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Novel Perspectives on Due Process Symposium: Do Foreign Nations Have Constitutional Rights?

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DO FOREIGN NATIONS HAVE CONSTITUTIONAL RIGHTS?

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Ingrid Wuerth challenges the conventional wisdom that the Constitution does not grant any procedural rights, such as notice and personal jurisdiction, to foreign countries.[1] This issue became salient in 1976, when the Foreign Sovereign Immunities Act (FSIA) authorized suits against a "Foreign State" in American courts in a few situations (e.g., where that nation had engaged in commercial activity or expropriated property).[2] Congress has recently added exceptions related to government-assisted terrorism,[3] which has further increased litigation involving "Foreign States" and state-owned enterprises (SOEs).[4]

As Professor Wuerth demonstrates, federal courts have responded by recognizing constitutional procedural rights for foreign individuals and corporations, but not the countries themselves (on the theory that they are protected exclusively by international law).[5] This distinction routinely requires judges to ascertain whether a nominally private foreign enterprise should be treated as independent or instead as a "Foreign State," which depends on the degree of government control.[6] This difficult judgment determines whether constitutional procedural protections will attach.[7]

Professor Wuerth persuasively attacks this precedent.[8] How, she asks, can the Constitution bestow procedural rights on foreign terrorists and their private sponsors, but not on the nations they target?[9] There is no logical answer, which suggests a fundamental flaw in this jurisprudence.

Wuerth addresses this problem by examining Article III and the Fifth Amendment Due Process Clause in historical context, which yields two conclusions. First, Article III's extension of "judicial Power" to "Cases"

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1. Ingrid Wuerth, *The Due Process and Other Constitutional Rights of Foreign Nations*, 88 FORDHAM L. REV. 633, 635–36, 640–53 (2019) (summarizing and criticizing this consensus).
2. Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1391, 1441, 1602–11.
3. *See* Wuerth, *supra* note 1, at 640 n.30 (citing amendments in 2012 and 2016).
4. *Id.* at 636, 640–44, 646–53.
5. *Id.* at 635–36, 640–53.
6. *Id.* at 636, 640, 642–53.
7. *Id.* at 636, 640, 642–44, 647–51.
8. *Id.* at 635–39, 642–44, 647–53.
9. *Id.* at 635–36.

involving "foreign States" shielded such sovereigns from suit unless they could be reached by a federal court's "process"—a summons to appear after notice and service of pleadings in a case within the court's personal jurisdiction.[10] Such procedures would protect foreign countries against unfair proceedings and prevent international conflict.[11] Second, under the Due Process Clause, foreign governments were "persons" entitled to similar "process."[12] In short, Article III and the Due Process Clause overlapped in ensuring litigation-related rights for all parties, including foreign nations.[13] Wuerth proposes that courts revive this original meaning.[14]

Her foundational premise is that the Constitution's Framers, Ratifiers, and early interpreters did not precisely use terminology such as "judicial power," "cases," "controversies," "due process," "subject matter jurisdiction," and "personal jurisdiction." Professor Wuerth follows suit by collapsing these terms into a general analytical framework, which is then applied specifically to litigation involving foreign sovereigns.

I submit, however, that these words (and the concepts they convey) were—and still are—distinct, albeit related. In particular, clarity would be promoted by treating Article III—which primarily concerns subject matter jurisdiction over three categories of "Cases" and six types of "Controversies"—separately from Due Process issues such as personal jurisdiction. Moreover, Article III's text and history indicate that its drafters included "Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects" to ensure that such disputes would be resolved impartially by federal judges who, unlike their state counterparts, enjoyed tenure and salary guarantees that insulated them from political pressure.[15]

By contrast, Professor Wuerth presents no direct evidence that the Framers or Ratifiers understood this Alienage Clause as guaranteeing procedural rights to foreign nations. Therefore, although I agree with her thesis that foreign governments should receive the same constitutional procedural protections as their citizens and enterprises, the main font of those rights should be the Due Process Clause rather than Article III.

I will develop the foregoing ideas primarily by critiquing Professor Wuerth's historical analysis of those two constitutional provisions. I will then consider some modern implications of her proposal.

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10. *Id.* at 636–37, 639, 653–73, 690.
11. *Id.* at 637, 639, 653–55, 659–61, 670–73, 687, 690.
12. *Id.* at 637–39, 673–80, 690.
13. *Id.* at 636–39, 653–90.
14. *Id.* at 638–39, 653, 680–90.
15. *See* Robert J. Pushaw, Jr., *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447, 449–50, 459, 469–72, 482–86, 492–96, 504–11, 519, 523–31 (1994) [hereinafter Pushaw, *Case/Controversy*]. I have published several lengthy articles exploring the Constitution's original meaning concerning the federal judiciary. This essay will usually summarize these works without reproducing their supporting sources.

I. ARTICLE III AND PROCEDURAL RIGHTS

A. Professor Wuerth's Interpretation

After examining the drafting, ratification, and early implementation of Article III, Wuerth concludes that its grant of "judicial Power" over "Cases" extended only as far as a federal court's "process" could reach parties (or their property) located within its territorial jurisdiction.[16] She asserts that "the word 'case' does not appear to have had a precise, technical meaning,"[17] but then finds that it actually had very specific procedural connotations. For example, "a 'case' required that a dispute be submitted in proper form"[18]—namely, by parties who were subject to the court's "process" (i.e., amenable to its personal jurisdiction and summons).[19] Similarly, "case" overlapped with "cause" and "suit," which in the eighteenth century featured strict procedural rules.[20] Separation-of-powers principles reinforced that Article III conferred subject matter jurisdiction over nine "Cases" and "Controversies" only if basic procedural requirements like personal jurisdiction had been satisfied.[21]

Professor Wuerth further claims that these two words were synonymous, with one trivial exception—a "Case" encompassed criminal and civil proceedings, whereas a "Controversy" included only the latter.[22] Accordingly, she applies her general vision of Article III "judicial Power" over "Cases" to those involving foreign nations,[23] even though Article III itself refers to "Controversies" between foreign states and American states (or their citizens).[24] In any event, such jurisdiction generated little opposition during the Convention and Ratification debates, as Wuerth shows.[25] Indeed, the only serious objection to it—that judgments against foreign countries could not be enforced—prompted the logical response that such recalcitrance would be unlikely, as the sovereign would already have consented to suit and hence would presumably comply with the judgment.[26]

In sum, Professor Wuerth maintains that the Framers and Ratifiers thought that the valid exercise of "judicial Power" over "Cases" involving "foreign

16. Wuerth, *supra* note 1, at 637–39, 653–73, 690.

17. *Id.* at 663.

18. *Id.* at 664. Wuerth repeatedly assumes that all "cases" involve "disputes" between adverse parties, but that is not necessarily true. *See infra* notes 42–43 and accompanying text.

19. Wuerth, *supra* note 1, at 661–65.

20. *See id.* at 662–64; *see also id.* at 663–64 (observing that a "suit" or "cause" typically denoted the institution of an action, whereas "case" signified an action that had already commenced or had been decided).

21. *Id.* at 636–39, 651–69, 679–80, 690.

22. *Id.* at 653 n.120, 661.

23. *Id.* at 637 ("Article III extends federal judicial power to cases involving foreign states."); *id*. at 653, 657–60, 673–74, 681, 683, 685, 690 (same).

24. U.S. CONST. art. III, § 1, cl. 2.

25. Wuerth, *supra* note 1, at 637, 655–56.

26. *Id.* at 656.

States" mandated adherence to procedural formalities.[27] She reinforces this point by citing *The Schooner Exchange v. McFaddon*,[28] which she characterizes as holding that, even though the Supreme Court had subject matter jurisdiction over a property claim brought by private parties against a foreign nation (France), it lacked personal jurisdiction to reach French warships in United States waters because sovereigns were immune from process under international law.[29]

B. A Different View of Article III

My research on Article III's original meaning suggests that Professor Wuerth uses several terms interchangeably that would be better kept separate.[30] Section 1 of Article III vests "judicial Power," which by 1787 had an established definition: rendering a final judgment after interpreting the governing law and applying it to the facts.[31] Therefore, "judicial Power" primarily concerned adjudication—not jurisdiction, as Wuerth believes.[32]

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27. *Id.* at 653–69. A judgment entered where a court lacked jurisdiction would be void—*coram non judice*. *Id*. at 667–69.

28. 11 U.S. (7 Cranch) 116 (1812).

29. Wuerth, *supra* note 1, at 671–72; *see also id.* at 671–73 (citing other decisions from 1795, 1822, and 1823). In *Schooner Exchange*, the Court did not actually use terms like "subject matter jurisdiction," "personal jurisdiction," and "process." Initially, Chief Justice Marshall admitted he was "exploring an unbeaten path" and thus had to resort to "general principles" of the law of nations. 11 U.S. (7 Cranch) at 136. The basic principle was that the United States, like any sovereign, had exclusive jurisdiction to control anything within its territorial jurisdiction unless it voluntarily consented to an exception. *Id.* The Court determined that America had implicitly made an exception by adopting the practice of civilized nations to immunize from suit a friendly foreign government (and its ships, including armed vessels) that came into its ports. *Id.* at 137–46. Although the United States retained sovereign power to withdraw this consent, such a change had to be unambiguous (to give other countries notice) and would never be inferred from a general grant of jurisdiction. *Id.* at 146. The Court recognized that any such repudiation of sovereign immunity which led to an adverse judgment against a foreign government could not be enforced judicially, but only by either military force or diplomatic negotiation. *Id*.

The Schooner Exchange is typical of most early litigation, which did not concern an American court's assertion of jurisdiction against the foreign state as a party, but rather admiralty jurisdiction over a foreign government's property (usually a ship or its cargo) located within its territory. That distinction, however, did not affect the political repercussions that would result from an American court's attempt to seize jurisdiction.

30. *See* Pushaw, *Case/Controversy*, *supra* note 15, at 447–50, 457, 465–532.

31. For a detailed history of the Anglo-American idea of "judicial power," see *id.* at 471–74, 484–92, 512–17, 523–24; Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 741–42, 746, 789, 799, 805–06, 809, 827–28, 844–48, 850, 853, 860 (2001) [hereinafter Pushaw, *Inherent*]; Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 398, 402–07, 417–27, 431–34, 436–44 (1996) [hereinafter Pushaw, *Justiciability*].

32. Valid adjudication requires applying preexisting law, both substantive and procedural. *See* Pushaw, *Justiciability*, *supra* note 31, at 397–98, 402, 406, 417–18, 426–27. The First Congress confirmed the shared understanding that state law would supply the baseline rules in federal courts. Initially, the Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73, 92, provided that the substantive rules of decision would be "the laws of the several states, except where the constitution, treaties, or statutes of the United States shall otherwise require or provide." A few days later, the Process Act, ch. 21, § 2, 1 Stat. 93, 93–94, mandated application of the procedural rules of the state in which the federal court sat, subject to the courts' formal

Admittedly, the proper exercise of "judicial Power" ordinarily presupposes that a court has jurisdiction. But that is not always true. For instance, a court may legitimately assert "judicial Power" to issue a judgment that it does not have jurisdiction.[33] Similarly, a court can exercise "judicial Power" absent personal jurisdiction if a defendant waives this objection, even inadvertently.[34]

Returning to my key point, "judicial Power" in Section 1 focused on adjudication, whereas the topic of subject matter jurisdiction was addressed in a separate paragraph of Article III: Section 2, which lists various "Cases" and "Controversies."[35] Professor Wuerth's conflation of these words, except for the minor "criminal vs. civil" distinction, is inadequate.[36] A far more important difference concerns the main role courts would be expected to play in "Cases," as opposed to "Controversies."[37]

Section 2 begins by repeating the phrase "all Cases" three times to introduce jurisdictional grants defined by legal subject matter—federal law, admiralty and maritime, and the international law governing foreign ministers. Section 2 then shifts to the word "Controversies" to denote six jurisdictional categories based on party configurations—including "Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." This structural division between "Cases" and "Controversies" reinforced the distinct primary function judges were expected to discharge in each category.[38]

"Case" derives from the Latin *casus*, or "chance."[39] In eighteenth-century legal parlance, a "case" was a happenstance occurrence that allegedly violated someone's legal rights in a way that gave rise to a recognized cause

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amendment when necessary. Congress retained ultimate power to fix procedural rules. *See* Pushaw, *Inherent*, *supra* note 31, at 747–51.

33. The earliest example is *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792). There all of the Justices rendered opinions concluding that Congress had improperly granted them jurisdiction to determine disabled veterans' pension eligibility, subject to revision by the federal executive and legislative branches, in violation of the principle that court judgments had to be final. *See* Pushaw, *Justiciabiliy*, *supra* note 31, at 438–41 (analyzing *Hayburn's Case*).

34. This longstanding principle has been encapsulated in Federal Rule of Civil Procedure 12(b)(2).

35. *See* U.S. CONST. art. III, § 2, cl. 1; *see also* Robert J. Pushaw, Jr., *Congressional Power Over Federal Court Jurisdiction: A Defense of the Neo-Federalist Interpretation of Article III*, 1997 BYU L. REV. 847, 860–63 [hereinafter Pushaw, *Congressional Power*] (evaluating possible differences between "judicial power" and the specific grants of "jurisdiction" in Section 2).

36. Wuerth does not mention that the "civil vs. criminal" distinction had not appeared as of 1787, but rather was developed in the 1790s. *See* Pushaw, *Congressional Power*, *supra* note 35, at 864–73. Consequently, no historical evidence supports the notion that the Framers incorporated this distinction.

37. *See* Pushaw, *Case/Controversy*, *supra* note 15, at 449–50, 465–511, 518–19.

38. *Id.* at 449–50, 471–72, 499–511.

39. *See id.* at 472 n.133; Robert J. Pushaw, Jr., *Limiting Article III Standing to "Accidental" Plaintiffs: Lessons from Environmental and Animal Law Cases*, 45 GEORGIA L. REV. 1, 11, 67 (2010) [hereinafter Pushaw, *Limiting*].

of action in a trial court or to an appeal.[40] A court's principal task in a "case" was to interpret and apply the law, guided by precedent.[41] Although many Article III "Cases" involved disputes between adverse parties, others did not—for example, naturalization proceedings and writs challenging government action.[42] And even when a dispute had arisen, a federal court's central job was not merely arbitrating it but rather expounding laws in areas of national importance.[43]

As Professor Wuerth acknowledges, I noted long ago that an Article III "Case," historically understood, had a procedural component.[44] At the trial level a "Case" would be presented only if a plaintiff complied with demanding procedural rules in setting forth a cause of action that fell within a form recognized in law or equity.[45] "Cases" thus focused primarily on the plaintiff's claims, not on the defendant's objections (such as lack of personal jurisdiction).

Turning to "controversy," this word had the same meaning in 1787 as it does today: a dispute.[46] That explains why the Framers chose "Controversies" to introduce the six jurisdictional categories defined by adverse parties, in which a federal court's main function would be to resolve the dispute impartially.[47] Legal exposition would be secondary—indeed, the applicable law was often prescribed by a state.[48]

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40. *See* Pushaw, *Limiting*, *supra* note 39, at 11, 66–68, 73, 76–82, 95, 101, 105; *see also* Pushaw, *Case/Controversy*, *supra* note 15, at 449–50, 472–82, 490–91, 496.

41. *See* Pushaw, *Limiting*, *supra* note 39, at 11–15, 66, 73–74, 76–77; Pushaw, *Case/Controversy*, *supra* note 15, at 449, 459, 470, 472–82, 489–92, 494–504, 519, 523–31; Pushaw, *Justiciability*, *supra* note 31, at 398, 402, 406, 417–18, 423, 426, 436, 447.

42. *See* Pushaw, *Case/Controversy*, *supra* note 15, at 480–82, 498, 500–01, 516, 526–27, 530. My insight that "Cases" did not necessarily require adversarial disputes has been developed in an article that demonstrates the wide range of non-contentious "cases" that federal courts have always decided. *See* James E. Pfander & Daniel D. Birk, *Article III Judicial Power, the Adverse-Party Requirement, and Non-Contentious Jurisdiction*, 124 YALE L.J. 1346 (2015).

43. *See* Pushaw, *Case/Controversy*, *supra* note 15, at 472–82, 489–504.

44. *See* Wuerth, *supra* note 1, at 661 n.174, 662 n.181 (citing Pushaw, *Case/Controversy*, *supra* note 15, at 450, 473, 483).

45. *See* Pushaw, *Case/Controversy*, *supra* note 15, at 449, 472-74, 480 n.171, 496, 527; Pushaw, *Justiciability*, *supra* note 31, at 406, 426, 437–38; Pushaw, *Limiting*, *supra* note 39, at 11, 68–69, 76–79.

46. *See* Pushaw, *Case/Controversy*, *supra* note 15, at 450, 482–83, 493–94, 519.

47. *Id.* at 450, 459, 472, 482–84, 493–96, 504–11, 519, 523–31.

48. *Id.* at 450, 483, 504–05, 511. The Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73, 92, made state law the default rule of decision in federal courts, with no exception for controversies involving foreign nations. Nonetheless, such disputes would typically implicate the international law of sovereign immunity. *See infra* notes 51–57, 60–66 and accompanying text. If the foreign country consented to jurisdiction, state substantive law would presumptively apply. However, if treaties were at issue, it would be an Article III "Case[] . . . arising under . . . [federal] Treaties" and hence fall within the first tier of jurisdiction, where the federal courts' chief role was expounding the law. The same analysis applies to "Cases of admiralty and maritime Jurisdiction," which often involved foreign sovereigns.

Hamilton acknowledged that in theory a state court could handle the state law issues in controversies involving foreign nations and their citizens, but concluded that (1) federal or international law questions would usually arise, and (2) the "safe and most expedient" course was to entrust all litigation involving foreign parties to impartial "national tribunals" to avoid

Article III includes only those "Controversies" litigated to vindicate recognized legal rights according to established procedural rules.[49] In this regard, I agree with Professor Wuerth that "Cases" and "Controversies" featured similar procedures.[50] But that does not mean these two words were otherwise identical.

Furthermore, Wuerth does not cite any Framer or Ratifier who said that the purpose of conferring subject matter jurisdiction over "Controversies" involving "foreign States" was to secure procedural rights such as notice, service, and personal jurisdiction. By contrast, leading Federalists such as James Wilson, Alexander Hamilton, and John Marshall emphasized that this head of jurisdiction would ensure that such disputes would be umpired by an impartial federal court (usually the Supreme Court),[51] not politically dependent state judges whose decisions against a foreign country would often be viewed as biased and thereby cause conflict.[52] As Madison declared:

> I do not conceive that any controversy can ever be decided . . . between an American State and a foreign State, without the consent of the parties. If they consent, provision is here made. The disputes ought to be tried by the national tribunal. This is consonant with the law of nations. Could there be a more favorable or eligible provision to avoid controversies with foreign powers? Ought it to be put in the power of a member of the Union to drag the whole community into war? As the national tribunal is to decide, justice will be done . . . . [T]hough . . . this jurisdiction . . . may

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the possibility of a single state disrupting America's peace. THE FEDERALIST NO. 80, at 536 (Jacob E. Cooke ed., 1961).

49. *See* Pushaw, *Case/Controversy*, *supra* note 15, at 483 n.183.

50. *See* Wuerth, *supra* note 1, at 661 n.174, 662 n.181 (citing Pushaw, *Case/Controversy*, *supra* note 15, at 450, 473, 483).

51. The Supreme Court has original jurisdiction whenever a state is a party, thereby assuring the most trustworthy forum when a foreign nation sued a state itself (or vice versa, if the sovereign consented). *See* U.S. CONST. art. III, § 2, cl. 2; Wuerth, *supra* note 1, at 637, 657–61 (arguing that this self-executing grant of original jurisdiction proves that foreign states cannot be completely outside the American constitutional system).

52. *See* 3 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE CONSTITUTION 557 (1901) (Marshall) ("[I]n controversies between a state and a foreign state, . . . [t]he previous consent of the parties is necessary" and therefore they would likely "acquiesce" to the court's judgment, so this jurisdictional grant would "be the means of preventing disputes with foreign nations."); THE FEDERALIST NO. 80, at 535–36, 541 (Hamilton) (to similar effect).

Wilson praised the Constitution as history's first attempt to settle controversies involving foreign governments through independent courts applying the law of nations, rather than through mediation, arbitration, or war. COLLECTED WORKS OF JAMES WILSON 685–87 (Kermit L. Hall & Mark David Hall eds., 2007). The critical purpose of the Article III provisions respecting foreign countries and individuals was to provide them with a "just and impartial [federal] tribunal"—not a state court—to resolve controversies (especially suits to recover debts owed by American states or citizens) "in order to preserve peace with foreign nations." *Id*. at 246–49. Because Wilson knew that sovereign immunity was a basic principle of the law of nations, he likely expected federal courts to apply that rule.

In passing, Professor Wuerth notes that one purpose of the Alienage Clause was "to provide a fair forum to resolve disputes involving foreign nations." Wuerth, *supra* note 1, at 637. However, she contends that the Framers' central goal was to provide the same baseline procedural rights for foreign states that would be given to other litigants. *Id.* at 636–39, 653–69.

> seldom or never operate, . . . [when it does it will be] of great importance, and indispensably necessary.[53]

Professor Wuerth quotes portions of the statements of Madison, Hamilton, and Marshall.[54] Yet they do not support her theory, as they say nothing about procedural protections. Conversely, these statements reinforce my thesis that a federal court's major role would be to neutrally resolve such disputes. For example, Madison refers to a "controversy" involving a foreign sovereign, equates that word with "dispute," and contends that such "controversies" should be decided by a "national" (as opposed to a state) tribunal that will render impartial "justice." Similarly, Joseph Story remarked:

> In regard to controversies between an American and foreign state, it is obvious that the suit must, on one side at least, be wholly voluntary. No foreign state can be compelled to become a party, plaintiff or defendant, in any of our tribunals. If, therefore, it chooses to consent to the institution of any suit, it is consent alone, which can give effect to the jurisdiction of the court.[55]

These contemporaneous comments reflected a bedrock law-of-nations principle: Sovereigns enjoyed immunity from suits in other nations' courts.[56] It is possible that the Framers and Ratifiers thought the Constitution implicitly incorporated this immunity rule, so that the federal government could not abrogate it.[57] Cutting against this conclusion is Article III's text, which sets forth the maximum extent of the judiciary's subject matter jurisdiction and gives Congress broad discretion to assign and limit it.[58] Wuerth argues that the Constitution, as originally understood, permitted Congress to grant federal courts jurisdiction over controversies between states (or their citizens) and foreign nations without the latter's consent—and thereby to override the general principle of sovereign immunity that courts would otherwise apply—even though such a statute would be "extremely unlikely."[59] Nonetheless, even if Congress unexpectedly abrogated such

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53. 3 ELLIOT, *supra* note 52, at 533–34.

54. Wuerth, *supra* note 1, at 655 n.134 (Hamilton); 656 n.139 (Madison); 656 n.140 (Marshall) (citations omitted).

55. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 570 (1833).

56. *See supra* notes 50–55 and accompanying text.

57. *See* Wuerth, *supra* note 1, at 684 (acknowledging, but rejecting, this possibility).

58. Because Article III judicial power "shall" [i.e., must] extend to "all" Cases involving federal law, admiralty, and foreign ministers, Congress's discretion in this category is limited to deciding whether to assign such cases to federal trial courts, appellate courts, or the Supreme Court. By contrast, since federal judicial power need not extend to "all" Controversies, Congress may—but need not—give any federal court jurisdiction and can restrict any jurisdiction granted. *See* Pushaw, *Congressional Power*, *supra* note 35, at 849–50, 856–64, 873–97.

59. *See* Wuerth, *supra* note 1, at 683–84; *see also id*. at 639–40, 644–47, 649–51, 656, 671–73, 676–78 (describing foreign sovereign immunity). For this proposition, she relies on *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812). As discussed in note 29, the Court did not rely on the Constitution but rather the law of nations, which presumed foreign sovereign immunity. *Id.* at 137–46. Chief Justice Marshall declared that he would never infer that the United States intended to repudiate this principle—and cause international

immunity, under the law of nations a foreign country could refuse to submit to an American court's jurisdiction, and any resulting default judgment could not be enforced by the United States unless it was willing to risk war.[60]

The foregoing analysis reveals that, although federal judicial independence would be beneficial regardless of whether the foreign nation was a plaintiff or defendant, the former situation would be far more common because an American court could not successfully assert jurisdiction over a foreign sovereign defendant involuntarily.[61] Consequently, this invocation of immunity would terminate such jurisdiction—it would "seldom or never operate," in Madison's words—and leave the issue to diplomatic or military resolution.[62] Therefore, procedural protections like notice, service, and personal jurisdiction—which aim to spare *defendants* not located within a court's territorial jurisdiction the inconvenience, cost, and potential bias of being dragged into a distant forum[63]—would not be needed by a foreign government.

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conflict—unless the federal government did so unambiguously. *Id.* at 146. Marshall's *Schooner Exchange* opinion, which concedes the novelty of the issue, *id.* at 136, adds a wrinkle to his Ratification comment that foreign states would always need to consent to jurisdiction. *See supra* note 52 and accompanying text.

More recently, the Court recognized that "[f]or more than a century and a half, the United States generally granted foreign sovereigns complete immunity from suit," but concluded that this practice reflected voluntary comity rather than a constitutional requirement. Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 486 (1983). The Court held that the FSIA exception to a foreign state's sovereign immunity for its commercial acts did not violate the Constitution because Congress had clearly exercised its Article III power to grant federal courts jurisdiction over cases "arising under" federal law—here, a statute enacted under the Article I power to regulate commerce with foreign nations. *Id.* at 491–97. Of special relevance here is the Court's preliminary ruling that this FSIA exception could not be based on another Article III power: to confer jurisdiction over controversies between a state (or its citizens) and a foreign nation. *Id*. at 491–92.

60. To my knowledge, no Framer or Ratifier publicly discussed the specific issue of whether the Constitution authorized Congress to abrogate foreign sovereign immunity. The general question of whether the Founders thought that Congress had constitutional power to violate the law of nations—and whether courts could remedy alleged violations—has generated extensive scholarly debate. *Compare* ANTHONY J. BELLIA JR. & BRADFORD R. CLARK, THE LAW OF NATIONS AND THE UNITED STATES CONSTITUTION (2017) (arguing that the Constitution granted Congress and the President exclusive power over foreign affairs, and that consequently the judiciary had to uphold their political decisions without inquiring into possible violations of the law of nations) *with* David M. Golove & Daniel J. Hulsebach, *The Law of Nations and the Constitution*, 106 GEO. L.J. 1593, 1593–98, 1605-58 (2018) (contending that neither the Founders nor the early Supreme Court believed that Congress could transgress this international law). *Cf.* Thomas H. Lee, *The Law of Nations and the Judicial Branch*, 106 GEO. L.J. 1707, 1709, 1726–36, 1745 (2018) (maintaining that Article III and the Judiciary Act of 1789 envisioned an affirmative, albeit restrained, role for federal courts: ascertaining and applying the multi-dimensional law of nations as federal common law, absent a contrary rule in the United States Constitution, laws, or treaties).

61. *See supra* notes 51–60 and accompanying text.

62. *See supra* note 53 and accompanying text; *see also* STORY, *supra* note 55, at 570 (noting that some controversies involving foreign states may "be redressed" judicially rather than by the usual "instrumentality of negotiations").

63. *See* World-Wide Volkswagen Corp. v. Woodson, 449 U.S. 286, 291–92 (1980) (emphasizing this rationale when a state court attempts to assert personal jurisdiction over out-of-state citizens); OMI Holdings, Inc. v. Royal Ins. Co. of Canada, 149 F.3d 1086, 1098 (10th

Obviously, the nations most willing to submit to a federal court as defendants would be our allies, especially those with commercial interests in America. In such litigation, judges would presumably take special care to ensure procedural and substantive fairness, given the sensitive nature of dealing with a sovereign. Thus, controversies in which a foreign country has consented to be sued would be the least likely to incite international conflict (as experience has proved).[64]

Overall, the Framers included "Controversies" involving "foreign States" in Article III to achieve the overarching goal of guaranteeing them an impartial decision-maker when they sued an American state or citizen, especially to recover debts.[65] State courts' mistreatment of foreign creditors (including government lenders) had sparked serious international tensions before 1787, and only disinterested national courts could rectify this problem.[66]

II. DUE PROCESS

Professor Wuerth contends that foreign nations are "persons" within the meaning of the Due Process Clause.[67] She demonstrates that "process," in the eighteenth century, (1) referred to a court's writs summoning a defendant to appear upon receipt of notice and service, and (2) was limited to a court's territorial jurisdiction.[68] Such "process" extended to all "persons," including foreign sovereigns, but could only reach them if they were subject to the issuing court's jurisdiction.[69] Accordingly, even if a foreign state had property within an American court's territorial jurisdiction, the court's "process" could not extend to that country absent personal jurisdiction.[70]

Professor Wuerth convincingly argues that the Due Process Clause, as originally conceived, gave foreign governments the same "process" rights as similarly situated defendants. Nonetheless, she does not explain why the Bill of Rights' drafters thought that this Clause was necessary if they understood Article III as already containing the same procedural requirements. The most

Cir. 1998) (applying this rationale in declining "to subject [a Canadian corporation] to the rigors of litigating in Kansas").

64. *See infra* notes 82, 85–88 and accompanying text.

65. Pushaw, *Case/Controversy*, *supra* note 15, at 483–84, 506–08. The Judiciary Act of 1789 nowhere expressly granted federal courts jurisdiction over controversies involving foreign nations *as defendants*. Indeed, Congress's only implementation of the Alienage Clause was to confer jurisdiction on district courts when foreign citizens, as plaintiffs, sued for torts in violation of a treaty or the law of nations. Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76–77. Similarly, although Article III extends "judicial Power" to "Controversies to which the United States shall be a Party," Congress clarified that this provision only applied where the United States was a plaintiff. *See id.* §§ 9, 11, 1 Stat. 73, 77–78.

66. *See* Pushaw, *Case/Controversy*, *supra* note 15, at 507. Professor Wuerth recognizes this urgent need for a neutral forum for foreign creditors, both private lenders and governments like England. Wuerth, *supra* note 1, at 635, 655, 659–60.

67. Wuerth, *supra* note 1, at 636–39, 673–80, 690.

68. *Id.* at 673–75, 690.

69. *Id.* at 676–79.

70. *Id.* at 676–77.

logical inference is that this Clause was added to provide new procedural protections, such as personal jurisdiction.

III. MODERN IMPLICATIONS

A. Article III and Due Process Rights

Professor Wuerth emphasizes that the key purpose of including Article III jurisdiction over controversies involving "foreign States"—ameliorating international conflict—has been frustrated by the federal courts' denying these nations the same constitutional rights as their citizens or enterprises.[71] In her view, the Constitution entrusts Congress—not the judiciary—with determining the content of "process" rights, as long as Congress (1) respects the baseline separation-of-powers principles contained in Article III and the Due Process Clause, and (2) makes those procedural rights available to foreign countries.[72] She concedes that "such protections are minimal" and that their application would often not have changed results in actual cases, but notes that these safeguards would prevent federal courts from acting arbitrarily.[73]

Wuerth further maintains that the Court has long held that federal statutes should be interpreted in light of the general law (including principles like sovereign immunity) but has recognized that Congress could expressly override that law.[74] Consequently, Congress has always had power to subject foreign governments to federal court jurisdiction without their consent (as in FSIA), although the Framers and Ratifiers did not expect Congress to do so.[75]

Finally, Professor Wuerth argues that the Due Process Clause is "flexible," so that courts have some discretion to determine what specific procedural rights foreign nations should receive.[76] For instance, some Due Process rights do not extend beyond United States territory, while others might apply only to human (not legal) "persons."[77]

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71. *Id.* at 634–55, 659–61, 670–73, 687, 690.

72. *Id.* at 637, 683–86.

73. *Id.* at 683–85. Most notably, Wuerth assails federal courts for holding that foreign states should not receive Due Process protections because they are not Fifth Amendment "persons." Her approach would lead to the same outcome, but through different reasoning: The Due Process Clause does protect foreign nations, but Congress can determine the scope of those procedural rights and has curtailed them in the FSIA. *Id.* at 685. Wuerth rejects both the results and reasoning of a different line of lower federal court cases: those that carelessly import Fourteenth Amendment Due Process "minimum contacts" and "reasonableness" standards—which determine personal jurisdiction in state courts—to the distinct context of the Fifth Amendment Due Process rights of foreign nations in federal courts. *Id.* at 637–38, 679, 681–85.

74. *Id.* at 683.

75. *Id.* at 683–84.

76. *Id.* at 686.

77. *Id*. If Wuerth is correct that the Constitution grants Congress sole power to identify "process" rights, it is not clear why she suggests that federal courts also can determine which such rights foreign nations should receive. It seems that Congress does not really have exclusive authority, because courts can always review federal statutes to ascertain whether or

Professor Wuerth's approach rests on an originalist analysis, yet she admits that the Framers and Ratifiers did not anticipate that Congress would ever abrogate the immunity of foreign sovereigns.[78] She contends, however, that the Constitution always included this power, even though it long lay dormant.[79] Concededly, the Constitution often articulates broad principles that can be adapted to meet new challenges,[80] and Congress has expanded the scope of its power (and that of federal courts) beyond anything the Founders could have imagined. Nonetheless, Wuerth's basic theme is that Article III's grant to federal courts of "judicial Power" over "Cases" involving "foreign States" implicitly and permanently baked in procedural rights like notice and personal jurisdiction.[81] If so, however, Article III might also have inherently locked in a doctrine of sovereign immunity that Congress cannot eliminate.[82]

Furthermore, the Court today does not have pressing practical incentives to reverse course. To her credit, Professor Wuerth acknowledges that her proposal would afford foreign nations only "minimal" procedural protections and would change only the *rationale*, rather than the *result*, in most cases.[83] In such situations, however, *stare decisis* usually leads courts to adhere to their precedent, even if it rests on flawed reasoning.[84]

Similarly, the longstanding judicial practice of giving foreign governments scant constitutional protections in litigation, even if legally incorrect, has not led to major strife. For example, since 1917 America has fought many wars, but none have been precipitated by the failure to accord a foreign country adequate constitutional procedural rights. The likeliest explanation is that such rights primarily protect defendants from unfair proceedings in a distant forum, and a foreign sovereign does not need such protections because it can refuse to submit to an American court's jurisdiction or judgment.[85] Such

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not they comply with Article III or Due Process—constitutional provisions that federal judges have the final say in interpreting, based on whatever standards they create.

78. *Id.* at 684.

79. *Id.*

80. *See, e.g.*, McCulloch v. Maryland, 17 U.S. 316, 405–30 (1819).

81. Wuerth, *supra* note 1, at 636–39, 653–73, 690.

82. *See supra* notes 51–55 and accompanying text (citing leading Federalists who arguably shared this view). This originalist analysis casts doubt upon the FSIA exceptions to sovereign immunity.

83. Wuerth, *supra* note 1, at 683–85.

84. To illustrate, Justice Thomas urged adoption of historians' consensus position that the Fourteenth Amendment incorporated provisions of the Bill of Rights (such as the Second Amendment) against the states through its Privileges or Immunities Clause—not its Due Process Clause, as the Court has long held. *See* McDonald v. City of Chicago, 561 U.S. 742, 805–58 (2010) (Thomas, J., concurring). However, his colleagues declined to change established precedent because the results would be the same, regardless of which clause was invoked. *Id.* at 753–87.

85. *See supra* notes 51–64 and accompanying text. Another reason for the general absence of international troubles is that the Supreme Court has admonished lower federal and state courts to carefully "consider the procedural and substantive policies of other *nations* whose interests are affected by the assertion of [personal] jurisdiction" against those sovereigns or their citizens, thereby discouraging the exercise of jurisdiction. Asahi Metal Industry Co. v. Superior Court, 480 U.S. 102, 115 (1984).

immunity can be invoked even if Congress purports to abrogate it (as in FSIA) and a federal court attempts to assert jurisdiction in a controversy that falls within a statutory exception,[86] as a recent dispute with Iran illustrates.[87] Conversely, a friendly defendant like England that consents to an American court's jurisdiction would almost certainly accept its judgment, whether adverse or favorable.[88]

In short, I agree with Professor Wuerth that, if a foreign nation waives immunity, it should receive the same procedural protections as its citizens or corporations. But those are precisely the controversies where international tensions are least likely to surface.

Admittedly, trickier issues arise when an American court takes jurisdiction over a dispute involving seized assets of a hostile foreign country (or an enterprise it controls) that are located within the United States' territorial jurisdiction.[89] In this situation, courts should accord the defendant ordinary constitutional procedural rights, as Wuerth says.[90] Nevertheless, to the extent that such litigation might (or does) produce international tensions, they will be resolved through diplomatic channels rather than public federal judicial proceedings.[91] Indeed, such political dispute resolution will occur whenever a foreign sovereign, friend or foe, perceives mistreatment in an American court.

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86. *See supra* notes 2–3, 51–64, 75, 78–82 and accompanying text.

87. Recognizing the difficulties of enforcing the FSIA exceptions for terrorism, Congress amended that law in 2012 to make $1.75 billion in Iranian government assets held in a New York bank available to partially satisfy federal court default judgments for families of victims of Iran-sponsored terrorism. Bank Markazi v. Peterson, 136 S. Ct. 1310, 1316–21 (2016) (citing statute). Dismissing Iran's sovereign immunity objection, the Court held that Congress had not violated separation of powers by directing a federal court to retroactively apply that amended law in the pending case, which determined the outcome. *Id.* at 1317, 1322–29.

Iran "rejected" *Peterson* as "theft" and "incompatible with international law." *Iran Denounces U.S. Ruling Awarding Iran Money to Bomb Victims*, Reuters (Apr. 26, 2016). The International Court of Justice then assumed jurisdiction in two cases to determine whether the United States had violated Iran's rights under a 1955 treaty. *See* Sabina Veneziano, *A Brief Criticism of the United States' Strategic Actions in Three Pending ICJ Cases*, 51 International Law & Politics 965, 966–70, 974–77 (2019). Iran might have responded to *Peterson* through force rather than litigation except that the year before, the Obama Administration had reached a nuclear agreement with Iran—and then secretly given it $1.7 billion and access to American banks to convert another $5.7 billion in Iranian assets. *See* Marc A. Theissen, *Obama Took Lying to New Heights with the Iran Deal*, Washington Post (June 8, 2018).

In short, Congress's attempts to override a hostile foreign sovereign's immunity do not end the matter. *See, e.g.*, Orde Kittrie, *Iran Still Owes $53 Billion in Unpaid Court Judgments to American Victims of Iranian Terrorism*, Foundation for Defense of Democracies (July 31, 2019). Rather, adverse federal judicial decisions result not in compliance but rather negotiations, international litigation, and military conflict.

88. Attempting to hale a foreign nation involuntarily into an American court presents entirely different issues than those that arise when such a sovereign sues as plaintiff: "[W]e are not dealing with an attempt to bring a recognized foreign government into one of our courts as a defendant and subject it to [our] rule of law . . . . We have a foreign government invoking our law but resisting a claim against it which fairly would curtail its recovery." National City Bank v. Republic of China, 348 U.S. 356, 361 (1955).

89. *See* Wuerth, *supra* note 1, at 635–36, 640–43, 652–53 (citing cases).

90. *Id.* at 634–53.

91. *See supra* notes 62, 85–87 and accompanying text.

B. Other Constitutional Rights

Professor Wuerth suggests that foreign states may have additional constitutional protections, which should be determined by examining each individual right.[92] For example, those nations should be entitled to Fifth Amendment protection against double jeopardy and taking of property, as well as Sixth Amendment rights to a jury trial and assistance of counsel in criminal proceedings.[93] Conversely, foreign governments should not be granted rights that attach only to human rather than legal "persons," such as First and Fourth Amendment rights.[94]

Wuerth's granular approach seems far preferable to a categorical rule that the Constitution as a whole either does or does not apply to foreign sovereigns. Nonetheless, if she is correct that federal courts have botched what should have been a simple interpretation of the Due Process Clause as applicable to foreign nations, it is not apparent why these courts would be capable of sound analysis of other constitutional rights.

IV. CONCLUSION

In Article III, the Framers vested independent federal courts with "judicial Power" over party-defined "Controversies"—including those involving "foreign States"—primarily to ensure an impartial forum to resolve disputes, not to confer specific procedural rights. The Due Process Clause amended Article III to clarify that litigants had standard Anglo-American "process" rights before they could lose their liberty or property.

Whatever the constitutional source and content of such procedural rights, however, Professor Wuerth persuasively argues that they should apply not just to foreign individuals and enterprises, but also to foreign nations. Adoption of this crucial insight would greatly clarify jurisprudence and scholarship in this area.

92. Wuerth, *supra* note 1, at 639, 686–90.
93. *Id.* at 689–90.
94. *Id.* at 688–89.