

UGA International Law Colloquium  
April 7, 2008

## **An Originalism for Foreign Affairs?**

**Ingrid Wuerth**

Vanderbilt University School of Law

This article provides an initial, descriptive answer to this question and concludes that there is an uncomfortable and unclear relationship between contemporary originalism and many aspects of foreign affairs law. It describes several positive accounts of originalism and explains why they are hard to apply in the context of foreign affairs. The difficulties arise in part because some defenses of originalism – especially Randy Barnett’s natural rights view -- appear simply irrelevant to many key issues in foreign affairs. Other justifications of originalism, like Keith Whittington’s popular sovereignty approach, have important application to foreign affairs but their proponents have not resolved key questions that such application would raise. Consequentialist defenses of originalism beg the question of what happens if originalist reasoning leads to very bad results in the area of foreign affairs. Finally, there are aspects of foreign relations law that make doing originalism particularly difficult, whatever the justification. These issues may generate difficulties for originalism in many other areas of constitutional law, particularly separation of powers, but the question I pose focus here is about foreign affairs and those who suggest, argue, or assume that originalism applies, full-force, in this context.