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## Constructing the Original Scope of Constitutional Rights

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# CONSTRUCTING THE ORIGINAL SCOPE OF CONSTITUTIONAL RIGHTS

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## INTRODUCTION

A number of scholars have questioned the utility of originalist methods for answering constitutional questions sounding in foreign affairs.<sup>1</sup> Questions about the territorial and personal scope of constitutional rights are said to be especially hard because the U.S. Constitution provides few clues about how to understand its relationship to background law of other nations and common law norms about legislative and judicial jurisdiction.<sup>2</sup> In the words of Ingrid Wuerth, no one has yet explained “why, how, and what kind of history is relevant” for answering such questions.<sup>3</sup> Nevertheless, legal scholars persistently write papers on the original history of the Constitution and foreign affairs, not for the sake of so-called pure historical inquiry, but to help answer contemporary constitutional questions.<sup>4</sup>

Wuerth’s recent paper, *The Due Process and Other Constitutional Rights of Foreign Nations*, is “Exhibit A.”<sup>5</sup> She relies on conventional legal materials and forms of reasoning to argue that Article III and the Due Process

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1. See generally Ingrid Wuerth, *An Originalism for Foreign Affairs?*, 53 ST. LOUIS U. L.J. 5 (2008) (hereinafter Wuerth, *Originalism*); Eugene Kontorovich, *Originalism and the Difficulties of History in Foreign Affairs*, 53 ST. LOUIS U. L.J. 39 (2008).

2. See Andrew Kent, *The New Originalism and the Foreign Affairs Constitution*, 82 FORDHAM L. REV. 757, 762 (2013).

3. Wuerth, *Originalism*, *supra* note 1, at 8.

4. See, e.g., AMANDA L. TYLER, *HABEAS CORPUS IN WARTIME: FROM THE TOWER OF LONDON TO GUANTANAMO BAY* (2017); MICHAEL W. MCCONNELL, *THE PRESIDENT WHO WOULD NOT BE KING* (manuscript on file with author); ANTHONY J. BELLIA JR. & BRADFORD R. CLARK, *THE LAW OF NATIONS AND THE UNITED STATES CONSTITUTION* (2017); MICHAEL D. RAMSEY, *THE CONSTITUTION’S TEXT IN FOREIGN AFFAIRS* (2007); Nathan S. Chapman, *Due Process of War*, 94 NOTRE DAME L. REV. 639 (2018); Gregory Ablavsky, “*With the Indian Tribes*”: *Race, Citizenship, and Original Constitutional Meanings*, 70 STAN. L. REV. 1025 (2018); Sarah H. Cleveland & William S. Dodge, *Defining and Punishing Offenses Under Treaties*, 124 YALE L.J. 2202 (2015); Ingrid Wuerth, *The Captures Clause*, 76 U. CHI. L. REV. 1683 (2009); Andrew Kent, *A Textual and Historical Case Against a Global Constitution*, 95 GEO. L.J. 463 (2007).

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

Clause protect the notice and personal jurisdiction rights of foreign states.<sup>6</sup> Yet she provides no description or defense of her methodology.<sup>7</sup> Without passing on her conclusions, this brief essay offers a qualified defense of scholarly (and judicial) attempts to construct the original territorial and personal scope (or domain) of constitutional rights.

As to “why history is relevant,” the answer is simple: perhaps the only matter of consensus in the contemporary practice of American constitutional law is that the text of the Constitution is the source of that law. Partly through the influence of originalism, American constitutional scholars and jurists have grown more sensitive to the importance of historical context for understanding the meaning of that text.<sup>8</sup> Wuerth (and many other “foreign affairs” scholars) take this for granted, but it seems worth making explicit.

As to “how” and “what kind of history,” the answer, as Wuerth and others have shown, is far more challenging. The late eighteenth-century legal ecosystem—the relationships among the customary law of nations, treaties, statutes, the common law, and the Constitution—was vastly different than our own. This is especially the case for the scope of constitutional rights. This response argues that Wuerth’s paper illustrates the most persuasive way to go about the task—one question at a time, with an emphasis on conventional legal materials and forms of argumentation. Some questions will call for especially imaginative constructions. This does not render them irrelevant, but it does caution some modesty about the extent to which they ought to trump competing constructions arising from practice and precedent. Despite her reluctance, then, Wuerth’s methods are entirely consistent with a confident originalism.

### I. WHY HISTORY?

Wuerth’s question is whether foreign states, as litigants in federal court, are entitled to separation of powers and due process protections, in particular the requirements of personal jurisdiction and notice. To answer the question, she turns to constitutional text and history. She provides little defense of this approach, especially considering her prior concerns about it. Moreover, the move is arguably unnecessary to resolve her question. This Part first explains why it is not obvious that the history is necessary, and then explains why it is.

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6. *See generally id.*

7. *See generally id.*

8. *See generally* RAMSEY, *supra* note 4, at 2 (“[T]hrough close attention to the Constitution’s language and the historical and linguistic context in which it was written, we can uncover the text’s basic foreign affairs structure as it was designed and understood in the founding era.”); Kent, *supra* note 2. Importantly, “foreign affairs” is an artificial category of constitutional law. I do not mean to ignore the scholars exploring questions of separation of powers, territorial expansion, and individual rights (among other things) touching on issues of “foreign affairs” who have discussed interpretative methodology.

A. *An Argument Without History*

First, it is not obvious that the turn to history is necessary (or even advisable). The doctrinal problem Wuerth seeks to resolve is the product of an unreflective interpretation of the word “person” in the Due Process Clause. The U.S. Supreme Court has held that the word does not refer to U.S. states,<sup>9</sup> and it declined to decide whether it refers to foreign states.<sup>10</sup> On this basis, lower courts have held that the Clause does not protect foreign states.

Quite apart from history, this interpretation of the Fifth Amendment seems wrong. First, common sense: the modern default rule is that foreign states are entitled to immunity from suit for their governmental acts (without their consent), but not for their non-governmental acts. For governmental acts, at least, why would the alternative to immunity be vulnerability to judgment without basic norms of fairness? The greater privilege (immunity) would seem to imply the lesser rights (notice and basic fairness). And if states’ acts are nongovernmental, why would they be entitled to lesser protection than foreign corporations? The contrary position—that foreign states that are, for whatever reason, not immune from suit may nevertheless be subject to judgment without notice and personal jurisdiction—would be an aberration.

Second, the modern doctrinal ground for the notion that foreign states are *not* entitled to notice and personal jurisdiction is dubious. The Supreme Court has never decided the issue. Lower courts have concluded that foreign states are not “persons” under the Due Process Clause, and therefore outside its protection,<sup>12</sup> because the Supreme Court, in *South Carolina v. Katzenbach*,<sup>13</sup> held that U.S. states are not such “persons.”<sup>14</sup> But the holding in *Katzenbach* can hardly be taken at face value. What the Court rejected was the notion that the Voting Rights Act violated a state’s due process rights by regulating its elections without prior judicial oversight.<sup>15</sup> The Court’s holding was probably right, but for the wrong reason. The case implicated South Carolina’s relative sovereignty, not its “life, liberty, or property.” The Due Process Clause was simply irrelevant. The Court was quite right when it said that “[t]he objections to the Act which are raised under these provisions [including the Due Process Clause] may therefore be considered only as additional aspects of the basic question presented by the case: Has Congress exercised its powers under the Fifteenth Amendment in an appropriate manner in relation to the States?”<sup>16</sup> The case should be understood to have no implications for one in which a foreign (or U.S.) state’s property interests are directly at stake.

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9. *South Carolina v. Katzenbach*, 383 U.S. 301, 323 (1966).

10. *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 619 (1992).

12. *See Frontera Res. Azer. Corp. v. State Oil Co.* 582 F.3d 393, 399 (2d Cir. 2009).

13. 383 U.S. 301 (1966).

14. *Id.* at 323.

15. *See id.*

16. *Id.* at 324.

Yet to resolve this puzzle, Wuerth turns to the historical sources. That they would yield an answer is not obvious. Her question is in some respects deeply anachronistic—exactly the kind that creates a puzzle for historical sources. During the early republic, a foreign state would rarely, if ever, have been a party to a suit in federal court without its consent. A foreign state's vessels and cargo were subject to condemnation as war prizes under the law of nations, but that law exempted the sovereign's person (and ambassadors) from the jurisdiction of another state's courts. In my view, the fact that prize cases proceeded according to municipal law and traditional admiralty procedures is powerful evidence that a foreign state—when subject to a U.S. court's jurisdiction—would have been entitled to traditional notice and due process.<sup>17</sup> But it does not show that a state would have been subject to jurisdiction without its consent. If a state did consent to suit, however, such consent would have guaranteed jurisdiction and customary notice. So Wuerth's questions would rarely, if ever, have arisen. They arise now because Congress has eliminated sovereign immunity in some cases, meaning that foreign states can be haled into court *without* their consent, giving rise to the question of personal jurisdiction.

So why turn to this seemingly moribund past for answers to contemporary legal problems? The only defense Wuerth offers for her methodology is that constitutional text and history are “fruitful avenues of inquiry because they yield straightforward and sensible answers to modern questions about the constitutional status of foreign states.”<sup>18</sup> With respect, I think this misses the point. If the answers are straightforward and sensible, then why look to history for them? We could have come up with them ourselves, and the fact that they are straightforward and sensible would simply be a mark in their favor, to be weighed against their costs. In any case, this is not much of a justification in light of her own prior concerns about originalist methods for answering foreign affairs questions.<sup>19</sup> Her methodology deserves a better defense.

### B. *Why History*

The best defense is (perhaps frustratingly) simple: American constitutional decision-makers privilege the text of the Constitution when answering a constitutional question, and they rely on historical context to ascertain the text's meaning. Why?

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17. See generally Nathan S. Chapman, *Due Process Abroad*, 112 NW. U.L. REV. 377 (2017).

18. See Wuerth, *supra* note 5, at 4–5.

19. Elsewhere she has argued that “[h]istory is essential to understanding the relationship between executive authority and war and the struggle and acquiescence of Congress vis-à-vis the President,” ostensibly because of “the lack of judicial opinions in this area.” Wuerth, *Originalism*, *supra* note 1, at 27. But again, this presumes rather than explains the salience of history for constitutional construction.

The short answer is that they do so because they do (and in fact always have). As the judge in Auden's poem unsatisfyingly insisted, "let me explain it once more, Law is The Law."<sup>20</sup>

This circularity does not mean the practice is arbitrary. There is a good reason for it. The Constitution is a text. American lawyers have always privileged the constitutional text over any other sources of constitutional law. If there is any issue to take with Justice Jackson's *bon mot*, it is that the most "fixed star in our constitutional constellation" has nothing to do with political orthodoxy or officials high or petty—it is rather that the Constitution is the Constitution.<sup>21</sup>

And words have meaning. Even the words that comprise laws. Originalists have not sufficiently explored the *distinction* between written laws (and among them, perhaps, constitutions) and other genres of texts., but they are quite right that words have meaning, and they gain that meaning from context, namely from contemporaneous usage by relevant communities. What makes laws unique is that their meaning depends upon their application to past, present, and future events beyond the text. In this sense, the meanings of laws are always procrustean. But this does not diminish the importance of their words, or the historical usage of those words, for ascertaining their principles.

American lawyers have always applied this sensibility about the Constitution's text when attempting to ascertain whether it prohibits or permits certain conduct. In 1798, Justices Samuel Chase, William Paterson, and James Iredell all resorted to English constitutional history to ascertain whether the Ex Post Facto Clause applied to noncriminal cases.<sup>22</sup> In 2014, Justice Breyer turned to founding-era resources to conclude that the Recess Appointments Clause is "ambiguous," while Justice Antonin Scalia, dissenting, turned to the same sorts of resources to conclude that its meaning is "plain."<sup>23</sup>

And it is not only the Constitution that gets this treatment. It just so happens that the Constitution is especially old. Yet consider the recent debates about the meaning of the Alien Tort Statute,<sup>24</sup> which was enacted before the Bill of Rights. The debates focused on the provision's text and history, not because the judges and lawyers participating in them were originalists, but because they were lawyers.<sup>25</sup>

Just so, the constitutional text and history matter because American law says they matter. American law says other things matter, too—such as

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20. W.H. Auden, *Law Like Love*, in AUDEN POEMS 87 (Edward Mendelson ed., 1991).

21. See *W. Va. Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943). For the distinction between the Constitution and a constitution, see, for example, Mark Tushnet, *Constitution*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 217 (2012).

22. See *Calder v. Bull*, 3 U.S. 386 (1798). Justices Paterson and Iredell also relied on Blackstone's definition of an ex post facto law. See *id.* at 396, 398.

23. *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2568, 2592 (2014).

24. 28 U.S.C. § 1350 (2012).

25. See, e.g., William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists,"* 19 HAST. INT'L & COMP. L. REV. 221 (1996).

subsequent practice and precedent.<sup>27</sup> The relative weight of these “modalities” of construction is what theorists and decision-makers dispute. One need not be an originalist in any strict sense to accept this; one just need be familiar with the norms of American constitutional construction, both historically and today.<sup>28</sup> Whether or not necessary to persuade a particular decision-maker, Wuerth’s resort to the historical understanding of the constitutional text is at least consistent with ordinary constitutional decision-making, and, in many cases, for many decision-makers, central to it.

## II. HOW TO CONSTRUCT THE SCOPE OF CONSTITUTIONAL RIGHTS?

Wuerth’s argument proceeds by a careful inquiry into the original meaning of Article III and the Due Process Clause of the Fifth Amendment and the implications of the original understanding for the litigation rights of foreign states.<sup>29</sup> Throughout, she relies principally on conventional legal materials and forms of legal reasoning to engage in a close analysis of the meaning of the constitutional text.<sup>30</sup> Although I have questions about some of her inferences and conclusions, I want to argue that her methodology is generally spot-on.

First, though the original meaning and scope of constitutional rights are hard questions for a variety of reasons, the best way to tackle them is piecemeal, one question at a time, rather than categorically. Second, Professor Wuerth is right to rely most heavily on materials and forms of reasoning that would have been familiar to late-eighteenth century legal decision-makers.

### A. *One Right at a Time*

Originalists today obsess about methodology. Most agree that the object of constitutional interpretation should be the original meaning of the Constitution.<sup>31</sup> Where a particular provision’s meaning was originally vague or ambiguous, though, many accept that jurists should “construct” its applicable principles.<sup>32</sup> (Some would also look to subsequent debate and

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27. See, e.g., PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 12–22 (1991).

28. This is the case whether one is a constitutional pluralist, see *id.*, or committed to originalism as the sole mode of constitutional interpretation, see William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349 (2015).

29. See generally Wuerth, *supra* note 5.

30. See generally *id.*

31. See, e.g., ILAN WURMAN, A DEBT AGAINST THE LIVING: AN INTRODUCTION TO ORIGINALISM 26 (2017); Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL’Y 599, 599 (2004).

32. See, e.g., Lawrence B. Solum, *Intellectual History as Constitutional Theory*, 101 VA. L. REV. 1111, 1122 n.22 (2015) (“If the communicative content is vague or open textured, then the underdetermination is fixed and constitutional construction will be required to fill in the legal content of constitutional doctrine.”); KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 5–14 (1999).

practice to settle, or “liquidate,” the provision’s meaning.)<sup>33</sup> Originalists disagree, however, about the boundaries between “interpretation” and “construction.” They also disagree about the proper method that jurists should use to “construct” the meaning of a provision—should they rely principally (or exclusively) on original history, or may they resort to modern moral and political concerns? For originalists, these disputes are grounded in the original meaning of the text, which may, in at least some cases, permit or even require a construction that changes over time depending on the evolution of another area of law (such as international law) or changes in public morality.

For those committed to approximating an original meaning of the constitutional text, the construction of *rights* provisions can be particularly challenging.<sup>34</sup> Some provisions are somewhat easy because they parrot specific norms from the English constitutional tradition,<sup>35</sup> but some are wholly novel (like the Establishment Clause),<sup>36</sup> and others include innovations unique to the U.S. Constitution (like the Seventh Amendment).<sup>37</sup> Still others protect “the” right at issue, perhaps presuming that the audience was familiar with its substance and scope, *i.e.*, the First Amendment’s prohibition on infringing “the freedom of speech, and of the press.”<sup>38</sup>

Furthermore, the provisions did not prompt much dispute during drafting or ratification, so there is less legislative history to illuminate the meaning of the Bill of Rights than there is for much of the original Constitution.<sup>39</sup> Those who championed the original Constitution believed that a Bill of Rights was unnecessary, redundant with the Constitution’s provision of limited, enumerated powers.<sup>40</sup> Some large portion of the public probably agreed with James Madison that the best that could be said for a Bill of Rights was that it was “neither improper nor altogether useless.”<sup>41</sup>

If constitutional rights were “simple and acknowledged principles” not “of a doubtful nature,”<sup>42</sup> it should be easy to ascertain their original meaning.

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33. See William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 13–20 (2019); Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 10–21 (2001).

34. For one of the more influential approaches to the topic, see generally AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* (1998).

35. See, e.g., William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393 (1995); Michael W. McConnell, *Tradition and Constitutionalism Before the Constitution*, 1998 U. ILL. L. REV. 173, 197 (1998).

36. See Nathan S. Chapman, *Forgotten Government-Missionary Partnerships: New Light on the Establishment Clause* (draft on file with author).

37. U.S. CONST. amend. VII.

38. *Id.* amend. I.

39. See generally THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS (Cogan ed., 1997).

40. See, e.g., THE FEDERALIST No. 84, at 442–51 (Alexander Hamilton) (Carey & McClellan eds., 2001). For a thorough consideration of the relationship between ratification of the Constitution and concern for a Bill of Rights, see generally PAULINE MAIER, *RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–88* (2010).

41. 1 ANNALS OF CONG. XXX (1789) (Rep. Madison).

42. X ANNALS OF CONG. XXX (1789) (Rep. Madison), in 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 1259 (Charlene Bangs Bickford et al. eds., 1992).

Yet scholars have gone back and forth on the original meaning of virtually every single one of the provisions. As Jud Campbell has suggested in a series of articles, the historical materials may be especially hard for modern lawyers to assess because late eighteenth-century American conceptions of rights and, relatedly, judicial review, were dramatically different than the conceptions embodied in contemporary doctrine and practice.<sup>43</sup> Some constitutional rights, Campbell argues, were “natural rights.” People gave them up for the public good.<sup>44</sup> Legislatures (and in some cases juries), not courts, assessed the extent to which the public good demanded an infringement of the right. Others were “positive rights” based on past political agreements (such as the right to jury trial) that limited the sovereign’s authority.<sup>45</sup> Courts would enforce these, but there was some disagreement about whether courts should construe them narrowly to cover only the paradigmatic governmental overreach, or should construe them broadly to cover new, analogous acts.<sup>46</sup> Campbell’s interpretation of the history may be incorrect, but its plausibility illustrates how complicated and shifting the evidentiary eddies can be.

The *territorial and personal scope* of constitutional rights are even more difficult.<sup>47</sup> At the time of the founding, numerous rules and principles under the law of nations and the common law overlapped to reinforce an underlying principle of reciprocal loyalty and protection. Subjects, including temporary subjects within the sovereign’s territory peacefully, owed a duty of loyalty, or obedience, to the sovereign; the sovereign had a reciprocal duty to provide the protection of the law.<sup>48</sup> In general, then, the result was that permanent subjects (or citizens) of a sovereign were entitled to the sovereign’s protection of law (or legal rights) wherever in the world they were. Resident aliens who were the subject of a sovereign at peace with their host sovereign also enjoyed this reciprocal relationship with their host. Enemy aliens (including residents) and aliens outside the sovereign’s territory were not entitled to the protection of the law.<sup>49</sup>

As Andrew Kent has argued, it is challenging to map this background law onto constitutional rights.<sup>50</sup> The Constitution simply does not mention these norms, and some of the provisions of the Bill of Rights, especially the Fifth

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43. See, e.g., Jud Campbell, *Judicial Review and the Enumeration of Rights*, 15 GEO. J. L. & PUB. POL’Y 569 (2017) [hereinafter Campbell, *Judicial Review*]; Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 252 (2017) [hereinafter Campbell, *First Amendment*]; Jud Campbell, *Republicanism and Natural Rights at the Founding*, 32 CONST. COMM. 85 (2017).

44. Campbell, *First Amendment*, *supra* note 41, at 272–73; 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND IN FOUR BOOKS 125 (1953) (noting that natural rights could be “so far restrained by human laws . . . as is necessary and expedient for the general advantage of the public”).

45. Campbell, *Judicial Review*, *supra* note 41, at 577–78.

46. *Id.*

47. See generally Kent, *supra* note 2.

48. See generally Philip Hamburger, *Beyond Protection*, 109 COLUM. L. REV. 1823 (2009).

49. See *id.*; see also Kent, *supra* note 4, at 507.

50. Kent, *supra* note 2.

Amendment, seem to provide absolute rights to all “person[s].” Kent chalks this up to hasty and poor drafting and argues that the Constitution’s rights provision should be constructed to incorporate the background principle of reciprocal loyalty and protection.<sup>51</sup> This is a sensible way to resolve the issue.

Yet, as Kent concedes, it is not the only sensible approach.<sup>52</sup> The rules and principles under the law of nations and the common law that reinforced the underlying principle of reciprocity could—and did—change over time. Nations could depart from the principles of the law of nations, and courts could determine when the norms under either source of law had changed.<sup>53</sup> So the question is whether the provisions of the Bill of Rights should be construed to have incorporated or to have changed the background principle of reciprocity with respect to the rights they articulate. This question is bound up with whether the Bill of Rights was understood to be a fresh source of positive rights or simply a declaration of existing rights (natural and positive).

For Wuerth’s case, added to this complexity is the uncertainty of the historical relationship between jurisdiction over the person (or the *rem*) and the requirement of due process of law. Stephen Sachs has recently argued that the Due Process Clause of the Fourteenth Amendment probably was understood to require personal jurisdiction, but only indirectly: it prohibited courts from depriving parties of rights without first acquiring jurisdiction over the person according to the *general law*, rather than creating a new constitutional law of personal jurisdiction.<sup>54</sup>

Wuerth does not provide a thorough analysis of these tensions, but she does argue that a construction of the historical territorial and personal scope of a constitutional right should proceed one right at a time.<sup>55</sup> This contrasts with a categorical approach. Such an approach could take one of two forms. The first would argue that the Bill of Rights incorporated the territorial and personal jurisdiction rules of the common law and the law of nations circa 1791.<sup>56</sup> This is analogous to the view that the Seventh Amendment incorporates the civil jury requirements of the common law as of 1791; the Constitution fixed the rules as of 1791, and those rules are now ours. The second categorical approach would agree that the Constitution incorporated the law of nations and common law jurisdictional norms, but that, as those

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51. *See id.* at 772. *See generally* Kent, *supra* note 4.

52. *See generally* Kent, *supra* note 2.

53. *See, e.g.*, William S. Dodge, *Customary International Law, Congress and the Courts: Origins of the Later-in-Time Rule*, in MAKING INTERNATIONAL LAW WORK IN THE GLOBAL ECONOMY: ESSAYS IN HONOR OF DETLEV VAGTS 531, 534–35 (Bekker et al. eds., 2010) (arguing that Americans would have agreed with Vattel that a nation could depart from the “customary” law of nations, but not the “necessary” or “voluntary” law of nations, which were based on natural law).

54. Stephen E. Sachs, *Pennoyer Was Right*, 95 TEX. L. REV. 1249 (2017); *see also* Wendy Collins Perdue, *What’s “Sovereignty” Got to Do with It? Due Process, Personal Jurisdiction, and the Supreme Court*, 63 S.C. L. REV. 729, 732 (2012).

55. Wuerth, *supra* note 5, at XX.

56. *See generally* Kent, *supra* note 4; Hamburger, *supra* note 46.

norms change over time, the Constitution's jurisdictional reach changes alongside them.<sup>57</sup> The Constitution's relationship to the law of nations is both categorical and dynamic.

I am on Wuerth's side. This is for several reasons, only some of which sound in the current academic manifestation of originalism. Most importantly, as mentioned above, contemporary constitutional construction gives pride of place to constitutional text. The focus on text is not exclusive, of course, but it is central. One implication is that interpreters/constructors should show care for linguistic details, including differences, across constitutional provisions. Such differences are rarely determinative, but they do bear legal meaning, at least in that they render some constructions more or less plausible. For instance, the Fifth Amendment's use of "person" and the Eighth Amendment's absolute prohibition on cruel and unusual punishment both suggest a broad application across categories of people.<sup>58</sup> The Second and Fourth Amendments, by contrast, refer to the rights of "the people," which may signal a narrower group of beneficiaries.<sup>59</sup> Perhaps these are differences of style or careless drafting; they cannot be both. But given the priority of text in the tradition and contemporary practice of constitutional interpretation, constructions that downplay those differences should bear the burden of showing that they are meaningless.

Second, constitutional argumentation during the early republic strongly suggests that Americans responsible for decision-making were comfortable advancing an array of arguments about the territorial and personal scope of constitutional rights, including arguments that they did not map precisely onto background norms from the common law and customary international law. Central and territorial officials bickered about the application of constitutional limits to territorial governments.<sup>60</sup> During the quasi-war with France, congressmen advanced diverse arguments about the application of the Bill of Rights to foreigners, including resident (quasi-) enemies.<sup>61</sup> They had to navigate not only ambiguity about the meaning and substance of rights, but also ambiguity about the relationship between the common law principles and the constitutional norms. During the War of 1812, American decision-makers such as Chancellor Kent and Chief Justice Marshall showed a willingness to apply new principles of the general law to protect resident enemy aliens.<sup>62</sup> As a matter of black letter law today, many questions about the territorial and personal scope of constitutional rights remain unresolved.<sup>63</sup>

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57. See, e.g., William S. Dodge, *Customary International Law, Change, and the Constitution*, 106 GEO. L.J. 1559, 1585 (2018).

58. U.S. CONST. amends. V, VIII.

59. *Id.* amends. II, IV; see also Wuerth, *supra* note 5, at 56.

60. Gregory Ablavsky, *Administrative Constitutionalism in the Northwest Territory*, 167 U. PA. L. REV. (forthcoming 2019) (manuscript at 37) (on file with author).

61. See, e.g., DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801*, at 256–58 (1997); Gerald Neuman, *Whose Constitution?*, 100 YALE L.J. 909, 927–43 (1991).

62. See Chapman, *supra* note 4, at 651–54, 699–701.

63. See, e.g., *Hernandez v. Mesa*, 137 S. Ct. 2003 (2017).

Decision-makers, especially courts, proceed one case at a time, reluctant to make sweeping generalizations.<sup>64</sup>

Third, there is little reason to think that questions about the territorial or personal scope of constitutional rights should be constructed any differently than the scope of federal power in general. There seems to be little dispute that separation of powers and federalism provisions apply to the federal government, regardless where or over whom it exercises its power. Indeed, some of those provisions are essential for understanding the contours of federal power over places outside the states. Over the District of Columbia, for instance, Congress has the power to “exercise exclusive Legislation in all Cases whatsoever.”<sup>66</sup> In other places, Congress’s power is limited by enumeration, including the Necessary and Proper Clause.<sup>67</sup> During the early republic, many jurists, including John Marshall, presumed that Congress, though subject to implicit and express constitutional limits, was not restricted by the customary law of nations or the common law.<sup>68</sup> If the law of nations did not limit the federal government’s power, why would it limit its limits? Decision-makers ascertain the territorial and personal scope of constitutional powers one power at a time; they should do the same with the express limits on those powers.

Indeed, the express limits in the original Constitution of 1789 seem to suggest territorial and personal diversity. Consider the following examples from Section 9 of Article I (where Madison originally planned to locate the Bill of Rights). The last clause prohibits officers of the United States from accepting emoluments, offices, or titles “from any King, Prince, or foreign State.”<sup>69</sup> One obvious application of this provision is to U.S. ambassadors subject to corruption by their host (or another) nation. This purpose would be undermined if it did not apply extraterritorially. The third clause, which prohibits bills of attainder and ex post facto laws, speaks categorically: none of them “shall be passed.”<sup>70</sup> Under the view that the Constitution incorporated background jurisdictional norms of the common law and the law of nations, this provision would not apply to legislative acts against an enemy alien or any nonresident alien, including a corporation. Perhaps this is correct, but it has a high textual hurdle to clear.

The Bill of Attainder Clause is not merely a limit on the federal government as a whole; it is a limit on Congress’s authority to enact a certain sort of law. The reason that many in the founding generation gave for the prohibition is that such laws confound the separation of the legislative, executive, and judicial functions—they pronounce guilt and punishment

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64. *See, e.g.*, *United States v. Verdugo-Urquidez*, 494 U.S. 259, 275 (1990) (Kennedy, J., concurring).

66. U.S. CONST. art. I, § 8, cl. 17.

67. *See generally* *McCulloch v. Maryland*, 17 U.S. 316 (1819).

68. *See, e.g.*, *Murray v. The Charming Betsey*, 6 U.S. (2 Cranch) 64 (1804); William S. Dodge, *The New Presumption Against Extraterritoriality*, 133 HARV. L. REV. (forthcoming 2019) (manuscript at 77) (on file with the author).

69. CITE.

70. CITE.

without the application of prior law by an independent court.<sup>71</sup> As Americans often put it, such laws purport to deprive persons of their rights without due process of law.<sup>72</sup>

None of this requires the conclusion that the Due Process Clause was understood to protect resident enemy aliens, foreigners abroad, or, for that matter, foreign states. But it does complicate an easy division between constitutional limits sounding in separation of powers and federalism and those sounding in individual rights. Many American jurists believed that such restrictions were intertwined and mutually reinforcing. Whether they are best construed to have incorporated, or to have entrenched, law-of-nations and common law territorial and personal limits is a case-by-case question.

This history suggests something further: declarations of the “original meaning” or “original understanding” of the personal and territorial scope of constitutional provisions, especially rights, should be modestly held. In important respects, there was no original *understanding* at all. There is a text and historical context that provide raw materials for constitutional argumentation. Jurists today, no less than decision-makers two hundred years ago, rely on those legal materials to construct plausible, even persuasive, legal meanings for the purpose of answering specific, often anachronistic, legal questions. This is precisely what Wuerth has done and many other scholars routinely do.<sup>73</sup>

Yet the construction of the territorial and personal scope of constitutional rights, because it requires facility with so many competing historical and contemporary literatures, represents the far edge of lawyerly historical synthesis. This calls for an extra measure of modesty. It also calls for an extra measure of deference to contrary constructions by historical decision-makers in the legislative, executive, or judicial branch. Perhaps the most defensible grammar for such arguments is that the original text and history “support” one construction or another, rather than that they “show” that the Constitution has this or that meaning.

### *B. Privileging the Methods of Decision-Makers*

This leads to a final point about methodology. Originalists disagree about whose “understanding” of the text ought to matter for contemporary construction—the framers, the ratifiers, a literate member of the general public, lawyers, etc. I have suggested that Wuerth’s argument depends

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71. See Chapman & McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1781–82 (2012). This is why *Bank Markazi v. Peterson*, 136 S. Ct. 1310 (2016), was such a close case. Congress conditioned the property rights of the Bank of Iran on a finding by a federal court in a pending case. *Id.* at 1317. The Supreme Court held, over a dissent by Chief Justice Roberts and Justice Sotomayor, that Congress had not trod on the judiciary’s purview. *Id.* A legislative act purporting to directly take Iran’s money and assign it to the plaintiffs, however, would have. And Iran would have had the right to contest such a deprivation under the Due Process Clause. See Chapman & McConnell, *supra*.

72. See generally *id.*

73. See generally Wuerth, *supra* note 5.

principally on sources of authority and forms of reasoning that have been the stock-in-trade of constitutional argumentation from the beginning of the republic. I think this is the right approach. In the terms of originalist methodological literature, it bears the closest affinity to the “original legal methods” approach.<sup>74</sup>

Throughout this response, I have referred to constitutional “decision-makers.” By this, I have meant to suggest that the arguments advanced and found persuasive by those with special responsibility for making constitutional decisions ought to have added weight. This is so for two reasons in addition to the notion that “the” original meaning of the text is whatever lawyers would have made of it.

First, decision-makers have always been, and are today, under oath to support the Constitution. Whatever else the oath may do, it at least has the possibility to uniquely pique the decision-maker’s conscience, providing an extra guarantee of good faith constitutional construction.<sup>75</sup> Second, relying on conventional legal materials and conventional forms of legal reasoning is how American decision-makers have *always* interpreted, constructed, and applied the Constitution. There is long tradition of privileging certain kinds of constitutional argumentation, and this tradition has its own normative weight in addition to whatever the first generation of constitutional interpreters may have done.<sup>76</sup> Put differently, Wuerth has engaged in an original form of constitutional *argumentation*, whether she has come up with “the” original meaning of the Constitution or not.

#### CONCLUSION

I have meant to support the most important aspects of Wuerth’s approach to resolving a specific constitutional question. She relies on conventional textual and historical arguments.<sup>77</sup> So do many other scholars who study the Constitution’s provisions touching on foreign affairs. Yet she, like most other foreign affairs scholars, offers little justification for this methodology.<sup>78</sup> Perhaps none is needed. Perhaps scholars eschew “originalist” methods for its perceived political taint. What I have suggested here, however, is that there are good reasons for precisely the way she has gone about her work. Some of them are highlighted by originalist methodology. Some of them may be anathema to many originalists. But all

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74. See generally John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751 (2009); John O. McGinnis & Michael B. Rappaport, *Unifying Original Intent and Original Public Meaning*, 113 NW. U. L. REV. 1371 (2019).

75. Evan D. Bernick & Christopher R. Green, *What Is the Object of the Article VI Oath?* (forthcoming); Richard M. Re, *Promising the Constitution*, 110 NW. U. L. REV. 299, 299 (2016). See generally H. JEFFERSON POWELL, CONSTITUTIONAL CONSCIENCE: THE MORAL DIMENSION OF JUDICIAL DECISION (2008).

76. See, e.g., H. JEFFERSON POWELL, THE MORAL TRADITION OF AMERICAN CONSTITUTIONALISM: A THEOLOGICAL INTERPRETATION (1993).

77. See generally Wuerth, *supra* note 5.

78. See generally *id.* There are, of course, exceptions. See *supra* note 8 and accompanying text.

of them, I would suggest, are consonant with an enduring tradition of constitutional construction—even on matters of foreign affairs.