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ORIGINALISM AND THE DIFFICULTIES OF HISTORY IN FOREIGN AFFAIRS

EUGENE KONTOROVICH*

INTRODUCTION

This Article spotlights some of the idiosyncratic features of admiralty law at the time of the founding. These features pose challenges for applying the original understanding of the Constitution to contemporary questions of foreign relations. Federal admiralty courts were unusual creatures by Article III standards. They sat as international tribunals, primarily applying international and foreign law, freely hearing cases that implicated sensitive questions of foreign policy and diplomacy, and liberally exercising universal jurisdiction over disputes solely between foreigners.¹ Whether today's district courts can or should ever play similar roles is the subject of wide-ranging debates. But an understanding of the judicial role in foreign relations would benefit from a discussion of admiralty, which in 1789 was where most cases bearing on external relations were heard.

This Article comments on several papers presented at the Saint Louis University School of Law symposium on *The Use and Misuse of History in Foreign Relations Law*, and in particular, on Prof. Ingrid Wuerth's *An Originalism for Foreign Affairs?*² Most of the papers in this symposium examine episodes from the early history of the Republic that bear on contemporary questions of foreign relations law. Prof. Wuerth, however, addresses a methodological question—the applicability of constitutional originalism to foreign relations law.³

Part I of this Article challenges some of Prof. Wuerth's claims about the inapplicability of originalism to foreign relations. However, while the originalist enterprise is not more unsound in foreign relations than elsewhere, there are certainly major challenges. As Wuerth notes, because most originalist scholarship has not focused on questions of foreign affairs, the

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1. See, e.g., *Thomassen v. Whitwell*, 23 F. Cas. 1003 (E.D.N.Y. 1877) (No. 13,928).

2. Ingrid Wuerth, *An Originalism for Foreign Affairs?*, 53 ST. LOUIS U. L.J. 5 (2008).

3. *Id.* at 6.

particular methodological difficulties have not been fully charted.⁴ Part II of this Article contributes to this project by examining one factor that makes originalist materials problematic—but not useless—in answering modern constitutional questions.

Early foreign relations issues were fundamentally intertwined with admiralty. That branch of jurisdiction was unique in many ways, particularly in its cosmopolitanism. Part II discusses the idiosyncratic internationalist features of early admiralty law and practice, and explains how these features call for some wariness in translating the original understanding to today's questions.

I. REASONS FOR ORIGINALISM

Prof. Wuerth's paper takes several normative accounts of originalism and asks whether they support applying the doctrine to foreign affairs questions.⁵ First, she considers the argument that originalism is about protecting individual rights, and the related notion that it applies principally to judicial review of legislation.⁶ It might have less to say, she suggests, about the balance of power between Congress and the Executive—a key feature of many foreign powers debates, such as those over who gets to start a war or make an international agreement.⁷ Next, she considers pragmatic or consequentialist arguments for originalism.⁸ Originalism in the foreign relations context might not be practical because determining the original meaning can be difficult.⁹ Moreover, the original understanding may dangerously constrain or embarrass the country given the many developments over the past two centuries in the international and domestic political arrangements. Other countries are not bound by eighteenth century constitutions. If America is, then it may greatly limit its ability to participate fully in the international realm.

A. *Subject-Specific Constitutional Methodology*

Perhaps the most intriguing part of Wuerth's project is the idea that methods of constitutional interpretation should vary based on subject matter. It has been suggested that certain provisions, such as the Due Process Clauses and the ban on "cruel and unusual punishments," by virtue of their vague

4. *Id.* at 6–8.

5. *Id.* at 14–21.

6. *Id.* at 9–10; *see also* Michael D. Ramsey, *Presidential Originalism?*, 88 B.U. L. REV. 353, 359–62 (2008) ("If originalism is truly founded only, or even primarily, on the institutional limitations of judges, it can gain little traction in debates over purportedly unconstitutional presidential actions.").

7. Wuerth, *supra* note 2, at 10–11, 13–14.

8. *Id.* at 19–21.

9. *Id.* at 20–21.

language, lend themselves to a free-form open reading.¹⁰ In contrast, the Article I provisions describing the legislative processes have a specificity that demand strict textualism. But the idea that the *subject matter* of the constitutional question should determine the method of interpretation—that originalism could be good for individual rights and inappropriate as applied to other areas—appears novel.¹¹ It is a refreshing perspective at a time when constitutional theory has been taken over by a panoply of competing “-isms.” Constitutional scholars adopt a particular “-ism” with a religious exclusivity. What is often forgotten is that there may be no single all-purpose tool for constitutional construction.

However, choosing interpretive theories by subject area raises serious problems. The Constitution itself does not distinguish between subject areas. Indeed, nowhere does the text use the words “foreign affairs.” It does not treat these powers specially in any way. The idea of foreign affairs as a distinct area is a gloss put on the Constitution. Prof. Wuerth suggests that some justifications for originalism resound mostly in individual rights cases.¹² Even if this were so, it is hard, if not impossible, to separate foreign affairs questions about rights or separation of powers from federalism.

Some of the major questions in foreign affairs today involve the breadth of the treaty power as it bears on individual rights, and the legality and location of responsibility for detention of foreigners by the military. Prof. Wuerth focuses on a particular subset of foreign affairs questions, those that involve conflicts of authority between the Executive and Legislative Branches. Her paradigmatic example is the initiation of wars.¹³ Few other decisions have as many consequences for individual liberty—from forcible conscription to being sent by the government to suffer great injury or death. The separation of powers is designed to protect individual rights, not just to create governmental inefficiency. Thus, the arrangements for restraining government power by separating and dividing it are as much a part of rights as are their definition and the prophylactic rules established to guard them.¹⁴

10. See, e.g., Robert W. Bennett, *Originalism: Lessons from Things that Go Without Saying*, 45 SAN DIEGO L. REV. 645, 651–63 (2008) (discussing the emergence of political parties and other examples of ways in which differences in the historical reality at the time of the Framing and today make originalism problematic).

11. Prof. Wuerth notes that Vermeule and Posner “reject originalism during times of crises (which has some, albeit imperfect, overlap with foreign affairs).” Wuerth, *supra* note 2, at 20. This is not surprising since they do not embrace originalism in any situation.

12. *Id.* at 10–16.

13. *Id.* at 9.

14. See, e.g., *Miranda v. Arizona*, 384 U.S. 436 (1966) (establishing a prophylactic rule of criminal procedure).

B. Popular Justifications for Originalism

Wuerth considers the applicability of originalism to foreign affairs by looking at the justifications for originalism produced by a few distinguished theorists.¹⁵ However, even if some theories of originalism may not say anything about some foreign affairs questions, this does not mean any foreign affairs questions are not addressed by any theory of originalism. The defenses of originalism offered by Whittington,¹⁶ Barnett,¹⁷ and McGinnis and Rappaport¹⁸ are not intended to be exclusive. They do not say that some other account of originalism might not better explain certain features or applications of the doctrine. (Obviously in advancing a particular theory, the authors focus on the basis and implications of their position.) There is nothing inconsistent about supporting originalism for some mix of reasons drawn from the various theories. It is not clear from Wuerth's article whether she thinks that some foreign affairs questions cannot be usefully approached under any of these views of originalism.

In any case, the justifications for originalism on which Wuerth focuses are, as she acknowledges, not the only ones.¹⁹ Perhaps the most obvious motivation for construing the Constitution in accord with its original meaning is that this is the proper way of determining what any legal document means. The Constitution is composed of finite words intended to have a binding legal effect. As Edwin Meese, one of the architects of the originalist revival puts it, "The language they chose meant something."²⁰ Originalism seeks to discover what that is, based on the simple belief that constitutional language is controlling because that is what written constitutions do.

A second major justification is that originalism limits the discretion inherent in constitutional interpretation. Because the relevant materials are a closed set, fixed in time, originalism limits the entire space of possible positions about constitutional meaning. As a result, jurisprudence "would not be tainted by ideological predilection" because of the limited range of available interpretations.²¹ Thus, originalism (much like textualism) locks in particular meanings.

15. Wuerth, *supra* note 2, at 9.

16. KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW (1999).

17. RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004).

18. John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 101 NW. U. L. REV. 383 (2007).

19. Wuerth, *supra* note 2, at 9.

20. Edwin Meese, III, U.S. Att'y Gen., Speech Before the American Bar Association (July 9, 1985), in ORIGINALISM: A QUARTER-CENTURY OF DEBATE 53 (Steven G. Calabresi ed., 2007).

21. *Id.*

Of course, when the original sources are incomplete or murky, there may be several possible interpretations of original meaning. One may worry that scholars will bias their work towards those original meanings that would yield current results in accord with their sympathies. Even originalism can have the problem of “looking over a crowd and picking out your friends.”²² However, any interpretive approach can only be evaluated in comparison to its competitors. The primary competing method is some variety of “living constitutionalism,” where meaning is determined based largely on the felt needs of the present. In this view, the crowd out of which one might pick friends is unlimited. Originalism is a risk-averse strategy that sees the awkwardness of dead hand control as less dangerous than the potential abuse of a living, grasping, manipulative hand. The former at least has no agenda in today’s political debates.

Whether or not originalism is *successful* in discovering what the text means and limiting discretion, these two goals seem to apply to any and all parts of the Constitution, including foreign relations. They also seem to apply regardless of which branch is interpreting the Constitution. After all, Congress and the Executive have sworn to uphold the Constitution,²³ and neither one can do that without knowing what it means. If anything, the need for accuracy and dangers of ideological predilection seem greater in the political branches. Under these justifications, originalism would be irrelevant only if the Constitution does not address a particular question—which could be quite often.

Finally, while it may be true that scholars of originalism have focused on individual rights, the reasons for this may be entirely contingent and historical. The decades before the revival of interest in originalism had seen a massive growth in rights jurisprudence.²⁴ Originalists concerned themselves with these questions because that’s where the action was. Their focus on these questions cannot be understood to be some kind of waiver of originalist theory as applied to other types of questions.

22. Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983) (quoting Judge Harold Leventhal in a private conversation).

23. U.S. CONST. art. VI, § 1, cl. 3; *see also* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (arguing that judicial review stems in part from judges’ swearing an oath).

24. *See* Keith Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL’Y 599, 599–604 (2004).

II. ORIGINALISM'S OPPORTUNITIES AND DIFFICULTIES

A. *Originalism Conducive to Foreign Affairs*

In some ways originalism is particularly well-suited to the foreign affairs Constitution. A particular difficulty for any backward-looking theory of interpretation is novel questions. It may be hard to apply a theory based on a document written in 1789 to matters entirely unknown at the time, such as a highly integrated national economy, the regulatory state, safe and widely available contraception and abortion, an Air Force, and so forth. This is a problem for originalism generally, not just as applied to foreign relations. Originalism, as Wuerth notes, does not claim to have the answers to all constitutional questions.²⁵

However, one thing there was plenty of in 1789 was foreign relations. The nation was born in war, and its first Chief Executive was the commander of its wartime armies. The fledgling nation was greatly preoccupied with foreign relations, and many of the major controversies of its early years involved diplomacy with the European powers. In these episodes, one can search for evidence of the founding generation's understanding of the constitutional arrangements they had just made. In relation to foreign affairs, the Constitution could easily have a particular and determinate public meaning—as opposed to many of today's individual rights questions, which were simply not on anyone's mind at the time.

Prof. Wuerth points out that foreign relations issues have, more than any others, been resolved outside the courts by the political branches.²⁶ However, this may make originalism more, not less, relevant to such questions. One of the biggest obstacles to a practical program of originalism in other areas of law is stare decisis. Indeed, originalists are sometimes accused of seeking what could amount to a jurisprudential revolution to restore a “Constitution in exile” by reversing hundreds of precedents.²⁷ With political branch action, precedent counts for much less. The original text remains directly available. It is truly a Constitution rather than a body of constitutional law that the political branches measure their actions against.²⁸ This may be why the originalist revival began not in the courts but rather in Reagan Justice Department decisions about how they would conduct their litigation strategy.²⁹

25. Wuerth, *supra* note 2, at 21–22.

26. *Id.* at 5–6.

27. See Cass Sunstein & Randy Barnett, Legal Affairs Debate Club - Constitution in Exile? (May 2–6, 2005), http://legalaffairs.org/webexclusive/debateclub_cie0505.msp.

28. *Cf.* *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) (“[I]t is a constitution we are expounding.”).

29. See Whittington, *supra* note 24, at 599.

B. A Difficulty: The Uniqueness of Admiralty

The original meaning of the Constitution may sometimes be difficult to relate to present circumstances. Any sophisticated tool needs to be used carefully and wisely. Precisely because less attention has been focused on originalism in foreign relations, there may be more work to do in establishing the basic guidelines. Thus, originalism may have only begun to show its promise in this area.

Foreign relations take place in a certain cultural and legal context. For example, at the time of the Framing, declarations of war, while by no means required for hostilities, played an important role in initiating military conflicts.³⁰ Today they have fallen entirely into disuse.³¹ The idea of a president serving as a battlefield leader was not implausible; today it is laughable. Similarly, the Constitution refers to specific—and rather obsolete—concepts, such as letters of marque, piracy, and “[o]ffences against the Law of Nations.”³²

One under-appreciated source of difficulty caused by legal changes over time is the unique nature of the admiralty jurisdiction. Many, and perhaps most, of the foreign relations decisions in the period of the Articles of Confederation, and even in the first years of the Constitution, arose in admiralty.³³ In this symposium on the use of history in foreign relations law, all three of the papers examining historical episodes focus on maritime events—the Franco-British prize cases of the 1790s,³⁴ a mutiny on a British vessel,³⁵ and the naval war with the Confederacy.³⁶ This Article argues that given certain idiosyncratic features of admiralty, particular caution is required in applying lessons from such historical events to present day questions of foreign relations law, which almost always involve non-maritime matters and arise in cases in law or equity.

30. See Robert J. Delahunty & John Yoo, *Making War*, 93 CORNELL L. REV. 123, 155–57 (2007).

31. See Jide Nzelibe, *The Uniqueness of Foreign Affairs*, 89 IOWA L. REV. 941, 977–79 (2004) (observing that while “[t]he early constitutional history of the foreign affairs powers strongly suggests that the Framers understood the constitutional meaning of these terms would be consistent with that of early British constitutional practice and the prevailing international norms at the time,” many of those practices, such as “declared war,” have become empty formalities or entirely fallen into desuetude).

32. U.S. CONST. art. I, § 8, cl. 10–11.

33. See Michael G. Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 WISC. L. REV. 39, 81–82.

34. David Sloss, *Judicial Foreign Policy: Lessons from the 1790s*, 53 ST. LOUIS U. L.J. 145 (2008).

35. Michael P. Van Alstine, *Taking Care of John Marshall’s Political Ghost*, 53 ST. LOUIS U. L.J. 93 (2008).

36. Thomas H. Lee, *The Civil War in U.S. Foreign Relations Law: A Dress Rehearsal for Modern Transformations*, 53 ST. LOUIS U. L.J. 53 (2008).

Admiralty was its own world, with its special procedure, jurisdiction, substantive law, and lawmaking, entirely unlike common law courts.³⁷ Some of these differences are constitutionally significant. Two constitutionally salient features of admiralty are the judges, inherently authorized to fashion and apply a complete body of substantive common law, and the absence of a jury.³⁸ The admiralty nature of a proceeding can make such a difference that applying admiralty cases outside of an admiralty context may be nonsensical.

1. Admiralty Courts as International Tribunals

Admiralty courts functioned under a number of unique rules. These remarkable features were not particularly American innovations, but rather were taken from British practice and paralleled the practices of the admiralty courts of all western maritime nations.³⁹ Admiralty courts were in a sense nationally-sponsored international tribunals. They proceeded under the forms of civil law.⁴⁰ They took their rules of decision from *jus gentium*, a supposedly universal law of the sea that was a form of customary international law,⁴¹ ostensibly derived from ancient “laws of Oleron and Rhodes.”⁴² Thus admiralty decisions regularly surveyed the laws of other nations to discern the correct rule of decision. American courts of admiralty applied this law without any particular congressional instruction, following the general practice of British and European admiralty courts.⁴³

37. See Thomas S. Rue, *The Uniqueness of Admiralty and Maritime Law*, 79 TUL. L. REV. 1127 (2005) (explaining the differences between admiralty and common law).

38. See *Waring v. Clarke*, 46 U.S. (5 How.) 441 (1847).

39. GERALD J. MANGONE, UNITED STATES ADMIRALTY LAW 1 (1997); James A.R. Nafziger, *The Evolving Role of Admiralty Courts in Litigation Related to Historic Wreck*, 44 HARV. INT'L L.J. 251, 266 (2003).

40. See *Glass v. The Sloop Betsey*, 3 U.S. (3 Dall.) 6 (1794); St. George Tucker, *View of the Constitution of the United States*, in BLACKSTONE'S COMMENTARIES app. D (1803), reprinted in ST. GEORGE TUCKER, VIEW OF THE CONSTITUTION OF THE UNITED STATES WITH SELECTED WRITINGS 91, 361–62 (Liberty Fund 1999).

41. See *The Jerusalem*, 13 F. Cas. 559, 561 (C.C.D. Mass. 1814) (No. 7293) (describing U.S. admiralty as an “ancient” jurisdiction that “exercises its powers according to the law of nations, and those rules and maxims of civil right, which may be said to form the basis of the institutions of all Europe”); J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 142 (3d ed. 1990).

42. Tucker, *supra* note 40, at 361; accord BAKER, *supra* note 41, at 142. See generally *Thompson v. The Catharina*, 23 F. Cas. 1028, 1029 & n.4 (D. Pa. 1795) (No. 13,949) (tracing maritime law applied by U.S. courts to ancient Greece).

43. See *The Catharina*, 23 F. Cas. at 1029 (“[When there is no contrary federal law or principle], we must resort to the regulations of other maritime countries, which have stood the test of time and experience, to direct our judgments, as rules of decision.”); Nafziger, *supra* note 39, at 266 (“[T]he general maritime law of the United States has strong roots in international custom. In extending judicial power ‘to all cases of admiralty and maritime jurisdiction,’ the framers of the Constitution apparently had English admiralty practice in mind, itself based on the civil law of continental Europe.” (quoting U.S. CONST. art. III, § 2, cl. 1)).

2. Admiralty and Foreign Policy

Admiralty courts in the United States decided many matters involving the rights of foreigners and foreign sovereigns, as they did in England and the colonies.⁴⁴ The foreign relations role of federal judges sitting in admiralty was an intentional part of the constitutional design:

[T]his class of cases has, or may have, an intimate relation to the rights and duties of foreigners in navigation and maritime commerce. It may materially affect our intercourse with foreign states, and raise many questions of international law, not merely touching private claims, but national sovereignty and national reciprocity.⁴⁵

Even more than other admiralty cases, matters of prize necessarily involved affairs of state. However, federal judges' ability to reach these questions was not seen as an inherent part of the Article III judicial function, but rather a particular incident of admiralty jurisdiction.

Prize courts were an integral and necessary part of a system of private military enterprise that no longer exists. Thus, admiralty judges' determinations in prize cases, even in the 1790s, would be a poor basis from which to interpolate the original meaning of the Constitution as regards questions such as the political branches' power to wage war without judicial interference or scrutiny. (Similarly, Congress's ability to issue writs of *marque* shows that the Legislative Branch has some role in controlling hostilities, but it does not answer particular questions about the Legislature's ability to do so through mechanisms other than the writ of *marque*.)

3. Admiralty's Universal Jurisdiction

Even more remarkably, admiralty courts routinely exercised "universal jurisdiction," deciding disputes entirely between foreigners arising outside of the United States and with no substantive U.S. nexus.⁴⁶ Again this was understood as an inherent part of admiralty jurisdiction and required no further statutory authorization. Because admiralty courts were, in a sense,

44. 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1670, at 469 (Melville M. Bigelow ed., 5th ed., Boston, Little, Brown, & Co. 1891).

45. *Id.*

46. ALFRED CONKLING, THE ADMIRALTY JURISDICTION, LAW AND PRACTICE OF THE COURTS OF THE UNITED STATES 33 (Albany, W.C. Little & Co. 1848) ("As far as any judgment can be formed from the meag[er] reports we have of the early decisions of the district courts . . . little or no distinction seems to have been originally made in respect to jurisdiction, between cases in which foreigners were alone concerned, and those in which our own citizens were interested.").

international courts of international law, they were understood to be open to disputes between any parties whose vessel came into port.⁴⁷

Universal jurisdiction was exercised for reasons of practicality and reciprocity.⁴⁸ Because of the long time between port calls, the only place many disputes could be settled was the first port the ship entered. Otherwise the defendants or witnesses might simply disembark before the voyage was completed. This was particularly true for disputes about seamen's wages and shipboard torts. It was thought to be a denial of justice to make sailors (a group with a famously high discount rate) wait to pursue legal remedies until their ship returned to its home port, perhaps months or years later. Perhaps more importantly, disputes were often about rights in the vessel or cargo itself.⁴⁹ Such suits could only be practically resolved in the port where the plaintiffs first found the vessel, as it or its cargo could change hands several times before it finished its voyage.⁵⁰

Being able to resolve such disputes in port was an important facilitator of the maritime economy. Maritime nations provided such adjudicative services in part as a courtesy to other states with the expectation that they reciprocate in kind. As Justice Story put it in *The Jerusalem*, upholding jurisdiction over a loan dispute between foreigners involving a Greek ship moored in Boston:

To [admiralty's] guardian care . . . the whole commercial world look for security and redress, and without its summary interference, maritime loans would, in all probability, become obsolete.

. . . .

. . . Nor am I able to perceive how the exercise of such judicial authority clashes with any principles of public policy. *The refusal [to exercise universal*

47. See, e.g., 2 CORNELIUS VAN BYNKERSHOEK, QUESTIONUM JURIS PUBLICI LIBRI DUO [QUESTIONS OF PUBLIC LAW] 102–03 (James Scott Brown ed., Tenney Frank trans., Clarendon Press 1930) (1737) (describing how Dutch admiralty courts hear libels against foreigner vessels instituted by other foreigners). This work is invariably discussed in Founding-era arguments about the law of nations and cited at least twenty times by the Supreme Court to 1820. See, e.g., *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116 (1812).

48. Jurisdiction over purely foreign disputes was seen as discretionary, and admiralty judges could refuse to hear such cases for reasons of convenience and comity, much like the current authority to dismiss supplemental state-law claims. See *Mason v. Ship Blaireau*, 6 U.S. (2 Cranch) 240 (1804) (laying out a general convenience-based balancing test for entertaining purely foreign cases); *Willendson v. Forsoket*, 29 F. Cas. 1283, 1284 (D. Pa. 1801) (No. 17,682); CONKLING, *supra* note 46, at 37 (“[T]he admiralty courts of this country are not bound to take jurisdiction of controversies . . . between foreigners having no domicile in this country, . . . [but] they may lawfully exercise it, and ought to do so in obedience to the demands of justice.”).

49. See *Sloss*, *supra* note 34, at 176–82 (noting that a majority of the privateering cases decided by the Supreme Court in the mid-1790s were in rem actions).

50. See, e.g., *The Two Friends*, (1799) 165 Eng. Rep. 174 (H. Ct. Adm.) (Scott, J.), *quoted in* CONKLING, *supra* note 46, at 25–28.

*jurisdiction] might indeed well be deemed a disregard of national comity, inasmuch as it would be withholding from a party the only effectual means of obtaining his right.*⁵¹

The founding generation understood that the grant of admiralty jurisdiction carried with it such powers, for they had been exercised even by the colonial vice-admiralty courts.⁵² In the early Republic, federal district courts heard a variety of purely foreign cases,⁵³ often making no distinction between those without U.S. parties and those with. The cases ranged from routine claims of nonpayment and abuse by sailors,⁵⁴ or maritime contracts,⁵⁵ to those bearing more substantially on matters of foreign policy. These include the cases arising from the naval war between Britain and France described by Prof. Sloss's symposium contribution. While in form these were merely "libel[s] for acquittal and restitution,"⁵⁶ they in fact challenged the lawfulness of a prize taken by public vessels in an armed conflict between sovereign states. Indeed, the only cases involving foreigners that could not be heard by admiralty courts were foreign prize proceedings.⁵⁷

Even a seaman's suit for wages or discharge from service could raise serious foreign relations issues if he happened to be in the crew of a British vessel cruising against French commerce under a British writ of *marque*. Yet

51. *The Jerusalem*, 13 F. Cas. 559, 561–62 (C.C.D. Mass. 1814) (No. 7293) (emphasis added).

52. See MANGONE, *supra* note 39, at 27–28 (noting that colonial vice-admiralty courts had broad jurisdiction over any dispute involving vessels present in their ports); L. Kinvin Wroth, *The Massachusetts Vice Admiralty Court and the Federal Admiralty Jurisdiction*, 6 AM. J. LEGAL HIST. 250, 352 (1962) (describing the case of *Palatines v. Lobb*, where a colonial vice-admiralty court adjudicated a dispute between a group of German passengers and the Dutch owner of a vessel that sailed from Rotterdam to Philadelphia).

53. See *Thompson v. The Catharina*, 23 F. Cas. 1028 (D. Pa. 1795) (No. 13,949) (observing that while most maritime contracts implicitly require adjudication in the home tribunal, where this is not the case foreign ships and seamen may pursue their disputes in U.S. courts); *Ellison v. The Bellona (The Bellona I)*, 8 F. Cas. 559, 559 (D.S.C. 1798) (No. 4407) ("Courts of admiralty have a general jurisdiction in causes civil and maritime; and the 9th section of the judiciary act of congress vests that power in this court . . . and this jurisdiction has been uniformly exercised by me, as regards foreigners generally.").

54. See, e.g., *Weiberg v. The St. Oloff*, 29 F. Cas. 591 (D. Pa. 1790) (No. 17,357) (awarding wages to Swedish sailors on a Swedish vessel, with a provision for the sale of the ship should the money not be forthcoming).

55. See, e.g., *The Jerusalem*, 13 F. Cas. at 559.

56. Sloss, *supra* note 34, at 169.

57. See *The Bellona I*, 8 F. Cas. at 559 (stating that the validity of a privateer's prize "can only be ascertained by a court of the nation to which the captors belong" and that neutral nations have no jurisdiction over such cases). *But see* Sloss, *supra* note 34, at 169 ("[T]he courts of a neutral nation cannot exercise jurisdiction over a prize case filed by a privateer who seeks a judgment that the captured vessel is a lawful prize, but they can exercise jurisdiction over a . . . case filed by the owner of a captured vessel who seeks restitution . . .").

the distinguished admiralty authority (and former member of the Continental Congress) Judge Thomas Bee took jurisdiction of such cases.⁵⁸ He noted that while admiralty courts could not adjudicate disputes involving foreign warships or privateers, “the case [was] . . . different with respect to letters of marque.”⁵⁹ But he drew a fine distinction between a “letter of marque,” which he defined as a merchantman that would only occasionally take prizes, and a privateer, which is a more heavily armed vessel dedicated entirely to cruising under commission.⁶⁰ A “letter of marque” is more like a commercial vessel than a privateer, he reasoned, and thus he would discharge sailors from such vessels even if they had just returned from cruising against French shipping.⁶¹

Taking cognizance of any purely foreign disputes, even those entirely commercial in character, could potentially launch courts into sensitive diplomatic waters. As the U.S. Attorney argued for the claimants in *The Jerusalem*, a case involving a bottomry bond (a loan for a ship):

The Jerusalem is the first Greek ship that has visited our shores. To compel a sale of her would be received as a declaration of war. It would be highly impolitic to interfere in a case like the present, where the ship is of considerable value, and the owner a man of some note and consequence among his countrymen; more especially, as he has been long struggling to extricate his ship, and to carry her to the very door of this libellant. The same strict rules of law are not to be applied to the subjects of the Ottoman empire, as to those of other nations⁶²

All of this was quite unlike the practice outside of admiralty. Common law did not allow universal jurisdiction.⁶³ Needless to say, purely alien suits cannot be heard under any of the party-based heads of federal jurisdiction. Nor can they be heard under federal question jurisdiction, with certain exceptions

58. See, e.g., *The Bellona I*, 8 F. Cas. at 559 (establishing that the court had jurisdiction); *Ellison v. The Bellona (The Bellona II)*, 8 F. Cas. 556 (D.S.C. 1798) (No. 4406) (adjudicating on the merits a dispute over the treatment of seamen by the captain and other disciplinary issues on a British letter of marque).

59. *The Bellona I*, 8 F. Cas. at 559.

60. See *id.*; see also *The Bellona II*, 8 F. Cas. at 557 (considering “the mercantile, not the warlike, character of the ship” and noting that the seamen “were to have wages, as belonging to a merchantman”).

61. *The Bellona I*, 8 F. Cas. at 559; *The Bellona II*, 8 F. Cas. at 557–58.

62. *The Jerusalem*, 13 F. Cas. 559, 560 (C.C.D. Mass. 1814) (No. 7293).

63. See *Molony v. Dows*, 8 Abb. Pr. 316, 329–30 (N.Y. Common Pleas 1859) (“[I]n English courts, actions between foreigners for injuries to person or property occurring within the British dominions may be maintained; but this is the limit, and I think no case will be found in the whole course of English jurisprudence in which an action for an injury to the person, inflicted by one foreigner upon another in a foreign country, was ever held to be maintainable in an English court.”).

for universal or treaty-based offenses, because the powers of Congress do not generally reach conduct entirely unrelated to the United States.⁶⁴

CONCLUSION

The grant of admiralty jurisdiction gave federal judges a broad role in foreign relations, including matters that directly touched upon diplomacy or involved purely foreign disputes. Cases could be decided under a body of judge-made international law or even foreign law. However, these powers did not arise out of the basic features of Article III, but rather from a felt need to adopt the preexisting (British) system of admiralty law *in toto*, as part of an international system of admiralty jurisdiction in which the Framers wanted the United States to participate. Seen in this historic light, admiralty, especially in the early years of the Republic, was an anomalous island of internationalism within the Constitution's otherwise parochial system. To the extent that the history of foreign relations is intertwined with admiralty, the lessons of this history cannot be simply transposed to modern foreign relations jurisprudence. This could have potentially significant implications, given that the canonical nineteenth century foreign relations cases all arose in admiralty. Indeed the list of major cases looks like a port registry: *The Schooner Exchange v. M'Faddon*,⁶⁵ *Charming Betsy*,⁶⁶ *La Jeune Eugenie*,⁶⁷ *The Antelope*,⁶⁸ and, of course, *The Paquete Habana*.⁶⁹

A historical approach to certain important current foreign relations issues, such as the constitutional limits on universal jurisdiction⁷⁰ or the use of foreign and international law by U.S. courts, requires sensitivity to the uniqueness of admiralty. Turning to a topic from the current symposium, admiralty cases give little insight into what the Framers thought was the proper role for federal judges to play in foreign relations matters that arose in law or equity.⁷¹

64. Eugene Kontorovich, *The "Define and Punish" Clause and Universal Jurisdiction: Recovering the Lost Limits*, 103 NW. U. L. REV. (forthcoming 2009), available at <http://ssrn.com/abstract=1113626>.

65. 11 U.S. (7 Cranch) 116 (1812) (Marshall, C.J.) (announcing principles of territorial jurisdiction in sovereign immunity).

66. *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, C.J.) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . .").

67. *United States v. The La Jeune Eugenie*, 26 F. Cas. 832 (C.C.D. Mass. 1822) (No. 15,551).

68. 23 U.S. (10 Wheat.) 66 (1825).

69. 175 U.S. 677 (1900).

70. See Eugene Kontorovich, *Beyond the Article I Horizon: Congress's Enumerated Powers and Universal Jurisdiction over Drug Crimes*, 93 MINN. L. REV. (forthcoming 2009), available at <http://ssrn.com/abstract=1120892>; Kontorovich, *supra* note 64; see also Curtis A. Bradley, *Universal Jurisdiction and U.S. Law*, 2001 U. CHI. LEGAL F. 323, 337.

71. Cf. Sloss, *supra* note 34, at 50–52.

Admiralty was a particular area of jurisdiction that gave English and colonial judges a direct role in foreign relations that their common law counterparts did not enjoy. The broad reach of admiralty was understood to be exceptional. Thus the early admiralty decisions in foreign affairs, and the executive branch conduct in the shadow of those decisions, give little insight about the foreign relations role of judges sitting in law. This shows Prof. Wuerth is right to say originalism cannot easily be used to answer all modern questions of foreign affairs. This by no means indicates the uselessness of originalism. Rather, its applicability requires a case-by-case examination of the relevant originalist evidence in its historical context—as was done in this Article for the particular question of judicial authority over foreign affairs questions in the admiralty jurisdiction. It is no indictment of hammers if not everything is a nail, and indeed an awareness of this should make for the better, safer use of hammers.