled to appear.¹² Moreover, foreign sovereign immunity protections are rooted in principles of general and international law, which Wuerth suggests should also shape our understanding under her proposed framework.¹³

The law of foreign sovereign immunity is well entrenched both in historical practice and in current law, and—given that it is currently a lever controlled by Congress—there is little reason to think that, in the scenario envisioned by Professor Wuerth, a congressionally created set of personal jurisdiction protections would function much differently in practice. At the same time, there are potential hazards in importing current personal jurisdiction ideas—as applied to foreign nations or otherwise—into the

7. As Wuerth points out, for example, the Court, in cases like *Bank Markazi v. Peterson*, 136 S. Ct. 1310 (2016), has appeared to assume without analysis that separation of powers protections apply to foreign entities. See Wuerth, *supra* note 1, at 651. Similarly, it is hard to imagine that the Constitution does not in some manner protect proceedings involving foreign sovereigns from being tainted by obvious bias or procedural irregularity.

8. Foreign sovereigns, that is, were potentially immune for all conduct, even commercial activities that had a significant connection to the United States. See Lawrence A. Collins, *The Effectiveness of the Restrictive Theory of Sovereign Immunity*, 4 COLUM. J. TRANSNAT'L L. 119 (1965).

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

10. See, e.g., *Wisconsin Dept. of Corrections v. Schacht*, 524 U.S. 381, 395 (1998) (Kennedy, J., concurring) (suggesting, in the state sovereign immunity context, that sovereign immunity is "hybrid" in nature but could be made fairer by being seen in a light similar to personal jurisdiction).

11. See 28 U.S.C. § 1602.

12. See *infra* notes 65–70 and accompanying text.

13. See Wuerth, *supra* note 1, at 648 (suggesting that, while the basic requirement that personal jurisdiction be present might be mandated by the Constitution, "international or general law might set out the actual rules of personal jurisdiction").

already unwieldy world of Article III jurisprudence. Professor Wuerth has ably identified inconsistencies in the law and makes a compelling case that the constitutional place of foreign nations deserves reexamination. Yet any theory of their constitutional place should take account of the way in which foreign sovereign immunity has worked both historically and in the present to protect them.

This response first looks at the historical understanding of foreign sovereign immunity and the ways in which it should inform our reading of Article III. It then considers the role that sovereign immunity protections for foreign nations currently play. It closes with a suggestion that—while the sovereign immunity regime is largely adequate to protect other nations’ interests—Professor Wuerth’s insights nonetheless have a role to play in our understanding of cases involving foreign sovereigns.

I. THE HISTORICAL FUNCTION OF FOREIGN SOVEREIGN IMMUNITY

Professor Wuerth notes that, at the time the Constitution was drafted and ratified, the idea that foreign sovereigns could be haled into court against their will was virtually unthinkable.¹⁴ More controversially, she argues that Article III incorporated “procedural protections,” including personal jurisdiction, that apply to “litigants . . . including foreign states.”¹⁵

Much of Professor Wuerth’s argument rests on the idea that, because foreign sovereigns could not be sued without their consent, claims against them could not constitute a constitutional “case.”¹⁶ The early linkage of foreign sovereign immunity, concepts of amenability to service, and Article III “cases” is well established. As Professor Caleb Nelson has argued in an influential article that Professor Wuerth discusses, early conceptions of sovereign immunity—whether applied to U.S. states,¹⁷ the federal government,¹⁸ or foreign nations¹⁹—are difficult to disentangle from doctrines of personal jurisdiction.²⁰ In the early United States, “the court’s ability to proceed to judgment depended on its ability to command the defendant’s appearance”—yet “[u]nder the general law of nations, sovereigns were thought to enjoy a broad exemption from command.”²¹ As a result, as Nelson further argues, disputes involving nonconsenting states could not—under existing law—turn into “cases” within the meaning of Article III of the Constitution because there was no means by which they

14. *See id.* at 662–63.

15. *See id.* at 656.

16. *See id.*

17. *See* Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559, 1574–79 (2002).

18. *See id.* at 1584.

19. *See id.* at 1588–89.

20. *See id.* at 1574–75 (explaining how the doctrine of sovereign immunity derived from limits on sovereigns’ amenability to suit, in the sense of the court’s power over the defendant’s person).

21. *Id.* at 1574.

could come under a court's jurisdiction.²² Importantly, however, Nelson also argues—and other commentators have agreed to varying extents²³—that the Constitution does not impose this limit in itself. Rather, “background principles of general law” simply ensured that, as a practical matter, there was no effective way for a plaintiff to sue a resistant sovereign and thus create a “case.”²⁴

Although Nelson's analysis is focused on states, disputes involving foreign nations appear to have been regarded in a similar way.²⁵ The Supreme Court first considered the foreign sovereign immunity issue in *The Schooner Exchange v. McFaddon*,²⁶ a case involving two Americans' claims to a Philadelphia-docked vessel that France had repurposed as a warship.²⁷ *The Schooner Exchange* draws general analogies between the immunities of foreign nations and states, alluding to the state-sovereign-immunity controversies that gave rise to the Eleventh Amendment²⁸ in discussing whether France could be subject to jurisdiction in the United States.²⁹ More specifically, however, the *Schooner Exchange* Court suggested that the issue was one of background legal principles—in this case, international law norms—that the Constitution had not altered as opposed to an affirmative proscription that the Constitution had enacted. Observing that there was “no municipal law, nor any practical construction by the executive, the legislative, or the judicial department of our government, which authorizes the jurisdiction now claimed,” the Court concluded that “we can only have recourse to the law of nations,” which “requires the consent of the sovereign . . . before he can be subjected to a foreign jurisdiction.”³⁰

Professor Wuerth is fully cognizant of this historical connection between sovereign immunity and personal jurisdiction. Her interpretation, however, diverges somewhat from the “background principle” view discussed above. As Wuerth sees it, Article III constitutionalized some limits on personal

22. *See id.* at 1587–89.

23. Many commentators, that is, accept the idea of state sovereign immunity as a background principle or a matter of federal common law, although some see the doctrine as a whole in a somewhat different light than Nelson. *See, e.g., Seminole Tribe v. Florida*, 517 U.S. 44, 84 (1996) (Stevens, J., dissenting) (describing state sovereign immunity as a matter of federal common law subject to congressional modification).

24. *See Nelson, supra* note 17, at 1627–28 (noting that sovereign immunity can be “trace[d] . . . to background principles of general law rather than to anything that the Constitution affirmatively enshrined”). An important implication of the view that the limits on sovereigns' amenability to suit do not derive from Article III itself is that they are potentially subject to change by Congress, provided that Congress is otherwise acting within its Article I powers. *See id.* at 1627–29.

25. *See id.* at 1588–89.

26. 11 U.S. 116 (1812).

27. *See id.* at 118–19.

28. *See id.* at 124 (suggesting that the general view was that “a state could not be subjected to judicial process, unless by the words of the Constitution of the United States” and noting that “when it was finally decided in the Supreme Court of the United States that a suit might be maintained against a state in the Federal Courts, the states amended the constitution so as not to admit of that construction”).

29. *See id.* at 124.

30. *See id.* at 125.

jurisdiction, including but not limited to jurisdiction over nonconsenting foreign nations. Wuerth notes that the “judicial power vested by Article III had personal jurisdiction . . . defenses baked into it.”³¹ Wuerth, that is, suggests that the Constitution affirmatively incorporated the then current understanding that sovereigns were not amenable to suit into its definition of the Article III judicial power. She argues that “Article III . . . required personal jurisdiction and notice,” protections that belonged to the “Constitution’s structural limitations on federal power.”³² This view of the “judicial power” is thus subtly different from the view that eighteenth-century limits on amenability to process were a background reality independent of the Constitution³³ subject to alteration by Congress as long as it acts within Article I limits.³⁴ It is also different from the way in which today’s Supreme Court has generally understood both *The Schooner Exchange* and the doctrine of foreign sovereign immunity more broadly, which the Court has characterized as a matter of comity, not constitutional demand.³⁵

Wuerth makes other historical arguments for why foreign sovereigns should have constitutional protections; among others, she contends that some historical evidence exists that foreign sovereigns would have been regarded as constitutional “persons” subject to the Due Process Clause.³⁶ But her understanding of Article III is a centerpiece of her case.³⁷ At the same time, Wuerth sees the implications of the Article III interpretation as less sweeping than might be expected. This is because, as she argues, the *content* of the limits that Article III imposes on foreign sovereigns is not fixed by the Constitution.³⁸ She explains, for example, that Congress may choose to provide for federal courts to exercise personal jurisdiction over foreign

31. Wuerth, *supra* note 1, at 668–69.

32. *See id.* at 669.

33. Because at the time there was no means of summoning unconsenting sovereigns to court, the Founders simply assumed that no “Cases” involving them would arise. Even so, Nelson argues, “the Constitution nowhere declares that legislatures cannot override those [background] principles and subject states to compulsory process at the behest of individuals.” *See* Nelson, *supra* note 17, at 1628. As a corollary to this, Nelson argues that the Constitution, with the exception of the particularized limit of the Eleventh Amendment, does not limit Congress’s ability to subject unconsenting states to suit, provided Congress acts within the scope of its Article I powers. *Id.* at 1567, 1626–28.

34. *Id.* at Part II.B (summarizing arguments for and against construing Article I to allow Congress to abrogate state sovereign immunity). Notably, the arguments Nelson elaborates for the no-power-to-abrogate view rest on the idea that the Constitution does not give Congress “the power to command state legislatures” in certain ways—an argument that would presumably have less force outside the vertical federalism context. *See id.* at 1642.

35. *See, e.g.,* *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983) (“As *The Schooner Exchange* made clear, . . . foreign sovereign immunity is a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution.”).

36. While an extended discussion of this argument is beyond the scope of this response, it is worth noting that—while Professor Wuerth does identify important incongruities in failing to apply due process protections to some aspects of foreign-sovereign litigation—the doctrine of foreign sovereign immunity exerts some protective effects here as well.

37. *See* Wuerth, *supra* note 1, at 637 (describing Article III as protecting foreign sovereigns even if the Fifth Amendment Due Process Clause does not).

38. *See id.* at 683.

sovereigns and that, so long as those standards are applied consistently, they do not offend any constitutional principle.³⁹

Because of this, the ways in which Wuerth's view differs from the "background principle" view of sovereign immunity are functionally and perhaps theoretically modest. The scholarly consensus, that is, suggests on the one hand that the Founders believed that suits against unconsenting sovereigns were impossible under then current law, yet—on the other hand—that Congress today nonetheless has the power to alter that background reality. If that is the case, what does it matter whether foreign sovereign immunity was incorporated into Article III or was simply a background, non-constitutional reality?

As technical as this distinction may seem, however, it is a potentially important one. Courts take Article III limits seriously, and entangling personal jurisdiction with Article III seems likely to confuse and complicate an already complex area of law as, arguably, adding an Article III dimension has with the standing doctrine.⁴⁰ We should be reluctant, as a result, to broaden Article III's reach—especially so when the historical evidence is, as it is here, ambiguous about what Article III requires. True, contemporaneous judicial opinions and commentary emphasized that the Constitution did not of its own force grant federal courts jurisdiction over foreign sovereigns. But such sources generally stop short of casting Article III as containing an explicit prohibition on such jurisdiction; rather, they simply note that neither the Constitution nor any other source purports to alter longstanding principles of international law.⁴¹ Given the lack of unmistakable historical evidence that Article III affirmatively incorporated personal jurisdiction limits as a limit on the "judicial power," reading Article III to incorporate them seems potentially imprudent.

The story of state sovereign immunity provides an apt cautionary tale: for many years, the doctrine was widely seen as a background principle, subject to abrogation by Congress, rather than a structural constitutional limitation on the federal judicial power.⁴² The Court's new understanding of sovereign immunity as a constitutional limitation on courts' power was immensely controversial,⁴³ and it is hard to see how it has improved state sovereign

39. See *id.* at 636.

40. See Jeffrey Kahn, *Zoya's Standing Problem, or, When Should the Constitution Follow the Flag?*, 108 MICH. L. REV. 673, 699 (2010) ("In a series of revolutionizing Supreme Court opinions, the law of standing shifted from its common law legal interest origins to a . . . constitutional requirement derived from the 'case or controversy' limitation of Article III.")

41. See, e.g., *The Schooner Exchange v. McFaddon*, 11 U.S. 116, 125 (1812).

42. See, e.g., Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1204–05 (2001) (arguing that the Supreme Court has, in recent years, erroneously come to regard state sovereign immunity as a constitutional principle, leading to the doctrine's problematic expansion).

43. See, e.g., *id.*; Aviam Soifer, *Courting Anarchy*, 82 B.U. L. REV. 699 (2002); Carl Tobias, *Unmasking Federalism*, 88 CORNELL L. REV. 1833 (2003); Ernest A. Young, *State Sovereign Immunity and the Future of Federalism*, 1999 SUP. CT. REV. 1, 2; see also *College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 688 (1999) (suggesting that the Court has continued to spar over the historical role of sovereign immunity with "a degree of repetitive detail that has despoiled our northern woods"). Reviewing all

immunity doctrine; rather, it has introduced into it historical and theoretical muddle, rigid and unnecessary limitations on Congress's powers, and jerry-rigged exceptions to those limitations in areas where they would be practically disastrous.⁴⁴

Professor Wuerth, to be sure, does not advocate this outcome; instead, as noted, she proposes a flexible, congressionally modifiable doctrine that could even be made consistent with modern case law.⁴⁵ But this view would mesh somewhat awkwardly with Article III's heavy machinery,⁴⁶ and it would create layers of complexity not just in the realm of foreign sovereign immunity but personal jurisdiction doctrine more generally. This is because—as Professor Wuerth recognizes⁴⁷—her historical understanding would suggest that not just immunity protections but all limits on personal jurisdiction are embedded in the constitutional understanding of the “judicial power.”⁴⁸ The implications of such a new understanding, particularly given the current confused state of personal jurisdiction doctrine, could be profoundly disruptive and unpredictable, and even a strictly originalist view of Article III's text does not demand it.

II. FOREIGN SOVEREIGN IMMUNITY UNDER THE FOREIGN SOVEREIGN IMMUNITIES ACT

The previous section has argued both that there are risks in reading new limits into our interpretation of Article III's “judicial power” and that historical and textual evidence does not require us to do so. Of course, if our

these criticisms and assessing their validity is beyond the scope of this response; nonetheless, they suggest some of the perils of adding new constitutional limits on federal courts' jurisdiction.

44. *See, e.g.*, *Central Virginia Community College v. Katz*, 546 U.S. 356 (2006) (holding that Congress may abrogate aspects of state sovereign immunity pursuant to the Bankruptcy Clause, despite earlier case law suggesting that Congress's Article I powers were ineffective for this purpose).

45. *See* Wuerth, *supra* note 1, at 685–86 (suggesting new reasoning that might preserve the results in existing case law).

46. *See* Katherine Florey, *Sovereign Immunity's Penumbra: Common Law, "Accident," and Policy in the Development of Sovereign Immunity Doctrine*, 43 WAKE FOREST L. REV. 765, 775 (2008) (noting disruptive effects of courts' treatment of state sovereign immunity as an Article III doctrine).

47. *See* Wuerth, *supra* note 1, at 637–38 (arguing that Article III only provides for jurisdiction over “cases” in which personal jurisdiction and notice are both proper, “as a matter of separation of powers, not due process”).

48. Personal jurisdiction doctrine has already been amply criticized for being ambiguous in its purpose and for meshing imperfectly with the due process protections in which it is supposedly rooted. *See, e.g.*, Steven Sachs, *Pennoyer Was Right*, 95 TEX. L. REV. 1249, 1255 (2017) (“The pitched battles of modern jurisdiction doctrine . . . haven't been solved by staring harder at the words ‘due process of law.’”). Indeed, Professor Wuerth herself notes that current personal jurisdiction doctrine is an “incoherent mess.” Wuerth, *supra* note 1, at 682. Yet while our current, due process-based notion of personal jurisdiction may be unsatisfactory, it is not clear that introducing Article III and separation of powers concerns into the personal jurisdiction analysis would provide clarity. Sachs, for example, suggests re-orienting the doctrine toward general and international law, the same principles on which early notions of foreign sovereign immunity also rested. *See* Sachs, *supra*, at 1319.

existing constitutional understanding were inadequate to the task of protecting foreign sovereigns' interests, this calculus might change.

Professor Wuerth argues, however, that the Constitution itself provides only “minimal” protections for foreign sovereigns—what she calls “positivist” restrictions, or the idea that the Constitution does not dictate any specific personal jurisdiction protections but only requires that whatever rules exist are followed uniformly.⁴⁹ Thus, even under Professor Wuerth's proposed view, Congress would have the primary role in crafting protections for foreign sovereigns.⁵⁰ Yet, in a sense, Congress already does exactly this. Statutory sovereign immunity protections are already adequate to protect sovereigns' interests in a variety of situations and, indeed, provide safeguards remarkably similar to what personal jurisdiction limits might offer.⁵¹ Further, to the extent Congress sometimes overreaches, it is not clear that a more expansive view of Article III limits would provide meaningful restraints.

The idea that Congress should have the primary role in setting the bounds of foreign sovereign immunity is less than a half-century old.⁵² For many years, courts dismissed cases against foreign sovereigns when the State Department made “suggestions” of immunity.⁵³ Indeed, the Supreme Court suggested that, given the “guiding principle” that “the courts should not so act to embarrass the executive arm in its conduct of foreign affairs,” it would be inappropriate for courts “to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize.”⁵⁴ Yet inconsistent State Department practice led to the area being dominated by an unsatisfactory “amalgam of judicial decisions, Executive Branch policies, some uncertain notions of international law and wholly inadequate procedure.”⁵⁵ In response, Congress, in 1976, enacted the Foreign Sovereign Immunities Act (FSIA) in an effort to “set forth consistent guidelines for determining sovereign immunity.”⁵⁶

The FSIA reads as an affirmative grant of immunity to sovereign nations, providing that, subject to some exceptions, “a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States.”⁵⁷

49. See Wuerth, *supra* note 1, at 684.

50. See *id.* at 685–86.

51. See *infra* notes 68–70 and accompanying text.

52. See *infra* note 55.

53. See *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 487–88 (1983).

54. See *Republic of Mexico v. Hoffman*, 324 U.S. 30, 35 (1945).

55. See Andreas F. Lowenfeld, *Claims Against Foreign States—A Proposal for Reform of United States Law*, 44 N.Y.U. L. REV. 901, 905 (1969); see also *Verlinden*, 461 U.S. at 488 (noting various factors that made the operation of foreign sovereign immunity unclear pre-FSIA, including political pressures by friendly nations to expand the doctrine in individual cases and the failure of some nations to go through the State Department).

56. See Karen Halverson, *Is a Foreign State a “Person”? Does It Matter?: Personal Jurisdiction, Due Process, and the Foreign Sovereign Immunities Act*, 34 N.Y.U. J. INT'L L. & POL. 115, 119 (2001).

57. See 28 U.S.C. § 1604.

Yet it in fact codifies the “restrictive theory” of foreign sovereign immunity,⁵⁸ first articulated in the 1950s, which represented a departure from earlier practice under which foreign nations enjoyed immunity for both private and public acts.⁵⁹ Thus, the FSIA has two effects, pointing in somewhat opposite directions: it codifies the previously contingent, case-specific doctrine of foreign sovereign immunity, thus providing greater certainty in cases where it applies. At the same time, it cements the narrower understanding of the doctrine that took hold only in the mid-twentieth century.⁶⁰

Despite the limits on the sovereign immunity protections it recognizes, however, the FSIA ensures that, for the most part, U.S. courts do not have jurisdiction⁶¹ to hear cases against foreign-sovereign defendants. Of course, “for the most part” is not always. The FSIA has exceptions, to be sure, and subsequent amendments have further limited its reach.⁶² Yet while the problems that Professor Wuerth identifies are real, it also bears emphasizing that, as to the majority of claims that might be brought against foreign sovereigns, the FSIA provides an effective shield. In particular—as the following discussion will explain—the FSIA ensures that foreign-sovereign entities are subject to suit in the United States without minimum contacts only in somewhat unusual situations.

To understand why this is the case, it may be helpful to review the FSIA’s somewhat complicated provisions and amendments. First, the FSIA is phrased in explicitly jurisdictional terms, providing that “a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States” unless an exception is met.⁶³ The FSIA also includes a broad removal provision, allowing any state civil actions to be removed to federal court by a foreign-sovereign defendant even if the underlying claims are based in state law, thus “ensur[ing to foreign sovereigns] immunity from the jurisdiction of state courts” as well, where none of FSIA’s exceptions apply.⁶⁴ Thus, the FSIA broadly shields foreign sovereigns from both federal and state court jurisdiction.

The FSIA, however, includes a number of exceptions, all of which originally—in contrast to exceptions added by later amendment—required some territorial link to the United States.⁶⁵ Perhaps the most important of

58. *See* *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 488 (1983).

59. *See* Collins, *supra* note 8, at 119. The restrictive theory first became official U.S. policy more than two decades before the FSIA’s enactment through the 1952 Tate Letter, a statement of State Department policy. *See id.*

60. *See id.*

61. *See infra* note 64.

62. *See* Halverson, *supra* note 56, at 127–28.

63. 28 U.S.C. § 1604 (2008).

64. *See* *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 489 (1983).

65. Halverson, *supra* note 56, at 123 (noting that the same principle does not apply to later-enacted exceptions); *see id.* at 121 (“It is significant that each of the exceptions to immunity under the 1976 statute (other than the waiver and maritime lien exceptions) contains a jurisdictional nexus requirement—that is, a requirement that the property at issue or the conduct surrounding the claim bears a territorial connection to the United States.”)

these is the exception that codifies the restrictive view, holding foreign sovereigns susceptible to suit for commercial activity that is either “carried on in the United States by the foreign state,” involving “an act performed in the United States in connection with a commercial activity of the foreign state elsewhere,” or relating to an external act related to commercial activity that “causes a direct effect in the United States.”⁶⁶ This exception, which the FSIA’s declaration of purpose notes is intended to align U.S. doctrine with international law,⁶⁷ is indeed wide-ranging. Yet it also requires a significant territorial nexus that ensures that foreign sovereigns conducting commercial activity are unlikely to be subject to the jurisdiction of U.S. courts in situations where equivalently situated private entities would not be.⁶⁸ That is, specific personal jurisdiction over foreign defendants is normally available in situations that map the FSIA’s nexus requirement: suits arising out of ongoing U.S. commercial activity, U.S. activities closely linked to the foreign conduct at issue, or foreign activities clearly traceable to U.S. effects.⁶⁹ Indeed, Congress appears to have included the nexus provision precisely in order to ensure consistency with personal jurisdiction limits.⁷⁰

The required FSIA nexus is not, of course, perfectly coextensive with limits on personal jurisdiction, especially as the latter doctrine has evolved in recent years.⁷¹ The territorial ties required by the FSIA relate to the United States as a whole, meaning that it is possible that a foreign sovereign could have contacts with multiple states but not enough with any single one to constitute minimum contacts with any one state. By contrast, personal jurisdiction analysis in many situations assesses contacts on a state-by-state basis, a rule that has frequently had the effect of protecting foreign corporations whose contacts may be spread across several states rather than targeted at one.⁷² This slight disparity is mitigated, however, by the fact that many federal statutes often invoked against foreign entities provide for

66. See 28 U.S.C. § 1605(a)(2).

67. See 28 U.S.C. § 1602.

68. See Halverson, *supra* note 56, at 122 (noting that in the FSIA as originally enacted, the “intent of Congress . . . was to treat foreign state defendants [similarly] to other ‘persons’ who are entitled to due process protection” for personal jurisdiction purposes).

69. See *id.* (noting the “close correlation between the jurisdictional nexus requirement in the statute and the ‘minimum contacts’ requirement of *International Shoe*”). Of course, later amendments did not continue to require this close connection in all circumstances.

70. See *id.*

71. The Supreme Court, for example, has strictly limited the use of general jurisdiction. See *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014). The Supreme Court has also emphasized that U.S.-wide contacts may not suffice to support personal jurisdiction in any one state. See *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873, 880-81 (plurality opinion).

72. See, e.g., *McIntyre*, 564 U.S. at 898 (2011) (Ginsburg, J., dissenting) (noting the anomaly that “a foreign manufacturer who targeted the United States (including all the States that constitute the Nation)” may not be subject to personal jurisdiction in any particular state).

nationwide jurisdiction,⁷³ as do the Federal Rules of Civil Procedure in certain situations.⁷⁴

Some later-added exceptions to the FSIA, however, do not require a territorial nexus⁷⁵ and have occasioned concern that they may go too far in allowing U.S. courts to assert jurisdiction over far-flung events involving foreign nations.⁷⁶ Early examples of such exceptions were a 1988 amendment allowing foreign states to be sued to enforce arbitration agreements⁷⁷ and provisions of the Anti-Terrorism and Effective Death Penalty Act of 1996 creating an exception to foreign sovereign immunity for certain terrorist and other unlawful acts perpetrated by foreign governments.⁷⁸ The Justice Against Sponsors of Terrorism Act (JASTA), enacted in 2016,⁷⁹ controversially expands this exception⁸⁰ to clarify that it applies to extraterritorial acts that contribute to terrorist activity in the United States.⁸¹

Finally, in some cases, the FSIA simply does not apply because an entity is insufficiently “sovereign”⁸² or because a corporation, while perhaps linked with a sovereign government to some degree, is not characterized by the required degree of government control to trigger sovereign immunity protections.⁸³ Such enterprises are, unlike foreign sovereigns themselves,

73. See, e.g., *Carrier Corp. v. Outokumpu Oyj*, 673 F.3d 430 (6th Cir. 2012) (noting that courts consider contacts with the U.S. as a whole in the minimum contacts analysis when analyzing federal statutes under which Congress has provided for nationwide service of process); *In re LIBOR-Based Financial Instruments Antitrust*, No. 11 MDL 2262 NRB, 2015 WL 6243526 (Oct. 20, 2015), at *23 & n. 39 (emphasizing same point and noting that it does not seem inconsistent with recent Supreme Court case law).

74. See Fed. R. Civ. P. 4(k)(2) (providing that service of a summons “establishes personal jurisdiction” over a defendant who is not subject to jurisdiction in any state, where the exercise of jurisdiction is consistent with the U.S. Constitution).

75. See Halverson, *supra* note 56, at 123. See also Wuerth, *supra* note 1, at 640 (noting that the FSIA “has been repeatedly amended to reduce the immunity to which foreign states are entitled”).

76. See Halverson, *supra* note 56, at 127–28.

77. 28 U.S.C. § 1605(a)(6) (2008).

78. See Halverson, *supra* note 56, at 116–17.

79. Pub. L. No. 114–222, 130 Stat. 852 (2016).

80. See Dan Cahill, Student Note, *The Justice Against Sponsors of Terrorism Act: An Infringement on Executive Power*, 58 B.C. L. REV. 1699, 1714 (2017); *Congress Overrides Obama’s Veto to Pass Justice Against Sponsors of Terrorism Act*, 111 AM. J. INT’L L. 156, 157 (2017).

81. See *Congress Overrides Obama’s Veto to Pass Justice Against Sponsors of Terrorism Act*, *supra* note 80, at 156–57. As commentators have noted, however, it does not create a way to enforce any successful judgments through attachment, meaning that its utility to terrorism victims may be limited. See Lisa Ann Johnson, Note, *JASTA Say No: The Practical and Constitutional Difficulties of the Justice Against Sponsors of Terrorism Act*, 86 GEO. WASH. L. REV. 231, 236 (2018).

82. See, e.g., *Livnat v. Palestinian Auth.*, 851 F.3d 45, 53 (D.C. Cir. 2017).

83. See, e.g., *Dole Food Co. v. Patrickson*, 538 U.S. 468, 473 (2003) (finding no immunity for “companies [that] were, at various times, separated from the State of Israel by one or more intermediate corporate tiers”).

treated as constitutional “persons” entitled to due process.⁸⁴ The distinction between an entity closely enough connected to a foreign government to be treated as an extension of it and one that is not may be quite technical.⁸⁵ Professor Wuerth suggests in consequence that subjecting these two categories of enterprises to different legal standards is problematic.⁸⁶

It should be noted, however, that the personal jurisdiction protections that both categories receive, while admittedly not identical, are similar. Enterprises not directly controlled by the foreign state are subject to jurisdiction following a normal minimum-contacts analysis.⁸⁷ The foreign state and closely related entities enjoy sovereign immunity that likewise protects them from the jurisdiction of U.S. state and federal courts unless they engage in commercial activities and meet a territorial nexus—one that was adopted to mimic the minimum-contacts standard—or one of the FSIA’s other exceptions applies.⁸⁸ Thus, when we speak about foreign entities being subject to suit without minimum contacts with the United States, we are primarily concerned about the FSIA’s later-added exceptions.

While this concern is real, it is also relatively narrow. The FSIA continues to shield foreign sovereigns from suit for the vast majority of their noncommercial activities and their commercial activities conducted without direct connection to U.S. territory.⁸⁹ Of course, the FSIA is statutory, not constitutional, so there is no guarantee that Congress might not, in the future, go dangerously far in eroding foreign sovereign immunity protections; indeed, it might be argued that in some areas, Congress has already gone too far.⁹⁰ Nonetheless, some constraints continue to exist on Congress. Congress’s existing conception of foreign sovereign immunity has been highly informed by international norms and background principles⁹¹—the very considerations that Professor Wuerth suggests are proper for Congress to take into account.⁹² Other branches of government also retain means of influencing the scope of foreign sovereign immunity. Insofar as foreign

84. *See Livnat*, 851 F.3d at 56 (holding that the Palestinian Authority was not a sovereign protected by the FSIA and hence the “usual personal-jurisdiction doctrine” requirements should apply to it under the Fifth Amendment).

85. *See, e.g., Dole*, 538 U.S. at 470–480.

86. *See Wuerth, supra* note 1, at 643 (noting disparity in treatment between state-owned enterprises and otherwise similar foreign corporations).

87. *See supra* note 84 and accompanying text.

88. *See supra* note 75 and accompanying text.

89. *See supra* notes 65–70 and accompanying text.

90. *See supra* note 80 and accompanying text.

91. Indeed, the FSIA, at least in its original form, has been frequently described as codifying existing international law principles in effect at the time of its passage. *See, e.g., Samantar v. Yousuf*, 560 U.S. 305, 319–20 (2010) (“[O]ne of the primary purposes of the FSIA was to codify the restrictive theory of sovereign immunity, which Congress recognized as consistent with extant international law.”); *Stephens v. National Distillers and Chemical Corp.*, 69 F.3d 1226 1234 (2d Cir. 1995) (“[T]he FSIA . . . primarily codif[ie]d pre-existing international and federal common law.”).

92. *See Wuerth, supra* note 1, at 647–48 (suggesting that the Constitution might require that personal jurisdiction be present, but that international or general law might govern the specifics of when personal jurisdiction is proper).

sovereign immunity (or other jurisdictional) protections may be rooted in international law,⁹³ the *Charming Betsey* canon of construction—that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains”⁹⁴—functions to prevent accidental overreach. Likewise, the Executive Branch can provide input to Congress in situations where a rollback of sovereign immunity might hinder international relations.

To be sure, Congress may choose to intentionally skirt such limits, as arguably it did when it dismissed Executive Branch objections and overrode President Obama’s veto to pass JASTA.⁹⁵ But if Congress is overly willing to expand U.S. jurisdiction over foreign nations, it is not clear that Professor Wuerth’s proposal provides a clear solution. Wuerth suggests that it may be the case that “due process protects foreign states[,] but due process only entitles them to what Congress gives them.”⁹⁶ It is nevertheless unclear how this differs significantly from Congress’s existing de facto control over the scope of foreign sovereign immunity. Perhaps Congress might take its responsibility more seriously if its protections for foreign nations were more clearly grounded in limits on the judicial power under Article III. That argument, however, seems speculative.

Professor Wuerth suggests that an advantage of her proposed interpretation is that whatever protections Congress enacts would apply equally to foreign corporations and foreign sovereigns.⁹⁷ In some cases, however, there are good reasons for treating such entities differently.⁹⁸ International comity considerations often dictate according foreign sovereigns stronger protections than private actors receive—and, indeed, the FSIA provides for such protections in most situations. At the same time, international law may justify holding foreign sovereigns accountable for terrorism or other unlawful acts under principles of universal jurisdiction⁹⁹ in situations where a private party’s activities might be considered too remote from the United States. Moreover, Congress has considerable ability to equalize personal jurisdiction protections for foreign sovereign enterprises and other foreign corporations if it so chooses, altering the former through the FSIA and the latter by, for example, providing more expansively for nationwide jurisdiction.¹⁰⁰

None of this is to say that there might not be value in bringing foreign sovereigns within the constitutional fold in some fashion. But any theory of

93. See *supra* note 91 and accompanying text.

94. See *Murray v. The Charming Betsey*, 6 U.S. 64, 118 (1804).

95. See Cahill, *supra* note 80.

96. Wuerth, *supra* note 1, at 685.

97. See *id.* at 684.

98. See *Price v. Socialist People’s Libyan Arab Jamahiriya*, 294 F.3d 82, 96-99 (D.C. Cir. 2002) (noting comity considerations and structural protections that justify treating foreign sovereigns differently from other actors).

99. See Halverson, *supra* note 56, at 126–27 (noting that some legislators have attempted to justify subjecting foreign nations to suit for acts of terrorism by invoking principles of universal jurisdiction for certain violations of international law).

100. See *supra* notes 73–74.

how to do so should account for existing immunity protections—the primary means by which Congress has implemented the international norms that have guided this area since the nation’s beginnings.

CONCLUSION

From the United States’ earliest days, foreign sovereign immunity has protected the interests of foreign nations in U.S. courts. It has done so despite the fact that it has generally been seen as a doctrine rooted not in Article III limits but in international and general law norms. Given this status quo, advocating for a significant shift in our constitutional understanding may be premature.

This is not to say that the status quo is perfect or that Professor Wuerth’s article does not contain valuable insights. Wuerth makes a strong case that some constitutional protections—such as basic elements of due process—should also be understood to apply in proceedings involving foreign sovereigns. As she astutely points out,¹⁰¹ cases like *Bank Markazi v. Peterson*,¹⁰² in which the Court considered whether Congress’s designation of specific Iranian assets to be used to satisfy individual judgments violated “constraints placed on Congress and the President,”¹⁰³ are difficult to understand as anything other than a recognition that structural constitutional protections apply to foreign nations as well.¹⁰⁴ It is equally difficult to imagine that bedrock due process principles such as notice and unbiased proceedings would not apply to cases involving foreign nations—even though the exact constitutional mechanism underpinning such an application of them may be unclear. For this reason, Wuerth’s fundamental call to better understand the various strands of doctrine applicable to foreign nations and integrate them with other constitutional mandates is an important contribution in an area of growing concern.

Foreign sovereign immunity, however, provides an important piece of this picture as well. Expectations that nonconsenting sovereigns would be mostly or entirely immune from suit have guided the judicial treatment of foreign nations from the Constitution’s drafting to the present. Even today, the FSIA’s territorial nexus requirements shield foreign sovereigns in many situations, requiring contacts similar to those needed for personal jurisdiction. Any theory of how foreign sovereigns should be regarded in the future should take into account how the existing doctrine of foreign sovereign immunity has mostly succeeded in protecting them in the past.

101. See Wuerth, *supra* note 1, at 651–52 (noting that “the entire Supreme Court assumed without discussion that the Central Bank of Iran was protected by separation of powers principles limiting congressional power”).

102. 136 S. Ct. 1310 (2016).

103. *Id.* at 1317.

104. See Wuerth, *supra* note 1, at 651–53.