

APPLICATION OF THE CONSTITUTION TO GUANTANAMO BAY

GUANTANAMO AND THE CONFLICT OF LAWS: *RASUL* AND BEYOND

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Of the legal issues raised by the Bush Administration's conduct of the war on terror, the detention of alleged "enemy combatants" presents perhaps the starkest conflict between individual liberty and executive authority. The Executive has claimed the power to designate individuals as enemy combatants and thereafter to hold them indefinitely without judicial review or access to counsel. A triad of cases decided by the Supreme Court in its October 2003 Term put this claim to the test and generally rejected it.¹

Two cases dealt with Americans confined in the Navy brig in Charleston, South Carolina. Yaser Hamdi, allegedly captured on the field of battle in Afghanistan, was held entitled as a matter of Fifth Amendment Due Process to "a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker," and to the assistance of counsel in that proceeding.² The claims of Jose Padilla, arrested in Chicago and detained initially in New York before transport to the Charleston brig, received a slightly less welcoming reception: over the dissent of four Justices, the Court held that his habeas petition was improperly filed in the Southern District of New York and ordered its dismissal.³ Padilla will, however, be able to take advantage of the same rights as Hamdi upon refileing in South Carolina.

No such confident prediction can be made with respect to the further proceedings contemplated by the Court's opinion in the third

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¹ *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004); *Rasul v. Bush*, 124 S. Ct. 2686 (2004); *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004).

² *See Hamdi*, 124 S. Ct. at 2635, 2652.

³ *See Padilla*, 124 S. Ct. at 2727.

case, *Rasul v. Bush*.⁴ There, the Justices affirmed that citizens of friendly countries confined in the U.S. naval base at Guantanamo Bay could challenge their detention by filing habeas petitions.⁵ Petitioners' counsel urged the Court to resolve only this preliminary question, and the Court accepted the invitation.⁶ The result was a decision that rejected the Executive's claim to complete freedom from judicial scrutiny but left unclear precisely what rights the petitioners have that might be vindicated by a habeas petition.⁷

Rasul is thus a victory for the rule of law, but one whose magnitude has yet to be determined. My aim in this Article is to offer some speculation about the question the Court left unanswered, and in particular to do so from the perspective of conflict of laws. The Court has not always understood extraterritorial application of American law to present a conflicts issue, but I hope to show that taking this perspective will allow us a clearer understanding of that difficult question. Equally important, bringing conflicts theory to bear on extraterritoriality will reflect light back on the theory, offering some lessons that can be applied to conflicts more generally.

Part I of the Article discusses the *Rasul* decision in detail, considering it in the context of both the other detention cases and the Court's most recent decisions about the extraterritorial scope of American law. It concludes that *Rasul* is most plausibly read to imply that the Constitution extends rights to the Guantanamo detainees.⁸ Part II describes the reasons why this extension is surprising; it traces

⁴ 124 S. Ct. 2686 (2004).

⁵ See *Rasul*, 124 S. Ct. at 2698.

⁶ See Brief for Petitioners at 20, *Rasul* (No. 03-334), available at http://www.abanet.org/publiced/preview/briefs/pdfs_03/334Pet.pdf (suggesting that the analysis of what due process rights petitioners may invoke "can wait for another day"); *Rasul*, 124 S. Ct. at 2699 ("What is presently at stake is only whether the federal courts have jurisdiction to determine the legality of the Executive's potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing.").

⁷ As I will argue later, the most sensible reading of *Rasul* would take it to imply that the Guantanamo detainees have some form of due process rights under the Fifth Amendment. See *infra* notes 51-57 and accompanying text. The aim of this Article, however, is not to tease out implications from the Court's opinion but rather to consider the extraterritorial reach of the Constitution as a more general matter, and in particular as a problem in the conflict of laws.

⁸ Surprisingly, the Executive still seems intent upon arguing that the detainees have no constitutional rights at all, asserting that "[a]s aliens detained by the military outside the sovereign territory of the United States and lacking a sufficient connection to the country, petitioners have no cognizable constitutional rights." See Neil A. Lewis, *New Fight on Guantánamo Rights*, N.Y. TIMES, July 31, 2004, at A18 (quoting the Executive's district court filing in *Rasul* on remand).

the development of the Court's extraterritoriality jurisprudence, from the early territorialist dogma to the more recent expansions. Part III turns from doctrine to theory, exploring the various arguments for and against extraterritoriality immanent in the case law and urged by scholars. It asserts that these theories have less resolving power than is commonly supposed; most, in fact, beg the question. Part IV explicitly invokes the methodology of conflicts. Though this methodology does not give a clear answer either, its application does frame the question in a more analytically tractable manner. This Part also argues that the exercise of applying conflicts methodology sheds some light on conflicts itself; having reformed our approach to conflicts in response, we are left in a better position to tackle the question of the extraterritorial scope of the Constitution. Part V returns to the case of Guantanamo, applying the methodology derived in the preceding part to the Due Process Clause.

I. EXECUTIVE DETENTION AND EXTRATERRITORIALITY IN OT 2003

The *Rasul* petitioners are two Australians and twelve Kuwaitis captured in Afghanistan and Pakistan and subsequently transferred to Guantanamo Bay, where they were confined without charges or access to counsel.⁹ According to their petitions, all were engaged in innocent conduct such as providing humanitarian aid, visiting relatives, or arranging marriage.¹⁰ They were arrested by various local authorities and turned over to U.S. forces, in some cases in exchange for bounties.¹¹ Through various next friends, they sought to invoke federal jurisdiction to review the legality of their confinement.

The district court dismissed the petitions for lack of subject matter jurisdiction, and the D.C. Circuit affirmed.¹² Like the district court, the D.C. Circuit relied on *Johnson v. Eisentrager*,¹³ in which the Supreme Court rejected the habeas petitions of German nationals con-

⁹ Two British citizens, Shafiq Rasul and Asif Iqbal, were among the petitioners at the district court and court of appeals stages of the litigation but were released prior to the Supreme Court's decision. See *Rasul*, 124 S. Ct. at 2690 n.1. Other Guantanamo detainees were initially arrested in other countries, including Bosnia, Zambia, and Gambia. See David Rose, *Guantánamo Bay on Trial*, VANITY FAIR, Jan. 2004, at 88, 133 (describing the nationalities and places of arrest of the Guantanamo detainees).

¹⁰ See *Al Odah v. United States*, 321 F.3d 1134, 1136-37 (D.C. Cir. 2003).

¹¹ See *id.*

¹² See *Al Odah v. United States*, 215 F. Supp. 2d 55 (D.D.C. 2002) (mem.), *aff'd*, 321 F.3d 1134 (D.C. Cir. 2003).

¹³ 339 U.S. 763 (1950).

fined in the Landsberg prison in Germany following convictions by military tribunals in China.¹⁴ The D.C. Circuit read *Eisentrager*, as glossed by later Supreme Court decisions, to establish that the U.S. Constitution offered aliens abroad no protection against the U.S. government.¹⁵ If the Constitution gave such people no rights, the D.C. Circuit reasoned, “[w]e cannot see why, or how, the writ [of habeas corpus] may be made available.”¹⁶

Given the initial premise that the Constitution is territorial in scope, at least as to aliens, the D.C. Circuit’s reasoning makes some sense. To permit the filing of a habeas petition alleging violations of constitutional rights when the court has already determined that the petitioner has no constitutional rights that could be violated is a charade at best pointless, and more likely cruel.¹⁷ The most surprising feature of the Supreme Court’s decision in *Rasul*, then, may be that the Court found a way to reverse the D.C. Circuit without contesting the territorialist premise.¹⁸ Understanding how the Court managed to do so requires a bit of a detour into pre- and post-*Eisentrager* habeas jurisprudence, as well as a more thorough discussion of *Eisentrager* itself.

¹⁴ *Id.* at 790-91.

¹⁵ See *Al Odah*, 321 F.3d at 1141 (discussing *Eisentrager*, *United States v. Verdugo-Quiróz*, 494 U.S. 259 (1990), and *Zadvydas v. Davis*, 533 U.S. 678 (2001)).

¹⁶ *Id.*

¹⁷ The reasoning makes only some sense, though, because such petitioners might still be able to identify rights under “the laws or treaties of the United States,” the other elements of the habeas trinity. See 28 U.S.C. 2241(a), (c)(3) (2004) (authorizing district courts to hear habeas petitions by those allegedly “in custody in violation of the Constitution or laws or treaties of the United States”). To deal with that possibility, the D.C. Circuit invoked an alternate formulation of the *Eisentrager* holding, that the petitioners lacked “the privilege of litigation” in U.S. courts. See *Al Odah*, 321 F.3d at 1144 (quoting *Eisentrager*, 339 U.S. at 777-78). On this point, however, it seems quite likely that the dispositive factor in *Eisentrager* was the petitioners’ status as nonresident enemy aliens. See *Eisentrager*, 339 U.S. at 776 (“[T]he nonresident enemy alien, especially one who has remained in the service of the enemy, does not have even [a] qualified access to our courts . . .”). The *Rasul* petitioners are nonresident alien friends. See *Al-Odah*, 321 F.3d at 1139-40. Such people certainly can litigate in U.S. courts, and it is hard to see why the mere fact of military custody (which the D.C. Circuit found dispositive) should deprive them of that privilege. See *Rasul*, 124 S. Ct. at 2699 (“The fact that petitioners in these cases are being held in military custody is immaterial to the question of the District Court’s jurisdiction over their nonhabeas statutory claims.”). As my concern here is the extraterritorial application of the Constitution, I will not address this issue further.

¹⁸ As I will explain later, I believe the reversal cannot be read as carrying anything less than a strong hint that the petitioners do possess substantive constitutional rights. See *infra* notes 51-56 and accompanying text.

A. Eisentrager, Ahrens, and Braden

Eisentrager, the *Rasul* majority observed, was decided under the regime of *Ahrens v. Clarke*.¹⁹ The habeas statute, 28 U.S.C. § 2241, then (as now) authorized federal courts to issue writs of habeas corpus “within their respective jurisdictions.”²⁰ *Ahrens* interpreted this language to require, as a jurisdictional matter, that a habeas petitioner applying to a district court be confined within that district.²¹ Thus, district courts under the *Ahrens* regime had the power to issue writs of habeas corpus at the application only of petitioners confined within their district. Correlatively, prisoners could file petitions only with the district court within whose district they were confined. What this meant for prisoners confined outside the borders of any federal judicial district, the *Ahrens* Court declined to decide,²² though (as the dissent pointed out) if the limitation were truly jurisdictional, no special circumstances could remedy the absence of judicial power.²³ Such people would have no means of seeking habeas relief, regardless of the legality of their confinement.

This categorical restriction on the availability of habeas relief would seem to raise serious questions under the Suspension Clause,²⁴ and it was that constitutional doubt that drove the D.C. Circuit’s analysis in *Eisentrager*. The D.C. Circuit (in an interesting counterpoint to its approach in *Al Odah*) started with the premise that “constitutional prohibitions apply directly to acts of Government, or Government officials, and are not conditioned upon persons or territory.”²⁵ In consequence, “any person who is deprived of his liberty by officials of the United States, acting under purported authority of

¹⁹ 335 U.S. 188 (1948).

²⁰ 28 U.S.C. § 2241(a) (2004).

²¹ See *Ahrens*, 335 U.S. at 190 (“It is not sufficient in our view that the jailer or custodian alone be found in the jurisdiction.”).

²² See *id.* at 192 n.4.

²³ See *id.* at 209 (Rutledge, J., dissenting) (“[I]f absence of the body detained from the territorial jurisdiction of the court having jurisdiction of the jailer creates a total and irremediable void in the court’s capacity to act . . . then it is hard to see how that gap can be filled”); Charles Fairman, *Some New Problems of the Constitution Following the Flag*, 1 STAN. L. REV. 587, 632 (1949) (“But if the *statute* makes the presence of the petitioner a requisite to *jurisdiction*, how can it make any difference whether the detention is in no district rather than in a different district?”).

²⁴ U.S. CONST. art. I, § 9, cl. 2 (“The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”).

²⁵ *Eisentrager v. Forrestal*, 174 F.2d 961, 965 (D.C. Cir. 1949), *rev’d*, 339 U.S. 763 (1950).

that Government,²⁶ could invoke due process rights under the Fifth Amendment, and the right to habeas corpus as a means of vindicating those rights could not be defeated “by an omission in a federal jurisdictional statute.”²⁷

While apparently conceding that the habeas statute, as interpreted in *Ahrens*, contained just such an omission, the D.C. Circuit also stated that the statute must be construed to make habeas jurisdiction “coextensive with executive power, at least in so far as prisoners in jail are concerned.”²⁸ Finding statutory jurisdiction present “by compulsion of the Constitution itself,” the D.C. Circuit directed the district court to resolve the merits of the petitions.²⁹

The Supreme Court reversed, in an opinion striking for its lack of clarity. The Court noted what it took to be the salient facts about Eisentrager’s status:

[Eisentrager] (a) is an enemy alien; (b) has never been or resided in the United States; (c) was captured outside of our territory and there held in military custody as a prisoner of war; (d) was tried and convicted by a Military Commission sitting outside the United States; (e) for offenses against laws of war committed outside the United States; (f) and is at all times imprisoned outside the United States.³⁰

Without explaining the precise significance of these factors to its various lines of reasoning, the Court then went on to suggest that the petitioners (a) simply lacked standing to litigate in U.S. courts, regardless of what substantive rights they might have;³¹ (b) possessed no Fifth Amendment rights;³² and (c) had failed to state a claim on the merits.³³ With respect to the question of the scope of the habeas statute, the Court made only a few dismissive remarks. It noted that nothing “in our statutes” conferred upon petitioners a right to the habeas writ, and it observed that as the petitioners had failed to present a “basis for invoking federal judicial power in any district,” there was no need to decide where, if anywhere, they might have filed had they been able to demonstrate such a basis.³⁴

²⁶ *Id.* at 963.

²⁷ *Id.* at 965.

²⁸ *Id.* at 967.

²⁹ *Id.* at 966, 968.

³⁰ *Johnson v. Eisentrager*, 339 U.S. 763, 777 (1950).

³¹ *See id.* at 776-77.

³² *See id.* at 782-85.

³³ *See id.* at 785-90.

³⁴ *See id.* at 768, 790-91.

The cursory treatment is understandable, given the multitude of different justifications for the Court's decision. If the petitioners lacked Fifth Amendment rights, application of the rule of *Ahrens* would pose no constitutional problems; if they lacked standing, the rule would not even need to be applied.

The *Eisentrager* Court did not need to confront the possible anomaly created by *Ahrens*: the case of a habeas petitioner unlawfully confined beyond the bounds of any federal district. Subsequent cases, dealing with Americans confined abroad, did, and found habeas jurisdiction without discussion, in apparent derogation of *Ahrens*'s jurisdictional rule.³⁵ The practical erosion of *Ahrens* was recognized in *Braden v. 30th Judicial Circuit Court*,³⁶ which explicitly rejected *Ahrens* and converted what had been an "inflexible jurisdictional rule" into an endorsement of "traditional principles of venue."³⁷

B. Rasul Revisited

With the *Ahrens* rule out of the way, it became possible to argue that the habeas statute, by its plain text, allowed the *Rasul* petitioners to seek habeas relief. And that argument is the one the Court accepted. Petitioners alleged confinement was "in violation of the [Constitution and] laws of the United States," and the statute "requires nothing more."³⁸

Finding habeas jurisdiction under the statute was undoubtedly an appealing resolution for the Justices in the majority. It allowed the Court to reject the Executive's claim of unreviewable authority without taking any more dramatic steps, such as explicitly reversing *Eisentrager* or announcing that the Guantanamo detainees possessed constitutional rights.³⁹ Moreover, the petitioners, exercising good strategic

³⁵ See, e.g., *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955) (reaching merits of habeas petition filed by prisoner in Korea); *Burns v. Wilson*, 346 U.S. 137 (1953) (same for prisoners in Guam).

³⁶ 410 U.S. 484 (1973).

³⁷ *Id.* at 500; see also *Moore v. Olsen*, 368 F.3d 757, 758 (7th Cir. 2004) ("[A]fter *Braden v. 30th Judicial Circuit Court*, which overruled *Ahrens*, the location of a collateral attack is best understood as a matter of venue . . ." (citation omitted)), *cert. denied*, 125 S.Ct. 362 (2004).

³⁸ *Rasul*, 124 S. Ct. at 2698.

³⁹ Justice Scalia, in dissent, argued with customary verve that the majority was hiding its "irresponsible overturning of settled law" behind *Braden*, which could not be read to undercut *Eisentrager*'s statutory analysis because it "did not so much as mention *Eisentrager*." *Id.* at 2701 (Scalia, J., dissenting). But it is not at all surprising that a decision rejecting by name the leading case for a particular reading of the habeas stat-

judgment, had sought no more. All the same, it makes the opinion somewhat less than fully satisfying.⁴⁰

What the Court did, essentially, was to decide that the petitioners fell within the scope of the habeas statute: they were among the people entitled to invoke it. It is at this point that conflicts rears its ugly head, for the question of who among the marginal cases may claim the benefit of a particular law is one of the two quintessential conflicts questions.⁴¹ An answer based purely on the text of a statute is unlikely to be compelling, and may not even be sensible, for it is one of the constant refrains of conflicts scholars that legislatures typically do not specify either the scope of their statutes or the class of persons who may invoke them.⁴² Indeed, failure to do so is precisely what necessitates conflicts analysis.

The Court did not perform anything resembling that analysis.⁴³ Apart from the text of the statute, it invoked the presumption against extraterritoriality—a guide to statutory construction that itself ignores modern conflicts learning⁴⁴—and then only to dismiss it. The pre-

ute would not mention subsequent cases relying upon the rejected decision. *Eisen-trager*, of course, does mention *Ahrens*, see 339 U.S. at 767, 778, 790; and a rejection of *Ahrens* (something implicitly achieved by 1955, see cases cited *supra* note 35) therefore casts doubt on *Eisen-trager*'s statutory interpretation.

⁴⁰ By this I mean no criticism of the majority; opinion writers have other things on their minds than pleasing the academic palate. Indeed, as I will suggest, I believe the opinion should be understood to go a bit farther than it explicitly states.

⁴¹ At least according to what I and others have urged is the most useful understanding of conflicts analysis. See, e.g., Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 291 (1990) [hereinafter Kramer, *Rethinking*] (“In [conflicts] cases, the court’s task is to interpret the laws to determine whether either confers a right to recover on the facts alleged in the particular case.”); Kermit Roosevelt III, *The Myth of Choice of Law: Rethinking Conflicts*, 97 MICH. L. REV. 2448, 2467 (1999) [hereinafter Roosevelt, *Myth*] (“[W]hether the plaintiff has a right at all . . . is a question of the scope of the right the plaintiff invokes—whether the law he appeals to grants rights to people in his situation.”). The other question is how to handle conflicts between rights.

⁴² See, e.g., Kramer, *Rethinking*, *supra* note 41, at 293 (“[T]he great majority of laws are silent with respect to extraterritorial reach . . .”). Thus, the Court’s assertion that the lack of a textual “distinction between Americans and aliens held in federal custody” means that “there is little reason to think that Congress intended the geographical coverage of the statute to vary depending on the detainee’s citizenship,” *Rasul*, 124 S. Ct. at 2696, is less than fully convincing.

⁴³ Although I do believe that the scope of the habeas statute, like the scope of the Constitution, presents a conflicts question, I will also argue that many approaches to conflicts are unhelpful in resolving the question. See *infra* Parts IV.A-B. I will argue further that their lack of utility suggests something about what conflicts analysis should look like. See *infra* Part IV.C.

⁴⁴ See Larry Kramer, *Vestiges of Beale: Extraterritorial Application of American Law*,

sumption against extraterritoriality, the Court stated, “certainly has no application to . . . persons detained within ‘the territorial jurisdiction’ of the United States.”⁴⁵

How, then, can the scope of the right to habeas be sensibly determined? Modern conflicts theory, at least that part which follows Brainerd Currie, would suggest that questions of extraterritorial application should be resolved by considering the purpose of the statute.⁴⁶ A not-implausible characterization of the purpose of habeas would be to allow petitioners to vindicate federal, notably constitutional, rights.⁴⁷ That purpose will, potentially, be implicated whenever a petition is filed by a federal rights-holder. Thus, a plausible method of deciding whether a particular person should be entitled to file a

1991 SUP. CT. REV. 179, 184 (1992) [hereinafter Kramer, *Vestiges*] (faulting the Court for “thoughtlessly attempt[ing] to revive the original principle” of territoriality rather than “learning from the diversity of views that [have] emerged”).

⁴⁵ *Rasul*, 124 S. Ct. at 2696 (quoting *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949)).

⁴⁶ See, e.g., BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 367 (1963) (suggesting that a court should “ascertain” the government policy “as it has been expressed in statutes and judicial decisions”); Kramer, *Vestiges*, *supra* note 44, at 213 (“The basic premise . . . is that the court should determine what policy a law was enacted to achieve . . .”).

⁴⁷ The *Rasul* petitioners asserted rights not only under the Constitution, but under the Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706 (2000), international law, and the Alien Tort Statute, 28 U.S.C. § 1350 (2000). See *Al Odah*, 321 F.3d at 1137 (detailing claims). The meat of the complaints, however, seems constitutional. The Alien Tort Statute does not create any substantive rights but merely grants federal courts jurisdiction to hear certain claims under international law. See *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2755 (2004). The Administrative Procedure Act claims relied at least in part on alleged constitutional violations. See *Rasul*, 215 F. Supp. 2d at 58 (“Plaintiffs allege that Defendants’ conduct constitutes arbitrary, unlawful, and unconstitutional behavior in violation of the Administrative Procedure Act.”). Customary international law is considered by many scholars to have the status of federal common law. See, e.g., Lea Brilmayer, *Federalism, State Authority, and the Preemptive Power of International Law*, 1994 SUP. CT. REV. 295, 301-02 (1995) (citing *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1963), for the proposition that customary international law must be part of federal law); Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1835 (1998) (“[E]ven after *Erie* and *Sabbatino*, federal courts retain legitimate authority to incorporate bona fide rules of customary international law into federal common law.”). But the issue is controversial within the academy, compare Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 870 (1997) (arguing that customary international law is not a part of federal law in the absence of “political branch authorization”), with Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371, 376 (1997) (“[S]uch rules [of customary international law] are presumptively incorporated into the U.S. domestic legal system and given effect as rules of federal law.”), and unsettled in the courts. Consequently, I will focus on the constitutional rights at stake.

habeas petition would be to ask whether that person alleges facts suggesting the possession of relevant federal rights. Extending the right to seek habeas to people who have no rights to vindicate is, as the D.C. Circuit observed in *Al Odah*, senseless;⁴⁸ it is hard to imagine that the drafters of the habeas statute would have approved such a result had they considered it.

The scope of habeas jurisdiction, then, may plausibly be deemed coextensive with the scope of substantive federal rights—in this case, constitutional rights.⁴⁹ That conclusion—embraced, in different ways, by the D.C. Circuit opinions in *Eisentrager* and *Al Odah*, and implicitly endorsed by the Supreme Court decisions reaching the merits of habeas petitions filed by Americans confined abroad—entangles the question of statutory jurisdiction with at least the preliminary merits of the constitutional claims. The prospect must have held little appeal for the cautious *Rasul* majority, but it is, I think, what understanding *Rasul* as a conflicts problem should suggest.

And that is one point that the conflicts perspective allows us to make: the scope of habeas jurisdiction may be hard to sever from the scope of the underlying substantive rights that habeas is meant to protect. It is a point of which the *Rasul* Court seemed to be aware, for, despite its claim to be deciding only the statutory issue, the *Rasul* majority's opinion casts long shadows over the merits. Its dismissal of the presumption against extraterritorial scope of statutory law in the context of Guantanamo suggests that a territorialist argument for restrict-

⁴⁸ *Al Odah v. United States*, 321 F.3d 1134, 1141 (D.C. Cir. 2003).

⁴⁹ Indeed, the text of the statute (granting courts authority to issue the writ to prisoners “in custody in violation of the Constitution or laws or treaties of the United States,” 28 U.S.C. § 2241(c)(3) (2000)) would seem to place the violation on a par with the custody. The Supreme Court has consistently treated the custody as a jurisdictional requirement, i.e., a limitation on the set of persons entitled to seek the writ. *See, e.g.*, *Maleng v. Cook*, 490 U.S. 488, 494 (1989). Whether it makes sense to treat custody as a prerequisite to subject matter jurisdiction, rather than a merits issue, is another question. Confusion of subject matter jurisdiction with merits is pervasive in the extraterritoriality case law; when the Court finds a plaintiff not within the set of people protected by a law by reason of geographical scope, it dismisses for lack of subject matter jurisdiction when the more conventional resolution would be dismissal for failure to state a claim. *See, e.g.*, *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991). *But see* *Bell v. Hood*, 327 U.S. 678, 682 (1946) (“[I]t is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction.”). The problem here appears to be the belief that the fact that a law “does not apply” means something other than that it grants the plaintiff no rights. *See* Larry Kramer, *Interest Analysis and the Presumption of Forum Law*, 56 U. CHI. L. REV. 1301, 1309 (1989) (“‘[C]hoosing’ [a law] is not a step that must be completed before the court can reach the merits, and there is no reason to insist that the court ‘apply’ some jurisdiction’s law.”).

ing constitutional rights may likewise be deemed inapplicable.⁵⁰ More suggestive still is Justice Kennedy's observation in concurrence that "[f]rom a practical perspective, the indefinite lease of Guantanamo Bay has produced a place that belongs to the United States, extending the 'implied protection' of the United States to it."⁵¹ Last, the Court drops a footnote that all-but-explicitly decides the issue: "Petitioners' allegations . . . unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States.'"⁵²

These hints suggest that the future holds a relatively simple answer to the constitutional question the *Rasul* Court purported to leave undecided. Ultimately, it seems likely that the Court will make clear that the petitioners enjoy constitutional due process protections akin—if not identical—to those accorded Hamdi.⁵³ *Eisenstrager* will have to be confronted at some point, but the Court's verbatim recital

⁵⁰ 124 S. Ct. at 2696.

⁵¹ *Rasul*, 124 S. Ct. at 2700 (Kennedy, J., concurring) (quoting *Johnson v. Eisenstrager*, 339 U.S. 763, 777-78 (1950)).

⁵² *Id.* at 2698 n.15 (majority opinion). In light of these strong hints, it is disappointing, though perhaps not surprising, that the Executive has continued to assert on remand that petitioners possess no constitutional rights at all. See *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 454 (D.D.C. 2005).

⁵³ In Hamdi's case, the plurality settled on the *Mathews v. Eldridge* balancing test, which weighs the private interest at stake against the governmental interest, considering the "risk of an erroneous deprivation" and the "probable value, if any, of additional or substitute safeguards." See *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). That is, *Hamdi* directs courts reviewing the claims of detained U.S. citizens to adjust the process provided so as to minimize the aggregate costs of erroneous deprivations (weighted according to the private interest at stake) and burdens on the government (weighted according to the significance of the governmental interest or function). *Hamdi*, 124 S. Ct. at 2646. The interests at stake, one would think, are the individual's interest in liberty and the government's interest in efficacious prosecution of the war on terror. Oddly, the Court asserted instead that "[o]n the other side of the scale are the weighty and sensitive governmental interests in ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States." *Id.* at 2647. But that is an interest that comes into play only if the goal is reducing the number of *mistakes* in the individual's favor. Providing more process—as distinguished from, for instance, imposing a higher burden of proof—should actually increase the accuracy of the factfinding process rather than simply altering the distribution of errors. Thus, more process, while it will undoubtedly impose greater burdens on the government, should not increase the number of enemy combatants erroneously released to rejoin the foe. Cf. *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 283 (1990) (noting the connection between burden of proof and error distribution). Not, that is, unless it is being compared to a system under which the Executive simply detains people at its pleasure, a system under which the risk of erroneous release would indeed seem slight. *Mathews* does not, however, seem to start from a baseline of absolute Executive power.

of *Eisentrager*'s "six critical facts"⁵⁴ suggests a willingness to distinguish it, most likely on the grounds suggested by Justice Kennedy: that formal sovereignty is not the touchstone for the "implied protection" of the U.S. Constitution.⁵⁵ Even if it is not considered the precise equivalent of U.S. sovereign territory, Guantanamo may be treated like the Canal Zone in Panama or the trust territory of the Pacific Islands, places under U.S. jurisdiction and control whose occupants have consistently been held to enjoy at least "fundamental" constitutional rights.⁵⁶

If the Court takes this route, which strikes me as the most likely sequel, the result will be significant in terms of allocating jurisdiction between the military and civilian courts.⁵⁷ It will be less relevant for

⁵⁴ *Rasul*, 124 S. Ct. at 2693.

⁵⁵ *Id.* at 2700 (Kennedy, J., concurring).

⁵⁶ The distinction between fundamental and non-fundamental rights comes from the *Insular Cases*, in particular Justice White's analysis of the rights of persons in "unincorporated" territories (those not destined for statehood). See, e.g., *Downes v. Bidwell*, 182 U.S. 244, 288-94 (1901) (White, J., concurring). See generally *United States v. Verdugo-Urquidez*, 494 U.S. 259, 268 (1990) (discussing *Insular Cases*); GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 85-89 (1996) (same). The analogy to the Canal Zone and trust territory was urged upon the Second Circuit in the litigation over the rights of Haitian refugees detained in Guantanamo. See Brief of Amicus Curiae International Human Rights Law Group at 17-21, *Haitian Ctrs. Council, Inc. v. McNary*, 969 F.2d 1326 (2d Cir. 1992) (No. 92-6090), available at 1992 WL 12024989. The court expressed some sympathy but did not resolve the issue, and its decision was ultimately vacated on mootness grounds. See *Haitian Ctrs. Council, Inc. v. McNary*, 969 F.2d at 1342-44, vacated *sub nom.* *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 918, 918 (1993). The *Rasul* petitioners, presenting only a statutory claim, did not make this argument but are certain to do so on remand. See generally Gerald L. Neuman, *Closing the Guantanamo Loophole*, 50 LOY. L. REV. 1, 15-32 (2004) (presenting a modified version of this argument).

⁵⁷ *Eisentrager*, interestingly, characterized the question before the Court as ultimately "one of jurisdiction of civil courts of the United States vis-à-vis military authorities"—a separation of powers, or, we might say, an interbranch conflicts case, rather than an international one. See 339 U.S. at 765; see also *Rasul*, 124 S. Ct. at 2700 (Kennedy, J., concurring) ("The decision in *Eisentrager* indicates that there is a realm of political authority over military affairs where the judicial power may not enter."). Before the district court in *Rasul*, the Executive tried a somewhat more subtle tack, asserting that while the petitioners might have some rights, they were for the Executive to determine. See *Rasul v. Bush*, 215 F. Supp. 2d 55, 56 (D.D.C. 2002), *rev'd*, 124 S. Ct. 2686 (2004). See also Fairman, *supra* note 23, at 619-20 (noting the possibility that a matter may be governed "by law of the United States as found by the executive branch of the Government"). But this Court has been emphatic about its exclusive role as constitutional interpreter; for better or for worse, litigants nowadays are entitled to the Court's Constitution and no other. See generally LARRY D. KRAMER, THE PEOPLE THEMSELVES 7-8 (2004) (questioning the modern Supreme Court's rejection of popular constitutionalism and arguing for greater deference to the constitutional interpretations of the executive and legislative branches). *Hamdi* confronts this issue and gives a clear an-

conflicts more generally—less relevant, certainly, than if the Court were to hold that aliens abroad enjoy Due Process rights. There is, I think, almost no chance that the Court will take this latter course. To a naïve reader of the *Rasul* opinion, however, it might seem an equally plausible outcome. The Fifth Amendment’s Due Process Clause, like the habeas statute, makes no mention of citizenship or geography.⁵⁸ The straightforward textualist methodology the Court employed with the statute would suggest a similar conclusion: the protections of the Due Process Clause extend to any person alleging that the U.S. government has deprived him of liberty without due process of law. The words of the Constitution require nothing more.⁵⁹ And so, as Justice Ginsburg put it recently, “[o]ne might assume, therefore, that [the Bill of Rights] guides and controls U.S. officialdom wherever in the world they carry our flag or their credentials.”⁶⁰

This argument can claim not only an affinity with the *Rasul* Court’s methodology but also some intuitive appeal. If we do cherish constitutional freedoms, if we do think that constitutional rights are,

swer: if constitutional rights are at stake, the judicial power will not be turned aside. *See Hamdi*, 124 S. Ct. at 2650 (“Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.”).

⁵⁸ Louis Henkin (though certainly not a naïve reader) made this point twenty years ago: “The choice in the Bill of Rights of the word ‘person’ rather than ‘citizen’ was not fortuitous; nor was the absence of a geographical limitation. Both reflect a commitment to respect the individual rights of all human beings.” Louis Henkin, *The Constitution as Compact and as Conscience: Individual Rights Abroad and at Our Gates*, 27 WM. & MARY L. REV. 11, 32 (1985).

⁵⁹ This analysis, of course, ignores the *Rasul* Court’s reference to the presumption against extraterritoriality. 124 S. Ct. at 2696. The textualist still has resources, however. It is now well settled that American citizens abroad can invoke the Constitution against the U.S. government. *See Reid v. Covert*, 354 U.S. 1, 33 (1957). Given that degree of extraterritorial scope, the lack of any textual distinction between citizens and noncitizens (and the equally settled proposition that aliens within the United States can invoke Due Process rights, *see, e.g.*, *Hampton v. Mow Sun Wong*, 426 U.S. 88, 102-03 (1976)), would suggest that the Constitution must afford rights to aliens outside the U.S. as well. My point here is not to endorse this argument, which, as the text notes, tilts rather strongly against our current jurisprudence. It is rather to suggest that a more sophisticated methodology is desirable.

⁶⁰ Ruth Bader Ginsburg, *Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication*, 22 YALE L. & POL’Y REV. 329, 334 (2004). *The Third Restatement of Foreign Relations Law* tentatively endorses the same position, though in this regard it is less a restatement than a prognostication. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 721 cmt. b (1987) (“Although the matter has not been definitely adjudicated, the Constitution probably governs also at least some exercises of authority by the United States in respect of some aliens abroad.”).

in some normative sense, *right*, it is surprising that the accident of geography should control the ability to invoke them.⁶¹ Why should a governmental action repugnant to our deepest values become anodyne merely because it occurs outside our borders?

It might come as a surprise to the naïve reader, then (though undoubtedly not to any of this symposium’s participants), to learn that, as Justice Ginsburg went on to observe, “that is not our current jurisprudence.”⁶² Why it is not—and whether it should be, or more particularly what form the analysis of that question should take—is the subject of this Article. The next Part takes a fairly brief trip through the case law, offering an historical perspective on the evolution of our jurisprudence with respect to the extraterritorial scope of federal law and the Constitution. Because it provides an illuminating sidelight here as elsewhere, I also discuss the contemporaneous development of conflicts jurisprudence.

II. DOCTRINE: A HISTORY OF EXTRATERRITORIALITY FROM THE CONFLICTS PERSPECTIVE

Early cases took a strong and unequivocal position on the scope of both the Constitution and federal law more generally. In 1891, the Court stated flatly that “[t]he constitution can have no operation in another country.”⁶³ With respect to federal law, the proclamations were equally forceful; in 1883 the Court announced the proposition “[t]hat the laws of a country have no extra-territorial force” as “an axiom of international jurisprudence.”⁶⁴

⁶¹ “Accident” is of course a loaded word, an avatar of the “mere fortuity” invoked by courts in domestic conflicts cases to diminish the importance of a geographical connecting factor. *See, e.g.*, *Simon v. United States*, 341 F.3d 193, 202 (3d Cir. 2003) (noting the plaintiff’s argument that it was a “mere fortuity” that the air traffic control center directing their plane was located in Indiana). Sometimes geography is indeed relevant, not in the crude territorialist sense, but because it relates to the purpose of a law (speed limits being the standard example). And to call the location of the Guantanamo prison camp accidental is to indulge a naivete beyond that of even the most committed textualist. *See Rasul*, 124 S. Ct. at 2710-11 (Scalia, J., dissenting) (“The Commander in Chief and his subordinates had every reason to expect that the internment of combatants at Guantanamo Bay would not have the consequence of bringing the cumbersome machinery of our domestic courts into military affairs.”).

⁶² Ginsburg, *supra* note 60, at 334.

⁶³ *In re Ross*, 140 U.S. 453, 464 (1891). The petitioner in *Ross* had been convicted by a consular court in Japan of a murder committed aboard an American ship in a Japanese harbor, and he protested that this process deprived him of the rights to a grand jury indictment and a jury trial. *Id.* at 454-58.

⁶⁴ *Can. S. Ry. Co. v. Gebhard*, 109 U.S. 527, 536 (1883).

Territoriality likewise held sway in domestic conflicts, where it was frequently considered to have the status of a constitutional rule, if not a law of nature. Declaring a contract executed in New York valid under New York law, the Court went on to observe that “this validity was not and could not be affected by the laws of the State of Texas, as in the nature of things such laws could have no extraterritorial operation.”⁶⁵ In very few cases was the territorialist thesis supported by any reasoning. The Court’s characterization of territoriality as an “axiom” neatly captures the extent to which it worked as the starting point, rather than the conclusion, of judicial analysis. Some explanation can be given, however: territoriality was a device for allocating authority among coequal sovereigns, be they states of the Union or nation-states.⁶⁶ Chief Justice Marshall traced the reasoning in *The Antelope*: “No principle of general law is more universally acknowledged, than the perfect equality of nations. . . . It results from this equality, that no one can rightfully impose a rule on another. Each legislates for itself, but its legislation can operate on itself alone.”⁶⁷

The rigidity of the territorialist rule should not be overstated; exceptions existed for lands subject to no sovereign and even for application of a state’s law to its own citizens.⁶⁸ By 1909, Justice Holmes was

⁶⁵ *Bond v. Hume*, 243 U.S. 15, 20-21 (1917); *see also, e.g., New York Life Ins. Co. v. Head*, 234 U.S. 149, 161 (1914) (“[I]t would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that State . . . without throwing down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends.”). Other famous products of the territorialist era include the civil procedure chestnut *Pennoyer v. Neff*, 95 U.S. 714 (1877).

⁶⁶ *See generally* Kramer, *Vestiges*, *supra* note 44, at 188 (explaining territoriality in “public international law, adjudicatory jurisdiction, and conflict of laws” as “variations on a single theme—that of accommodating conflicting policies of independent sovereigns”).

⁶⁷ 23 U.S. (10 Wheat.) 66, 122 (1825). Territoriality is, of course, not the only means of implementing an equality norm. Modern conflicts theory has largely rejected territoriality, but I have suggested that it need not discard equality, and that in fact the Constitution provides courts with antidiscrimination norms that could be used to police state choice-of-law rules. *See* Roosevelt, *Myth*, *supra* note 41, at 2518-33 (“In particular, Full Faith and Credit prevents consideration of the fact that a particular right is a local one, and Privileges and Immunities similarly prevents the fact that a party is (or is not) a forum domiciliary from having weight.”).

⁶⁸ *See Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 355-56 (1909) (noting the exceptions); Kramer, *Vestiges*, *supra* note 44, at 189-90 (same). With respect to constitutional law, one might expect even a looser approach. As Catherine Struve observed to me in conversation, extraterritorial application of a rule—such as a constitutional prohibition—*restricting* the power of state authorities is not easily seen as an infringement on the sovereignty of another state. The fact that territorialism does not make any such practical assessment of state interests is precisely the modern criticism.

characterizing it as a presumption to be applied “in case of doubt,” though also “the general and almost universal rule.”⁶⁹ Even as a presumption, however, and even as it grew progressively riddled with exceptions and escape devices, territoriality proved a poor fit in an increasingly interconnected world. Gradually it gave ground as the twentieth century moved on.⁷⁰ In personal jurisdiction, *Pennoyer* yielded to *International Shoe*;⁷¹ in domestic conflicts, the “choice of law revolution” swept from the law reviews into the state courts, though not entirely and not without resistance.⁷²

For a time, the jurisprudence with respect to federal law seemed to be keeping pace. Justice Holmes’s analysis of the scope of federal law in *American Banana* was, in the words of Larry Kramer, “pure conflict of laws,” citing familiar conflicts cases and even Dicey’s treatise.⁷³ And when Learned Hand took the fateful step, in *Alcoa Steamship*, of extending the Sherman Act’s prohibitions to conduct abroad affecting commerce within the United States, he commented that limitations on the extraterritorial scope of federal statutes “generally correspond to those fixed by the ‘Conflict of Laws.’”⁷⁴

⁶⁹ *American Banana*, 213 U.S. at 357, 356.

⁷⁰ See Kramer, *Vestiges*, *supra* note 44, at 192-93 (discussing the roughly contemporaneous erosion of territoriality in international law, personal jurisdiction, and conflict of laws).

⁷¹ *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 317-19 (1945).

⁷² For an exhaustive description and assessment of the “revolution,” see Harold L. Korn, *The Choice-of-Law Revolution: A Critique*, 83 COLUM. L. REV. 772 (1983).

⁷³ See Kramer, *Vestiges*, *supra* note 44, at 186-87 (observing that Holmes supported the opinion by citing such cases as *Slater v. Mexican National Railroad* and *Milliken v. Pratt*).

⁷⁴ *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443-44 (2d Cir. 1945). See also *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597, 613-15 (9th Cir. 1976) (“[T]o determine whether American authority *should* be asserted in a given case as a matter of international comity and fairness . . . [w]e believe that the field of conflict of laws presents the proper approach . . .”). With its invocation of international comity and fairness, *Timberlane* displays a theoretical sophistication beyond that of *Alcoa*. *Alcoa* treated the extraterritorial scope of the Sherman Act as a single question: either U.S. law applies or it does not. 148 F.2d at 443-44. *Timberlane* recognized the possibility that while an act might fall within the scope of the Sherman Act, the defendant might nonetheless escape liability out of deference to the authority of a foreign state. 549 F.2d at 613-15. In conflicts terminology, it allowed for the possibility that U.S. law might not always prevail in a conflict with foreign law. See Kramer, *Vestiges*, *supra* note 44, at 193-94 (discussing *Alcoa*, *Timberlane*, and other conflicts-infused extraterritoriality cases). *Timberlane*’s analysis thus contained two steps, rather than one. See 549 F.2d at 613 (“[T]here is the additional question which is unique to the international setting of whether the interests of, and links to, the United States—including the magnitude of the effect on American foreign commerce—are sufficiently strong, vis-à-vis those of other nations, to justify an assertion of extraterritorial authority.”). See generally

With respect to the Constitution, the *Insular Cases*, decided between 1901 and 1922, seem perhaps even slightly ahead of their time. They did not explicitly invoke the field of domestic conflicts (though references to doctrines of international law were of course frequent); but the various Justices seeking to ascertain the Constitution's scope deployed an array of interpretive methodologies impressive in their breadth and largely sensible in their substance. Indeed, the approaches are both more appealing to the modern eye than the fine reticulations of Joseph Beale's metaphysics and more sophisticated than some of the Court's subsequent categorical invocations of territoriality.⁷⁵

The methodological richness and diversity on display in the *Insular Cases* makes them worth considering in some detail, for the approaches they offer will recur. The analyses in *Downes v. Bidwell*⁷⁶ are illustrative.⁷⁷ Justice Brown, writing for the Court, began with the observation that textualism alone is inadequate: "The Constitution itself does not answer the question."⁷⁸ Instead, "[i]ts solution must be found in the nature of the government created by that instrument, in the opinion of its contemporaries, in the practical construction put upon it by Congress, and in the decisions of this court."⁷⁹ The particular issue presented in *Downes* was whether Puerto Rico counted as part of the United States for the purposes of Article I, Section 8's demand that duties, imposts, and excises be "uniform throughout the United States."⁸⁰ Brown's analysis considered the textual distinctions the Constitution makes between the United States and "place[s] subject to

Kramer, *Rethinking*, *supra* note 41, at 280 (endorsing two-step analysis).

⁷⁵ In particular, the White and Brown opinions in the *Insular Cases* suggest to me an awareness that "applying" the Constitution abroad need not mean deciding cases with foreign elements as though they were wholly domestic. That is, White and Brown are willing to grant that Congress cannot act outside the restraints of the Constitution, while at the same time asserting that cases with foreign elements may come out differently than they would if they were wholly domestic. This is a crucial insight in conflicts theory. See Larry Kramer, *The Myth of the "Unprovided-For" Case*, 75 VA. L. REV. 1045, 1051 (1989) [hereinafter Kramer, *The "Unprovided-For" Case*] ("One must determine the rule of decision for the case actually before the court, and this may not be the rule used in a similar but purely domestic case.").

⁷⁶ 182 U.S. 244 (1901).

⁷⁷ Neuman's account of *Downes*, see NEUMAN, *supra* note 56, at 85-89, is similar to the one offered here. While I differ in some respects—notably my understanding of Justice White's theory, see *infra* note 89 and accompanying text—I generally found little to improve on.

⁷⁸ 182 U.S. at 249.

⁷⁹ *Id.*

⁸⁰ *Id.*

their jurisdiction,”⁸¹ the “object” of Section 8 and related clauses,⁸² and the history of American expansion.⁸³ Though he concluded that Puerto Rico was not part of the United States for the purposes of the impost clause, he went on to observe that some constitutional prohibitions might “go to the very root of the power of Congress to act at all” and therefore restrain it “irrespective of time and place.”⁸⁴

Justice White, concurring, offered the theory that would eventually win majority support.⁸⁵ White started with the proposition that, as “every function of the government [is] derived from the Constitution, it follows that that instrument is everywhere and at all times potential in so far as its provisions are applicable.”⁸⁶ To ascertain the applicability of constitutional provisions, he suggested “an inquiry into the situation of the territory and its relations to the United States.”⁸⁷ Territories that had been “incorporated into and become an integral part of the United States,”⁸⁸ were, with respect to the availability of constitutional rights, indistinguishable from the states of the Union: all constitutional provisions applied. Unincorporated territories lay beyond the scope of constitutional provisions (like the impost clause) that referred to “the United States.” But, for White, that did not mean that they lay beyond the Constitution entirely. Like Brown, he offered a backstop of limitations on Congressional power that operated without respect to geography:

Undoubtedly, there are general prohibitions in the Constitution in favor of the liberty and property of the citizen which are not mere regulations as to the form and manner in which a conceded power may be exercised, but which are an absolute denial of all authority under any circumstances or conditions to do particular acts. In the nature of things,

⁸¹ *Id.*

⁸² *Id.* at 278.

⁸³ *Id.* at 279.

⁸⁴ *Id.* at 277; see also *id.* at 283 (“Even if regarded as aliens, [the inhabitants of Puerto Rico] are entitled under the principles of the Constitution to be protected in life, liberty and property.”). Brown also asserted without qualification, however, that “the Constitution does not apply to foreign countries or to trials therein conducted . . .” *Id.* at 270. One could say that the Justices who decided the *Insular Cases* shared the dominant territorialist premise and differed only over its application, but I think this would overlook the extent to which Brown and White endorsed some version of what I will call the model of limited government. See *infra* Part III.D.

⁸⁵ See *Dorr v. United States*, 195 U.S. 138, 143-46 (1905) (adopting distinction between incorporated and unincorporated territories).

⁸⁶ *Downes*, 182 U.S. at 289 (White, J., concurring).

⁸⁷ *Id.* at 293.

⁸⁸ *Id.* at 299.

limitations of this character cannot be under any circumstances transcended, because of the complete absence of power.⁸⁹

Chief Justice Fuller, writing for four dissenters, rejected as “occult” White’s distinction between incorporated and unincorporated territories, contending that in practice it amounted to the contention that “Congress has the power to keep [a territory], like a disembodied shade, in an intermediate state of ambiguous existence for an indefinite period.”⁹⁰ He likewise dismissed as “idle” the attempt to draw a “distinction between a total want of power and a defective exercise of it.”⁹¹

Fuller spent most of his energies attacking Brown’s reading of precedent and White’s distinctions; he offered little in the way of a positive theory for determining the scope of the Constitution. The first Justice Harlan, who joined Fuller’s dissent but also wrote separately, did offer such a theory. Harlan found textual support for the extension of the Constitution to Puerto Rico in the Supremacy Clause. An early draft, he observed, made the Constitution, federal laws, and treaties “the supreme law of the several States”; the convention had changed this phrase to “the supreme law of the land.”⁹² The amendment, Harlan claimed, demonstrated an intent to “embrace[] all the peoples and all the territory, whether within or without the States, over which the United States could exercise jurisdiction or authority.”⁹³

Harlan thus reasoned that “[t]he Constitution is supreme over every foot of territory, wherever situated, under the jurisdiction of the United States.”⁹⁴ Going further—and suggesting the normative underpinning of his conclusion—he asserted that “[b]y whomsoever and wherever power is exercised in the name and under the authority of

⁸⁹ *Id.* at 294-95. It is now conventional to describe White’s approach as holding that inhabitants of unincorporated territories enjoy only “fundamental” rights. *See, e.g., Reid v. Covert*, 354 U.S. 1, 13 (1957) (describing the *Insular Cases* as “conceding that ‘fundamental’ constitutional rights applied everywhere”); NEUMAN, *supra* note 56, at 87 (“[E]ven unincorporated territories benefit from ‘inherent, although unexpressed, principles which are the basis of all free government . . . restrictions of so fundamental a nature that they cannot be transgressed.’” (quoting *Downes*, 182 U.S. at 291)). I take White’s reference to an “absence of power” more seriously and read him to be endorsing what I will call the model of limited government. *See infra* Part III.D.

⁹⁰ *Downes*, 182 U.S. at 372 (Fuller, C.J., dissenting).

⁹¹ *Id.* at 373.

⁹² *Id.* at 382-83 (Harlan, J., dissenting).

⁹³ *Id.* at 383.

⁹⁴ *Id.* at 385.

the United States, or of any branch of its Government, the validity or invalidity of that which is done must be determined by the Constitution.”⁹⁵ Harlan’s ultimate position, then, seemed to be that constitutional protections were triggered not by geography, nor even necessarily by citizenship, but rather by the simple exercise of United States power.⁹⁶

Eisentrager was a less impressive performance, deploying, among other things, a fairly rigid territoriality.⁹⁷ But in *Reid v. Covert*,⁹⁸ the Court slipped the bonds of territoriality, at least with respect to American citizens, a full six years before the first significant judicial salvo of the domestic choice-of-law revolution.⁹⁹ *Reid* considered the consolidated cases of two American women who had killed their servicemen husbands abroad, one in England and one in Japan. Each was tried before a court martial abroad, and each sought habeas relief on the basis of constitutional rights to grand jury indictment and jury trial.¹⁰⁰ The Court initially rejected the petitions on the theory that the Fifth and Sixth Amendments’ jury guarantees did not extend to

⁹⁵ *Id.* He also rejected the distinction between constitutional provisions regulating power and those denoting an absence of power, *see id.* at 383, and, echoing Fuller, termed the idea of incorporation “occult,” *id.* at 391.

⁹⁶ *See* NEUMAN, *supra* note 56, at 87 (“Harlan unambiguously expounded a conception of the Constitution based on the mutuality of legal obligation.”). The sort of mutuality that Neuman endorses seems somewhat narrower than Harlan’s; Neuman sees only certain exercises of power as carrying with them constitutional rights. *See id.* at 99 (“[A]liens abroad could not claim the protection of constitutional rights under this version of the mutuality of obligation approach every time the United States acted to their disadvantage.”).

⁹⁷ Though not as rigid as later cases alleged, a fact to which the *Rasul* Court appeared sensitive. *Compare* *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (citing *Eisentrager* for the proposition that the “Fifth Amendment’s protections do not extend to aliens outside the territorial boundaries”), *with* *Rasul*, 124 S. Ct. at 2693 (observing that “all six of the facts” about the status of the *Eisentrager* petitioners were “critical to [the Court’s] disposition” of the constitutional claims).

⁹⁸ 354 U.S. 1 (1957).

⁹⁹ *Babcock v. Jackson*, 191 N.E.2d 279 (N.Y. 1963), is generally considered the first significant judicial adoption of the new conflicts learning. *See, e.g.*, Larry Kramer, *Same Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L. J. 1965, 1992 n.105 (1997) (“[F]irst honors here are typically awarded to the New York Court of Appeals for its opinion in *Babcock v. Jackson*.” (citation omitted)). Rumbblings could be heard before *Babcock*; the same court adopted a “center of gravity” approach to a contracts case in 1954, *see* *Auten v. Auten*, 124 N.E.2d 99, 101-02 (N.Y. 1954), and the Indiana Supreme Court had adopted the “significant contacts” approach (again in a contract action) as early as 1945, *see* *W.H. Barber Co. v. Hughes*, 63 N.E.2d 417, 423 (Ind. 1945).

¹⁰⁰ *See Reid*, 354 U.S. at 3-5.

Americans tried “in foreign lands for offenses committed there” (though the Due Process Clause did).¹⁰¹

After granting reargument, however, the Court reversed itself. Accidents of geography, it suggested, should not control the relationship between Americans and their government. “When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land.”¹⁰² Like the *Insular Cases*, *Reid* contains no explicit invocation of conflicts theory. But its reasoning echoes (or presages) the domestic rejections of territoriality. Its ringing endorsement of the relevance of citizenship is as forceful as any penned by Brainerd Currie,¹⁰³ and its disparagement of geography would become a staple of torts cases involving accidents in the course of interstate travel.¹⁰⁴ Even though it does not bill itself as a conflicts case, *Reid* easily holds its own with the self-professed conflicts decisions of its era.¹⁰⁵

¹⁰¹ *Id.* at 5.

¹⁰² *Id.* at 6.

¹⁰³ Compare *id.* at 6 (describing the importance of citizenship as being “as old as government”), with CURRIE, *supra* note 46, at 85 (concluding that Massachusetts is concerned with the welfare of Massachusetts domiciliaries). The domiciliary focus in domestic conflicts can take on an unpleasant parochialism. See *Kilberg v. Northeast Airlines, Inc.*, 172 N.E.2d 526, 527-28 (N.Y. 1961) (“Our courts should if possible provide protection for our own State’s people against unfair and anachronistic treatment . . .”).

¹⁰⁴ Compare *Reid*, 354 U.S. at 6 (arguing that an American citizen’s rights “should not be stripped away just because he happens to be in another land”), with, e.g., *Kilberg*, 172 N.E.2d at 527 (“Modern conditions make it unjust and anomalous to subject the traveling citizen of this State to the varying laws of other States through and over which they move. . . . The place of injury becomes entirely fortuitous.”).

¹⁰⁵ *Reid* also contains other approaches. Some language echoes the *Insular Cases*’ conception of a limited government bound always by the Constitution. See *Reid*, 354 U.S. at 5-6 (“The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution.”); *id.* at 12 (rejecting the proposition that the Constitution is territorially limited as “obviously erroneous if the United States Government, which has no power except that granted by the Constitution, can and does try citizens for crimes committed abroad”). Some language takes a textual tack. See *id.* at 8 (“The Fifth and Sixth Amendments . . . are also all inclusive with their sweeping references to ‘no person’ and to ‘all criminal prosecutions.’”). Still other passages suggest that constitutional rights appertain to the obligation of obedience or subject status. See *id.* at 6 (observing that English inhabitants of settled colonies “take with them . . . allegiance to the Crown, the duty of obedience [but also] all the rights and liberties of British Subjects” (quoting 2 CHARLES M. CLODE, *MILITARY FORCES OF THE CROWN; THEIR ADMINISTRATION AND GOVERNMENT* 175 (London, John Murray 1869))).

This harmonious state of affairs did not persist. Though the Supreme Court's mid-century cases dealing with the scope of the Jones Act had abandoned territorialist reasoning sufficiently to win the approval of Brainerd Currie,¹⁰⁶ in 1990, territorialism returned as a vigorous presumption for the interpretation of federal law in *EEOC v. Arabian American Oil Co. (Aramco)*.¹⁰⁷ And while that decade saw lower federal courts relatively adventurous in enforcing constitutional rights in favor of aliens abroad,¹⁰⁸ the Supreme Court seemed to be engaged in a similar territorialist retrenchment. In *United States v. Verdugo-Urquidez*,¹⁰⁹ the Court rejected a Mexican national's attempt to invoke the exclusionary rule as a remedy for the alleged Fourth Amendment violation created by a warrantless search of his house in Mexico.¹¹⁰

After *Reid*, pure territoriality was no longer an option for the *Verdugo-Urquidez* Court, and the opinion displays some creativity in accommodating that precedent. Chief Justice Rehnquist, writing for the majority, relied in part on the Fourth Amendment's reference to "the right of the people" to justify a distinction between nonresident aliens and "a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community."¹¹¹ He also consulted the "available historical data" in an attempt to ascertain "the purpose of the Fourth Amendment,"¹¹² turned to the practice of the Framers' contemporaries to shed light on the original understanding,¹¹³ and toured the doctrine, giving special attention to the *Insular Cases*.¹¹⁴

¹⁰⁶ The cases are *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959), and *Lauritzen v. Larsen*, 345 U.S. 571 (1953). For Currie's evaluation, see CURRIE, *supra* note 46, at 361-75.

¹⁰⁷ 499 U.S. 244 (1991). For a thorough discussion of the territorialist recrudescence in *Aramco*, see Kramer, *Vestigis*, *supra* note 44.

¹⁰⁸ See, e.g., *Haitian Ctrs. Council, Inc. v. McNary*, 969 F.2d 1326, 1342-44 (2d Cir. 1992) (finding serious questions as to Fifth Amendment rights of Haitian refugees detained in Guantanamo), *vacated sub nom. Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 918 (1993); *Lamont v. Woods*, 948 F.2d 825, 832-33 (2d Cir. 1991) (entertaining an Establishment Clause challenge to federal funding of foreign religious organizations located outside United States); *United States v. Verdugo-Urquidez*, 856 F.2d 1214 (9th Cir. 1988) (excluding evidence obtained from a warrantless search of an alien's residence abroad), *rev'd*, 494 U.S. 259 (1990).

¹⁰⁹ 494 U.S. 259 (1990).

¹¹⁰ *Id.* at 274-75.

¹¹¹ *Id.* at 265.

¹¹² *Id.* at 266.

¹¹³ *Id.* at 267.

¹¹⁴ See *id.* at 268-69 ("And certainly, it is not open to us in light of the *Insular Cases* to endorse the view that every constitutional provision applies wherever the United

The culmination of this methodological eclecticism, however, suggests a thwarted yearning for the simple clarity of territoriality: what follows in the opinion is a surprisingly univocal reading of *Eisen-trager* that finds its “rejection of extraterritorial application of the Fifth Amendment . . . emphatic.”¹¹⁵ Later cases would repeat that characterization, citing *Eisen-trager* (and *Verdugo-Urquidez*) for the simple proposition that the “Fifth Amendment’s protections do not extend to aliens outside the territorial boundaries.”¹¹⁶

Perhaps more disturbing than the return of territoriality (though related to it) is the one-step nature of the Court’s analysis: the supposition that to “apply” the Constitution extraterritorially means to decide cases with foreign elements as though they were wholly domestic.¹¹⁷ That is, the majority seems to assume that in order to avoid granting *Verdugo-Urquidez* a full panoply of Fourth Amendment protections—including the exclusionary rule, which is not a constitutional right at all, but rather a judicially-crafted remedy—it was required to announce that the Amendment had “no application” to federal action against aliens abroad.¹¹⁸

States Government exercises its power.”).

¹¹⁵ *Id.* at 269. The Court did, admittedly, employ the familiar anti-territorial tactic of characterizing *Verdugo-Urquidez*’s presence in the United States as the product of chance. *See id.* at 272 (“We do not think the applicability of the Fourth Amendment to the search of premises in Mexico should turn on the fortuitous circumstance of whether the custodian of its nonresident alien owner had or had not transported him to the United States at the time the search was made.”). This, however, is simply asserting the primacy of one territorial factor (location of the house) over another (location of the owner).

¹¹⁶ *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001).

¹¹⁷ Chief Justice Rehnquist’s opinion in *Aramco* suggests a similar understanding of what it means to apply federal law abroad. *See EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 255 (1991) (asserting that if Title VII applies abroad to govern the conduct of an American employer of an American citizen, it must also govern the conduct of a French employer of an American citizen); *Kramer, Vestiges*, *supra* note 44, at 219-20 (making the same point).

¹¹⁸ For instance, one searches the majority’s discussion of the *Insular Cases* in vain for any acknowledgement of Justice White’s assertion that “[t]he Government of the United States was born of the Constitution, and all powers which it enjoys or may exercise must be either derived expressly or by implication from that instrument.” *Downes v. Bidwell*, 182 U.S. 244, 288 (1901) (White, J., concurring). Similar language does make an appearance in the analysis of *Reid v. Covert*, but it is then swept aside as applying only to citizens. *See Verdugo-Urquidez*, 494 U.S. at 270 (“Since respondent is not a United States citizen, he can derive no comfort from the *Reid* holding.”). The separate concurrence of Justice Kennedy appears motivated by the desire to reject this binary vision and reaffirm the universal subordination of the federal government to the Constitution. *See id.* at 277 (Kennedy, J., concurring) (“[T]he Government may act only as the Constitution authorizes, whether the actions in question are foreign or domestic.

A general description of what is happening here is that the Court's approach to extraterritoriality has become detached from modern conflicts theory. There are two more specific components of the general phenomenon. First, the Court does not seem to see extraterritoriality cases as presenting a conflicts issue. Only this blinkered perspective could have made it plausible to rely so heavily on the presumption against extraterritoriality in *Aramco*, almost half a century after territoriality had been widely rejected in domestic conflicts and personal jurisdiction.¹¹⁹ Second, when it does not see itself as deciding a conflicts case (and as the first point shows, it only quite rarely does), the Court seems to have forgotten (or decided to ignore) the choice-of-law revolution almost entirely.¹²⁰ For instance, no one familiar with the evolution of the Court's conflicts jurisprudence would think that its early decisions constitutionalizing territoriality are good law after the relaxation of constitutional constraints in cases such as *Clay v. Sun Insurance Office, Ltd.*¹²¹ and *Allstate Insurance Co. v. Hague*.¹²² Yet one of the most forceful of those early cases, *New York Life Insurance Co. v. Head*,¹²³ resurfaced like a coelacanth in 1996, quoted at substantial

But this principle is only a first step in resolving this case." (citations omitted)).

¹¹⁹ Likewise, the Court's account of what constitutes a "conflict" between U.S. and foreign law in *Hartford Fire Insurance Co. v. California*, 509 U.S. 764, 798-99 (1993), is far removed from the domestic conflicts understanding, and its apparent belief in both *Hartford Fire*, see *id.* at 795-98, and *Aramco*, see 499 U.S. at 252-53, that the scope of federal law relates to the subject matter jurisdiction of federal courts is simply baffling. See Larry Kramer, *Extraterritorial Application of American Law After the Insurance Antitrust Case: A Reply to Professors Lowenfeld and Trimble*, 89 AM. J. INT'L L. 750, 750 n.3 (1995) (discussing the *Hartford Fire* Court's apparent conclusion that "the applicability of U.S. law and conduct abroad is a question of subject matter jurisdiction"). For general assessments of the value of conflicts thinking as applied to the question of the extraterritorial application of federal law, see, for example, HENRY J. STEINER ET AL., *TRANSNATIONAL LEGAL PROBLEMS* 888-90 (4th ed. 1994); William S. Dodge, *Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism*, 39 HARV. INT'L L.J. 101, 121-43 (1998); Andreas F. Lowenfeld, *Public Law in the International Arena: Conflict of Laws, International Law, and Some Suggestions for Their Interaction*, 163 RECUIL DES COURS D'ACADEMIE DE DROIT INTERNATIONAL [R.C.A.D.I.] 311, 328-29 (1979); Harold G. Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 AM. J. INT'L L. 280, 281-85 (1982); Russell J. Weintraub, *The Extraterritorial Application of Antitrust and Securities Laws: An Inquiry into the Utility of a "Choice-of-Law" Approach*, 70 TEX. L. REV. 1799, 1801-05 (1992).

¹²⁰ Perhaps conflicts scholars bear some of the responsibility for this; conflicts theory is not considered a huge success. And indeed, I will suggest that some standard conflicts approaches may not be especially helpful in determining the scope of the Constitution. See *infra* Part III.

¹²¹ 377 U.S. 179 (1964).

¹²² 449 U.S. 302 (1981).

¹²³ 234 U.S. 149 (1914).

length for the long-rejected proposition that extraterritorial application of state statutes violates the Constitution.¹²⁴

Rasul does little in the way of reconnecting the Court's analysis of territorial scope with conflicts theory. Its textualist approach to determining the scope of the habeas statute is certainly not a recognizable conflicts methodology, and to the extent that the substance of the constitutional sequel can be forecast, it seems far more likely to focus on the special attributes of Guantanamo Bay than to take issue with the territorialist paradigm. I intend to suggest that a properly constituted conflicts theory could be useful in resolving the constitutional issue, but before considering conflicts, it is worth looking a bit more closely at the techniques the Court has been using. The preceding discussion has been little more than a chronological tour of the case law, and a somewhat disorganized one at that. Reconciling the various decisions is no easy task—indeed, I suspect it is impossible—because they reflect and embody quite different theories of extraterritoriality.¹²⁵ Rather than attempt a synthesis, the following Part extracts those theories and assesses them individually.

One test of theory is its fit with practice. That criterion is of limited utility here; precisely because the Court has not been consistent in its methodology, we cannot expect any model to capture the doctrine perfectly. We may, however, demand at least moderate consistency with settled law, and we may test the approaches on the basis of their ability to resolve the question of extraterritorial scope in an intellectually coherent way.¹²⁶

¹²⁴

[I]t would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that State . . . without throwing down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends. This is so obviously the necessary result of the Constitution that it has rarely been called in question and hence authorities directly dealing with it do not abound.

BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 571 n.16 (1996) (quoting *Head*, 234 U.S. at 161).

¹²⁵ See NEUMAN, *supra* note 56, at 97 (“In the case of American constitutionalism, conflicting conceptions of geographical scope have led to serious indeterminacy in the modern period.”).

¹²⁶ See *id.* at 98 (“The question of scope must be resolved primarily by deliberative choice among alternative approaches on the basis of their normative characteristics and their coherence with less unsettled constitutional practices.”).

III. THEORY: APPROACHES TO EXTRATERRITORIALITY

The task to which I turn in this Part—isolating and evaluating the different approaches that different Justices have offered to the question of the extraterritorial scope of the Constitution—has been performed before. Most notably, Gerald Neuman’s book *Strangers to the Constitution*, and its predecessor article *Whose Constitution?*, set out a taxonomy that includes four different models: universalism, membership, mutuality, and global due process.¹²⁷ I am fortunate not to be writing on a blank slate, and I have benefited greatly from Neuman’s work. My own reconstruction differs from his in significant respects, however: I include universalism, membership, and mutuality, but add territoriality (which Neuman considers part of mutuality) and replace global due process with limited government, a related model that I think better captures the intellectual history of the relevant arguments. (These distinctions will become clear later.) I also attempt a more critical evaluation of the models. Many of them, I will suggest, have much less resolving power than is commonly supposed, and some turn out to beg the question entirely.

A. *Universalism/Textualism*

The simplest approach to extraterritoriality would be to take the Constitution’s text as a sufficient guide. Some constitutional provisions specify limitations on their scope, either geographical or personal. The impost clause at issue in *Downes*, for instance, applies only to taxes “throughout the United States,”¹²⁸ and the Fourteenth Amendment’s equal protection clause makes specific reference to the “jurisdiction” of the states.¹²⁹ Likewise, the Privileges and Immunities Clause appears to restrict its protection to “citizens of the United

¹²⁷ See *id.* at 4-8; Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909, 915-21 (1991). The article refers to the mutuality model as “municipal law”; I have chosen to focus on the book as the more recent statement of Neuman’s analysis. No discussion of models of constitutional analysis would be complete without an acknowledgement of Philip Bobbitt’s extremely helpful taxonomy of constitutional argument. See PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 7, 93 (1982). Bobbitt identifies six modes of argument: textual, historical, structural, doctrinal, prudential, and ethical. The preceding discussion of the case law shows that these modes may be employed in the service of various different positions, and this Part will demonstrate that they are not tied to particular theoretical approaches to extraterritoriality either. (For instance, although I call one approach textualism, textual argument may be made in support of the social contract/membership approach as well. See *infra* Part III.C.)

¹²⁸ U.S. CONST. art. I, § 8.

¹²⁹ *Id.* amend. XIV.

States.”¹³⁰ A textualist, or at least one who believed textualism to be the only permissible interpretive methodology, might then approach the problem of scope by reasoning that constitutional provisions *without* textual limitations are available to anyone, regardless of citizenship or geography.

The textualist model (which Neuman refers to as “Universalism”)¹³¹ has never enjoyed much support among the Justices.¹³² A significant number have employed textualism as one among other methodologies—Justices Brown and Harlan in *Downes*,¹³³ Justice Black in *Reid*,¹³⁴ and Justices Rehnquist and Brennan in *Verdugo-Urquidez*¹³⁵—but the analysis is more commonly used to narrow rights, rather than to extend them, the counterexamples being *Reid* and the dissenting opinions of Harlan and Brennan in *Downes* and *Verdugo-Urquidez*. The *Rasul* Court’s embrace of textualism in setting the scope of the habeas statute might give textualism a boost, but it would be an undeserved one.

As already noted, conflicts problems typically arise precisely because legislatures do not specify the geographical or personal scope of their statutes. To decide that such statutes (or, in the constitutional context, such provisions as the Fifth Amendment’s Due Process Clause) are therefore unlimited in scope is abdication, not analysis. Textualism does indeed tell us how to resolve the question—something I will argue some other models do not—but it does not tell us how to do so in a sensible way.¹³⁶

¹³⁰ *Id.* One might also read the phrase “privileges or immunities of citizens of the United States” to identify the class of rights protected against abridgement, rather than the class of rights-holders—that is, to indicate that the relevant privileges and immunities were those held against the United States under federal law, rather than the state-law privileges and immunities referenced in Article IV. *Cf.* *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 119-20 (1873) (Bradley, J., dissenting) (noting that Bill of Rights guarantees and others “are specified in the original Constitution, or in the early amendments of it, as among the privileges and immunities of citizens of the United States”).

¹³¹ *See* NEUMAN, *supra* note 56, at 5-6 (describing an approach with no limitations on people or places covered by the Constitution).

¹³² *See id.* at 6 (admitting that it has “played almost no role in American constitutionalism until recent years”).

¹³³ *See Downes*, 182 U.S. at 251; *id.* at 382-83 (Harlan, J., dissenting).

¹³⁴ *See Reid v. Covert*, 354 U.S. 1, 7-8 (1957).

¹³⁵ *See United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990); *id.* at 283 n.7 (Brennan, J., dissenting).

¹³⁶ Neuman, consistent with his preference for mutuality, faults universalism for suggesting that the United States would be required to respect the rights of aliens abroad “in all the contexts in which it interacts with them; not just when it seeks to ap-

B. *Territoriality*

Territoriality suggests that as each sovereign is supreme within its geographical borders, its law, all of its law, and only its law, is there in force. The Constitution, then, could be invoked by persons within (some definition of) the United States, and not by anyone else. This model can claim at least an historical ascendance and, perhaps, a renewed modern appeal. (There are second acts in the lives of American constitutional doctrines.) Certainly, no rival conception can boast such repeated and unqualified endorsement by the Supreme Court.¹³⁷

On the other hand, no other approach has the defect of being so demonstrably false. Territoriality, in domestic conflicts and international law, was understood not as a sensible way to allocate legislative jurisdiction (though some digging can get you there¹³⁸) but rather as a limit on the power of legislatures, imposed domestically by the Constitution and internationally by the law of nations. Practice proved the premise false; neither constraint held up, and if Congress and state legislatures can project power beyond their borders, so too can We the People.¹³⁹ Perhaps more significant, territoriality suffered a crip-

ply its law, but also when it exercises military force against them or interacts consensually in a commercial or foreign aid context.” NEUMAN, *supra* note 56, at 110. I will suggest later that concerns about war—which have been raised by almost everyone with whom I have discussed this issue—are significantly overstated. See *infra* notes 205-07 and accompanying text. Foreign aid is a more difficult issue, and I think it is probably a good illustration of (though hardly the only reason) why pure textualism is a silly approach.

¹³⁷ See, e.g., *Ross v. McIntyre*, 140 U.S. 453, 464-65 (1891); *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356-57 (1909); *N.Y. Life Ins. Co. v. Head*, 234 U.S. 149, 163-64 (1914).

¹³⁸ See *supra* Part II; Kramer, *Vestiges*, *supra* note 44, at 187-88 (describing territoriality as a method of accommodating conflicting policies). Kramer points to its relatively egalitarian allocation of authority as a selling point; another, more salient to the judicial mind, might be its ease of application. Though determining the location of an event can prove surprisingly complex, territoriality does allow judges to avoid the difficult task of deciding how domestic law should interact with, and perhaps be altered by, foreign law when it is applied to events occurring outside the borders of a state or nation. See *infra* note 214 and accompanying text.

¹³⁹ One might nonetheless attempt to defend territoriality as the original understanding, but this is less than fully convincing. The Framers doubtless understood the scope of the Constitution in territorialist terms, but no more so than the scope of national power more generally, and they could as plausibly be characterized as understanding that the Constitution would follow the exercise of such power, or even that it should have the maximum scope possible. Neuman, in fact, characterizes territoriality as a version of the mutuality approach. See NEUMAN, *supra* note 56, at 7. I do not, on the grounds that territoriality was initially understood to be based on the limits of sovereign power rather than mutuality, and that it departs from mutuality in its modern applications.

pling blow in *Reid v. Covert*; as long as Americans abroad enjoy constitutional protection (a position the Court is not likely to abandon), territoriality will not fit the doctrine. Still, territoriality could be recast as merely a sensible approach, not a necessary restraint, and given the Court's inability to settle on a particular theory, demanding a perfect fit with existing case law is surely asking too much. It is worthwhile, then, to consider territoriality on its own merits.

From a more theoretical perspective, territoriality faces additional challenges. First, as Currie took great pains to point out, it is not a consistently sensible way of determining the scope of a law.¹⁴⁰ Second, territoriality is somewhat question-begging. Grant that the Constitution "applies" within the borders of the United States. Does that mean that cases involving aliens arising within the U.S. should be resolved as though they were entirely domestic—i.e., as though the alien were a citizen? Territoriality, as a one-step approach, suggests that the answer is *yes*, which aligns it with the cases holding that even unlawful entrants enjoy constitutional rights.¹⁴¹

That may be a normatively desirable and intellectually supportable answer, but territoriality provides it only by fiat.¹⁴² The reservation of some benefits to citizens is common. It is not unimaginable that the purposes of the Constitution would be better served by denying some protections to unlawful or involuntary entrants, perhaps those who have entered the country in order to make war on it¹⁴³ or those we have deemed enemies and brought within our borders for incapacitation or punishment.¹⁴⁴ (There would, of course, remain the antece-

¹⁴⁰ See CURRIE, *supra* note 46, at 180-81 (arguing that "[t]he territorialist conception has been directly responsible for indefensible results"); see also, e.g., Kramer, *Vestiges*, *supra* note 44, at 210-11 ("Indeed, while much of modern conflicts theory remains unsettled, if anything is established, it is that across-the-board territoriality is a poor system for resolving conflicts.").

¹⁴¹ See, e.g., *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (noting that "once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent") and cases there cited.

¹⁴² *Eisentrager* attempted to offer a somewhat more complete justification, that presence implied protection. But the logic of this rationale is limited—and *Eisentrager* did limit it—to those who have entered lawfully, and perhaps excludes involuntary entrants as well. See *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950) ("[L]awful presence in the country creates an implied assurance of safe conduct and gives [the alien] certain rights . . .").

¹⁴³ Cf. *Ex parte Quirin*, 317 U.S. 1, 47-48 (1942) (holding, on the basis of petitioners' undisputed status as unlawful belligerents, that they could be tried by military tribunals rather than civil courts).

¹⁴⁴ But see *United States v. Verdugo-Urquidez*, 494 U.S. 259, 278 (1990) (Kennedy,

dent problem of what rights these people could assert in the effort to prove that they did not fit the category into which the government placed them.) Or rather, to look at the matter from the opposite side, if there is a good reason that such people should have constitutional rights *within* the U.S., it is hard to see why it should make a difference that the government has (fortuitously or strategically) elected to hold them outside its borders. With such a lengthy list of defects, territoriality should not be an appealing model.

C. Social Contract/Membership

A textualist who started her close reading at the beginning of the Constitution would find what appears to be a highly useful indicator as to its scope and purpose in the Preamble:

We the People of the United States, in order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.¹⁴⁵

Justices have indeed relied on the Preamble to argue for limits on constitutional scope. *Ross v. McIntyre*, somewhat surprisingly, used it to fund a territorialist approach, arguing that “[b]y the constitution a government is ordained and established ‘for the United States of America,’ and not for countries outside of their limits.”¹⁴⁶ This version of the social contract theory seems to beg the question (though only slightly more obviously than do others): grant that the Constitution empowers and restrains only the government of the United States; why does it follow that it restrains the government only *within* the United States? There is no obvious answer to this question, and the social contract theory is more commonly used (as Neuman’s term “membership” suggests)¹⁴⁷ to restrict rights to citizens.

J., concurring) (“All would agree, for instance, that the dictates of the Due Process Clause of the Fifth Amendment protect the defendant.”). Justice Rehnquist’s majority opinion could in fact be read to suggest that illegal aliens enjoy lesser rights. *See id.* at 282 (Brennan, J., dissenting) (expressing alarm at the implication); *cf.* *Fong Yue Ting v. United States*, 149 U.S. 698, 738 (1893) (Brewer, J., dissenting) (“The Constitution has no extraterritorial effect, and those who have not come lawfully within our territory cannot claim any protection from its provisions.”).

¹⁴⁵ U.S. CONST. pmbi.

¹⁴⁶ 140 U.S. 453, 464 (1891).

¹⁴⁷ *See* NEUMAN, *supra* note 56, at 6-7 (discussing social contract theory under the rubric of “Membership Models”).

Justice Rehnquist's opinion in *Verdugo-Urquidez* is perhaps the most notable example. In a portion of the opinion disavowed by Justice Kennedy, Rehnquist read "the people" referenced in the Fourth Amendment as related to the "People" of the Preamble: "a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community."¹⁴⁸

Rehnquist's argument relates to the Fourth Amendment specifically, but the Preamble could be taken to support a more general approach. The Constitution declares itself to be established to secure the blessings of liberty for a limited class: the People and their "Posterity." It seems plausible, then, to reason that the benefits of the Constitution are generally reserved for the People—not the ratifiers and their biological descendants, of course, but the American community Rehnquist described. Some constitutional provisions explicitly reject this restriction, notably the Fourteenth Amendment's Equal Protection Clause, which specifically extends to all persons within the jurisdiction of the States,¹⁴⁹ but those may be considered exceptions that prove the rule: absent such a clear textual indicator, the background membership assumption should control.

From this perspective, it might seem clear that aliens abroad should not enjoy constitutional rights. Neither, as Rehnquist intimated in *Verdugo-Urquidez*, should illegal entrants, and indeed the rights of lawful resident aliens might seem to be in some jeopardy. Neuman calls this model Hobbesian in its implications, and it quite neatly tracks Hobbes's pronouncement that "the Infliction of what evil soever, on an Innocent man, that is not a Subject, if it be for the benefit of the Commonwealth, and without violation of any former Covenant, is no breach of the Law of Nature."¹⁵⁰

A first problem with the membership model is that, in its most uncompromising version, it does not fit our doctrine, which does extend constitutional rights to illegal aliens, involuntary entrants, and even aliens abroad who are defendants in civil suits.¹⁵¹ Responses are avail-

¹⁴⁸ *Verdugo-Urquidez*, 494 U.S. at 265. For Kennedy's disavowal, see *id.* at 276.

¹⁴⁹ See, e.g., *Plyler v. Doe*, 457 U.S. 202, 211-14 (1982) (relying on the text of the Equal Protection Clause to protect undocumented aliens).

¹⁵⁰ See NEUMAN, *supra* note 56, at 109 (quoting THOMAS HOBBS, *LEVIATHAN* 360 (C.B. McPherson ed. 1985) (1651)).

¹⁵¹ See NEUMAN, *supra* note 56, at 113 (noting that American courts observe constitutional limitations when trying nonresident alien defendants). For an interesting discussion of the Due Process rights of nonresident alien defendants, see Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 HARV. L.

able. One might argue that this signals that the doctrine should be revised, a position that probably has its supporters. More plausibly, one might point out that it is quite likely in the interest of citizens to extend constitutional rights to some categories of aliens.¹⁵²

But at this point the question-begging aspect of the membership model becomes apparent. Grant that the Constitution exists and extends rights only for the benefit of the People. Why does it follow that it extends rights only *to* the People? Of course, it does not. The People might worry that ruthless treatment of aliens by their own government would expose them to equally ruthless treatment at the hands of foreign powers.¹⁵³ They might think it beneficial to extend constitutional rights as a means of encouraging commerce and immigration.¹⁵⁴ They might worry that a government that had experienced the exercise of totally unchecked power against aliens would prove a greater danger to citizens. Or they might simply be repulsed by the idea of the government—their agent—acting in their name with no obligation to observe even the most fundamental norms of decency and fairness.¹⁵⁵

These issues are familiar from conflicts, where they surface in the debate over how to determine state interests. Currie's early work pos-

REV. 1217, 1223 (1992). NEUMAN, *supra* note 56, at 11-12, also observes that Hobbism comes at the price of delegitimizing claims that aliens have an obligation to obey U.S. law, but I fear I am too much of a positivist to find this consideration particularly weighty.

¹⁵² Madison presented this argument in the course of opposing the Alien Act, as Neuman describes. See NEUMAN, *supra* note 56, at 59 (characterizing Madison as arguing that “[t]he rights (natural or otherwise) of aliens and of citizens are intertwined, and oppression of aliens could indirectly harm citizens”).

¹⁵³ See, e.g., Brief Amicus Curiae of Retired Military Officers in Support of Petitioners at 25, *Rasul v. Bush*, 124 S. Ct. 2686 (2004) (Nos. 03-334, 03-343) (“[T]he lives of captured American military forces may well be endangered by the United States’ failure to grant foreign prisoners in its custody the same rights that the United States insists be accorded to American prisoners held by foreigners.”), available at 2004 WL 99346; *Verdugo-Urquidez*, 494 U.S. at 285 (Brennan, J., dissenting) (“By respecting the rights of foreign nationals, we encourage other nations to respect the rights of our citizens.”).

¹⁵⁴ See NEUMAN, *supra* note 56, at 59 (“Arbitrary government power over aliens would disrupt and discourage desired relations between aliens and citizens, whether marriage, friendship, commerce, or education.”).

¹⁵⁵ See, e.g., *Verdugo-Urquidez*, 494 U.S. at 286 (Brennan, J., dissenting) (“Our national interest is defined by [our moral] values and by the need to preserve our own just institutions.”); A Statement of Conscience: Not in Our Name, at <http://www.nion.us/NION.htm> (last modified Apr. 15, 2003) (“We believe that all persons detained or prosecuted by the United States government should have the same rights of due process.”).

ited, for illustrative purposes, a “selfish state,” interested only in the welfare of its own citizens.¹⁵⁶ Currie himself acknowledged that states might pursue more enlightened policies, and it was soon pointed out that considerations of reciprocity and game theory might lead even the most selfish state to moderate its assertions of authority and restrictions of rights.¹⁵⁷ The premise that the Constitution exists only for the benefit of Americans, in short, tells us very little about whether and under what circumstances it extends rights to aliens.

This is not a reason to reject the membership model. It is rather a demonstration that selecting the membership model does not in fact determine the scope of the Constitution. There remains the question of what scope best promotes the interests of the American People—a question that, interestingly enough, is familiar from the conflict of laws.¹⁵⁸ I will suggest that this question is indeed the fundamental one, and that it can usefully be addressed by the methodology of conflicts. For present purposes, however, it is enough to conclude that the membership model does not provide an answer.

D. *Limited Government/Global Due Process*

If the question of what constitutional rights aliens possess proves knotty, an analysis that does not work in terms of rights might seem an attractive alternative. Rather than identifying rights that defeat the exercise of government power, one could seek out limitations on that power. If the government simply lacks the power to take a certain act, considerations of geography and citizenship might seem irrelevant, and the question of who bears particular rights can be avoided.

Invocations of limited government are common in the extraterritoriality case law. Justice Brown in *Downes* acknowledged the existence

¹⁵⁶ See CURRIE, *supra* note 46, at 89 (assuming a “selfish state” to examine hypothetical conflict of laws cases).

¹⁵⁷ See *id.* (arguing that even for the state seeking to maximize its own interests, applying foreign law would sometimes be rational). For the suggestion that game theory will lead to cooperation, see Kramer, *Rethinking*, *supra* note 41, at 343-44.

¹⁵⁸ In its constitutional guise, the question may be somewhat more freighted. A judge attempting to divine state interests, as Currie noted, is always subject to the “advice of those who know better”—namely state legislatures. CURRIE, *supra* note 46, at 592 (emphasis omitted). Legislative correction is a real possibility; for instance, after the Supreme Court’s decision in *Aramco*, Congress amended Title VII to specify extra-territorial scope. See Civil Rights Act of 1991, Pub. L. No. 102-166, § 109, 105 Stat. 1071, 1077-78 (codified at 42 U.S.C. §§ 2000e(f), 2000e-1). Correction by the People, on the other hand, requires the much more difficult process of constitutional amendment.

of “such prohibitions as go to the very root of the power of Congress to act at all, irrespective of time or place,” and observed that “when the Constitution declares that ‘no bill of attainder or *ex post facto* law shall be passed,’ and that ‘no title of nobility shall be granted by the United States,’ it goes to the competency of Congress to pass a bill *of that description*.”¹⁵⁹ Justice White, likewise, asserted that “those absolute withdrawals of power which the Constitution has made in favor of human liberty are applicable to every condition or *status*.”¹⁶⁰ More recently, Justice Brennan’s dissent in *Verdugo-Urquidez* argued that “[t]he focus of the Fourth Amendment is on *what* the Government can and cannot do, and *how* it may act, not on *against whom* these actions may be taken.”¹⁶¹

The idea that individual liberty is secured by limited government has a distinguished pedigree. The Federalists argued that an explicit bill of rights to protect particular freedoms was unnecessary, as the government had been given no power to invade them. The Constitution itself, they asserted, was a bill of rights.¹⁶² It might seem, then, that an analysis based on the limited powers of the federal government offers a way to impose at least some restraints on governmental action against aliens abroad.

In fact, however, matters turn out to be a good deal more complicated. We may grant for argument’s sake the Federalist claim that the national government has not been given the power to invade fundamental liberties and, its corollary, that the Bill of Rights is largely declaratory. Aliens abroad are not protected by this line of reasoning—at least, not protected to the same extent as citizens invoking Bill of Rights guarantees—without the further premise that the federal government wields no power in its conduct of foreign affairs that it does not wield domestically. And that premise, of course, runs headlong

¹⁵⁹ *Downes v. Bidwell*, 182 U.S. 244, 277 (1901).

¹⁶⁰ *Id.* at 297-98 (White, J., concurring).

¹⁶¹ *United States v. Verdugo-Urquidez*, 494 U.S. 259, 288 (1990) (Brennan, J., dissenting); *see also Reid v. Covert*, 354 U.S. 1, 5-6 (1957) (stating that “[t]he United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution” (citations omitted)); *Lamont v. Woods*, 948 F.2d 825, 834-35 (2d Cir. 1991) (relying on *Downes* for the proposition that “the constitutional prohibition against establishments of religion targets the competency of Congress to enact legislation of that description—irrespective of time or place”).

¹⁶² *See* THE FEDERALIST No. 84, at 515 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“The truth is, after all the declamations we have heard, that the Constitution is itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS.”).

into *United States v. Curtiss-Wright Export Corp.*,¹⁶³ where Justice Sutherland famously announced that the federal foreign affairs power was inherent in sovereignty and not dependent on the Constitution for its source.¹⁶⁴

The source and scope of the foreign affairs power is an area of intense controversy, and *Curtiss-Wright* is a favorite academic target.¹⁶⁵ Nonetheless, the Supreme Court continues to cite it,¹⁶⁶ and “[m]ost scholars assume that Congress has a general power to legislate in foreign affairs matters.”¹⁶⁷ This power is not, of course, superior to constitutional rights,¹⁶⁸ but it is a general power of the sort wielded by state legislatures or by Congress in regulating the territories,¹⁶⁹ rather than the discrete set of enumerated powers granted to the federal government in domestic affairs. That sets the bar substantially higher,

¹⁶³ 299 U.S. 304 (1936).

¹⁶⁴ “The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs.” *Id.* at 315-16.

¹⁶⁵ See Michael D. Ramsey, *The Myth of Extraconstitutional Foreign Affairs Power*, 42 WM. & MARY L. REV. 379, 380 & n.6 (2000) (stating that “[m]uch academic labor has been devoted to proving *Curtiss-Wright* wrong” and citing examples). A fierce debate over similar inherent powers arose earlier in the context of anti-Chinese immigration legislation, and the Court adopted a position similar to that of Justice Sutherland. See, e.g., *Fong Yue Ting v. United States*, 149 U.S. 698, 711 (1893) (characterizing “[t]he right to exclude or to expel all aliens, or any class of aliens, absolutely or upon certain conditions, in war or in peace” as “an inherent and inalienable right of every sovereign and independent nation”). The assertion of inherent power provoked a fierce dissent from Justice Field, who protested that “[t]he existence of the power thus stated is only consistent with the admission that the government is one of unlimited and despotic power, so far as aliens domiciled in the country are concerned.” *Id.* at 755-56 (Field, J., dissenting). Even accepting that complete power over immigration is an inherent aspect of sovereignty, a question remains: since in America the people, and not the government, are sovereign, where is the evidence that this power has been entirely delegated to the government? See NEUMAN, *supra* note 56, at 121 (asserting that this theory “conflated the sovereignty of the nation with the power of the federal government”).

¹⁶⁶ See, e.g., *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 188 (1993) (citing *Curtiss-Wright* in support of presidential discretion in foreign affairs); *Toll v. Moreno*, 458 U.S. 1, 10 (1982) (citing *Curtiss-Wright* for federal government’s “broad authority over foreign affairs”); see also LAURENCE H. TRIBE, 1 AMERICAN CONSTITUTIONAL LAW 977 (3d ed. 2000) (noting, critically, “[t]he traditional international perspective—that internal limits on the powers of national governments are without significance to foreign affairs”).

¹⁶⁷ Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 233 (2001).

¹⁶⁸ See *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 416 n.9 (2003) (noting that even on the *Curtiss-Wright* understanding, federal power remains “[s]ubject . . . to the Constitution’s guarantees of individual rights”).

¹⁶⁹ See U.S. CONST. art. IV, § 3.

for it means that a limited government analysis could not take the form of modern “liberty-preserving” limited government decisions such as the Court’s recent federalism cases.¹⁷⁰ It would have to identify inherent and necessary limitations on governmental authority rather than the lack of a textual basis for the exercise of power.

That requirement does not doom the project, for the Supreme Court has frequently invoked just such limits. The model can be traced as far back as Justice Chase’s opinion in *Calder v. Bull*,¹⁷¹ which asserted that the “purposes for which men enter into society will determine the nature and terms of the social compact . . . as they are the foundation of the legislative power, they will decide what are the proper objects of it: The nature, and ends of legislative power will limit the exercise of it.”¹⁷² Thus, Chase’s analysis did not rely on affirmative rights but, rather, absences of power. There were some things, he reasoned, that the people forming a government would simply not want that government to do, and they would not delegate it the necessary power. “[I]t is against all reason and justice,” he wrote, “for a people to intrust [sic] a legislature with such powers; and therefore, it cannot be presumed that they have done it.”¹⁷³

This style of reasoning exerted significant influence in the extra-territoriality context in the early twentieth century, as the *Insular Cases* demonstrate. It blossomed in the police power cases of the *Lochner* era, during which the Court aggressively patrolled the boundaries of legislative authority.¹⁷⁴ And while the *Lochner* jurisprudence has lost its

¹⁷⁰ See, e.g., *United States v. Morrison*, 529 U.S. 598, 607 (2000); *United States v. Lopez*, 514 U.S. 549, 552 (1995).

¹⁷¹ 3 U.S. (3 Dall.) 386 (1798).

¹⁷² *Id.* at 388; see also *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 135 (1810) (“It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power . . .”).

¹⁷³ *Calder*, 3 U.S. at 388.

¹⁷⁴ *Lochner v. New York*, 198 U.S. 45 (1905). For a pathbreaking study of the *Lochner* era that sees it as concerned with the proper scope of the police power, see HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* 20 (1993). For similar accounts, see, for example, BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION 6-7* (1998); G. EDWARD WHITE, *THE CONSTITUTION AND THE NEW DEAL* 243-44 (2000). A contrary account, which sees the issue as one of rights, rather than absences of power, may be found in David E. Bernstein, *Lochner Era Revisionism, Revised: Lochner and the Origins of Fundamental-Rights Constitutionalism*, 92 *GEO. L.J.* 1, 12 (2003). The analysis of *Lochner* speaks explicitly of the limits of legislative power. See 198 U.S. at 58 (“We think the limit of the police power has been reached and passed in this case.”). Perhaps more tellingly, *Allgeyer v. Louisiana*, 165 U.S. 578 (1897), the case frequently cited for the creation of a fundamental right to contract,

luster, the limited power refrain continues to be heard, both in lower court extraterritoriality decisions¹⁷⁵ and, though not with the utmost clarity, in the Supreme Court itself.¹⁷⁶

How could a modern Court discern the limits of federal power? The *Lochner* Court found its textual hook in the Due Process Clause, and a similar methodology exists in the *Insular Cases*.¹⁷⁷ More recently, other Justices have endorsed an approach that asks whether federal action against aliens abroad violates due process,¹⁷⁸ and so this might seem a viable way to proceed.¹⁷⁹

Again, however, things are more complicated than they first appear. The *Lochner*-era Court's vision of a government limited to the evenhanded pursuit of the public interest,¹⁸⁰ or at least its vision of the

deals with an attempt by Louisiana to regulate an insurance contract entered into in New York, and was decided on the grounds that Louisiana lacked the power to legislate extraterritorially. (It was not questioned, for example, that New York could have regulated the contract.) See *id.* at 588 (noting that “the contract was made in New York, outside the jurisdiction of Louisiana”); *id.* at 591 (noting that a state’s power “does not and cannot extend to prohibiting a citizen from making contracts of the nature involved in this case outside of the limits and jurisdiction of the state, and which are also to be performed outside of such jurisdiction”). That *Allgeyer* is in fact a conflicts case has been noted. See, e.g., Michael G. Collins, *October Term, 1896—Embracing Due Process*, 45 AM. J. LEGAL HIST. 71, 85-87 (2001) (looking at *Allgeyer* from a “choice-of-law angle” and noting the decision’s “distinctly procedural flavor”); David P. Currie, *The Constitution in the Supreme Court: The Protection of Economic Interests 1889-1910*, 52 U. CHI. L. REV. 324, 378 (1985) (“In any event, *Allgeyer* was a choice-of-law decision, not, strictly speaking, a substantive one.”).

¹⁷⁵ See *Lamont v. Woods*, 948 F.2d 825, 832-33 (2d Cir. 1991).

¹⁷⁶ In *Lawrence v. Texas*, 539 U.S. 558 (2003), the Court struck down a Texas law prohibiting same-sex sodomy not on the grounds that it infringed on any preferred right but rather that it “further[ed] no legitimate state interest which can justify its intrusion into the personal and private life of the individual,” a statement that would seem to place the law outside the bounds of legislative power. *Id.* at 578. For scholarly assessments of *Lawrence*, see, for example, Laurence Tribe, *Lawrence v. Texas: The “Fundamental Right” that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1898 (2004) (suggesting that *Lawrence* is best understood as a fundamental rights model).

¹⁷⁷ See *Downes v. Bidwell*, 182 U.S. 244, 282-83 (1901). Justice Brown did, additionally, suggest that the prohibitions of Article I, Section 9 indicated absences of power, as, perhaps, did the First Amendment. See *id.* at 277.

¹⁷⁸ See *Reid v. Covert*, 354 U.S. 1, 75 (1957) (Harlan, J., concurring) (“[O]ne can say, in fact, that the question of which specific safeguards of the Constitution are appropriately to be applied in a particular context overseas can be reduced to the issue of what process is ‘due’ a defendant in the particular circumstances of a particular case.”); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 278 (1990) (Kennedy, J., concurring) (same, quoting Harlan).

¹⁷⁹ Thus the model of limited government evolves into what Neuman calls “global due process.” NEUMAN, *supra* note 56, at 8.

¹⁸⁰ See generally sources cited *supra* note 174 (analyzing the fundamental concerns of the *Lochner*-era Court).

judiciary as a branch of government competent to define and defend this boundary, is gone. After *United States v. Carolene Products*,¹⁸¹ *West Coast Hotel v. Parrish*,¹⁸² and *Ferguson v. Skrupa*,¹⁸³ the general understanding is that the legislature is superior to the judiciary in the determination of the public interest, for reasons of both institutional competence and democratic accountability.¹⁸⁴ *Lawrence* aside, it is rare for a court to find an absence of governmental power. Instead, a person seeking to resist governmental action must usually invoke a right sufficient to overcome the exercise of government power.¹⁸⁵ And indeed, modern due process jurisprudence is typically concerned with what rights are contained in the Due Process Clause, rather than the limits of governmental power.¹⁸⁶

At first blush, this changed understanding might seem to be a boon to aliens abroad. If due process is the issue, and the Fourteenth Amendment's Due Process Clause has been held to incorporate most of the specific guarantees of the Bill of Rights, why not apply this understanding to Fifth Amendment Due Process (which has already shown sufficient appetite to incorporate equal protection) and conclude that aliens abroad possess all the Bill of Rights guarantees that bind the states?

This line of reasoning might seem excessively clever, but there is a very real link between the *Insular Cases* and those dealing with applica-

¹⁸¹ 304 U.S. 144 (1938).

¹⁸² 300 U.S. 379 (1937).

¹⁸³ 372 U.S. 726 (1963).

¹⁸⁴ See also, e.g., *Berman v. Parker*, 348 U.S. 26, 32 (1954) (“Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive.”).

¹⁸⁵ I hope the distinction between the analytical structure of the two arguments (absence of power as opposed to right defeating power) is clear. In case it is not, consider this: Antonio Morrison’s victory against the United States in *Morrison* clearly did not depend on any right to rape Christy Brzonkala (though that was the liberty the Court protected), but rather on the absence of power in the federal government to regulate his behavior. See *United States v. Morrison*, 529 U.S. 598, 627 (2000) (noting that any remedy “must be provided by the Commonwealth of Virginia, and not by the United States”). Likewise, the Louisiana statute at issue in *Allgeyer*, see *supra* note 174 and accompanying text, was held not to constitute due process of law because it was unconstitutional for reasons unrelated to liberty of contract—namely that its extraterritorial scope exceeded the power of the legislature. By contrast, modern cases featuring constitutional challenges to state action typically ask whether an affirmative right (under, for example, the First Amendment) defeats the exercise of state power.

¹⁸⁶ This is so even where the text of the relevant constitutional provision—for instance, the First Amendment—suggests an absence of power rather than the presence of a countervailing right.

tion of the Bill of Rights against the states.¹⁸⁷ In *Hawaii v. Mankichi*,¹⁸⁸ Justice White concurred with the majority's conclusion that inhabitants of Hawaii¹⁸⁹ need not be afforded the grand and petit jury rights of the Fifth and Sixth Amendments on the grounds that these rights were not sufficiently fundamental.¹⁹⁰ He cited as support *Hurtado v. California*,¹⁹¹ which held that the Due Process Clause did not require states to proceed by grand jury indictments. Justice Harlan dissented in both cases on the grounds that jury trial rights were fundamental in their nature.¹⁹² Identifying fundamental due process rights worthy of extraterritorial application might well proceed parallel to the incorporation of such rights against the states.

Still, a problem remains, and a serious one: the transition to a rights-centered understanding destroys the promised benefits of the model of limited government. If the question is whether governmental action comports with due process, and we have adopted the modern understanding of due process as a matter not of an absence of government power but of affirmative rights against that power, we have in fact come full circle. Due process rights are rights like any others; they may be granted to some people and withheld from others, depending upon factors such as geography and citizenship. Em-

¹⁸⁷ In each case, the limited government analysis essentially asks, in the manner of Justice Chase, whether reasonable people would give their government the power to perform a certain act. Application of the Bill of Rights to the states eventually came to be governed instead by an analysis that asked whether the asserted right was "fundamental." See AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 139-40 (1998) (describing "selective incorporation"). Likewise, the *Insular Cases* now tend to be understood as adopting an approach that turned on the fundamentality of the right at issue. See *id.* at 276-77 (describing "the little-noted link" between the incorporation and extension of the Bill of Rights to territories). Amar's brilliant analysis of the incorporation debate suggests that although it is correct to address incorporation right-by-right, fundamentality is not the correct criterion. Instead, the relevant question is whether the right at issue is "a personal privilege . . . of individual citizens, rather than a right of states or the public at large." See *id.* at 218-23. Similarly, I shall argue, one considering extraterritorial application of the Bill of Rights should not inquire into fundamentality but rather ask whether extending a particular right to this new context will serve its domestic purpose. See *infra* text accompanying notes 225-26.

¹⁸⁸ 190 U.S. 197 (1903).

¹⁸⁹ Mankichi himself was a Japanese national, see *id.* at 234 (Harlan, J., dissenting), but his lack of citizenship played no role in the Court's decision.

¹⁹⁰ *Id.* at 221 (White, J., concurring).

¹⁹¹ 110 U.S. 516 (1884).

¹⁹² See *Mankichi*, 190 U.S. at 244-45 (Harlan, J., dissenting); *Hurtado*, 110 U.S. at 545-46 (Harlan, J., dissenting). See generally NEUMAN, *supra* note 56, at 88 (observing that "Harlan's literal demands continued his ongoing dispute with his colleagues over the applicability of the Bill of Rights to the state governments through the Fourteenth Amendment").

bracing the modern understanding that due process consists of affirmative rights simply brings us back to the question of whether aliens abroad should hold particular constitutional rights.

In fact, even the promise of the older version was more apparent than real. Justice Chase's argument that the purposes of government will determine its scope and powers is plausible when that power is exercised against members of the political community. It is plausible for what might be called veil of ignorance reasons: the people might well hesitate to create a government with the power to take property from *A* and give it to *B* (to use one of Justice Chase's examples)¹⁹³ because they could not predict whether they or their posterity would be *A* or *B*. More generally, it might well seem odd that a government created in part to protect property should be given the power arbitrarily to seize property from those it is supposed to protect, and likewise with life and liberty. But if *A* is an alien, an outsider to the community, the matter appears in a different light. The government is not created to protect the property, lives, or liberty of aliens, and no principle of logic suggests that people would not create a government with the power to deal with aliens as ruthlessly as it pleases—for instance, to take their property and give it to citizens.¹⁹⁴ And so the model of limited government also proves ultimately unable to determine the scope of the Constitution.

E. *Mutuality of Obligation*

Neuman's preferred model is what he calls "mutuality of obligation."¹⁹⁵ According to this model, constitutional rights "are prerequisites for justifying legal obligation."¹⁹⁶ Thus, "when the United States asserts an alien's obligation to comply with American law as a justification for interfering with the alien's freedom or property, the alien is presumptively entitled to the protection of all constitutional rights in the interaction."¹⁹⁷

Like the other models, this one has a substantial presence in the case law, though frequently in dissent. Mutuality is the key to Justice

¹⁹³ See *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798).

¹⁹⁴ Even to enslave them. See *The Antelope*, 23 U.S. (10 Wheat) 66, 119-20 (1825) (observing that the slave trade is "contrary to the law of nature" but "could not be pronounced repugnant to the law of nations").

¹⁹⁵ NEUMAN, *supra* note 56, at 7.

¹⁹⁶ *Id.* at 8.

¹⁹⁷ *Id.* at 99. Neuman notes that specific text or other factors may override the presumption. See *id.*

Harlan's dissent in *Downes*, which would impose constitutional restraints "[b]y whomsoever and wherever power is exercised in the name and under the authority of the United States, or of any branch of its government."¹⁹⁸ It appears in a supporting role in *Reid*, where Justice Black's plurality opinion invoked the example of English colonists who took with them "the duty of obedience" and also "all the rights and liberties of British Subjects."¹⁹⁹ And mutuality constituted the central argument in the dissents of Justices Brennan and Blackmun in *Verdugo-Urquidez*.²⁰⁰

This model has the potential to answer the question of constitutional scope, though some lines remain to be drawn. In *Verdugo-Urquidez*, Brennan and Blackmun differed over what sort of exercise of government power would trigger correlative constitutional rights, with Blackmun writing separately to emphasize his belief that the mutuality requirement was triggered only by what he called the "exercise of sovereignty."²⁰¹ Brennan's understanding appears broader, at times approaching Harlan's standard of the mere exercise of federal power.²⁰²

If constitutional rights are called into play by *any* federal action, mutuality approaches universalism: since the Constitution is generally good only against the government in the first place, that sort of mutu-

¹⁹⁸ *Downes v. Bidwell*, 182 U.S. 244, 385 (1901) (Harlan J., dissenting).

¹⁹⁹ *Reid v. Covert*, 354 U.S. 1, 6 (1957). The quoted passage suggests, but does not make explicit, a connection between the rights and the duties. Describing the rights as those of "British Subjects" supports the implicit link.

²⁰⁰ See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 279 (1990) (Brennan, J., dissenting) ("Today the Court holds that although foreign nationals must abide by our laws even when in their own countries, our Government need not abide by the Fourth Amendment when it investigates them for violations of our laws."); *id.* at 282 (Brennan, J., dissenting) ("At the very least, the Fourth Amendment is an unavoidable correlative of the Government's power to enforce the criminal law."); *id.* at 284 (Brennan, J., dissenting) ("Mutuality is essential to ensure the fundamental fairness that underlies our Bill of Rights."); *id.* at 297 (Blackmun, J., dissenting) ("[W]hen a foreign national is held accountable for purported violations of United States criminal laws, he has effectively been treated as one of 'the governed' and therefore is entitled to Fourth Amendment protections.").

²⁰¹ *Id.* at 297 (Blackmun, J., dissenting). Blackmun also opined that the Warrant Clause of the Fourth Amendment did not apply to extraterritorial searches. *Id.*

²⁰² Brennan's discussion of the Fourth Amendment as an absence of power, see *id.* at 288 (Brennan, J., dissenting), suggests a broad scope for its operation, as does his repetition of the *Reid* observation that the government "can only act in accordance with all the limitations imposed by the Constitution." *Id.* at 281 (Brennan, J., dissenting) (quoting *Reid*, 354 U.S. at 5-6). He did apparently intend to exclude wartime operations from the scope of the Amendment, but it is not clear what else. See *id.* at 292 (discussing the exceptions inherent in foreign "non-law enforcement activities not directed against enemy aliens in wartime").

ality imposes no limits beyond those already set in place by the state action requirement. The plausibility of such an extensive conception of mutuality may be questioned. The idea that aliens abroad should enjoy exactly the same rights as Americans in their interactions with the government appears impractical, and perhaps absurd.²⁰³ I have already discussed the failings of textualism and, as someone always asks, must the military give enemy soldiers hearings before shooting them in battle? Neuman's restrictive conception of the circumstances triggering mutuality appears to be motivated in part by a desire to avoid the *reductio ad absurdum* of "due process of war."²⁰⁴

This concern strikes me as significantly overstated. The *Hamdi* Court noted that the government can hold a rights-bearing citizen as a prisoner of war,²⁰⁵ and if it can do that, it can presumably shoot him dead on the battlefield if he engages its forces. Indeed, the government conducted years of military operations against the quintessential rights-bearers—American citizens on American soil—and while the Civil War did produce some episodes of questionable constitutionality,²⁰⁶ no one to my knowledge has suggested that the battle of Gettysburg was one.²⁰⁷

Thus it seems possible—perhaps even desirable—to draw the boundaries of mutuality more broadly. What happens, one wonders, if the government does not assert authority over aliens by reason of laws they have allegedly violated, but simply sweeps them up for detention and interrogation on the grounds that they might have useful information? Can it detain them incommunicado, and subject them

²⁰³ One might also suppose that mutuality analysis is simply a first step, and that subsequent analysis might either suggest that aliens' rights should be lesser, or defeat the presumption of applicability entirely. See NEUMAN, *supra* note 56, at 115 (noting that rights are subject to analysis for reasonableness and exigency).

²⁰⁴ Neuman, *supra* note 127, at 990; see also NEUMAN, *supra* note 56, at 100 (curtailing the application of mutuality "to the residents of an adversary nation during armed hostilities").

²⁰⁵ See *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2640 (2004) ("There is no bar to this Nation's holding one of its own citizens as an enemy combatant.").

²⁰⁶ See generally, e.g., *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866); *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9,487).

²⁰⁷ See *Moyer v. Peabody*, 212 U.S. 78, 85 (1909) ("Public danger warrants the substitution of executive process for judicial process. This was admitted with regard to killing men in the actual clash of arms") Even police officers, operating under the rather different law enforcement model, are authorized in some circumstances to use deadly force without a hearing. On the distinction between the models of war and law enforcement, and their application to terrorism, see Noah Feldman, *Choices of Law, Choices of War*, 25 HARV. J.L. & PUB. POL'Y 457 (2002).

to stress positions and sleep deprivation, without the Constitution having anything to say?

These issues certainly have practical importance, but from a theoretical perspective they are mostly quibbles. The mutuality model does have the capacity to set the scope of constitutional protections in a reasonably sensible fashion, and in that respect it is superior to the other models. Is that enough to warrant our endorsement?

Neuman's most sustained argument in favor of the mutuality model takes the form of comparing it to the others.²⁰⁸ If these models were the only choices, that argument would be satisfactory. I think, however, that there is another alternative to be considered, which is conflicts methodology. The following Part asks what light conflicts can shed on the scope of the Constitution, and vice-versa.

IV. EXTRATERRITORIALITY FROM A CONFLICTS PERSPECTIVE

From one perspective, the utility of conflicts methodology in determining the scope of the Constitution might seem obvious. Determining which rights particular people can invoke under particular circumstances is the bread and butter of conflicts thinking. From another, if we bring the problem of Guantanamo out of the subtext, it might not. Conflicts analysis is conventionally understood as a means of deciding which of a number of different sovereigns has authority to regulate a transaction. In Guantanamo, however, the issue is not whose law (or whose Constitution, except in the sense of Neuman's article); it is whether the detainees are beyond the Constitution's scope—strangers to it, in Neuman's evocative phrase, or entirely invisible. This feature need not, however, stop us from at least trying to apply some different conflicts methodologies. If they seem incapable of dealing with the question, that may tell us as much about the methodologies as it does about Guantanamo.

A. *Territoriality*

I have already criticized territoriality as a conflicts methodology, and its application to the Guantanamo detainees does not redeem it. Territoriality offers very little help in resolving the problem. It simply tells us that if Guantanamo is within the territory of the United States,

²⁰⁸ See NEUMAN, *supra* note 56, at 109-16 (comparing mutuality to universalism, the Hobbesian membership approach, and global due process).

the Constitution applies; if not, it does not. This premise will produce different answers depending on whether we define territory by technical notions of sovereignty or by practical considerations of jurisdiction and control. It might also depend on how we construe the location of the acts complained of. For instance, the *Rasul* petitioners sued the President and other high-ranking executive officials, based on decisions made and orders given within the United States. Those actors are indisputably subject to the Constitution—though one might respond that if the Constitution does not protect aliens abroad, orders to detain such people without due process do not violate it.²⁰⁹

This shows one thing about territoriality, which is that its localizing rules tend to devolve into metaphysical hairsplitting.²¹⁰ It also shows that territoriality does not offer much in the way of a sensible resolution. It does, or could, tell us something about the scope of the Constitution, but it considers only one factor (geography), and it employs that factor in a mechanical way. Territoriality resolves the problem of allocating authority between sovereigns by confining each to an exclusive sphere. Having drawn geographical lines on the basis of authority, territoriality goes on to suggest that once it is determined *where* an event takes place, the legal consequences of that event may be determined as if it were wholly domestic.

It is for this reason that I suggested above that the territorialist model might beg the question. To say that the Constitution applies within the United States is not the same as saying that it grants the

²⁰⁹ Cf. *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2748-50 (2004) (rejecting the “headquarters” doctrine).

²¹⁰ This is not to say that careful geographical analysis is not needed in questions of extraterritorial application of the Constitution. The *Verdugo-Urquidez* Court seems quite right, for instance, to observe that since a Fourth Amendment violation occurs at the time of the search, rather than when the evidence is introduced, the location of the property is more significant than the location of the trial. See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990). Similarly, while a Fifth Amendment self-incrimination violation occurs when an improperly obtained confession is introduced, the propriety of the obtainment must be determined by taking into account where it occurred. If the action of federal officers abroad is not subject to Fifth Amendment constraints—a position I do not endorse—then subsequent introduction of a confession obtained without *Miranda* warnings should be no more problematic than introduction of a confession obtained by some private party who did not administer the warnings. I thank Alex Sista for this observation, which runs against the standard analysis. See, e.g., Mark A. Godsey, *Miranda’s Final Frontier—The International Arena: A Critical Analysis of United States v. Bin Laden, and a Proposal for a New Miranda Exception Abroad*, 51 DUKE L.J. 1703, 1723-26 (2002) (arguing that because “the privilege against self-incrimination is a trial right[,] . . . whether the interaction occurs within the borders of the United States or abroad becomes immaterial to the applicability of the privilege if the suspect later stands trial in the United States”).

same rights to all persons within the United States.²¹¹ Territoriality, as a one-step approach, does not distinguish between the question of whether U.S. law supplies the rule of decision and displaces competing laws (a question of priority) and the question of whether it grants rights to the parties invoking it (a question of scope).²¹² If, as per the conventional understanding, it answers the latter question, it does so on the basis of a factor (geography) whose relevance to that question it does not explain.²¹³ Unsurprisingly, strict territoriality has fallen out of favor in domestic conflicts for essentially this reason.

Perhaps the best that can be said for territoriality is that it simplifies the work of judges by allowing them to avoid the difficult questions of how to operationalize constitutional provisions abroad. How to apply the warrant “requirement” of the Fourth Amendment to foreign searches, for instance, is far from obvious.²¹⁴ Of course, the history of constitutional law is one of adaptation of doctrine to new circumstances, but there is some reason to think that international application of constitutional provisions will present unusually difficult issues; it is more likely, for one thing, to bring the courts into conflict with the Executive’s handling of foreign affairs. The appeal of territo-

²¹¹ Obviously, some distinctions are made in the text itself; my concern is with those further distinctions that might be made on the basis of status factors such as illegal or involuntary entrance.

²¹² See Kermit Roosevelt III, *Resolving Renvoi: The Bewitchment of Our Intelligence by Means of Language*, 80 NOTRE DAME L. REV. 101, 148-49 (2005) [hereinafter Roosevelt, *Renvoi*] (distinguishing between scope and priority).

²¹³ That is, territoriality is based on an understanding of the respective authority of different sovereigns, in particular that sovereigns cannot project their law *beyond* their borders. But that premise does not tell us why they should extend rights equally to all *within* their borders, something they clearly have authority to decline to do. Neuman’s interpretation of territoriality as mutuality does offer an explanation: parties within a sovereign’s jurisdiction may claim rights as correlatives to their obligations under its law. See NEUMAN, *supra* note 56, at 7-8. This is quite likely the best argument that can be made, but in the modern world where federal law is pervasively extraterritorial in scope, it is no longer an argument for territorial restrictions on the scope of the Constitution.

²¹⁴ See *Verdugo-Urquidez*, 494 U.S. at 274 (noting the “sea of uncertainty as to what might be reasonable in the way of searches and seizures conducted abroad”); *id.* at 279 (Stevens, J., concurring) (arguing that the Warrant Clause has no application to searches abroad because “American magistrates have no power to authorize such searches”). One might respond that the Fourth Amendment actually imposes a reasonableness requirement, not a warrant requirement, see Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 762-81 (1994), or that an American magistrate can indeed authorize searches by American authorities as far as the American Constitution is concerned (leaving aside, that is, the question of whether foreign law can effect a prohibition). It is true, however, that applying constitutional provisions to government action abroad would raise some new issues.

rialism is thus not inexplicable: just as it did in domestic conflicts, it seems to offer a simple solution to otherwise difficult problems. This argument has not carried the day in domestic conflicts, however, and it is too much a counsel of despair to hold great appeal in the international setting. We should at least consider whether we can do better.

B. *The Second Restatement*

The Second Restatement would tell us that the law governing the detainees' claims is that of the sovereign with the most significant relationship to the case. To identify that sovereign, we would consult the familiar list of section 6 factors.²¹⁵ The inquiry is underdetermined in most cases, but let us suppose that here it suggests the United States. This analysis does not seem, however, to answer the question of whether aliens abroad can claim rights under the United States Constitution. At least, it is an extremely poorly-designed way of doing so.

The section 6 factors identify the sovereign with the greatest claim to authority; that is, they are designed to resolve conflicting claims of authority. They form what I have called a rule of priority, which lets courts pick between competing claims of right.²¹⁶ Here, however, we are dealing with an issue of the scope of the Constitution. The *Second Restatement* blends some scope-related concerns into its rule of priority, but it has no distinct scope analysis.²¹⁷ That is, it does not concern itself with whether an individual should actually be able to claim rights under the law it determines is "applicable."

The neglect of scope analysis makes the *Second Restatement* largely useless in resolving the problem of Guantanamo. It tells us that U.S. law applies in one sense—that the case should be decided according to U.S. law. But that we knew already; the detainees will obviously not be able to get relief under Cuban law. It does not tell us whether the Constitution applies, in the sense of granting rights that plaintiffs may invoke.

Exactly the same defect appears in the *Second Restatement's* treatment of domestic conflicts. Having identified the sovereign with the most significant relationship to the issue, the *Second Restatement* then

²¹⁵ See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971).

²¹⁶ See Roosevelt, *Renvoi*, *supra* note 212, at 149.

²¹⁷ See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2)(c) (noting the relevance of states' interests and policies). These are, I will suggest, essentially the considerations that should come into play in determining whether a law grants a party a right.

seems to contemplate deciding the case under that sovereign's law as though it were a purely domestic case—it runs together the two senses, distinguished in the preceding paragraph, in which a law might “apply.” Or, to use the terminology I believe is more helpful, the *Second Restatement* appears to assume that its rule of priority will also be used to determine the scope of a sovereign's law. This can result in peculiar anomalies.

The basic problem is this: the *Second Restatement* tells courts to apply some sovereign's law on an issue without asking whether that law (or the law of some other sovereign) actually grants the parties rights.²¹⁸ If it selects a law that does not grant rights, two equally unappealing possibilities present themselves. First, as the *Second Restatement* seems to suggest, a court might go ahead and apply that law as though the case were purely domestic—i.e., enforce rights that do not exist according to the courts of the sovereign whose law has been selected. I think there is something wrong with that resolution; indeed, I think that in the interstate context the problem is of constitutional magnitude.²¹⁹ A second alternative would be to select a law according to the *Second Restatement* methodology and then engage in a process of interpretation to determine whether that law grants rights to the party invoking it. If it doesn't, the court could simply decide the issue against that party. This approach, however, neglects the possibility that the law of some other sovereign (one with a less significant relationship) might grant that party rights, and, again, this neglect is problematic.

C. A Two-Step Model

What is needed, as I and others have suggested, is an approach to conflicts that consists of two steps.²²⁰ The first step concerns itself with

²¹⁸ Suppose, for instance, that two individuals from territorialist State *A* are involved in a one-car accident in *Second Restatement* State *B*. A State *B* court might find State *A* most significantly related on some issue of loss-allocation, even though State *A* courts would rule that *A* law gives neither party any rights on these facts. To hold that State *A* law “applies” in both senses of the word “apply”—that is, to hold not only that the case will be decided under State *A* law, but also that it will be decided as if it were purely domestic to State *A*—ignores the authority that State *A* courts should have in setting the scope of their own law. Astute readers will recognize this as the *renvoi* problem, and I have argued at (much) greater length elsewhere that the *renvoi* problem points to a fundamental defect in conventional conflicts thinking, found in both territoriality and the *Second Restatement*. See Roosevelt, *Renvoi*, *supra* note 212, at 165-67.

²¹⁹ See *id.* at 137-42.

²²⁰ See Kramer, *Rethinking*, *supra* note 41, at 280-83 (advocating a two-step ap-

questions of scope. The court should ask whether the laws the parties invoke actually grant them rights. This analysis might reveal that only one party has rights, in which case the court can simply enforce those rights.²²¹ Or it might turn out that neither party has rights, in which case the suit can be dismissed.²²² Last, it might be that each party has a right under the law of a different sovereign, in which case the court would need to decide which right should prevail.²²³ For this second step, the court should apply a rule of priority.

Rules of priority are not at issue in the Guantanamo case.²²⁴ The only question is whether the petitioners come within the scope of the Constitution, and in particular the due process clause. This is the question we began with, and it is time now to see how a proper conflicts theory could help to answer it.

proach); Roosevelt, *Myth*, *supra* note 41, at 2485-88 (distinguishing between questions about the scope of rights and questions about conflicts between rights). Kramer suggests, and I agree, that this approach is an application of the basic insights of Brainerd Currie. I would call it interest analysis, but nothing turns on the genealogy, and the question of how interest analysis should be understood has proved surprisingly divisive. See Letter from Larry Kramer to Harry C. Sigman, Esq. (Aug. 4, 1994), reprinted in *Appendix B*, 28 VAND. J. TRANSNAT'L L. 455 (1995) (noting differences among modern interest analysts). Consequently, I will simply acknowledge a debt to Currie (for those who find the two-step model consistent with his thinking) while disavowing any attempt to impute this precise model to him (for those who do not).

²²¹ This would correspond to Currie's false conflict. See CURRIE, *supra* note 46, at 77-107.

²²² This would correspond to Currie's unprovided-for case. See *id.* The solution of dismissing for failing to state a claim was first suggested by Larry Kramer. See Kramer, *The "Unprovided-For" Case*, *supra* note 75, at 1060-64 (advocating dismissal in cases where the plaintiff has no right to recover under either state's laws).

²²³ This would correspond to Currie's true conflict. See CURRIE, *supra* note 46, at 77-107.

²²⁴ In other federal extraterritoriality cases, they might be—that is, aliens abroad might in some circumstances be able to invoke the protections of a foreign law authorizing the acts alleged to violate American law. See, e.g., *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597, 614 (9th Cir. 1976) (noting possibility of deferring to foreign law in antitrust context); *Steele v. Bulova Watch Co.*, 344 U.S. 280, 285-87 (1952) (same); *Lauritzen v. Larsen*, 345 U.S. 571, 586-87 (1953) (same with respect to Jones Act). In *Hartford Fire*, the majority notably ignored this possibility, assuming that if a particular act fell within the scope of the Sherman Act, the case must be decided as if it were purely domestic. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 794-99 (1993). As Justice Scalia observed in dissent, federal law contains what I would characterize as a built-in rule of priority, allowing “state regulatory statutes to override the Sherman Act in the insurance field . . .” *Id.* at 819 (Scalia, J., dissenting). That strongly suggests that Congress might well intend foreign regulatory statutes to prevail in similar circumstances, a possibility revealed by the two-step analysis but obscured by framing the question as simply whether U.S. law “applies.”

How should a court go about doing scope analysis within the two-step model? Again, the methodology I suggest resembles that of interest analysis. As Kramer puts it, “[t]he basic premise . . . is that the court should determine what policy a law was enacted to achieve in wholly domestic cases and ask whether there are connections between the case and the nation implicating that policy.”²²⁵ That is, the court should focus on the particular right at issue and whether its application to a case with foreign elements will promote its domestic purpose.²²⁶

This is not necessarily an easy task. A simplistic approach might say that the purpose of the individual rights provisions of the Constitution is to protect particular liberties, and to the question “Whose liberties?” respond, “Those of Americans, of course!”²²⁷ But that is nothing more than restating the question and answering it through a crude application of the membership model. If we can do no better, the methodology would merit the kind of accusations Lea Brilmayer has leveled against interest analysis: that it simply substitutes a presumptive domiciliary focus for a presumptive territorial focus.²²⁸

I think we *can* do better, both with interest analysis and the Constitution, though I will restrict my discussion here to the latter. Some provisions—for instance, the Fourth Amendment—seem likely to pose a substantial challenge. Without a well-developed theory of what the Fourth Amendment is for, we are left asking whether its application to searches of aliens’ property abroad implicates the “right of the people to be secure in their persons, houses, papers, and effects, against un-

²²⁵ Kramer, *Vestiges*, *supra* note 44, at 213; *see also, e.g.*, Kramer, *Rethinking*, *supra* note 41, at 290-93 (demonstrating the methodology); Roosevelt, *Myth*, *supra* note 41, at 2486-87 (same).

²²⁶ To some extent, this approach parallels the “refined incorporation” Akhil Amar has suggested as the proper method of deciding whether a Bill of Rights provision binds the states. *See* AMAR, *supra* note 187, at 139-40. In particular, it focuses attention on the substance of the particular right, rather than attempting to resolve the question of constitutional scope all at once, as the models considered in the preceding Part seem, with the exception of limited government, to contemplate. Neuman does suggest looking to the purpose of constitutional provisions, but he likewise appears to do so at the wholesale rather than the retail level. *See* NEUMAN, *supra* note 56, at 97 (“To resolve the question of the proper scope of the individual-rights provisions of the United States Constitution, it is useful to ask . . . what United States constitutional rights are for.”).

²²⁷ *Cf.* CURRIE, *supra* note 46, at 85 (asserting that Massachusetts is concerned with the welfare of “Massachusetts married women”).

²²⁸ *See* LEA BRILMAYER, *CONFLICT OF LAWS* 85-87 (2d. ed. 1995) (criticizing Currie’s domiciliary focus).

reasonable searches and seizures.”²²⁹ I confess the answer to this is not obvious to me, though one might well conclude that a search for items to be introduced at a U.S. trial as evidence of the violation of U.S. laws brings its target within the community of the “people.”²³⁰

Other provisions seem more tractable, which suggests to me that the effort is worthwhile. Consider, for example, the First Amendment. The purpose of the speech clause has received substantial scholarly attention, with conventional accounts tending to ring the changes on two main themes: facilitating democracy by informing the electorate and promoting self-actualization.²³¹ The first of these might be implicated by actions against aliens abroad, most obviously if they are attempting to communicate with Americans.²³² Alien communication to other aliens, by contrast, seems much less relevant to the First Amendment’s domestic purpose of facilitating democracy.²³³ As for self-actualization, a domiciliary focus seems appropriate: it is hard to see why the Constitution would be concerned with the self-actualization of aliens abroad. Thus it seems possible to conclude that the government should have greater latitude in regulating speech among aliens abroad than it does in the domestic context, at least as far as the First Amendment is concerned.²³⁴

²²⁹ U.S. CONST. amend. IV.

²³⁰ This would amount to an endorsement of some form of mutuality in the Fourth Amendment context. Supposing that the Fourth Amendment does grant aliens abroad some protection, it might also make sense to look to foreign standards to determine what searches are reasonable.

²³¹ See Kermit Roosevelt, Note, *The Costs of Agencies: Waters v. Churchill and the First Amendment in the Administrative State*, 106 YALE L.J. 1233, 1250-52 (1997) (describing “speaker-centered” and “listener-centered” models of the First Amendment).

²³² In such cases, of course, Americans would be able to assert their rights as willing listeners under current doctrine. See, e.g., *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 756-57 (1976); *Lamont v. Postmaster Gen.*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring). Thus, this analysis might not change results very much, though it would allow the aliens to litigate in their own right. But the very fact that the Court has reached similar results, by whatever rationale, indicates its recognition that the First Amendment is at stake in such communications.

²³³ Thus, for instance, a federal decision to support a particular foreign political party seems unlikely to trigger the same kind of “funding forum” concerns it might in the United States.

²³⁴ This is not to say that attempts at such regulation would be a good idea, only that on the account of the First Amendment developed in the text, the First Amendment would not be a barrier. If we understand the First Amendment differently—if, for instance, we suppose that it has some moral dimension, reflecting a judgment that governmental restraints of speech are intrinsically abhorrent—then we would likely reach a different conclusion. If it were the case that the First Amendment did not bar criminalization of speech among aliens abroad, however, I believe it should make no difference if the government seeks to try defendants within the United States. This is

The Establishment Clause of the First Amendment presents different issues. Again, substantial scholarship on its purpose exists.²³⁵ Suppose that its purpose may be formulated as protecting a community within which neither a particular religion, nor religion in general, is supported by compulsory individual donations or receives the endorsement of the government.²³⁶ Is this purpose implicated by federal action abroad?

The answer to this question is probably yes. Federal expenditures in support of religion abroad clearly convey a message of governmental favoritism, and they compel individual taxpayers to support religions with which they may disagree. Thus, the Establishment Clause should operate to restrain federal action abroad. That is not necessarily to say that aliens abroad should be able to bring claims. They are not, generally speaking, taxpayers, nor can they argue that federal endorsement of religion marks them as second-class citizens, for they are not citizens at all. In this case the purpose-based analysis tends to accord with mutuality, as potential Establishment Clause violations are unlikely to involve the assertion of authority over aliens. However, it also answers the question of whether federal action abroad can violate Americans' Establishment Clause rights, which mutuality does not.

I do not claim that these analyses are authoritative. Others may have different conceptions of the purpose of the provisions I have considered, or different views on what sort of contacts implicate those purposes. But they seem plausible enough to make me think the methodology is sound.²³⁷

contrary to Neuman's understanding, see Gerald L. Neuman, *Extraterritorial Rights and Constitutional Methodology After Rasul v. Bush*, 153 U. PA. L. REV. 2073, 2083 (2005), and quite likely inconsistent with the practice of U.S. courts, but I think it is the correct analysis. If speech among aliens abroad is unprotected by the First Amendment, then it is outside the Amendment's scope, in much the same way as if it had been deemed obscenity or fighting words. The location of the trial makes no difference.

²³⁵ For a recent and comprehensive treatment, see Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346 (2002).

²³⁶ This statement does not do justice to the complexity of Establishment Clause jurisprudence and scholarship, but its accuracy is essentially irrelevant to the value of the methodology I demonstrate.

²³⁷ In his gracious response to this Article, Professor Neuman questions the starting point of the approach: the premise that a purpose-based analysis of constitutional provisions should look to the benefits they secure for Americans or within the United States rather than their "value to rights-holders considered in the abstract or in a context that can be generalized." Neuman, *supra* note 234, at 2080-81. As I hope the discussion in the text demonstrates, I certainly agree with Neuman that it would be a mistake to take this domestic focus as the last step—to adopt the crude version of the membership model. But I do find it plausible as a *first* step because I believe that, as

V. APPLYING CONFLICTS METHODOLOGY
TO GUANTANAMO

It is time now to return, again, to Guantanamo. Here the question to ask is what the purpose of the Due Process Clause is. One purpose is to protect people from arbitrary government action, and if that is all, then extending its scope to aliens abroad may seem tenuous. The U.S. Constitution probably has no general concern with the welfare of aliens abroad. But if that is the only purpose, one might also wonder why due process rights extend to aliens within the United States. Is, perhaps, an additional aim of the Due Process Clause simply to prevent the government from engaging in arbitrary or despotic acts?

One may construct pragmatic arguments for this suggestion and tie them to the interests of U.S. citizens—a government in the habit of tyrannizing aliens may be more likely to tyrannize Americans, for instance, or to disrupt Americans' personal or commercial relationships with aliens. I do not intend to diminish the significance of these concerns, but I would suggest another, which relates less to the immediate interests of Americans and more to their values.

The United States government is not a principal. It is the agent of the people, and it wields in our name the powers we have seen fit to give it. It might be worthwhile to ask, then, in the manner of Justice Chase, what sort of government we have created. Did we unleash upon the world an agent with no obligation to respect even the most basic rights of our alien friends?²³⁸ What kind of a people would do such a thing? Or more briefly, what kind of a people are we?

the Preamble suggests, the Constitution is concerned with America and Americans, and the extension of rights to foreigners (wherever they are located) must therefore be justified by some domestic consequence. It bears mention, however, that this methodology is, in principle, compatible with Neuman's mutuality thesis. If, as Neuman claims, one overarching purpose of U.S. constitutional rights is to legitimize U.S. claims of authority, then that purpose might well be implicated by any assertion of authority over aliens abroad. See NEUMAN, *supra* note 56, at 98 ("The rationale of the mutuality approach has been the presumption that American constitutional rights and the obligation of obedience to American law go together . . ."). The idea is appealing. I wonder, however, how confident we can be in ascribing to the Constitution a purpose to impose such a strong legitimacy constraint on the foreign affairs power. The federal government would not be intrinsically illegitimate if the First Amendment did not exist (is the British government illegitimate?), and so I do not think the legitimacy of the exercise of federal power abroad necessarily requires extension of all constitutional rights to those over whom authority is asserted.

²³⁸ Historical precedents exist. The Alien Act allowed resident aliens to be deported and in some circumstances imprisoned "so long as, in the opinion of the presi-

This strikes me as the basic question. Laurence Tribe has argued that many constitutional issues cannot be resolved without a choice of values,²³⁹ and while I think that the set of such cases is actually relatively narrow, this may be one. The question of the due process rights of the Guantanamo detainees, and of aliens abroad more generally, comes down to a question of what our values are.²⁴⁰

America does stand for things, in aspiration if not always in practice. Examining the consistency of governmental action with those aspirations is a familiar means of constitutional adjudication. As Justice Brennan observed in *Verdugo-Urquidez*, “[f]or over 200 years, our country has considered itself the world’s foremost protector of liberties. . . . Our national interest is defined by those values and by the need to preserve our own just institutions.”²⁴¹ Over a century earlier, Justice Mathews noted that “[w]hen we consider the nature and the theory of our institutions of government [and] the principles on which they are supposed to rest . . . we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power.”²⁴²

Times of crisis test these principles. As the Supreme Court stated in *Hamdi*:

dent, the public safety might require.” See *Fong Yue Ting v. United States*, 149 U.S. 698, 747 (1893) (Field, J., dissenting) (discussing Alien Act in a case involving governmental power to deport resident Chinese aliens). Madison responded in protest that “[a]lien friends, except in the single case of public ministers, are under the municipal law, and must be tried and punished according to the law only.” *Id.* at 750 (Field, J., dissenting) (quoting 4 ELLIOT’S DEBATES 556 (photo. reprint 1996) (2d ed. J.B. Lippincott Co. 1891)). “[I]t will surprise most people,” Field continued (speaking now to the facts of *Fong Yue Ting*), “to learn that any such dangerous and despotic power lies in our government . . .” *Id.*

²³⁹ See Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1064 (1980) (arguing that a process-based theme of Constitutional interpretation requires “a full theory of substantive rights and values”).

²⁴⁰ And from this perspective, I believe that the modality of constitutional argument most relevant to the Guantanamo case is what Bobbitt terms ethical—one that appeals to the basic animating values of our history and constitutional traditions. See BOBBITT, *supra* note 127, at 93-119 (defining an ethical argument as one based in the character of the American polity and providing examples of such arguments in constitutional law cases). Neuman’s reliance on social contract theory is likewise a form of ethical argument. See *supra* Part III.C; Louis Henkin, *Foreign Affairs and the Constitution*, 66 FOREIGN AFF. 284, 307 (1987) (suggesting we must look to “what kind of country we are and wish to be” to determine the extraterritorial effect of American law).

²⁴¹ *United States v. Verdugo-Urquidez*, 494 U.S. 259, 285-86 (1990) (Brennan, J., dissenting).

²⁴² *Yick Wo v. Hopkins*, 118 U.S. 356, 369-70 (1886); see also *Fong Yue Ting*, 149 U.S. at 755 (Field, J., dissenting) (“Arbitrary and tyrannical power has no place in our system.”).

[I]t is equally vital that our calculus not give short shrift to the values that this country holds dear or to the privilege that is American citizenship. It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad.²⁴³

That is well and good as far as it goes.²⁴⁴ The case of the Guantanamo detainees raises a further question: is it the values or the citizenship that is most important? Are we committed to these principles only at home, or might they have some relevance abroad? This is a stark choice, between honoring the principles we fight for and degrading them, between asserting that our rights are the only ones that matter²⁴⁵ and demonstrating a decent respect for the opinions of mankind.²⁴⁶

What kind of a people are we? We have confronted this question at other crises in American history, and the Court, responding to the felt necessities of the times, has rendered decisions that cast neither it nor us in the best light.²⁴⁷ Those cases are now viewed with regret, as object lessons testifying that history vindicates neither undue restriction of the community of rights-bearers, nor blind deference to the Executive. *Rasul* suggests, if nothing else, that these lessons have been absorbed. Things may be different the next time round. No judicial decision will restore the good will that the Executive has cost us. No

²⁴³ *Hamdi*, 124 S. Ct. at 2648.

²⁴⁴ As things turned out, the Executive opted to release Hamdi rather than attempt to justify his detention in court. See Editorial, *Freeing Mr. Hamdi*, WASH. POST, Sept. 24, 2004, at A24 (discussing Hamdi's release and the surrounding issues). The government agreed to release Hamdi on the condition that he renounce his U.S. citizenship. See *id.* Given his treatment at the hands of his (and our) government, Hamdi might be excused for deeming this a small sacrifice. How significant a role his citizenship played in the outcome of his case will be determined by the aftermath of *Rasul*.

²⁴⁵ To simplify the analysis, Currie at one point hypothesized such a "selfish state, concerned only with promoting its own interests." CURRIE, *supra* note 46, at 89. But he went on to admit the possibility that "such an attitude [might] be shocking, or unwise, or unjust, or unconstitutional." *Id.*

²⁴⁶ See, e.g., Brief of 175 Members of Both Houses of the Parliament of the United Kingdom of Great Britain and Northern Ireland as Amici Curiae in Support of Petitioners at 2 n.5, *Rasul v. Bush*, 124 S. Ct. 2686 (2004) (Nos. 03-342, 03-334) ("Members of Parliament have employed every potential avenue to voice concern for the British detainees and turn now to this Court as an alternative, independent route to ensure that due process is provided."), available at 2004 WL 96766.

²⁴⁷ See, e.g., *Korematsu v. United States*, 323 U.S. 214, 223-24 (1944) (deferring to executive assertions about demands of national security); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 403-06 (1856) (holding that African Americans could not attain national citizenship).

court can undo the abuses inflicted in Guantanamo and elsewhere, any more than the belated reparations offered to Japanese Americans in 1988 could erase the internment camps. But this time, perhaps, it will not take us nearly half a century to figure out that this is not who we want to be.