

# FOREIGN NATIONS, CONSTITUTIONAL RIGHTS, AND INTERNATIONAL LAW

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## INTRODUCTION

Some of the more pressing issues related to global governance and world order lie at the intersection of foreign relations law, international law, and constitutional law. What role does the Constitution play in ensuring the United States lives up to the nation's international law obligations in an evolving period of globalization? More provocatively, to what degree will the United States uphold its international legal obligations if not mandated by the Constitution? And what role do domestic courts play in enforcing these international law obligations? In this regard, the U.S. Supreme Court has not directly addressed the question of the rights, if any, that foreign states have under the U.S. Constitution.

Into this mix comes Professor Ingrid Wuerth's article, *The Due Process and Other Constitutional Rights of Foreign Nations*.<sup>1</sup> With a textual and historical bent to her analysis, Professor Wuerth's core claim is that foreign states and state-owned enterprises are entitled to some litigation-related constitutional protections emanating from separation of powers and the Fifth Amendment's Due Process Clause, independent and separate from any legislative protections, such as those provided under the Foreign Sovereign Immunities Act. In so doing, she invokes Founding-era history to launch a broadside re-examination of prevailing understandings. In this way, her article serves as the opposing bookend to a well-regarded article by Professor Lori Damrosch from the 1980s (and earlier statements from Professor Louis Henkin in the 1970s) that took a different view.<sup>2</sup> She also contributes to a growing body of literature that more fully examines the role that domestic

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1. 88 *FORDHAM L. REV.* 633 (2019).

2. Lori Fisler Damrosch, *Foreign States and the Constitution*, 73 *VA. L. REV.* 483 (1987); LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 254 (1972) (noting that foreign governments "have no constitutional rights . . ."); *cf.* Wuerth, *supra* note 1, at 636 n. 13 ("The leading scholarly treatment of foreign states and the Constitution concludes that text and history have little to offer and that foreign states lack constitutional rights as against the federal government . . . . This Article disagrees.").

institutions play in global governance.<sup>3</sup> On the one hand, Professor Wuerth's article underscores how much the structural features of international law are baked into our Constitution. What distinguishes her position from the prior work of others is how she embraces older case law and Founding-era understandings in an attempt to influence current doctrine on the ground.

This short Essay commenting on Professor Wuerth's article does three things. First, it describes the topic's significance, and explains why future discussion on the procedural rights of foreign states and state-owned enterprises is worthwhile. The issues are increasingly important given the rise of state-owned enterprises as major players in the global economy and as the amount of transnational regulation—untethered to international agreement—continues to grow, while the doctrine of foreign sovereign immunity appears to narrow. Second, it situates Professor Wuerth's article within a broader conversation. While a dearth of literature addresses the rights of foreign states, the literature that does exist intersects with other important strands of scholarship related to global governance and transnational regulation, as well as a renewed interest in how the Fifth Amendment's Due Process Clause applies to foreign entities. Lastly, the Essay makes some brief observations on the substance of Professor Wuerth's claims.

I am more skeptical than Professor Wuerth about locating the sovereign rights of foreign states in constitutional doctrine, and I am more sanguine that courts will take her up on her invitation to embrace more original understandings derived from international law. In other contexts, constitutional limitations generally do not apply to foreigners. While her article resolves one inconsistency—the treatment of foreign states as compared to foreign corporations when it comes to procedural rights—it reveals other inconsistencies. And in many ways, the protections that Professor Wuerth seeks to have recognized already exist under established international law. That said, Professor Wuerth is undoubtedly right that the basic structural limitations of our international system related to sovereign authority were well-understood at the Founding.<sup>4</sup> To the extent that U.S. courts overlook or fail to engage with international law's limitations on state power, locating the basic structural limitations of the international system in our constitutional system may be prudent.

#### I. A GROWING IMPORTANCE

Professor Wuerth's article comes at an important time, both as the amount of litigation involving foreign states has grown and as the number and size

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3. See generally Christopher A. Whytock, *From International Law and International Relations to Law and World Politics*, OXFORD RESEARCH ENCYCLOPEDIA OF POLITICS: THE POLITICS OF LAW AND THE JUDICIARY (William Thompson & Keith E. Whittington eds., 2018).

4. See Wuerth, *supra* note 1, at 636–39, 648 (noting that “the relationship among states of the Union was governed by international law before the Constitution was enacted, and some of those international law protections were preserved and entrenched by the Constitution itself”).

of state-owned enterprises continues to expand too. Changes in how courts apply foreign sovereign immunity, and legislative willingness to extend judicial power broadly, mean that the constitutional limits on judicial power are likely to assume greater importance. Below, I highlight a few points that Professor Wuerth addresses only briefly.

#### A. *The Rise of State-Owned Enterprises*

Appreciating the rise of state-owned enterprises is key to understanding the stakes involved. State-owned enterprises are an increasingly important part of the global economy and play an important role in cross-border interactions.<sup>5</sup> Many of the world's largest companies are state-owned.<sup>6</sup> Not only is there a growing number of state-owned enterprises, but in certain sectors state-owned enterprises are the largest companies in the sector.<sup>7</sup> They are also the fastest growing.<sup>8</sup>

The size and impact are staggering. In 2013, one analysis described just how significant the holdings of state-owned enterprises have become:

The combined sales of these [state-owned enterprises] amounted to USD 3.6 trillion, representing more than 10% of the aggregate sales of the 2,000 [world's] largest companies, and exceeding the 2010 [gross national income] of countries like the United Kingdom, France or Germany. The value of sales of these [state-owned enterprises] was tantamount to almost 6% of world [gross domestic product] . . . . Their market value corresponded to 11% of the market capitalisation of all listed companies worldwide . . . .<sup>9</sup>

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5. Alvaro Cuervo-Cazurra et al., *Governments as Owners: State-Owned Multinational Companies*, 45 J. INT'L BUS. STUD. 919, 919 (2014) ("The globalization of state-owned multinational companies (SOMNCs) and the wide variety of approaches taken by the state as a cross-border investor have become an important phenomenon."); see also Bernardo Bortolotti et al., *Innovation of State-Owned Enterprises 2* (BAFFI CAREFIN Centre, Working Paper No. 72, 2018), <http://ssrn.com/abstract=3150280> [<https://perma.cc/6B73-QXU7>] ("The past two decades have seen not just an increase in state ownership of firms, following a previous wave of privatizations in western markets, but also substantial changes in the dominant type of state ownership model.").

6. Przemyslaw Kowalski et al., *State-Owned Enterprises: Trade Effects and Policy Implications* 20 (Org. Econ. Cooperation & Dev., Working Paper No. 147, 2013), <http://dx.doi.org/10.1787/5k4869ckqk7l-en> [<https://perma.cc/R9D8-NVZB>] (stating that "204 out of the world's 2,000 largest publicly listed firms were identified as SOEs. They originated from 37 different countries with China leading the list (70 SOEs), followed by India (30), Russia and the United Arab Emirates (9 each) and Malaysia (8).").

7. *Id.* at 27–29.

8. Xiaobing Huang, *Reform of State-Owned Enterprises and Productivity Growth in China*, 33 ASIAN-PACIFIC ECON. LITERATURE 67–77 (2019) (although the aggregate productivity of SOEs is lower than that of other types of enterprises, their growth rate is the fastest).

9. Kowalski et al., *supra* note 6, at 20; see also Garry D. Bruton et al., *State-Owned Enterprises Around the World as Hybrid Organizations*, 29 ACAD. OF MGMT. PERSP. 92, 92 (2015) (noting that state-owned enterprises "generate approximately one tenth of world gross domestic product (GDP) and represent approximately 20% of global equity market value . . . .").

By 2017, the assets of Chinese state-owned enterprises had grown to over USD 10.4 trillion.<sup>10</sup> That same year, profit of Chinese state-owned enterprises was estimated to exceed USD 453 billion.<sup>11</sup>

The increasing market power and influence of state-owned enterprises—after a period of decline—is now well documented.<sup>12</sup> From 2005 to 2012, “nine of the 15 largest initial public offerings” involved state-owned enterprises.<sup>13</sup> And some level of state-ownership appears to assist in the international expansion of firms.<sup>14</sup> For the BRICS, the significance of state-owned enterprises is even greater,<sup>15</sup> particularly in China.<sup>16</sup> Given China’s increasing power in the global economy, we can expect state-owned enterprises to continue to play an important role in global markets.<sup>17</sup>

### B. Unilateral Global Regulation

The growing global prominence of state-owned enterprises is, however, only part of the story. Foreign governments play a prominent role in transnational litigation in other ways. Foreign governments have filed cases in U.S. courts as plaintiffs.<sup>18</sup> And foreign governments increasingly

10. *State-Owned Enterprises Are a Hard Habit China Doesn't Want to Break*, STRATFOR (Nov. 7, 2018), <https://worldview.stratfor.com/article/state-owned-enterprises-are-hard-habit-china-doesnt-want-break> [<https://perma.cc/JDU6-2S8D>].

11. Chi Dehua, *Chinese State-Owned Enterprises See Dramatic Profit Growth in 2017*, GB TIMES (Jan. 24, 2018), <https://gbtimes.com/chinese-state-owned-enterprises-see-dramatic-profit-growth-in-2017> [<https://perma.cc/F9XK-7H99>].

12. See, e.g., *State Capitalism*, ECONOMIST (Jan. 21, 2012), <https://www.economist.com/leaders/2012/01/21/the-rise-of-state-capitalism> [<https://perma.cc/J5RU-3ZC5>]; see also *How Strong Is China's Economy*, ECONOMIST (May 26, 2012), <https://www.economist.com/leaders/2012/05/26/how-strong-is-chinas-economy> [<https://perma.cc/9E8H-8T49>]; Aldo Musacchio & Francisco Flores-Macias, *The Return of State-Owned Enterprises: Should We Be Afraid?*, HARV. INT'L REV. WEBSITE (Apr. 4, 2009), <https://www.hbs.edu/faculty/Pages/item.aspx?num=36235> [<https://perma.cc/AC26-7HX5>].

13. Bruton et al., *supra* note 9, at 92.

14. Sergio Mariotti & Riccardo Marzano, *Varieties of Capitalism and the Internationalization of State-Owned Enterprises*, 50 J. INT'L BUS. STUD. 669, 669 (2019) (asserting that “state-dominated enterprises internationalize more . . . than privately-owned enterprises in coordinated (liberal) market economies, whereas they exhibit an inconstant behavior in state-influenced market economies.”); cf. Kiattichai Kalasin et al., *State Ownership and International Expansion: The S-Curve Relationship*, GLOBAL STRATEGY J., Mar. 2019, at 1 (finding that “[f]irms with a medium level of state ownership have an increasing level of international expansion because they have greater access to resources while the negative effects of state control are restrained by the dominance of private owners.”).

15. See Kowalski, et al., *supra* note 6, at 21-23; see also JOHN H. DUNNING & SARIANA M. LUNDAN, *MULTINATIONAL ENTERPRISES AND THE GLOBAL ECONOMY* 62 (2d ed. 2008).

16. Amir Guluzade, *Explained, the Role of China's State-Owned Companies*, WORLD ECON. F. (May 7, 2019), <https://www.weforum.org/agenda/2019/05/why-chinas-state-owned-companies-still-have-a-key-role-to-play/> [<https://perma.cc/HF36-52FR>] (noting that China has “109 corporations listed on the Fortune Global 500—but only 15% of them are privately owned”).

17. See generally NICHOLAS R. LARDY, *THE STATE STRIKES BACK: THE END OF ECONOMIC REFORM IN CHINA?* (2019) (describing and critiquing the risks of China’s state-led growth approach).

18. Hannah L. Buxbaum, *Foreign Governments as Plaintiffs in U.S. Courts and the Case Against “Judicial Imperialism,”* 73 WASH. & LEE L. REV. 653, 656 (2016).

participate in U.S. litigation through amicus brief submissions.<sup>19</sup> It is not uncommon now for U.S. courts to address issues involving foreign nations.<sup>20</sup> And, as Professor Wuerth describes, changes in the doctrine related to foreign sovereign immunity increasingly mean that foreign nations are viable defendants for U.S. actions.<sup>21</sup> That is particularly true after the dramatic expansion of laws post-September 11, which permitted U.S. citizens to file claims against foreign governments that had allegedly materially supported terrorist acts.<sup>22</sup> Somewhat along a similar vein, investor-state dispute settlement cases have increased in recent decades, as foreign states are challenged by foreign investors before international arbitration tribunals.<sup>23</sup>

These phenomena are not surprising given the United States' withdrawal from some certain forms of international collaboration and the dramatic growth of unilateral regulatory action, where the United States (and now other countries) use domestic law to address global challenges that once were the domain of international law and international relations.<sup>24</sup> To the extent that domestic law is projected abroad to govern global activities, the likelihood of conflict increases. A number of commentators have described how cross-border, transnational litigation is common,<sup>25</sup> and the practice, for good or for bad, of global forum shopping has become more prevalent.<sup>26</sup>

Another phenomenon suggests that the questions raised by Professor Wuerth will continue to be salient. While the Supreme Court has indicated

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19. See generally Kristen Eichensehr, *Foreign Sovereigns as Friends of the Court*, 102 VA. L. REV. 289 (2016); Matteo Godi, *A Historical Perspective on Filings by Foreign Sovereigns at the U.S. Supreme Court: Amici or Inimici Curiae?*, 42 YALE J. INT'L L. 409 (2017); Daniel Fahrendthold, Note, *Navigating "Respectful Consideration": Foreign Sovereign Amici in U.S. Courts*, 119 COLUM. L. REV. (forthcoming 2019), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3360806](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3360806) [<https://perma.cc/RWX6-4CN3>].

20. Zachary D. Clopton, *Judging Foreign States*, 94 WASH. U.L. REV. 1, 10–23 (2016) (describing ways in which U.S. courts “sit in judgment on foreign states”).

21. Wuerth, *supra* note 1, at 640–41, 676–79; see also Jacqueline M. Fitch, Note, *If the Shoe Fits: Rethinking Minimum Contacts and the FSLA Commercial Activity Exception*, 76 WASH. & LEE L. REV. ONLINE 123, 124–27, 149–51 (2019) (describing a more restrictive interpretation of foreign sovereign immunity). See generally *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992). But see *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 393 (2015).

22. See Juan Basombrio, *Nations on Trial*, L.A. LAWYER, Apr. 2017, at 16–21 (describing how new measures designed to address international terrorism have led to increased litigation against foreign nations).

23. See generally Yong Kyun Kim, *States Sued: Democracy, the Rule of Law, and Investor-State Dispute Settlement (ISDS)*, 43 INT'L INTERACTIONS 300 (2017).

24. See generally *Developments in the Law: Extraterritoriality*, 124 HARV. L. REV. 1226 (2011) (describing an increase in extraterritorial jurisdiction).

25. Pamela K. Bookman, *Litigation Isolationism*, 67 STAN. L. REV. 1081, 1083–84 (2015) (“Transnational suits—cases involving foreign parties, foreign conduct, foreign law, or foreign effects—and the law that governs them have growing significance in the United States and around the world.”). See generally Austen L. Parrish, *Personal Jurisdiction: The Transnational Difference*, 59 VA. J. INT'L L. 97, 103–09 (2019) (describing the growth of transnational litigation and the reasons for it).

26. See generally Pamela K. Bookman, *The Unsung Virtues of Global Forum Shopping*, 92 NOTRE DAME L. REV. 579 (2016); Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 CORNELL L. REV. 481 (2011).

its unwillingness to hastily assume that Congress has intended to regulate foreigners for their conduct in foreign countries, Congress continues to pass a significant number of laws that seek to reach foreign conduct untethered from international agreement. Once mostly limited to the area of antitrust and securities regulation, where gaps in global regulation existed, now a wide-range of domestic laws purport to address foreign conduct.<sup>27</sup> Also, as law firms with large global practices compete with one another for transnational cases, one can expect litigation to be an increasingly significant way for foreign nations to engage with one another.<sup>28</sup> Separate from this, continued state-supported terrorism, wide-spread reports of foreign interference with elections, and foreign state-directed cyber-attacks<sup>29</sup> mean that courts are called upon to resolve claims against foreign nations. Given this, as Professor Wuerth correctly notes, one can expect cases involving foreign nations to continue to have a prominent place in U.S. litigation.<sup>30</sup>

### C. A Broader Context

Over the last few years, three strands of scholarship have been prominent at the intersection of international law and foreign relations, to which Professor Wuerth's piece is related.

The first is a renewed interest in the Fifth Amendment Due Process Clause and the limitations it imposes on exercising judicial jurisdiction over foreigners. Driven by recent decisions that curtail the jurisdiction of state courts under the Fourteenth Amendment, a number of commentators have sought to deploy a national-contacts approach under the Fifth Amendment to

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27. See CHARLES DOYLE, CONG. RESEARCH SERV., 94–166, EXTRATERRITORIAL APPLICATION OF AMERICAN CRIMINAL LAW 1 (2007) (describing how a significant number of federal criminal statutes have extraterritorial application); see also Int'l Law Comm'n, Rep. on the Work of its Fifty-Eighth Session, UN Doc. A/61/10, at 516 (2006) (describing the "increasingly common phenomenon" of U.S. laws regulating foreign conduct); INT'L BAR ASS'N, REPORT OF THE TASK FORCE ON EXTRATERRITORIAL JURISDICTION 5–6 (2009) ("[T]he growth of multinational corporations doing business across borders and on a global scale, the ease of modern travel between states, the globalisation of banking and stock exchanges, technological developments such as the internet, and the emergence of transnational criminal enterprises and activities, have combined to encourage states to exercise jurisdiction beyond their territorial boundaries.")

28. See generally Donald Earl Childress III, *Rethinking Legal Globalization: The Case of Transnational Personal Jurisdiction*, 54 WM. & MARY L. REV. 1489 (2013).

29. For examples, see Ahmed Ghappour, *Searching Places Unknown: Law Enforcement Jurisdiction on the Dark Web*, 69 STAN. L. REV. 1075, 1075 (2016) (describing what "may well be the greatest extraterritorial expansion of enforcement jurisdiction in U.S. law enforcement history" related to criminal activity on the dark web). See generally Paige C. Anderson, *Cyber Attack Exception to the Foreign Sovereign Immunities Act*, 102 CORNELL L. REV. 1087 (2016) (describing the problem of foreign government-sponsored cyber-attacks). For a general discussion of emerging issues related to cybersecurity, see Jennifer Daskal, *The Un-Territoriality of Data*, 125 YALE L.J. 326, 365–78 (2015).

30. Wuerth, *supra* note 1, at 640–41; see also *id.* at 641 ("Litigation involving foreign states and [state-owned enterprises] appears to be increasing in part due to growing scrutiny of their conduct by the U.S. government.")

expand jurisdiction over foreign activity.<sup>31</sup> The number of scholars focused on the Fifth Amendment Due Process Clause's limitations on personal jurisdiction has increased because the Supreme Court has reserved addressing the issue of what restraints emanate from the Fifth Amendment (as opposed to the Fourteenth Amendment)<sup>32</sup> and because the Court, in a series of decisions, has arguably narrowed the scope of personal jurisdiction.<sup>33</sup> While Professor Wuerth's article is one of the few that explores Fifth Amendment Due Process limitations on foreign nations,<sup>34</sup> it is an important addition to this burgeoning literature.

Second is the long-standing literature focused on the constitutional rights of foreigners—separate from concerns related to personal jurisdiction.<sup>35</sup> A vast amount of scholarship has addressed what constitutional rights, if any, foreigners hold outside the United States.<sup>36</sup> That literature continues to be

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31. For recent examples, see generally A. Benjamin Spencer, *The Territorial Reach of Federal Courts*, 71 FLA. L. REV. 979 (2019) (advocating for a nation-wide contacts approach and arguing that federal court jurisdiction reach is greater under the Fifth Amendment); Jonathan Remy Nash, *National Personal Jurisdiction*, 68 EMORY L.J. 510 (2019) (arguing for the expanded use of national jurisdiction); William S. Dodge & Scott Dodson, *Personal Jurisdiction and Aliens*, 116 MICH. L. REV. 1205 (2018) (advocating for a national contacts approach); Patrick J. Borchers, *Extending Federal Rule of Civil Procedure 4(K)(2): A Way to (Partially) Clean Up the Personal Jurisdiction Mess*, 67 AM. U. L. REV. 413 (2017) (arguing for a national contacts approach consistent with the Fifth Amendment); Stephen E. Sachs, *How Congress Should Fix Personal Jurisdiction*, 108 NW. U. L. REV. 1301 (2014) (arguing for a system of nationwide federal personal jurisdiction). The literature focused on the Fifth Amendment Due Process Clause owes much to the landmark work of Leah Brilmayer and Charles Norchi. See Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 HARV. L. REV. 1217, 1219 (1992).

32. See *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873, 885 (2011) (Kennedy, J.) (plurality opinion); *Asahi Metal Indus. Co. v. Superior Court of Cal., Solano Cty.*, 480 U.S. 102, 113 n. \* (1987).

33. Aaron D. Simowitz, *Legislating Transnational Jurisdiction*, 57 VA J. INT'L L. 325, 325 (2018) (asserting that “the Supreme Court has, in the past few years, turned the United States into one of the most jurisdictionally stingy countries in the world.”); Scott Dodson, *Personal Jurisdiction in the Trump Era*, 87 FORDHAM L. REV. 73, 76 (2018) (describing the narrowing and restricting of jurisdiction); cf. Adam N. Steinman, *Access to Justice, Rationality, and Personal Jurisdiction*, 71 VAND. L. REV. 1401, 1417–34 (2018) (highlighting the substantive changes in recent case law, but questioning whether they require a more restrictive reading of minimum contacts).

34. Admittedly, a flurry of recent student notes has started to address the issue, although mostly in the form of legislative reform. See, e.g., Fitch, *supra* note 21; Lauren J. Rosenberger, Comment, *Our Allies Have Rights Too: Judicial Departure from In Personam Case Law to Interference in International Politics*, 5 NAT'L SEC. L.J. 307 (2017); Lauren Bursey, Note, *They're People Too: Why U.S. Courts Should Give Foreign Agencies and Instrumentalities Due Process Rights under the Foreign Sovereign Immunities Act*, 66 DEPAUL L. REV. 221 (2016); Frederick Watson Vaughan, Note, *Foreign States Are Foreign States: Why Foreign State-Owned Corporations Are Not Persons under the Due Process Clause*, 45 GA. L. REV. 913 (2011).

35. For discussions of personal jurisdiction over foreign defendants, see generally Parrish, *supra* note 25; Austen L. Parrish, *Sovereignty, Not Due Process: Personal Jurisdiction over Nonresident, Alien Defendants*, 41 WAKE FOREST L. REV. 1 (2006).

36. For some well-known examples, see generally GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW (1996); KAL RAUSTIALA, DOES THE CONSTITUTIONAL FOLLOW THE FLAG?: THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW (2009); Christina Duffy Burnett, *A Convenient*

important in a range of contexts.<sup>37</sup> Related is the literature addressing whether the U.S. Constitution requires adherence with international law.<sup>38</sup>

And finally, continued interest exists in the growing area of extraterritoriality and transnational law, which has become its own defined area of study.<sup>39</sup> To the extent that Professor Wuerth's article suggests some limitation on when U.S. courts may be used to achieve what previously would have been the purview of international law and diplomacy, Professor Wuerth provides an important balm to the dramatic growth of extraterritorial laws and the willingness of powerful nations to ignore limits on sovereign authority.<sup>40</sup>

## II. INTERNATIONAL LAW AND CONSTRAINING SOVEREIGN OVERREACH

Traditionally, international law—not constitutional law—has provided the answers to basic questions related to the procedural rights afforded to states. While there are good reasons to examine how much the U.S. Constitution incorporates international law norms,<sup>41</sup> many of the procedural protections Professor Wuerth describes (for example the jurisdictional protections afforded foreign states) already exist by virtue of international law.

International law restricts a state's exercise of power over people and activities in other states with which the state has no connection.<sup>42</sup> Derived

*Constitution?: Extraterritoriality After Boumediene*, 109 COLUM. L. REV. 973 (2009); Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909 (1991).

37. See generally Nathan S. Chapman, *Due Process Abroad*, 112 NW. U. L. REV. 377 (2017) (describing why the question of the geographic scope of constitutional rights remains an important issue); Sarah H. Cleveland, *Embedded International Law and the Constitution Abroad*, 110 COLUM. L. REV. 225 (2010) (addressing the appropriate relationship between international law and constitutional interpretation in the context of the extraterritorial application of the Constitution).

38. For some recent examples, see generally David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 932 (2010); Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555 (1984); David H. Moore, *Constitutional Commitment to International Law Compliance?*, 102 VA. L. REV. 367 (2016).

39. For a recent in-depth exploration, see generally DAN MARGOLIES ET AL., *THE EXTRATERRITORIALITY OF LAW: HISTORY, THEORY, POLITICS* (2019).

40. For a description of how the U.S. has used unilateral, extraterritorial law to project power, see Nico Krisch, *International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order*, 16 EUR. J. INT'L L. 369, 388 (2005) (describing U.S. resort to extraterritorial regulation). For a description in the European context, see Anu Bradford, *The Brussels Effect*, 107 NW. U.L. REV. 1, 1 (2012) (examining "the unprecedented and deeply underestimated global power that the European Union is exercising through its legal institutions and standards, and how it successfully exports that influence to the rest of the world"). The growth of extraterritorial laws has frustrated multilateral agreement. See TONYA L. PUTNAM, *COURTS WITHOUT BORDERS: LAW, POLITICS, AND U.S. EXTRATERRITORIALITY* (2016) (describing how use of extraterritorial law can reduce incentives to engage in other forms of lawmaking).

41. As Professor Wuerth explains, both constitutional law and international law may govern. Wuerth, *supra* note 1, at 647.

42. IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 298, 306–08 (4th ed. 1990) (describing the well-established requirement of public international law that a sufficient nexus must exist between the subject matter and the state to justify a state's exercise of jurisdiction).

from long-standing requirements of sovereign equality, self-determination, and non-intervention,<sup>43</sup> public international law and the international law of jurisdiction<sup>44</sup> often restrain states from regulating or intervening in the affairs of foreign states.<sup>45</sup> States have the right to develop their own economic, social, and cultural systems in the way they see fit (absent doing so in a way that harms others or violates basic human rights norms). The purpose of these rules is to reduce conflict and promote international peace.<sup>46</sup> Other international legal principles, such as the principles of good neighborliness,<sup>47</sup> the duty to cooperate,<sup>48</sup> and the no-harm rule,<sup>49</sup> give meaning to these jurisdictional limitations on sovereign power.

As Professor Wuerth describes, these international law limitations on sovereign authority were well-understood at the Founding.<sup>50</sup> U.S. states were equated to foreign states, with the question being how much sovereignty remained after ratification of the Constitution. And, at least for personal jurisdiction, the international laws of jurisdiction were given effect through the Due Process Clause. In the landmark *Pennoyer v. Neff* decision,<sup>51</sup> a violation of international law principles related to jurisdiction (then tightly

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43. U.N. Charter art. 2, ¶ 1 (“The Organization is based on the principle of the sovereign equality of all its Members.”); U.N. Charter art. 2, ¶ 7 (principle of non-intervention); *see also* Lori Fisler Damrosch, *Politics Across Borders: Nonintervention and Nonforcible Influence over Domestic Affairs*, 83 AM. J. INT’L L. 1, 8 (1989) (describing well-established principles of territorial integrity and political independence). For an overview, *see* Stuart Elden, *Contingent Sovereignty, Territorial Integrity and the Sanctity of Borders*, 26 SAIS REV. 11, 11 (2006) (“Since the end of World War II, the international political system has been structured around three central tents: the notion of sovereign equality of state, internal competency for domestic jurisdiction, and territorial preservation of existing boundaries.”).

44. *See generally* CEDRIC RYNGAERT, JURISDICTION IN INTERNATIONAL LAW (2d ed. 2015); THE OXFORD HANDBOOK OF JURISDICTION IN INTERNATIONAL LAW (Stephen Allen et al. eds., 2019). For a classic treatment, *see generally* Arthur Lenhoff, *International Law and the Rules on International Jurisdiction*, 50 CORNELL L.Q. 5 (1964).

45. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, 106 (June 27) (setting out the customary law principle of non-intervention). For the classic description, *see* EMERICH DE VATEL, THE LAW OF NATIONS (James Brown Scott ed., 1916) (1758) (“Nations [are] free and independent of each other, in the same manner as men are naturally free . . .”).

46. U.N. Charter art. 2, ¶ 4 (“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state . . .”). Hersch Lauterpacht described international law’s mission as leading “to enhancing the stability of international peace, to the protection of the rights of man, and to reducing the evils and abuse of national power.” Steven R. Ratner, *International Law: The Trials of Global Norms*, 16 FOREIGN POL’Y 65, 65–66 (1998).

47. Island of Palmas Case (U.S. v. Neth.), 2 R.I.A.A. 829 (Perm. Ct. Arb. 1928) (describing the good neighborliness principle).

48. Corfu Channel Case (United Kingdom v. Albania), 1949 I.C.J. Rep. 4, ¶ 51 (1949) (holding that it is “every state’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States”); Lake Lanoux Arbitration (Fr. v. Spain), 12 R.I.A.A. 281 (1957), 53 AM. J. INT’L L. 156 (1959) (describing the duty of cooperation).

49. Trail Smelter Arbitral Decision, 35 AM. J. INT’L L. 684, 687–88, 733–34 (1941) (setting forth the no-harm principle).

50. *See* Wuerth, *supra* 1, at 683.

51. 95 U.S. 714 (1877).

tied to territory) resulted in a Fourteenth Amendment violation.<sup>52</sup> As various scholars have described, jurisdictional doctrine in the United States drew from international law,<sup>53</sup> and even the modern test of minimum contacts originated in international law.<sup>54</sup> While the early cases addressed Fourteenth Amendment protections for inter-state actions, and sovereign immunity meant claims against foreign states did not often arise, it was clear that jurisdictional power was limited by international law.<sup>55</sup> It may be true, as Professor Wuerth describes in some depth, that a defect in “process” would leave a court without a case, and hence without judicial power.<sup>56</sup> But more simply, it was that the United States understood the well-established international law principles that limited sovereign power. This was less a “right” of the foreign state, but instead a structural limitation on U.S. (or any state’s) power.<sup>57</sup>

In the past, there was little need to consider litigation-related procedural protections embedded in the Constitution. Even putting aside immunity doctrines, disputes between foreign states would generally be resolved through diplomatic negotiation and international agreement, not through litigation.<sup>58</sup> And when court proceedings did occur, they were international in nature. The famous *Trail Smelter Arbitration* is a classic example of this approach, where Canada and the United States resolved their cross-border disagreements through international agreement and arbitration.<sup>59</sup>

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52. *Id.*; see also Friedrich Juenger, *Judicial Jurisdiction in the United States and in the European Communities: A Comparison*, 82 MICH. L. REV. 1195, 1198 (1984) (describing how *Pennoyer* limited jurisdiction by express reference to existing and fixed international and common law rules); cf. Stephen E. Sachs, *Pennoyer Was Right*, 95 TEX. L. REV. 1249, 1252 (2017) (arguing that jurisdiction is not a matter of constitutional law, but a matter of general, including customary, international law).

53. For some examples, see Patrick J. Borchers, *Comparing Personal Jurisdiction in the United States and the European Community: Lessons for American Reform*, 40 AM. J. COMP. L. 121, 123 (1992); Roger H. Trangsrud, *The Federal Common Law of Personal Jurisdiction*, 57 GEO. WASH. L. REV. 849, 871–76 (1989); Max Rheinstein, *The Constitutional Bases of Jurisdiction*, 22 U. CHI. L. REV. 775, 796–808 (1955).

54. Graham C. Lilly, *Jurisdiction Over Domestic and Alien Defendants*, 69 VA. L. REV. 85, 124 (1998).

55. Wuerth, *supra* note 1, at 647–48.

56. Wuerth, *supra* note 1, at 639, 674–76.

57. As Professor Damrosch explains: “[f]rom Chief Justice Marshall’s day onward, the recognition that foreign states and the United States interact as juridical equals on the level of international law and diplomacy outside the constitutional system, with rights and duties on the international plane not deriving from the Constitution, has shaped the Supreme Court’s approach to various problems of domestic law.” Damrosch, *supra* note 2, at 521 (citing *Schooner Exch. v. McFaddon*, 11 U.S. 116 (1812)).

58. *Id.* at 522 (quoting *Monaco v. Mississippi*, 292 U.S. 313, 330 (1934)) (noting the need to “employ the resources of diplomatic negotiations and to effect such an international settlement as may be found to be appropriate, through treaty, agreement of arbitration, or otherwise.”).

59. *Trail Smelter Arbitration*, *supra* note 49; DAVID HUNTER ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 511 (2d ed. 2002) (describing the *Trail Smelter* case and its use of international arbitration); H. Scott Fairley, *Private Remedies for Transboundary Injury in Canada and the United States: Constraints Upon Having to Sue Where You Can Collect*, 10 OTTAWA L. REV. 253, 278 (1978) (explaining the barriers to litigation in transboundary cases). For a comprehensive analysis of the *Trail Smelter* case, see

## III. THE BROADER IMPLICATIONS

The above has attempted to situate Professor Wuerth's work in the broader conversation about transnational and international law, and to underscore its significance. This final Part expresses some skepticism over Professor Wuerth's approach, while explaining how, ultimately, the main thrust of her argument—that U.S. courts face limits on their judicial power, regardless of the immunity doctrines—is correct.

A. *Potential Downsides*

As an initial matter, it is unclear that locating rights of foreign nations in the U.S. Constitution would be a positive development, at least from a policy perspective. First, in the past, constitutional doctrine has often made it more difficult to enter into international agreements that would clarify and better allocate jurisdiction between states.<sup>60</sup> The collapse and stalled negotiation of the Hague Judgments Convention in the 1990s is just one example where U.S. constitutional doctrine rendered international agreement out of reach.<sup>61</sup> To the extent U.S. constitutional doctrine diverges from international law, the ability to enter international judgment and jurisdictional treaties will likely be frustrated. Second, many of the concerns that Professor Wuerth raises could be corrected legislatively through statutory changes. When foreign states and their enterprises are not entitled to immunity, Congress could choose to afford those states the same protections afforded private citizens.<sup>62</sup> That symmetry could be achieved through amendment of the Foreign Sovereign Immunities Act, which would obviate the need to address the more challenging and thornier constitutional questions. For the reasons set forth by Professor Wuerth, Congress should have some interest in closing this gap.

A broader pragmatic concern also exists. Recently, some U.S. scholars have re-envisioned international law to suggest that some of the core structural limitations no longer apply.<sup>63</sup> It is a tendentious position that is

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TRANSBOUNDARY HARM IN INTERNATIONAL LAW: LESSONS FROM THE TRAIL SMELTER ARBITRATION (Rebecca M. Bratspies & Russell A. Miller eds., 2006).

60. For a more detailed description of some of this history, see Parrish, *Sovereignty, Not Due Process*, *supra* note 35, at 53, (citing articles and noting that “U.S. jurisdictional rules have made it near impossible to negotiate an international judgments treaty”).

61. Linda Silberman, *Comparative Jurisdiction in the International Context: Will the Proposed Hague Judgments Convention Be Stalled?*, 52 DEPAUL L. REV. 319, 320-27, 330-31 (2002).

62. See generally Fitch, *supra* note 21; Jason E. Myers, *Preserving International Comity: The Foreign Sovereign Immunities Act of 176 and OBB Personenverkehr AG v. Sachs*, 90 S. CAL. L. REV. 913 (2017). As Professor Damrosch argued: “[s]ymmetry and sound policy suggest that [foreign states] should likewise enjoy the judicially implemented rights and protections available to private parties in connection with commercial and financial activities.” Damrosch, *supra* note 2, at 497.

63. For one prominent example, see RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: JURISDICTION § 302, intro. note (AM. LAW INST. 2018) (finding that “[w]ith the exception of sovereign immunity, modern customary international law generally does not impose limits on jurisdiction to adjudicate”). For an explanation for why the Fourth Restatement is incorrect and inconsistent with established understandings of

contrary to long-established understandings of public international law. It also creates a new standard for determining customary law that, if accepted, would potentially eliminate wide swaths of established law. If this attempt and others to further marginalize international law is successful,<sup>64</sup> however, finding that limits exist in the Constitution would put the U.S. at a comparative disadvantage. When the constitutional and international law limits align, as they did in *Pennoyer* and earlier cases, they are mutually reinforcing. But if there exists only a constitutional right, it provides a one-way check on state power (limiting U.S. action under U.S. constitutional principles, but not providing a similar check on foreign states exercising power over U.S. interests, in states that may not have similar domestic law restraints). Unlike constitutional law, international jurisdictional law constrains, in principle, the power of all states. Traditionally the U.S. sought to develop international law in a way that was consistent with U.S. law limitations precisely for this reason.

Lastly, it is unclear how far the historical and textual analysis takes us. In the Founding era personal jurisdiction was limited by the territorial limits of international law. Those principles, articulated most famously by *Pennoyer*, were jettisoned not only in the state-to-state context,<sup>65</sup> but also in the foreign defendant context.<sup>66</sup> This is then not to disagree with Professor Wuerth on her history, but to question its continuing relevance. In other words, Professor Wuerth is not the first to advocate for a return to first principles, without much traction in the U.S. Supreme Court.<sup>67</sup> It is true that from time to time, some members of the Court have indicated a willingness to use history and text to return to earlier doctrine.<sup>68</sup> But usually the historical approach has been used as a way to reinforce longstanding practice, not to depart from it. And it may be that the Court's more recent pronouncements are best understood as a rejection of the legal realism and fairness approaches to jurisdiction articulated most famously by Justice Brennan in the 1970s and 1980s or an attempt at tort reform, rather than any true willingness to fully revisit modern jurisdiction doctrine.

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international law, see Austen L. Parrish, *Adjudicatory Jurisdiction and Public International Law: The Fourth Restatement's New Approach*, in *THE RESTATEMENT AND BEYOND: THE PAST, PRESENT, AND FUTURE OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES* (Oxford University Press, forthcoming 2020).

64. GARY BORN, *INTERNATIONAL LAW IN AMERICAN COURTS* (forthcoming 2020).

65. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316-17 (1945).

66. *Asahi Metal Indus. Co. v. Superior Court of Cal., Solano Cty.*, 480 U.S. 102, 116 (1987).

67. See, e.g., Patrick J. Borchers, *The Death of the Constitutional Law of Personal Jurisdiction: From Pennoyer to Burnham and Back Again*, 24 U.C. DAVIS L. REV. 19, 57 nn. 226-27 (1990) (arguing that the Court should abandon the notion that state court personal jurisdiction is a matter of constitutional law, based on an historical argument); see also Sachs, *supra* note 52, at 1251-55, 1318-27 (urging for *Pennoyer*'s revival and a return to "jurisdiction's general—and international—law origins").

68. See, e.g., *Burnham v. Super. Ct. Cal. Cty. Marin*, 495 U.S. 604, 610-16 (1990).

*B. Other Considerations*

Ultimately, in many ways my preferred approach is not all that different from Professor Wuerth's. If the question is whether state power is limited, the answer seems clear under established international law principles. If the U.S. Constitution embeds those international law principles substantively, then perhaps, despite the pragmatic difficulties described above, that is fine. In an article written in the mid-2000s, while I highlighted the doctrinal inconsistencies with finding that due process protections apply to foreign defendants, I took the position that procedural protections should apply as a result of sovereignty and international comity.<sup>69</sup> Those sovereignty-based imperatives are even stronger when foreign nations are involved.

The Supreme Court also seems cognizant and receptive again to the idea that the U.S. Constitution embodies the sovereignty principles inherent in the structure of the international legal system. Just this year in *Gamble v. United States*, the Court reaffirmed the importance of sovereignty in both the domestic and foreign contexts in a Fifth Amendment case.<sup>70</sup> And in the personal jurisdiction realm, the Court has reaffirmed in the foreign context that sovereignty concerns loom large.<sup>71</sup>

Still, while Professor Wuerth points to history and text to suggest that foreign states are "persons," she does not fully respond to the broader conceptual issue.<sup>72</sup> As Professor Damrosch highlighted in her famous piece: "[t]o the extent that the Constitution is a social contract establishing a system of self-government, permanent outsiders . . . seem to have little claim to invoke constitutional 'rights.'"<sup>73</sup> That seems to hold more force for foreign nations. So while there is a logic to saying that if foreign citizens are entitled to due process protections so too should foreign states be, it is not entirely clear why foreign citizens are protected by virtue of constitutional doctrine (rather than international law).<sup>74</sup> As others have argued, generally the

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69. Parrish, *Sovereignty, Not Due Process*, *supra* note 35, at 28–34.

70. *See generally* No. 17–646, (U.S. June 17, 2019).

71. Parrish, *supra* note 25, at 122–25 (describing recent cases).

72. Wuerth, *supra* note 1, at 676–79.

73. Damrosch, *supra* note 2, at 487; *see also* 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, 135 (2001) ("[B]oth international law experts and judges have taken the view that foreign states stand outside of the constitutional structure and, as such, are not entitled to assert constitutional rights").

74. Robin Efron, *Solving the Nonresident Alien Due Process Paradox in Personal Jurisdiction*, 116 MICH. L. REV. ONLINE 123, 129 (2018) (describing how finding a constitutional right to resist personal jurisdiction enjoyed by the nonresident alien defendant in a civil lawsuit is remarkably out of alignment with that same nonresident alien's ability to assert nearly every other constitutional right); Gary A. Haugen, *Personal Jurisdiction and Due Process Rights for Alien Defendants*, 11 B.U. INT'L L.J. 109, 118–25 (1993) (exploring the tension between the Court's holding in *Verdugo-Urquidez* and its jurisprudence in personal jurisdiction cases); Karen Nelson Moore, *Aliens and the Constitution*, 88 N.Y.U. L. REV. 801, 826–34 (2013) (describing how outside the personal jurisdiction context aliens have limited or no Fifth Amendment rights). Courts have also noted this problem. *See, e.g.*, *Afram Exp. Corp. v. Metallurgiki Halyps, S.A.*, 772 F.2d 1358, 1362 (7th Cir. 1985) (noting that although "countless cases" assume due process protections apply to foreign defendants, the assumption

Constitution, in the context of foreign defendants, “defers to international law to prescribe jurisdiction among the nation-states of the world.”<sup>75</sup>

#### CONCLUSION

Professor Wuerth’s article on the due process rights of foreign nations raises important question that will likely remain important as litigation involving foreign states in the United States continues. While she may be correct as a matter of history and text, why foreign nations today would have constitutional rights rather than litigation-related protections under international law remains unclear. Nevertheless, if Professor Wuerth’s suggested approach helps courts more closely examine and more cautiously assert power over foreign defendants and foreign states, it may well, on balance, be a welcome development.

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has not been fully examined); *GSS Grp. Ltd. v. Nat’l Port Auth.*, 774 F. Supp. 2d 134, 139 (D.D.C. 2011), *aff’d*, 680 F.3d 805 (D.C. Cir. 2012) (“It is not clear why foreign defendants . . . should be able to avoid the jurisdiction of United States courts by invoking the Due Process Clause when it is established in other contexts that nonresident aliens without connections to the United States typically do not have rights under the United States Constitution.”).

75. Andrew L. Strauss, *Where America Ends and the International Order Begins: Interpreting the Jurisdictional Reach of the U.S. Constitution in Light of a Proposed Hague Convention on Jurisdiction and Satisfaction of Judgments*, 61 ALB. L. REV. 1237, 1242 (1998).