OUR EXTRATERRITORIAL CONSTITUTION: A THEORY PROPOSED

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For over a century, courts have struggled to determine whether, and to what extent, the Constitution applies outside our borders. To date, they have not come up with a single test to make this determination, instead taking an ad hoc, clause-by-clause approach that has left nothing but questions for lower courts to grapple with. Scholars have suggested various tests, based on differing theories of extraterritorial application, but so far, none has caught on. After examining the conventional discussion of the extraterritorial application of the Constitution, additional cases that are often left out of this history, as well as contributions from the lower courts, this Article provides a new test for courts to use to determine when to apply the Constitution to a claim. This proposed test draws on various prior court cases to distill the inquiry down to a straightforward application of a three-part test.

First, a court should determine whether the U.S. government has the power to act at all. If the court determines that the Constitution forbids the action in question, then the court should enforce that prohibition and the test is over, for the government may not exercise power it lacks anywhere in the world. Second, if the government does have the power, the court should next ascertain where the alleged constitutional violation has taken or will take place. Courts far too often skip this step, just assuming that if the plaintiff is outside the United States, the violation must have occurred there. But as this Article discusses, this is not always so. While the effects of unconstitutional action may be felt outside the United States, the action itself often occurs domestically. In such a case, the court would apply the Constitution normally. Only if the action alleged to have

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violated the Constitution occurred abroad should the court turn to the final inquiry—does the Constitution apply and if so, to what extent?

This final step is itself composed of three parts. First, because the Constitution will never provide more rights outside the territory of the United States than within, the court should determine if there are constitutional or prudential doctrines, such as standing, ripeness, or mootness, that interpose and prevent a decision. If the court can reach the merits, it then must ask itself, consistent with Supreme Court precedent, if applying the constitutional provision at issue abroad would be "impracticable or anomalous." Is the court dealing with a right that can be applied abroad? Are there practical obstacles that would require tailoring the right, such that its application abroad may not precisely mirror its application at home? As a backstop, I suggest that such tailoring can never violate a ratified treaty or nonderogable jus cogens norm. Finally, does there exist, or can the court create, an equally effective alternative to safeguard the interests protected by the constitutional provision at issue?

The Article concludes by running several fact patterns through this test, to demonstrate how it would work in the real world, where judges are called upon to make these difficult decisions.

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INTRODUCTION

The United States Constitution applies beyond the geographic borders of the United States. This is not a controversial statement, nor should it be. The President of the United States is the Commander in Chief of the armed forces regardless of where those forces are stationed or where the President happens to be at any given time. Likewise, a treaty the President signs in Geneva still requires the advice and consent of the U.S. Senate sitting in Washington, D.C. Provisions of the Constitution expressly contemplate their application overseas, such as the Foreign Commerce Clause[1] and the Define and Punish Clause.[2]

On the other hand, there are provisions of the Constitution which clearly have no application outside the United States. Congress has the power to make rules for the governance of Washington, D.C.—a federal district—which can only apply within that district.[3] The Commerce Clause allows Congress to regulate commerce between the states, which are, by definition, entirely domestic. And the Uniform Duties Clause, by its very terms, applies only within the United States.[4]

The question this Article will analyze is not whether the Constitution of the United States applies outside its geographic borders, but rather what provisions reach outside our geographic borders and whether they apply with the same force and effect as they do within the United States. Unfortunately, this question is not easily answered. Despite wrestling with the question for over a century, the United States Supreme Court has failed to articulate a consistent test for determining if a constitutional provision applies outside the United States and, if so, how to interpret it. Lower courts have also struggled with this question, addressing it in a piecemeal fashion.

While no court has proposed a concise and generally applicable theory of extraterritorial constitutionalism, the most consistent thread was articulated by the second Justice Harlan in *Reid v. Covert*,[5] and later by Justice Kennedy, who cobbled together a majority in support

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1. U.S. CONST., art. I, § 8, cl. 3.
2. U.S. CONST., art. I, § 8, cl. 10.
3. Joseph V. Jaroscak & Ben Leubsdorf, *Governing the District of Columbia: Overview and Timeline*, CONG. RSCH. SERV. (Jan. 29, 2024).
4. U.S. CONST., art. I, § 8, cl. 1.
5. *See* Reid v. Covert, 354 U.S. 1, 74 (1957) (Harlan, J., concurring) (first suggesting the "impracticable and anomalous" test).

of the "impracticable and anomalous" test in *Boumediene v. Bush*.[6] Unfortunately, Justice Kennedy, writing for the Court, did not explain any broader applicability of his test, confining it instead to the specific question before him: whether the Suspension Clause applied to alleged enemy combatants held at Guantanamo Bay, Cuba.[7] Because of the narrow nature of Kennedy's analysis, and Guantanamo's unique status as under the "complete jurisdiction and control" [8] of the United States, the majority's opinion in *Boumediene v. Bush* does not provide a generalizable framework for the extraterritorial application of the Constitution.

This Article aims to provide a theory that courts can use to determine whether a constitutional provision applies overseas. In Part I, it offers an overview of the current state of the law, examining the Supreme Court's adventures in extraterritoriality. This conventional account traces the Court's meandering journey between formalist and functionalist tests, beginning with *In re Ross* in 1891 and concluding with *Boumediene* in 2008. [9] Building on this, the Article introduces other cases that deal with the question of extraterritorial application of the Constitution, but which have been excluded from the discussion. These include the Court's most recent foray into the area, *Agency for International Development v. Alliance for Open Society International, Inc (Alliance for Open Society II)*, [10] which was decided in 2020 and

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6. Boumediene v. Bush, 553 U.S. 723, 766–771 (2008) (achieving a majority in support of applying the "impracticable and anomalous" test to the application of the Suspension Clause to noncitizens held in Guantanamo Bay, Cuba).

7. *Boumediene*, 553 U.S. at 766.

8. Agreement Between the United States and Cuba for the Lease of Lands for Coaling and Naval Stations, Cuba-U.S., art. III, Feb. 23, 1903, T.S. No. 437, https://avalon.law.yale.edu/20th_century/dip_cuba002.asp [https://perma.cc/QM7F-G39C].

9. *See, e.g.*, Alina Veneziano, *Applying the U.S. Constitution Abroad, from the Era of the U.S. Founding to the Modern Age*, 46 FORDHAM URB. L.J. 602, 610–624 (2019) (examining *In re Ross*, *the Insular Cases*, *Johnson v. Eisentrager*, *Reid v. Covert*, *United States v. Verdugo-Urquidez*, and *Boumediene v. Bush*); Margaret Kopel, *Injustice at the Border: Application of the Constitution Abroad Through Conflict of Laws*, 167 U. PA. L. REV. 1241, 1257–1261 (2019) (examining *In re Ross, Reid v. Covert*, *United States v. Verdugo-Urquidez*, and *Boumediene v. Bush*). Articles written before *Boumediene* was decided similarly focus on this series of cases. *See, e.g.*, Robert Knowles & Marc D. Falkoff, *Toward a Limited-Government Theory of Extraterritorial Detention*, 62 N.Y.U. ANN. SURV. AM. L. 637, 658–664 (2007) (discussing *In re Ross, Reid v. Covert, United States v. Verdugo-Urquidez, Johnson v. Eisentrager, and Downes v. Bidwell* (one of *the Insular Cases*)).

10. 140 S. Ct. 2082 (2020).

marks a return to formalism. This Section concludes with a discussion of key lower court decisions which address the issue.

Part II of the Article briefly analyzes theories offered by judges and other scholars for determining the reach of the Constitution beyond U.S. borders. Several scholars have proposed theories with varying degrees of applicability. This Article focuses on those that offer a broader view, rather than theories that apply to specific provisions.

Responding to gaps identified in these existing theories, the new theory proposed in Part III of this Article suggests a three-step analysis, building on federal courts' earlier decisions. A court should first ask if the Constitution completely denies the power at issue to the government. If so, the inquiry is over. If the government is granted power to act by the Constitution, the second step then asks where a constitutional violation takes place. As I have argued elsewhere,[11] many instances of constitutional violations that are traditionally viewed as having taken place extraterritorially are actually domestic. If a court determines the violation occurred within the United States, it should apply the law as it normally would. Finally, if the government is granted the power to act and the violation, if any, would occur outside the United States, a court should turn to step three.

This step itself has three subparts. First, a court should ask if other doctrines interpose between the plaintiff and enforcement of the right. Second, the court should determine if it would be "impracticable" or "anomalous" to apply the right overseas.[12] Here, courts determine if the right is capable of being applied overseas, and if so, whether there are practical obstacles that would require tailoring the application of the right in ways not required when enforcing it domestically. Finally, as part of any tailoring, courts should ask if there exists an equally effective alternative available, or if they can craft such an alternative, such that application of the constitutional right overseas is unnecessary. This theory proposes a final backstop where, when tailoring, courts could go no lower than international law allows, determined either via treaty commitments the United States voluntarily entered or norms of customary international law recognized as non-derogable by any state.

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11. *See* Alan Mygatt-Tauber, *Determining Constitutional Extraterritoriality*, 84 LOUISIANA L. REV. 531 (2024) (arguing that courts should examine the location of a constitutional violation before determining if enforcing the Constitution is extraterritorial in a particular case).

12. Reid v. Covert, 354 U.S. 1, 74 (1957) (Harlan, J., concurring); Boumediene v. Bush, 553 U.S. 723, 766–771 (2008).

The final Part of the Article traces the theory through several scenarios, illustrating how each step would work in practice. Some of these scenarios are drawn from actual cases before the federal courts, to serve as an example of how the analysis would work on the ground. While the outcomes of some of these cases remain unchanged, the theory offers a means for courts to address all aspects of the Constitution's application overseas in a consistent manner, rather than following the current practice of *ad hoc* determinations which require starting anew with each fresh challenge.

I. CURRENT STATE OF THE LAW

In the 130 plus years since the Supreme Court first addressed the Constitution's application outside our borders in *In re Ross*, the Court has swung from a strict territorial view, in which the Constitution could only apply within the geographic boundaries of the United States, to a two-track view. In the latter view, most rights apply to U.S. citizens abroad, albeit possibly in a limited form, and almost no rights apply to noncitizens who have not formally entered the United States. The goal of this section is to trace this evolution from its earliest days to the Court's most recent pronouncements and explain how the law became what it is today. Section I.A traces the conventional account of the Constitution's extraterritorial application, as defined by scholars in this area. Here, we discover three views of the Constitution's application overseas. In the first, formalist view, the Constitution has no reach whatsoever beyond the geographic borders of the United States. A second view, propounded by Justice Hugo Black in the mid-20th century, roundly rejected this formulation as applied to U.S. citizens, holding instead that citizens should receive the full protections of the Bill of Rights regardless of their location. Finally, a functionalist test, suggested by Justice John Marshall Harlan II, and picked up by Justice Anthony Kennedy, argues that the Constitution should apply to both U.S. citizens and foreign nationals when doing so is not "impracticable and anomalous."[13]

In Section B, I add additional cases to the discussion, which have undoubtedly played a role in the current state of the law, but which are traditionally absent from scholarly discussions of the Constitution's reach beyond U.S. borders. This absence is surprising in that all of these cases contribute to one of the three views described

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13. Reid v. Covert, 354 U.S. 1, 74 (1957) (Harlan, J., concurring); United States v. Verdugo Urquidez, 494 U.S. 259, 278 (1990) (Kennedy, J., concurring).

above. Yet a survey of the literature discussing the extraterritorial application of the Constitution shows they are rarely mentioned. Finally, Section C provides a brief examination of the work of lower courts, which has also contributed to the extraterritorial reach of the Constitution. Given the Supreme Court's relatively scant history in addressing the question, lower courts have been left to fill in the gaps.

A. The Conventional History

The conventional account of the extraterritorial application of the Constitution begins with *In re Ross* in 1891 and its statement that "the Constitution can have no operation in another country."[14] *Ross* emphasized what scholars have come to refer to as the "strict territoriality" view of the Constitution—that it has no application whatsoever outside the geographic borders of the United States.[15] This formalist account of the Constitution's reach arose in response to a challenge by a British citizen serving on an American ship—and thus treated as an American for the Court's purposes—who was convicted of murder aboard the ship by a consular court sitting in Japan.[16] Ross argued that this violated the Sixth Amendment, but the Court held that, while ships are often constructively treated as American

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14. Ross v. McIntyre, 140 U.S. 453, at 464 (1891).

15. *See, e.g.*, Note, *The Extraterritorial Applicability of the Fourth Amendment*, 102 HARV. L. REV. 1672, 1675, n. 14 (1989) (noting that *Ross* applied a "strict territorial" view of the Constitution); Gerald Neuman, *Whose Constitution?* 100 YALE L. J. 909, 918–19 (1991) (breaking down theories of constitutional extraterritoriality into four subsets, including what he terms "Municipal Law" theories, of which strict territoriality is a subset); Akash R. Desai, *How We Should Think About the Constitutional Status of the Suspected Terrorist Detainees at Guantanamo Bay: Examining Theories that Interpret the Constitution's Scope*, 36 VAND. J. TRANSNAT'L L. 1579, 1608 (2003) (noting that a strict territoriality approach "was at the center of the Court's decision in *In re Ross*."). *See also* Veneziano, *supra* note 9, at 606 (arguing that during the 19th century, "the United States embraced an approach of strict territoriality" in determining the Constitution's reach).

16. The formalist view—embodied by strict territoriality—that the Constitution applied only to U.S. territory has been criticized by scholars. *See, e.g.*, Andrew Kent, *Citizenship and Protection*, 82 FORDHAM L. REV. 2115, 2129 (2014) ("In influential accounts, some scholars emphasize that geographic limits on the Constitution's protections reflect abandoned notions of strict territorial jurisdiction in eighteenth- and nineteenth-century international law and conflicts of laws."); Knowles & Falkoff, *supra* note 9 (criticizing the strict territoriality approach for failing to account for constitutional provisions, such as the Commander-in-Chief Clause, the Define and Punish Clause, and the Foreign Commerce Clause, which have explicit effects outside the territorial boundaries of the United States).

territory, one cannot insist upon the requirements of the Sixth Amendment until they are brought within the geographic borders of the United States.[17] The Court noted the historic practice of providing for consular trials in "non-Christian" countries, which were viewed as providing more process than a criminal defendant would encounter in a foreign tribunal.[18]

The strict territoriality account did not enjoy prominence for long. The Court began to undercut this account at its next opportunity to address the Constitution's reach outside the states, when it had to determine if the Constitution and all its particulars applied to newly acquired overseas territories at the end of the Spanish-American War of 1898.[19] These territories were already populated by non-Europeans who had been under Spanish rule, in some cases for centuries. In a series of decisions known as the *Insular Cases*, the Court was asked to determine if the Constitution "followed the flag" to these new territories.[20]

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17. Ross v. McIntyre*,* 140 U.S. 453, 464 (1891). Furthermore, the Court noted that it would be impracticable to enforce the Sixth Amendment abroad because of the impossibility of constituting a grand and petit jury in foreign lands. Requiring such would lead to abandoning prosecutions.

18. *Ross,* 140 U.S. at 462–63. Sarah Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. 1, 17 (2006) (noting that Justice Field viewed his ruling in *Ross* as protecting American's rights from "barbaric foreign legal proceedings"); Maryellen Fullerton, *Hijacking Trials Overseas: The Need for an Article III Court*, 28 WM. & MARY L. REV. 1, 59 n. 205 (1986) (noting that American consular courts "were established in countries whose legal systems were considered so inferior to that of the United States that American citizens could not obtain justice in them").

19. At the end of hostilities, the United States found itself in possession of several overseas territories, including Puerto Rico, the Philippines, Cuba, and Guam. Treaty of Peace Between the United States and Spain, Spain-U.S., art. I, (Cuba), art. II (Puerto Rico and Guam), and art. III (Philippines), Dec.10, 1898, T.S. No. 343, https://avalon.law.yale.edu/19th_century/sp1898.asp) [https://perma.cc/2NAL-LHYL].

20. The phrase "Does the Constitution Follow the Flag" was a common shorthand for asking if the Constitution applied to the overseas territories acquired as part of the Spanish-American War. *See, e.g.*, Kevin Fung, *Does the Constitution Follow the Flag?* THE YALE GLOBALIST, Sept. 21, 2014, https://globalist.yale.edu/in-the-magazine/glimpses/does-the-constitution-follow-the-flag-exploring-puerto-ricos-role-in-america/ [https://perma.cc/GD2T-49YT]. For a full discussion of the *Insular Cases* and their proper interpretation, see Alan Mygatt-Tauber, *Overruling the Insular Cases on Their Own Terms*, 33 GEO. MASON UNIV. CIV. RTS. L. J. 201 (2023); *see also* Christina Ponsa-Kraus, *The* Insular Cases *Run Amok: Against Constitutional Exceptionalism in the Territories*, 131 YALE L.J. 2390 (2022) (arguing that the *Insular Cases* should not be used to shield cultural practices in the territories from constitutional scrutiny); Adriel I. Cepeda Derieux & Rafael Cox

While the *Insular Cases* are often discussed as standing for the proposition that the Constitution does not apply to unincorporated territories—those not destined for eventual statehood—the cases are actually much narrower, addressing only three constitutional clauses.[21] In one of the earliest cases, and widely recognized as the most important—*Downes v. Bidwell*—the Court addressed whether the Uniform Duties Clause applied to Puerto Rico.[22] Holding that Puerto Rico was "foreign…in a domestic sense" the Court ruled 5–4 in *Downes* that the clause did not apply, although no opinion commanded a majority for the reasoning employed.[23] Yet even as the Court denied the application of the Uniform Duty Clause to Puerto Rico, the Justices recognized that *certain* aspects of the Constitution applied even to the territory. In *Downes*, the Court began to step away from the idea of strict territoriality, holding that aspects of the Constitution may not apply even within sovereign U.S. territory.

Justice Brown authored the ostensible opinion for the Court, even though no other Justice joined it. In his sweeping opinion, he held that while Congress had a free hand to govern the territories as it saw fit, it was still constrained by constitutional provisions which "go to the very root of the power of Congress to act at all, irrespective of time or place . . ."[24] Justice White, in his concurring opinion, noted that every constitutional provision "applicable" in the U.S. territories is operative there.[25] Coloring these opinions was the majority's concern with the indigenous and other native inhabitants of the territories,[26] who they viewed as "unfit" to receive American citizenship.[27]

Similar concerns arose in the Court's opinion dealing with the application of the Sixth Amendment right to a jury trial to U.S.

Alomar, *Saying What Everyone Knows to Be True: Why Stare Decisis is Not an Obstacle to Overruling the* Insular Cases, 53 COLUM. HUM. RTS. L. REV. 721 (2022) (arguing that the *Insular Cases* should be overruled).

21. Those clauses are the Uniform Duties Clause, the Grand Jury Clause of the Fifth Amendment, and the Petit Jury Clause of the Sixth Amendment. The term "unincorporated territories" to describe those not destined for eventual statehood is driven by the Court's decision in Dorr v. United States, 195 U.S. 138, 143 (1904), where the Court argued that Article IV, Section 3's Territory Clause allowed the United States to have territory "which is not incorporated into the United States as a body politic[.]" Hence, "unincorporated territory."

22. 182 U.S. 244, 277 (1901).

23. *Downes*, 182 U.S. at 341.

24. *Downes*, 182 U.S. at 277–78.

25. *Id.* at 291 (White, J., concurring).

26. *Id.* at 287.

27. *Id.* at 306 (White, J., concurring).

territories.[28] In *Hawaii v. Mankichi*, holding that the Sixth Amendment did not apply in the territory of Hawaii prior to 1900, the Court expressed concern that the provisions of the Constitution were unfamiliar to a great number of inhabitants of the islands, thereby making them incapable of discharging their duties as jurors.[29]

Finally, the Court dealt with the question of whether territorial inhabitants were entitled to indictment by a grand jury for capital or other infamous crimes as required by the Fifth Amendment. In the two cases where the claim arose,[30] the Court decided the question on slightly different grounds, noting that the Court had determined in *Hurtado v. California*[31] that the requirement for indictment did not apply, even to fully incorporated territories.[32] Thus, the Court set a precedent that those outside the geographic boundaries of the states could not expect to receive more rights than those within those boundaries.

The *Insular Cases* began the Court's move away from a strictly formalist approach to the Constitution, with its focus on practical concerns about how claimed rights would be enforced. The *Insular Cases* demonstrate that, while not dominant, functionalism played a role as well. Under the conventional account, the formalist approach dominated for the first half of the 20th century and saw one last victory in *Johnson v. Eisentrager*, a case arising out of World War II, brought by convicted war criminals.[33]

In *Eisentrager*, German prisoners of war sought writs of *habeas corpus* challenging their detention.[34] The prisoners had been sentenced by a U.S. military commission sitting in China to prison terms in

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28. Hawaii v. Mankichi, 190 U.S. 197 (1903); Dorr v. United States, 195 U.S. 138 (1904); Balzac v. Porto Rico, 258 U.S. 298 (1922).

29. *Mankichi*, 190 U.S. at 215–216. Congress formally extended the Constitution, including the Sixth Amendment, to Hawaii in 1900. *See* Section 5 of 31 Stat. 141 (April 30, 1900). Furthermore, the Court viewed the right to a jury trial as non-fundamental, but instead a rule of procedure unique to Anglo-Saxon jurisprudence. A unanimous Court affirmed the holding of *Mankichi* in *Balzac*, 258 U.S. at 306 (1922). However, the question there was whether Congress had incorporated Puerto Rico with the passage of the Jones Act in 1917, which granted Puerto Ricans U.S. citizenship. The Court held that absent a clear intent to incorporate a territory, Congress had not done so.

30. *Mankichi*, 190 U.S. 197 (1903); Dowdell v. United States, 221 U.S. 325 (1911).

31. 110 U.S. 516, 534–35 (1884).

32. *Mankichi*, 190 U.S. at 220; *Dowdell*, 221 U.S. at 332.

33. 339 U.S. 763 (1950).

34. *Eisentrager*, 339 U.S. at 797.

Germany's Landsberg Prison, and they had never set foot in the United States.[35] They raised claims under Articles I and III of the Constitution, as well as the Fifth Amendment.[36] The Court rejected these claims,[37] noting that "nonresident alien enemies," such as the petitioners, have been denied access to U.S. courts—especially when in continued service of a hostile nation.[38]

However, the Court did not rest its analysis solely on this formalist reading of the law. It also entertained practical obstacles to recognizing the reach of the writ. Specifically, the Court noted that *habeas corpus* required the production of the prisoner in U.S. courts to vindicate their rights, a process provided by Congress and which the Court had required in *Ahrens v. Clark*.[39] It would have been practically difficult to transport the prisoners from Germany to Washington, D.C.[40] Additionally, allowing the writ would cause complications with the prosecution of active hostilities.[41] For these reasons, the Court determined that the courts of the United States were not open to enemy combatants engaged in actual hostilities against the United States, even if they would be tried and convicted by the U.S. government. *Eisentrager* thus represented another move away from the strict territoriality model the Court utilized in *Ross*, which had "turned more on territory rather than citizenship."[42] While the prisoners' location in Germany played a large role in the Court's decision, their enemy

35. *Id.* at 766.
36. *Id.* at 767.
37. *Id.* at 768. In a now-famous line, the Court noted that "[t]he alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society." *Id.* at 770. The Court tied these rights to the foreign national's physical presence in the United States. ("But, in extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien's presence within its territorial jurisdiction that gave the Judiciary power to act.") *Id.* at 771. For a challenge to this view of the ascending scale of rights, see Won Kidane, *The Alienage Spectrum Disorder: The Bill of Rights from Chinese Exclusion to Guantanamo,* 20 BERKELEY LA RAZA L.J. 89 (2010) (surveying the rights of various classes of non-natural born citizens and concluding that there is no neat spectrum of ascending rights).
38. *Eisentrager*, 339 U.S. at 776.
39. *Id.* at 778 (citing *Ahrens*, 335 U.S. 188, 190–91). *Ahrens* was largely overturned by Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484 (1973).
40. *Eisentrager*, 339 U.S. at 779.
41. *Id.*
42. Veneziano, *supra* note 9, at 625 (2019).

combatant status, as well the practical concerns identified by the Court, were just as important.

Less than a decade later, in *Reid v. Covert*, the formalist model's restrictions on the reach of the Constitution beyond our borders collapsed and the Court created two new tests in its place. In *Reid*, the Court held that civilian dependents of military personnel who accompanied armed force members overseas could not be tried for capital crimes by a military court martial.[43] A fractured Court held for the first time that the Constitution offered *some* protection for citizens overseas when capital crimes were at issue. A plurality of four Justices held that the Constitution applies to U.S. citizens any time the federal government sought to take action against them.[44] According to the plurality, led by Justice Black, "[w]hen 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."[45]

But Justice Black was unable to secure a fifth vote for his sweeping vision of the Constitution's reach. Instead, Justices Frankfurter and Harlan each concurred separately, offering their own functionalist reasons for extending the Constitution in these cases.[46]

Justice Harlan created a test that would eventually command majority support five decades later. He agreed that *Ross* and the *Insular Cases* did not automatically exclude application of the Fifth

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43. 354 U.S. 1 (1957). Consolidated cases, *Reid* dealt with the wives of two service members who murdered their husbands on U.S. military bases in England and Japan. In the wake of World War II, the United States' military posture changed dramatically, when for the first time, civilian dependents were allowed to accompany military members overseas. Given the large numbers of U.S. citizens suddenly stationed overseas, who were not in actual military service, questions were raised about the judicial process available when these civilians committed crimes.

44. *Reid*, 354 U.S. at 5–6.

45. *Id.* at 6.

46. *Id.* at 45–47 (Frankfurter, J., concurring). Justice Frankfurter focused on the unique nature of the capital crimes at issue and noted that in such cases, where defendants faced the most severe penalties, the utmost respect for rights was necessary. He also noted that because the Government's figures only disclosed thirteen capital prosecutions of civilian dependents over seven years, the requirement that the Government respect the Fifth and Sixth Amendment rights of such dependents would not overly burden the Government. Given the practical realities, Justice Frankfurter concluded that the right to a jury trial in capital cases could not be overcome by military necessity.

and Sixth Amendments extraterritorially. Unlike the plurality led by Justice Black, however, he felt those cases still had some vitality.[47] While Harlan did not believe that the Constitution had no applicability outside the United States, he also "[could not] agree with the suggestion that every provision of the Constitution must always be deemed automatically applicable to American citizens in every part of the world."[48] Instead, he believed that there were constitutional provisions which did not *automatically* apply overseas in every circumstance.[49]According to Justice Harlan, *Ross* and the *Insular Cases* impart:

> that there is no rigid and abstract rule that Congress, as a condition precedent to exercising power over Americans overseas, must exercise it subject to all the guarantees of the Constitution, no matter what the conditions and considerations are that would make adherence to a specific guarantee altogether impracticable and anomalous.[50]

In giving substance to this new "impracticable and anomalous" test, he felt that it was appropriate to examine the particular local setting, the practical necessities, and the possible alternatives available to Congress when deciding whether a trial by jury *should* be considered a necessary condition to Congress's exercise of power in this instance.[51] For Harlan, this was a question of judgment. In its simplest form, Harlan stated "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."[52]

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47. *Id.* at 65 (Harlan, J., concurring).
48. *Id.* at 74 (Harlan, J., concurring).
49. *Id.* (emphasis in original).
50. Reid v. Covert, 354 U.S. 1, 74 (1957).
51. *Id.* at 75 (Harlan, J., concurring). For scholarly examinations of the "impracticable and anomalous" test, see Jesse Merriam, *A Clarification of the Constitution's Application Abroad: Making the "Impracticable and Anomalous" Standard More Practicable and Less Anomalous*, 21 WM. & MARY BILL RTS. J. 171 (2012); *see also* Gerald Neuman, *Understanding Global Due Process*, 23 GEO. IMMIGR. L.J. 365 (2009).
52. *Reid*, 354 U.S. at 75. In the context of a capital case, Harlan determined that civilian dependents tried for such crimes were "due" more than a court martial. Like Justice Frankfurter, Harlan noted that the number of cases involving capital punishment of civilian dependents was so small that providing the heightened processes required by the Fifth and Sixth Amendments would not present practical problems that could not be overcome. *Id.* at 78.; Neuman, *supra* note 51, at 365 (expanding on what it would mean to provide global due process around the world).

The Court then let the issue of the extraterritorial application of the Constitution lie fallow for over three decades. It returned to this issue and to a modified view of strict territoriality in the 1990 case *United States v. Verdugo-Urquidez*.[53] Rene Verdugo-Urquidez was a Mexican citizen and believed to be a high-ranking member of a drug cartel located in Mexico. Following the murder of an undercover agent from the Drug Enforcement Administration (DEA), officers of the DEA worked with agents of the Mexican Federal Judicial Police (MJP) to arrest Verdugo-Urquidez and transport him to a jail in San Diego.[54] While awaiting trial in San Diego, DEA agents and MFJP officers conducted a joint search of two of Verdugo-Urquidez's homes located in Mexico, where they seized evidence relating to his participation in narcotics offenses.[55] Verdugo-Urquidez moved to suppress the evidence seized in his Mexican homes because the DEA did not secure a warrant prior to conducting the searches. The District Court granted the motion and the Ninth Circuit affirmed.[56]

The Supreme Court reversed. A majority of five justices held that because the Fourth Amendment applied to "the people" it was restricted to American citizens and noncitizens who had developed a "sufficient connection" with the United States.[57] Because Verdugo-Urquidez had failed to develop substantial connections with the United States prior to his arrest, he was not among "the people" who fell within the Fourth Amendment's protection. Therefore, there was no need to secure a warrant before searching his homes in Mexico.[58]

The majority's opinion embraced a return to the strict territoriality view expressed in *Ross*, at least as far as noncitizens without sufficient connection to the United States are concerned. The opinion highlights several "significant and deleterious consequences for the United States" were Verdugo-Urquidez to prevail, as well as

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Professor Neuman argued that this approach is "designed to provide practicable but substantial limits on the treatment of human beings subjected to U.S. power" and that any remaining uncertainty in the approach is "preferable to the brutal clarity of denying any rights to foreign nationals abroad." Neuman, *supra* note 51, at 401.

53. 494 U.S. 259 (1990).

54. *Id.* at 262.

55. *Id.*

56. *Id.* at 263.

57. *Id.* at 265. Elsewhere in the opinion Chief Justice Rehnquist, writing for the majority, used the term "substantial connections" which has come to define the relevant test. *See id.* at 271 ("Respondent is an alien who has had no significant voluntary connection with the United States . . .").

58. United States v. Verdugo-Urquidez, 494 U.S. 259, 271–72 (1990).

identifies practical concerns with extending the warrant requirement to noncitizens overseas.[59] As a result of the majority's reasoning, there were now two tests for extraterritorial application of the Constitution: one for citizens and one for everyone else.

Justice Kennedy, who joined the majority, wrote a concurrence in which he rejected the majority's reliance on the text of the Fourth Amendment. Instead, he relied on Justice Harlan's concurrence in *Reid*, finding that the application of the warrant requirement in a foreign country would be "impracticable and anomalous."[60] While Justice Kennedy stated that his concurrence did not differ materially from the majority, his rejection of Rehnquist's logic has generated some debate among lower courts about whether Justice Rehnquist's opinion constitutes a majority or plurality opinion.[61] Scholars are similarly divided.[62] In his concurrence, Justice Kennedy identified three

59. *Id.* at 273–74. The Court expressed concern that applying the warrant requirement to all foreign policy operations would hinder the political branches' ability to respond to foreign situations impacting the national interest, that it might expose U.S. agents to damages claims from noncitizens, and that any warrant issued by a U.S. judge would be a dead letter overseas. *Id.*

60. *Id.* at 277–78 (Kennedy, J., concurring). While Justice Kennedy stated his concurrence did not differ materially from the majority, this rejection of Rehnquist's logic has led some scholars and lower courts to dispute whether the Rehnquist opinion constitutes a majority at all.

61. Cases that treat the Rehnquist opinion as a majority include Hernandez v. United States, 757 F.3d 249 (5th Cir. 2014) (*Hernandez I*); United States v. Portillo-Munoz, 643 F.3d 437 (5th Cir. 2011); *In re* Iraq & Afghanistan Detainees Litigation, 479 F. Supp. 2d 85 (D.D.C. 2007); and United States v. Esparza-Mendoza, 265 F. Supp. 2d 1254 (D. Utah 2003). *But see* Sissoko v. Rocha, 440 F.3d 1145 (9th Cir. 2006), *superseded by* 509 F.3d 947 (9th Cir. 2007) (referring to Chief Justice Rehnquist's opinion in *Verdugo-Urquidez* as a plurality); United States v. Boynes, 149 F.3d 208 (3d Cir. 1998) (same); Lamont v. Woods, 948 F.2d 825 (2d Cir. 1991) (same); Kadi v. Geithner, 42 F. Supp. 3d 1 (D.D.C. 2012) (same); and United States v. Guiterrez, 983 F. Supp. 905 (N.D. Cal. 1998) *rev'd on other grounds*, 203 F.3d 833 (9th Cir. 1999) (same).

62. The scholarly literature is similarly divided. For examples of scholars who view the Rehnquist opinion as a majority, see, e.g., Alec Walen, *Constitutional Rights for Nonresident Aliens: A Doctrinal and Normative Argument*, 8 DREXEL L. REV. 53, 62–63 (2015) (referring the Rehnquist opinion as an "unusual majority"); Anna Su, *Speech Beyond Borders: Extraterritoriality and the First Amendment*, 67 VAND. L. REV. 1373, 1384 (2014) (stating that Chief Justice Rehnquist was writing for a majority); Merriam, *supra* note 51, at 195 (same); Galia Rivlin, *Constitutions Beyond Borders: The Overlooked Practical Aspects of the Extraterritorial Question*, 30 B.U. INT'L L. J. 135, 140 n.8 (2012) (referring to the *Verdugo-Urquidez* majority); Joshua Alder Geltzer, *Of Suspension, Due Process, and Guantanamo: The Reach of the Fifth Amendment After Boumediene and the Relationship Between Habeas Corpus and Due Process*, 14 U. PA. J. CONST. L. 719, 734 (2012) (noting that Chief

practical problems with applying the warrant requirement overseas to the same extent it applies in the United States: "[t]he absence of local judges or magistrates available to issue warrants, the differing and perhaps unascertainable conceptions of reasonableness and privacy that prevail abroad, and the need to cooperate with foreign officials[.]"[63]

Justice Kennedy's functionalist view of the Constitution's extraterritorial application in *Verdugo-Urquidez* won the day in a case arising out of the War on Terror, *Boumediene v. Bush*.[64] *Boumediene* was a challenge to the detention of suspected terrorists held by U.S. forces at the naval base at Guantanamo Bay, Cuba. The detainees sought writs of habeas corpus challenging their detention. In response to Congress's attempts to deny jurisdiction, a majority of five Justices held that Section 7 of the Military Commissions Act, which purported to strip U.S. courts of jurisdiction over habeas claims made by Guantanamo detainees, violated the Suspension Clause.[65]

Justice Kennedy, writing for the majority, drew on the "impracticable and anomalous" test first articulated by Justice Harlan in *Reid* and adopted by Justice Kennedy in his *Verdugo-Urquidez* concurrence to determine that the Constitution applied to the Guantanamo detainees.[66] The Court concluded that "Art. I, § 9, cl. 2 of the Constitution has full effect at Guantanamo Bay."[67] In determining that the detainees were entitled to the Constitution's protection, the

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Justice Rehnquist wrote for a five-justice majority); Christina Duffy Burnett, *A Convenient Constitution? Extraterritoriality After Boumediene*, 109 COLUM. L. REV. 973, 1014 (2009) (noting that Justice Kennedy "joined Chief Justice Rehnquist's opinion for the Court . . . ,"). *But see* Netta Rotstein, Boumediene vs. Verdugo-Urquidez*: The Battle for Control Over Extraterritoriality at the Southwestern Border*, 93 WASH. U. L. REV. 1371, 1379 (2016) (referring to Justice Rehnquist as writing for a plurality); Karen Nelson Moore, *Aliens and the Constitution*, 88 N.Y.U. L. REV. 801, 808 (2013) (referring to a "plurality led by Chief Justice Rehnquist . . . ."); Kidane, *supra* note 37, at 106 (referring to the Court's plurality opinion); D. Carolina Núñez, *Inside the Border, Outside the Law: Undocumented Immigrants and the Fourth Amendment*, 85 S. CAL. L. REV. 85, 88 (2011) (referring the Court's plurality opinion); Jeffrey Kahn, *Zoya's Standing Problem, or, When Should the Constitution Follow the Flag?*, 108 MICH. L. REV. 673, 689 (2010) (referring to Chief Justice Rehnquist as "writing for a plurality"); Gerald L. Neuman, *The Extraterritorial Constitution After* Boumediene v. Bush, 82 S. CAL. L. REV. 259, 290 (2009) (calling for the repudiation of the *Verdugo-Urquidez* plurality).

63. *Verdugo-Urquidez*, 494 U.S. at 278 (Kennedy, J., concurring).

64. Boumediene v. Bush, 553 U.S. 723 (2008).

65. *Id.* at 732.

66. *Id.* at 770.

67. *Id.* at 771.

majority articulated a three-part test drawn from *Eisentrager*, which would require consideration of: "(1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ."[68] The Court specifically noted that "questions of extraterritoriality turn on objective factors and practical concerns, not formalism."[69]

This ends the conventional account of the extraterritorial application of the Constitution. But it is not the end of the story, even at the U.S. Supreme Court. Several other cases bear on the question and will be addressed in the following section.

B. Other Supreme Court Cases to Consider

Several additional Supreme Court cases deserve attention in the discussion of the extraterritorial application of the Constitution. These include *Ker v. Illinois*,[70] *Russian Volunteer Fleet v. United States*,[71] *United States v. Curtiss-Wright Export Corp.*,[72] *Kinsella v. United States*,[73] *Agency for International Development v. Alliance for an Open Society International, Inc.* (*Alliance for Open Society II*),[74] and

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68. *Id.* at 766.

69. *Id.* at 764. This second prong has caused some courts to limit *Boumediene*'s reach. When discussing the nature of the site where the detention took place, the Court rejected the Government's focus on de jure sovereignty, finding instead that the United States exercised "complete jurisdiction and control" over Guantanamo Bay, thus maintaining de facto sovereignty over the territory. *Id.* at 755. As a result, some lower courts have read *Boumediene* as only extending the Constitution to locations where the United States exercises a similar level of control. *See, e.g.*, Hernandez v. Mesa, 885 F.3d 811, 817 n.13 (5th Cir. 2018) (en banc) (collecting cases); Al Maqaleh v. Gates, 605 F.3d 84, 97 (D.C. Cir. 2010) (rejecting application of the Suspension Clause to Bagram Air Force Base in Afghanistan, because the United States did not exercise de jure or de facto sovereignty).

70. 119 U.S. 436 (1886).

71. 282 U.S. 481 (1931).

72. 299 U.S. 304 (1936).

73. 361 U.S. 234 (1960).

74. Agency for Int'l Dev. v. All. for an Open Soc'y Int'l, Inc. (*Alliance for Open Society II*) 591 U.S. ____ (2020), 140 S. Ct. 2082 (2020). This is actually the second case with this name. An earlier case in the same litigation dealt with conditions placed on U.S. non-profits seeking grants from the U.S. government to support programs abroad. The Court held that such conditions violated the First Amendment. Agency for Int'l Dev. v. All. for an Open Soc'y Int'l, Inc. (*Alliance for Open Society I*), 570 U.S. 205, 220 (2013). The second case dealt with challenges to

a line of cases involving state court personal jurisdiction over foreign corporations.[75] Given the age of many of these cases, one even predating *Ross*, their exclusion from the conventional narrative is puzzling. The Supreme Court issued its decision for *Alliance for Open Society II*, the most recent of these cases, in 2020; academic discussion therefore has yet to incorporate it.[76]

Ker v. Illinois arose from a case involving a U.S. citizen, Ker, charged with larceny and embezzlement in the state of Illinois. In an effort to avoid prosecution, Ker fled to Peru, leading the Governor of Illinois to seek his extradition.[77] Following a request from Illinois, the President of the United States issued a warrant for Ker's extradition pursuant to a treaty between the United States and Peru, which was given to Henry G. Julian, who some sources identify as a Pinkerton detective, to execute.[78] For reasons unknown, when Julian reached

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the same conditions by foreign-chartered affiliate organizations. *Alliance for Open Society II*, 140 S. Ct. at 2082.

75. *See*, *e.g.*, Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952) (holding that a Philippine company was not amenable to suit in Ohio under the 14th Amendment's Due Process Clause); Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982) (holding that a foreign corporation which fails to engage in discovery regarding the court's personal jurisdiction over it has waived any defense to the court's jurisdiction under the 14th Amendment); Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408 (1984) (holding that the 14th Amendment prohibited Texas courts from exercising personal jurisdiction over a Colombian corporation which lacked minimum contacts with the forum state); Asahi Metal Indus. Co. v. Superior Ct. of California, 480 U.S. 102 (1987) (holding that subjecting a Japanese corporation with no contacts with California to suit in that state would violate the Due Process Clause of the 14th Amendment); J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873 (2011) (holding that it violated the Due Process Clause of the 14th Amendment to subject a British company to personal jurisdiction in New Jersey courts where the British company lacked purposeful contacts with New Jersey); Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915 (2011) (finding that the exercise of general jurisdiction over a Turkish company by North Carolina courts violated the Due Process Clause of the 14th Amendment when the only ties to the state were occasional sales by a corporate subsidiary); and Daimler AG v. Bauman, 571 U.S. 117 (2014) (holding that the 14th Amendment's Due Process clause prevented a foreign plaintiff from suing a foreign corporation for human rights violations in a foreign country, when the only tie to the forum was that the foreign corporation had a subsidiary incorporated in the United States that had dealerships in the forum).

76. 591 U.S. ____ 140 S. Ct. 2082 (2020).

77. 119 U.S. at 438.

78. *Id.* at 438. For Julian's status as a Pinkerton see, e.g., United States v. Yunis, 681 F. Supp. 909, 918 (D.D.C. 1988) (In discussing the facts of *Ker*, the court stated: "He was forcibly abducted from Peru by a Pinkerton agent brought to Illinois, tried and convicted").

Peru he chose not to present the warrant, but instead forcibly and violently kidnapped Ker.[79] Upon his return to Illinois, Ker was convicted of embezzlement.[80]

Ker challenged his kidnapping on several grounds, including that his arrest in violation of the extradition treaty also violated his right to due process under the Fourteenth Amendment. The Court rejected Ker's claim, but not on the basis that the Constitution did not apply to an American citizen in Peru. Indeed, the Court did not address the international aspect of the case at all when discussing the constitutional claim.[81] Instead, the Court held that "due process" is respected when a defendant is regularly indicted by the grand jury, has a trial according to prescribed forms and modes, and is not denied any rights in the course of said trial.[82] Thus, five years before the Court blithely declared in *Ross* that the Constitution has no effect outside the United States, the Court heard Ker's claim on the merits and rejected it, not because he did not have a right to claim, but merely because it did not believe the behavior at issue impaired any rights Ker may have had. While one might forgive commentators and courts for leaving *Ker* out of the conventional account because it focused on the treaty's applicability,[83] the lack of discussion about *Russian Volunteer Fleet* and *Kinsella* is far more puzzling.

In 1931, the Supreme Court issued its unanimous decision in *Russian Volunteer Fleet v. United States*.[84] The Petitioner was a corporation "duly organized under the laws of Russia . . . "[85] The Russian corporation had been the assignee of certain contracts for the construction of two vessels by a New York corporation.[86] But at the onset of World War I, in accordance with statute and executive order, the United States Shipping Board Emergency Fleet Corporation requisitioned the contracts for the use of the United States, thus taking

79. 119 U.S. at 438.

80. *Id.* at 439.

81. *Id.* at 439–40. Considering *Ker* was decided five years before *Ross*, this lack of discussion is puzzling.

82. *Id.* at 440. The Court held that "for mere irregularities in the manner in which he may be brought into custody of the law, we do not think he is entitled to say that he not be tried at all for the crime with which he is charged in a regular indictment."

83. Indeed, as the Court itself noted in *Ker*, Ker's counsel spent the bulk of his efforts focused on the treaty-based question rather than the due process question. *Id.* at 439, 441.

84. 282 U.S. 481 (1931).

85. *Id.* at 489.

86. *Id.* at 487.

possession of the vessels.[87] The Russian corporation filed a claim under the Fifth Amendment's Takings Clause. A unanimous Court ruled that because the corporation was an alien friend, it was entitled to recover for the taking of its property.[88]

The Court's move to employ differing tests for citizens and noncitizens has a much earlier pedigree than the conventional account posits. In *Curtiss-Wright*, for example, the Court was confronted with a challenge by a company charged with violating a Congressional Joint Resolution and Presidential Proclamation which prohibited the selling of arms to Bolivia.[89] The company argued that the delegation of legislative power from Congress to the President violated the separation of powers.[90] The Court held that the Constitution's limits do not apply in the field of foreign affairs.[91] Indeed, it held that "[n]either the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens."[92] But despite this recognition of a broad foreign affairs power, the Court still recognized that "of course, like every other governmental power, [it] must be exercised in subordination to the applicable provisions of

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87. *Id.*

88. *Id.* at 491–92 ("The provision that private property shall not be taken for public use without just compensation establishes a standard for our government which the Constitution does not make dependent upon the standards of other governments."). One possible explanation for the Court's decision is that any constitutional violation took place within the United States. Thus, this case may be analogized to Wong Wing v. United States, 163 U.S. 228 (1896), which held that noncitizens within the United States were entitled to constitutional protections under the Fifth and Sixth Amendments.

89. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 311 (1936).

90. *Id.* at 314–15.

91. *Id.* at 315–16 ("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.").

92. *Id.* at 318. Of course, time has shown that the United States regularly extends the reach of its laws, including criminal laws, far beyond our borders and to all violators, regardless of citizenship. *See, e.g.*, FBME Bank, Ltd. v. Lew, 209 F. Supp. 3d 299 (D.D.C. 2016) (challenge by Tanzanian-chartered bank against special measure issued by the U.S. Dep't of the Treasury Financial Crimes Enforcement Network); *Tiede v. United States*, 86 F.R.D. 227 (D.D.C. 1979) (trial of two foreign nationals in the United States District Court for Berlin for diversion of a Polish aircraft to a forced landing in West Berlin); United States *ex rel.* Lujan v. Gengler, 510 F.2d 62 (2d Cir. 1974) (challenge by Argentinian national criminal defendant to abduction from Bolivia); United States v. Al Kassar, 660 F.3d 108 (2d Cir. 2011) (criminal prosecution of Spanish national); United States v. Cadena, 585 F.2d 1252 (5th Cir. 1978) (criminal prosecution of 13 Colombian nationals captured on the high seas).

the Constitution," like the First Amendment.[93] The recognition that the Constitution would have effect for citizens overseas is a precursor to the Court's holding just over 20 years later in *Reid*.

Kinsella was a follow-on case to *Reid* and addressed the question the Court purported to distinguish in the earlier case—namely whether civilians stationed on U.S. military bases overseas could be tried by martial courts for non-capital crimes.[94] Both Justices Frankfurter and Harlan had based their decisions in *Reid* on the unique nature of capital offenses.[95] But three years later the Court ruled 7-2 that the protections of the Fifth and Sixth Amendments applied to civilian dependents regardless of the nature of their crimes.[96]

The *Kinsella* Court did not use the same sweeping language Justice Black adopted for the plurality in *Reid* but rejected the distinction made by Frankfurter and Harlan, relying on the plurality's argument that the Fifth and Sixth Amendments applied to all persons and in all criminal trials.[97] The Court rejected the government's suggestion that it re-evaluate the balance of interests given the non-capital nature of the crimes, holding instead that the Article I power to make rules for land and naval forces did not differentiate between the types of offenses.[98]

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93. *Curtiss-Wright*, 299 U.S. at 320; *see also* United States Agency for Int'l Dev. v. All. For Open Soc'y Int'l, Inc., (*Alliance for Open Society I*), 570 U.S. 205 (2013) (holding that the First Amendment prohibited restrictions on what messages U.S. NGOs could share overseas).

94. Kinsella v. United States *ex rel* Singleton, 361 U.S. 234, 234 (1960).

95. *See* Reid v. Covert, 354 U.S. at 45–46 (Frankfurter, J. concurring in the result) ("It is in capital cases especially that the balance of conflicting interests must be weighed most heavily in favor of the procedural safeguards of the Bill of Rights."); *Id.* at 77 (Harlan, J. concurring in the result) (asserting that capital cases "stand on quite a different footing than other offenses" because "[i]n such cases the law is especially sensitive to demands for that procedural fairness which inheres in a civilian trial where the judge and trier of fact are not responsive to the command of the convening authority.").

96. *Kinsella*, 361 U.S. at 249.

97. *Id.* at 241–42.

98. *Id.* at 246. Building on the functionalist analysis of Justices Frankfurter and Harlan in their *Reid* concurrences, the Court noted both the limited nature of the problem (only 273 cases in a four-year period had been identified) and the fact that distinguishing between the types of cases would give the military unreviewable discretion to grant the defendant constitutional rights or not via its charging decisions. *Id.* at 244 & n.9. Finally, the Court determined that providing constitutional rights for non-capital cases would not disturb "'delicate arrangements with many foreign countries.'" *Id.* at 249. Instead, such equal

It is unclear why courts and commentators have not spent more time discussing *Kinsella* and its holding that the Constitution protects civilian dependents of military personnel living abroad with their servicemembers.[99] While it lacks the far-reaching language of Justice Black's plurality in *Reid*, *Kinsella* adopts the logic of that holding. Indeed, Justice Whitaker, joined by Justice Stewart, filed a concurrence in part that specifically quotes Justice Black's language in *Reid* as if it were a majority opinion.[100] *Kinsella* radically expanded the reach of the Constitution to U.S. citizens overseas, further cementing the different treatment of citizens and noncitizens, but is largely ignored.

Another branch of law which touches on the question of the extraterritorial application of the Constitution but is seldom mentioned as part of the conventional account is the law of personal jurisdiction under the Fourteenth Amendment. In a series of cases dating back 70 years, the Supreme Court has consistently held that it violates the Due Process Clause of the Fourteenth Amendment for states to subject corporations based in foreign countries to suit in state courts absent minimum contacts with the forum state.[101] In at least

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treatment for defendants, regardless of the nature of their crimes, "would be a palliative to a troubled world." *Id.*

99. This was actually a collection of cases challenging the application of courts martial to civilian dependents as well as civilian employees of the armed forces stationed abroad. Several of the justices thought that distinction was important. *See, e.g., id*. at 264 (Whitaker, J., dissenting in part) ("There is a marked and clear difference between civilian dependents 'accompanying the armed forces' and civilian persons 'serving with [or] employed by' the armed forces at military posts in foreign lands."). While a slimmer majority extended the Constitution's protections to civilian employees of the armed forces as well as dependents, the Court was clear that the distinction drawn in *Reid* between capital and non-capital offenses no longer had any applicability.

100. *Id.* at 261 (Whitaker, J., concurring in part).

101. *See e.g.*, Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952) (holding that a Philippine company was not amenable to suit in Ohio under the 14th Amendment's Due Process Clause); Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982) (holding that a foreign company which fails to engage in discovery regarding the court's personal jurisdiction over it has waived any defense to the court's jurisdiction under the 14th Amendment); Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408 (1984) (holding that the 14th Amendment prohibited Texas courts from exercising personal jurisdiction over a Colombian corporation which lacked minimum contacts with the forum state); Asahi Metal Indus. Co. v. Superior Ct. of California, 480 U.S. 102 (1987) (holding that subjecting a Japanese corporation with no contacts with California to suit in that state would violate the Due Process Clause of the 14th Amendment); J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873 (2011) (holding that

seven cases since 1952, the Court has sustained such challenges, three of which post-date the Court's finding in *Verdugo-Urquidez* that the Constitution only applies to noncitizens with "substantial connections" to the United States.[102] While some civil procedure scholars have pointed out this inconsistency,[103] the Court has never addressed it. Instead, it has consistently assumed that corporations chartered outside the United States are protected by the Fourteenth Amendment, even when they lack connections with the United States. Indeed, it is the very lack of connections which offends due process. One possible explanation for this assumption, which has been explored elsewhere, is that the constitutional violations take place within the boundaries of the United States.[104] Thus, just as Verdugo-Urquidez was entitled to the protections of the Fifth and Sixth Amendments once he entered the United States, these foreign corporations may exercise their rights in the United States as well. As will be discussed in *infra* Section III.B, focusing on the location of the alleged constitutional

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it violated the Due Process Clause of the 14th Amendment to subject a British company to personal jurisdiction in New Jersey courts where the British company lacked purposeful contacts with New Jersey); Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915 (2011) (finding that the exercise of general jurisdiction over a Turkish company by North Carolina courts violated the Due Process Clause of the 14th Amendment when the only ties to the state were occasional sales by a corporate subsidiary); Daimler AG v. Bauman, 571 U.S. 117 (2014) (holding that the 14th Amendment's Due Process clause prevented a foreign plaintiff from suing a foreign corporation for human rights violations in a foreign country, when the only tie to the forum was that the foreign corporation had a subsidiary incorporated in the United States that had dealerships in the forum).

102. *Nicastro*, *Goodyear*, and *Bauman* were all decided more than 20 years after *Verdugo-Urquidez*, yet none of the opinions in those cases cites, much less discusses, *Verdugo-Urquidez*. *See supra* note 101 for cases since 1952.

103. *See*, *e.g.*, Robin J. Effron*, Solving the Nonresident Alien Due Process Paradox in Personal Jurisdiction*, 116 MICH. L. REV. 123, 124 (2018) (recognizing the paradox between the Court's *Verdugo-Urquidez* "substantial connections" test and the 14th Amendment "minimum connections" test); Lea Brilmayer*, The Extraterritorial Application of American Law: A Methodological and Constitutional Appraisal*, 50 L. & CONTEMP. PROBS. 11, 33 (1987) (recognizing the conundrum and suggesting that it is the local litigation in U.S. courts which triggers the 14th Amendment's Due Process Clause).

104. *See* Mygatt-Tauber, *supra* note 11 (arguing that many cases in which the courts examine the extraterritorial application of the Constitution actually involve violations within the boundaries of the United States); *see also* the discussion of *Russian Volunteer Fleet*, *supra* notes 87–88 and accompanying text (noting that the taking of the Russian Volunteer Fleet's ships took place within the United States).

violation is a critical first step of the framework proposed in this Article.[105]

The most recent case decided by the Supreme Court represented a sharp break with *Boumediene* and a return to the strict territoriality formalism of *Ross*—at least for noncitizens. In *Alliance for Open Society II*, the Alliance for Open Society International challenged a USAID rule that prohibited foreign nongovernmental organizations (NGOs) from receiving funding unless they had a policy explicitly opposing prostitution and sex trafficking.[106] NGOs based in the United States had previously challenged the application of this regulation to their activities[107] and were now arguing that applying the provision to their foreign-chartered affiliates unconstitutionally imposed on the United States-based NGO's First Amendment rights.

Justice Kavanaugh, writing for the Court, held that "it is long settled as a matter of American constitutional law that foreign citizens outside U.S. territory do not possess rights under the U.S. Constitution."[108] In support of this contention, the majority pointed to *Boumediene*, Justice Scalia's dissent in *Hamdi v. Rumsfeld*,[109]

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105. *See infra* Part III (arguing that courts should first look to where the violation takes place before considering if the Constitution applied abroad); *see also* Mygatt-Tauber, *supra* note 11, at 563 (arguing that determining where a constitutional violation takes place is a key *a priori* step to determining if the Constitution applied abroad).

106. United States Agency for Int'l Dev. v. All. For Open Soc'y Int'l, Inc., (*Alliance for Open Society II*), 140 S. Ct. 2082, 2085 (2020).

107. United States Agency for Int'l Dev. v. All. For Open Soc'y Int'l, Inc., (*Alliance for Open Society I*), 570 U.S. 205 (2013).

108. *Alliance for Open Society II*, 140 S. Ct. at 2086. For a cogent rebuttal to Justice Kavanaugh's assertion, see Nicholas Romanoff, Note, *The "Bedrock Principle" That Wasn't:* Alliance for Open Society II *and the Future of the Noncitizens' Extraterritorial Constitution*, 53 COLUM. HUM. RTS L. REV. 345 (2021) (arguing that the "bedrock principle" identified by Justice Kavanaugh is illusory and the Court had long recognized constitutional rights outside the United States).

109. Hamdi v. Rumsfeld, 542 U.S. 507, 558–59 (2004) (Scalia, J., dissenting). *Hamdi* dealt with the detention of an American citizen who was accused of participating in the War on Terror against the United States. Justice Scalia's dissent merely noted that the plurality's assertion that captured enemy combatants could be held until the end of hostilities was "probably an accurate description of wartime practice with respect to enemy *aliens*." *Id.* at 559. (emphasis in original). Justice Scalia's comment is qualified dicta within a dissent and only focused on noncitizens who had taken up arms against the detaining power, such as the German prisoners in *Eisentrager*. It hardly serves as a basis for the claim that all noncitizens lack rights.

Verdugo-Urquidez,[110] *Eisentrager*,[111] *United States ex rel Turner v. Williams*,[112] and the Preamble to the U.S. Constitution.[113] The Court recognized that foreign citizens within the United States have been accorded rights, along with foreign nationals in territories within the exclusive jurisdiction and control of the United States, "[b]ut the Court has not allowed foreign citizens outside the United States or such U.S. territory to assert rights under the U.S. Constitution."[114] This holding is particularly interesting because Justice Kavanaugh failed to cite or differentiate from the Court's decisions in *Russian Volunteer Fleet* and the personal jurisdiction cases—*Perkins*, *Insurance Corporation of Ireland*, *Helicopteros*, *Asahi*, *Nicastro*, *Goodyear*, and *Daimler*—which undeniably applied the Constitution's due process clause to "foreign citizens outside the United States."[115]

110. United States v. Verdugo Urquidez, 494 U.S. 259 (1990).

111. Johnson v. Eisentrager, 339 U.S. 763 (1950).

112. United States *ex rel* Turner v. Williams, 194 U.S. 279 (1904). *Turner* was an immigration case dealing with the exclusion of an immigrant from the United States who had advocated for the violent overthrow of the U.S. government. Interestingly, the *Turner* majority did not believe that the immigration statute violated the First Amendment in the first instance. *Id.* at 292.

113. *Alliance for Open Society II,* 140 S. Ct. at 2086.

114. *Id.* This statement is flatly false in the context of the Supreme Court's own cases, as *Russian Volunteer Fleet* and the Fourteenth Amendment due process cases discussed above demonstrate. It also ignores decades of cases in the lower courts, recognizing constitutional rights for noncitizens outside the United States. Some of those cases are discussed in the following section. However, they are but a sample of the lower court cases applying constitutional rights to noncitizens, even where the violation occurred outside the United States. *See, e.g.*, United States v. Cadena, 585 F.2d 1252 (5th Cir. 1978) (applying the Fourth Amendment to the search of foreign-flagged vessel with a Colombian crew on the high seas); United States v. Tiede, 86 F.R.D. 227 (D.D.C. 1979) (applying Sixth Amendment right to a jury trial to two noncitizens tried in the United States Court for Berlin); United States v. Marino-Garcia, 679 F.2d 1373 (11th Cir. 1982) (deciding on the merits a Fourth Amendment claim arising out of the seizure of a stateless vessel on the high seas); United States v. Yunis, 859 F.2d 953 (D.C. Cir. 1988) (deciding on the merits defendant's Fifth and Sixth amendment claims regarding self-incrimination, where defendant was a foreign national questioned on a U.S. Navy ship on the high seas); United States v. Loera, 333 F. Supp 3d. 172 (E.D.N.Y. 2018) (applying Fourth Amendment standing doctrine and Fifth Amendment due process rights to the search and seizure of data held on Dutch servers of noncitizens with sufficient connections to the country).

115. *See supra* Section I.B.

C. The Contributions of Lower Courts

In addition to the above Supreme Court cases, a number of lower courts have addressed questions regarding the extraterritorial application of the Constitution. While many of those lower court decisions build upon or interpret the decisions discussed above, at least two lower court innovations which have not reached the Supreme Court are worthy of discussion. First, there is a line of cases, beginning with *United States v. Tosconino,*[116] holding that courts will refuse to accept jurisdiction over criminal defendants when the manner of their apprehension or subsequent treatment "shocks the conscience" of the judiciary. Second, the courts of appeal have dealt with numerous questions about the application of the Fourth Amendment to citizens who have been searched or seized abroad.[117] These courts have created a test for determining when the Fourth Amendment applies outside the United States, namely when United States agents had substantially participated in the search or seizure. In cases where they have, courts have not hesitated to extend the Constitution's protections, in spite of the fact that the searches and seizures took place overseas.

Francisco Toscanino was an Italian citizen charged by the United States with conspiracy to import narcotics. According to Toscanino, he was captured in Montevideo, Uruguay by members of the local police, who were acting as paid agents of the United States.[118] Toscanino alleged that following his arrest, which he termed a kidnapping, he was bound and blindfolded and transported to Brazil.[119] He was then transferred to Brazilian authorities who held him incommunicado and denied him food and water. He was then subject to torture and interrogation for 17 days by Brazilian officials acting as agents of the United States.[120] Toscanino alleged that U.S. agents were

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116. United States v. Tosconino, 500 F.2d 267 (2d Cir. 1974). *Tosconino* is an exception to *Ker v. Illinois*.

117. *See, e.g.*, United States v. Peterson, 812 F.2d 486 (9th Cir. 1986) (finding that the Fourth Amendment applies to a search overseas where United States agents played a substantial role in the search, and the search was inconsistent with foreign law); Stonehill v. United States, 405 F.2d 738 (9th Cir. 1968) (holding that the Fourth Amendment only applies to overseas searches when the searches can be termed joint ventures between U.S. and foreign agents); Birdsell v. United States, 346 F.2d 775 (5th Cir. 1965) (holding that the Fourth Amendment does not apply to searches by Mexican agents acting in Mexico, even if the searches are the result of tips from U.S. agents).

118. *Toscanino*, 500 F.2d at 269.

119. *Id.* at 269.

120. *Id.* at 270.

aware of this treatment, received regular reports, and even participated in the interrogations.[121] The U.S. Attorney prosecuting Toscanino argued that the claims were irrelevant under the *Ker-Frisbie* doctrine.[122]

Relying on caselaw following *Frisbie*, which greatly expanded due process protections to cover pre-trial conduct by the police, the Second Circuit found an exception requiring the courts to divest themselves of jurisdiction "where it has been acquired as the result of the government's deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights."[123] As for whether Toscanino, as an Italian citizen, had constitutional rights, the court determined that he did. The court relied on *Katz v. United States* to find that the Fourth Amendment protects "people" not "areas" or "citizens."[124] However, the court cabined its discussion, noting that the Fourth Amendment only applied to conduct by agents acting on behalf of the United States and not the independent actions of foreign agents in their own country.[125] But where either U.S. agents or those acting on their behalf are involved, the Constitution offers some protection when their actions shock the conscience.[126]

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121. *Id.*

122. *Id. Ker* is discussed in *supra* notes 77–83 and accompanying text. Frisbie v. Collins, 342 U.S. 519 (1952) was a case with similar facts, though the alleged bad conduct all occurred within the United States.

123. *Toscanino*, 500 F.2d at 273–75.

124. *Id.* at 280. *Toscanino* was decided in 1974, well before the Supreme Court issued its decision in *United States v. Verdugo-Urquidez*.

125. *Id.* at 280 n.9.

126. The Second Circuit almost immediately limited the reach of *Toscanino* in United States *ex rel* Lujan v. Gengler, 510 F.2d 62 (2nd Cir. 1974). In fact, almost no court to examine a claim under *Toscanino* has granted relief on that basis. *See, e.g.*, United States v. Lovato, 520 F.2d 1270 (9th Cir. 1975) (no allegation of severe mistreatment, so no *Toscanino* exception); United States v. Marzano, 537 F.2d 257 (7th Cir. 1975) (no allegations of shocking conduct by U.S. agents); United States v. Valot, 625 F.2d 308 (9th Cir. 1980) (because defendant had not alleged "conduct 'of the most shocking and outrageous kind,'" there was no basis for an exception under *Toscanino*); United States v. Cordero, 668 F.2d 32 (1st Cir. 1981) (circumstances not shocking enough and U.S. involvement not great enough to warrant the exception); United States v. Darby, 744 F.2d 1508 (11th Cir. 1984) (defendant failed to allege "cruel, inhuman and outrageous treatment" by U.S. officials or their agents); United States v. Rosenthal, 793 F.2d 1214 (11th Cir. 1986) (11th Circuit had not adopted *Toscanino*, but even if it had, the alleged conduct did not rise to the threshold necessary); United States v. Matta-Ballesteros, 71 F.3d 754 (9th Cir. 1995) (allegations of mistreatment were not as severe as the allegations in *Toscanino*); United States v. Keller, 451 F. Supp. 631 (D.P.R. 1978) (no conduct shocking enough to warrant *Toscanino* exception); United States v. Yunis, 681 F.

This last point has been used by other lower courts called upon to judge the application of the Fourth Amendment abroad. In 1965, the Fifth Circuit, per Judge Friendly, issued its opinion in *Birdsell v. United States*.[127] Birdsell was accused of participating in a crime ring which would steal vehicles in the United States and abscond with them to Mexico.[128] During one of his vehicle runs, Birdsell and an accomplice were arrested by Mexican police and two vehicles were searched. The fruits of the search were transferred to the United States, along with Birdsell and his accomplice, and were introduced as evidence in his trial, over Birdsell's objection.[129]

The court ruled that "the Fourth Amendment does not apply to arrests and searches made by Mexican officials in Mexico for violation of Mexican law, even if the persons arrested are Americans and American police officers gave information leading to the arrest and search."[130] But in a footnote, the court added an important caveat: "[W]here federal officials had induced foreign police to engage in conduct that shocked the conscience, a federal court, in the exercise of its supervisory powers over the administration of federal justice, [may] refuse to allow the prosecution to enjoy the fruits of such action."[131] This limited the application of the Constitution to a search or seizure conducted by foreign agents in a foreign country only where U.S. agents induced it and the conduct shocked the conscience—a very high bar.

Three years later, the Ninth Circuit expanded this holding in *Stonehill v. United States*.[132] Building on cases involving mixed federal and local searches and seizures, the Ninth Circuit held that "the Fourth Amendment could apply to raids by foreign officials only if Federal agents so substantially participated in the raids as to convert them into joint ventures between the United States and the foreign officials."[133] The court ruled that the participation must be judged by looking to the conduct of the federal agents during the search and

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Supp. 909 (D.D.C. 1988) (Government action did not shock the judicial conscience). The closest courts have come was in DiLorenzo v. United States, 496 F. Supp. 79 (S.D.N.Y. 1980) where the court noted that if the defendant's allegations were true, he would have a valid claim under *Toscanino*, and therefore summary judgment against the individual agents was inappropriate at that time.

127. Birdsell v. United States, 346 F.2d 775 (5th Cir 1965).

128. *Id.* at 776.

129. *Id.* at 782.

130. *Id.*

131. *Id.* at 782 n.10.

132. Stonehill v. United States, 405 F.2d 738 (9th Cir. 1968).

133. *Id.* at 743.

seizure compared with the totality of the acts done in the search and seizure.[134]

II. THEORIES OF CONSTITUTIONAL EXTRATERRITORIALITY

The idea that the Constitution does—or at least should—apply overseas is widely supported in the scholarly literature.[135] Some scholars have proposed theories that apply in specific contexts or to specific amendments.[136] Others, however, have taken a broader view

134. *Id.* at 744. Here, merely giving information to the foreign officials, as in *Birdsell*, did not rise to the level of a joint venture. *Id.* at 746. In fact, the evidence showed that U.S. agents objected to the search. *Id.* at 746. Lower courts have, however, found cases in which U.S. participation did rise to the level of a joint venture. In *United States v. Peterson*, 812 F.2d 486 (9th Cir. 1986) U.S. agents worked closely with Philippine agents to interdict vessels transporting marijuana on the high seas. The Philippine agents obtained wiretaps of a phone in an apartment in the Philippines. Evidence from those wiretaps was introduced at trial. On appeal, then Judge Anthony Kennedy found that the Fourth Amendment applied because the operation was a joint venture. *Id.* at 490. Because the DEA's role was not subordinate to the Philippine police officers, and the DEA agents themselves termed the enterprise a joint investigation, the court found that it was. The court was then required to determine if the search was reasonable. To do so, it looked to the search's compliance with Philippine law. The court determined the search did not comply with Philippine law and was thus unreasonable. However, because U.S. law determines if the evidence was excludable, the good faith exception to the warrant requirement allowed U.S. agents to depend on the representations of foreign officials that the search complied with local law. *Id.* at 490–92. Thus, even when courts have found that constitutional provisions apply overseas, that is not the end of the inquiry and other doctrines can interpose.

135. *But see* Paul B. Stephan III, *Constitutional Limits on the Struggle Against International Terrorism: Revisiting the Rights of Overseas Aliens*, 19 CONN. L. REV. 831 (1987) (arguing that courts should allow the executive branch or Congress to take the lead in determining what rights, if any, noncitizens should enjoy overseas); J. Andrew Kent, *A Textual and Historical Case Against A Global Constitution*, 95 GEO. L.J. 463 (2007) (arguing that constitutional text and history do not support extending constitutional rights to noncitizens overseas); see also Kent, *supra* note 16 (examining the traditional divide between the protection of constitutional rights for citizens and noncitizens overseas and offering functional and normative justifications for treating noncitizens differently).

136. *See, e.g.*, Stephen A. Saltzburg, *The Reach of the Bill of Rights Beyond the Terra Firma of the United States*, 20 VA. J. INT'L L. 741 (1980) (building on the "joint venture" test for application of the Fourth and Fifth Amendments); Randall K. Miller, *The Limits of U.S. International Law Enforcement After Verdugo-Urquidez: Resurrecting* Rochin, 58 U. PITT. L. REV. 867 (1997) (arguing that the Court should utilize the due process principle articulated in *Rochin v. California*, 342 U.S. 165 (1972) to determine if an overseas search of a noncitizen or her property is unreasonable); Tung Yin, *Procedural Due Process to Determine "Enemy Combatant" Status in the War on Terror*, 73 TENN. L. REV. 351 (2006) (arguing that detainees

and offered theories that apply to all constitutional provisions. These various theories can be broken down into five broad categories: 1) theories that argue the Constitution always applies; 2) theories based on conceptualizations of limited government; 3) theories that extend classes of rights; 4) theories that are based on international law; and 5) theories that offer a multifactor test to be applied to each right. Each of these categories will be discussed in this Part.

A. Universal Application

Several scholars have argued for the universal application of the Constitution abroad to the same extent that it applies at home. Perhaps the strongest form of this argument was put forward by Professor Andreas Lowenfeld in a 1990 article.[137] As he put it, "[t]he correct principle, in my view, is that any action under the authority of the United States is subject to the Constitution . . . . [N]either the high seas or foreign soil can free a U.S. law enforcement officer from the restraints on official behavior imposed by the United States Constitution."[138] Professor John Ragosta also ties the Constitution to

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held by the United States in Guantanamo Bay, Cuba have a constitutional right to due process to challenge their initial classification as "enemy combatants"); Timothy Zick, *The First Amendment in Transborder Perspective: Toward a More Cosmopolitan Orientation*, 52 B.C. L. REV. 941 (2011) (providing a framework for applying the First Amendment to activities that cross the border with the United States or take place entirely overseas); Jessica Gallinaro, *Over There, Over There: The Extraterritorial Application of Domestic Establishment Clause Jurisprudence in Former Warzones*, 17 RUTGERS J. L. & RELIGION 1 (2015) (arguing that the Establishment Clause applies overseas and that domestic jurisprudence can be used to successfully balance national security and religious liberty concerns when the U.S. repairs religious buildings abroad); Joseph C. Alfe, *Extraterritorial Constitutionalism: A Rule Proposed*, 50 J. MARSHALL L. REV. 787 (2017) (proposing a means for applying the Fourth Amendment to the narrow issue of cross-border shootings by U.S. agents who shoot and kill Mexican nationals).

137. Andreas F. Lowenfeld, *U.S. Law Enforcement Abroad: The Constitution and International Law, Continued*, 84 AM. J. INT'L L. 444 (1990). Professor Gerald Neuman has argued that much of the academic commentary strongly supports the universalist view. GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION 5–6 (Princeton Univ. Press., 1st ed. 1996). Professor Neuman is a legal commentator on the extraterritorial application of the Constitution, having authored numerous articles and a book on the subject.

138. Lowenfeld*, supra* note 137, at 451. Indeed, Lowenfeld goes so far as to argue that a warrant issued by a United States magistrate for actions overseas is a necessary, but not sufficient, condition of U.S. law enforcement action abroad. *Id.* at 458. To be fully authorized, U.S. agents would also have to comply with foreign law in the place where the search and seizure occurs. *Id.* Professor Paul Stephan pushes back, noting that even when the Court appeared to reject territoriality, as

the action of U.S. officials.[139] In addressing the argument that the Constitution was written to apply exclusively to U.S. citizens, Professor Ragosta notes "it is always a U.S. citizen—a government official—who is being controlled by the Constitution."[140]

Professor Louis Henkin argues that the Constitution does not create rights at all, but instead recognizes rights which precede government.[141] He argues that the social compact of the Constitution established a "community of righteousness" meaning that a government that is formed to secure rights is bound to respect them.[142] Henkin states that he is not claiming the Constitution "applies" everywhere or that it gives "rights" to every human being because, in

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in *Reid*, the plurality noted that even if the Constitution were to apply overseas, a different interpretation may apply depending on the place of application. Stephan, *supra* note 135, at 840. Professor J. Andrew Kent goes further, arguing that universal (what he calls globalist) approaches to the text of the Constitution err in two key respects: 1) they demand a clear statement rule that the Bill of Rights applies abroad unless it clearly states otherwise; and 2) reading the Constitution clause-by-clause, rather than as a whole. Kent, *supra* note 135, at 464.

139. *See* John A. Ragosta, *Aliens Abroad: Principles for the Application of Constitutional Limitations to Federal Actions*, 17 N.Y.U. J. INT'L L. & POL. 287 (1985) (arguing that when applying the Constitution abroad, it is always applied to the actions of a U.S. citizen, namely a government official).

140. *Id.* at 294. Professor Ragosta also argues that the Bill of Rights does not create rights, but rather reserves rights to individuals. *Id.* at 297. Professor J. Andrew Kent has taken issue with theories that apply the Constitution to noncitizens overseas. *See, e.g.*, Kent, *supra* note 16 (arguing that the text and history of the Constitution counsel against its application globally). He has argued there are plausible reasons to think that limiting the Constitution's reach to U.S. territory is justifiable. Specifically, Kent argues that within our borders, "government has the capacity and duty to create an ordered society of liberty. It has pervasive contact with the populace. It can legislate to structure the government, economy and society . . . Thus, at home, the government is all powerful and has duties to allow human flourishing." *Id.* at 2130. Outside the United States, by contrast, the U.S. government has much less power and ability to act and must usually do so with the support, or at least at the sufferance, of a foreign state.

141. *See* Louis Henkin, *The Constitution as Compact and Conscience: Individual Rights Abroad and at Our Gates*, 27 WM. & MARY L. REV. 11 (1985) (arguing that the theory of the Constitution as a social compact creates a government of conscience, which requires extending the Constitution to noncitizens).

142. *Id.* at 32; *see also id.* at 31 ("If, in a world of states, the United States is not in a position to secure the rights of all individuals everywhere, it is always in a position to respect them.").

his view, the Constitution doesn't *grant* rights to anyone. Rather, the rights protected therein precede the document itself.[143]

Finally, Professor Jules Lobel provides three normative reasons for extending the Constitution abroad.[144] First, he argues, "the rights and proscriptions contained in our Constitution protect not only individual interests, but also the community's interest."[145] Thus, the community is harmed anytime the government derogates from constitutional protections because our shared values underlying those protections are undermined.[146] Second, Lobel notes that we cannot insulate the domestic context from the international.[147] Precedents set in the international arena have ways of creeping into domestic applications of our constitutional rights.[148] Third, Professor Lobel argues that global application of the Constitution recognizes our common humanity in an increasingly interdependent world.[149]

The universalist view is contested in the literature and has never received court approval.[150] At best, it has found isolated champions, such as Justice Black's plurality in *Reid* or Justice

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143. *Id.* Professor Stephan squarely takes aim at Henkin's conception of the Constitution as compact, arguing that there is no reason to believe that "the conscience and righteousness the parties wished to generate in themselves would be imputed to those who had not joined[.]" Stephan, *supra* note 135 at 847. He argues that Henkin's view could actually be turned around to deny the Constitution's protection to resident noncitizens, since they are not party to the compact. *Id.* at 848.

144. Jules Lobel, *The Constitution Abroad*, 83 AM. J. INT'L L. 871, 873–74 (1989) (arguing that the Constitution should apply abroad because it recognizes that the Constitution protects not just individual interests but community interests; that the domestic arena cannot be insulated from the international arena; and doing so reflects an understanding of our common humanity in an interdependent world). Professors Robert Knowles and Marc D. Falkoff argue that the proper test, discussed in the next subsection, is not universalist, but rather a focus on the limited nature of the Government's powers under the Constitution. Knowles & Falkoff, *supra* note 9, at 647 n.39 (2007)

145. Lobel, *supra* note 144, at 873.

146. *Id*.

147. Lobel *supra* note 144, at 873. For a more detailed discussion of the way cases in international contexts serve to undercut protections at home, see David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953 (2002) (arguing that decisions on the rights of noncitizens bleed into the interpretation of citizens' rights); Desai, *supra* note 15, at 1615–16 (same).

148. Lobel, supra note 144, at 873–74.

149. *Id.* at 874.

150. For the strongest argument against applying the Constitution abroad, see generally Kent, *supra* note 135 (arguing that the text and history of the Constitution mitigate against extending rights to noncitizens abroad).

Brennan's dissent in *Verdugo-Urquidez*.[151] And even among its champions, few would go as far as Professor Lowenfeld and say that the Constitution must apply in exactly the same manner abroad as it does at home.[152] Perhaps the biggest drawback to the universalist view is that it fails to address the practical realities that would prevent applying the Constitution overseas in exactly the same manner as it applies at home.[153]

B. Limited Government Theories

Limited government theories build upon the idea that the Constitution sets up a government of limited powers and that those limits cannot legally be transcended, regardless of where the actions occur. Professors Robert Knowles and Marc Falkoff offer such a theory.[154] In contrast to rights-based approaches, Knowles and Falkoff's limited government approach puts the onus on the

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151. Justice Brennan referred to the Fourth Amendment as the "unavoidable correlative" of the exercise of police power abroad. *Verdugo-Urquidez*, 494 U.S. at 282 (Brennan, J., dissenting). Brennan argued that Verdugo-Urquidez's most substantial connection to the United States was that it was seeking to impose its criminal laws on him and imprison him for their violation. In Brennan's view, fundamental fairness required that, when seeking to impose society's obligations on someone, the Government had to respect the limits placed on it by the Constitution. *Id.* at 283–84 (Brennan, J., dissenting).

152. *See, e.g.*, Louis Henkin, *The Constitution at Sea*, 36 ME. L. REV. 201, 205 (1984) (noting that the Fourth Amendment cannot practically apply in the same way on the high seas as it does on shore); Lobel, *supra* note 144, at 878 (arguing that courts need to "articulate clearly when special circumstances require a relaxation of [constitutional] standards."); Ragosta, *supra* note 139, at 304 (identifying three circumstances where the Constitution could apply differently to noncitizens: 1) when the immigration and naturalization process is involved; 2) when the noncitizen's act affects military forces or operations; and 3) when the noncitizen's act presents foreign policy or national security concerns).

153. In addition to practical obstacles which have already been discussed, such as the lack of magistrates qualified to issue warrants overseas and their ineffectiveness, other constitutional rights may be practically impossible to implement, such as the Sixth Amendment's promise of access to counsel during interrogations. *See* United States v. Bin Laden, 132 F. Supp. 2d. 168, 188 (S.D.N.Y. 2001) (recognizing that the right to assistance and presence of counsel may not be feasible overseas and when in the custody of a foreign nation).

154. Knowles & Falkoff, *supra* note 9. Professor Ragosta, while championing a Universalist view, also addresses this argument. See Ragosta, *supra* note 139, at 298–99 (noting that application of the enumerated powers doctrine becomes problematic when dealing with the non-enumerated foreign affairs power.) But he notes that the Court, in *Curtiss-Wright*, recognized the application of constitutional limits on government power even in the arena of foreign affairs. *Id*. at 300.

government to justify its assertion of power in the first instance.[155] Once the government meets this burden, courts should then look to rights to determine if they provide any limits.[156] While drawing from the same theoretical underpinning of the universal application theories, Knowles and Falkoff are quick to point out that the limited government theory can lead to very different results.[157] For example, one could argue that the government possesses limited powers without recognizing the rights of noncitizens to enforce those limits.[158] They also note that there is a difference between the claim that the federal government enjoys limited powers and the argument that noncitizens possess constitutional rights.[159]

Professor Kermit Roosevelt also offers a version of a limited government theory of extraterritorial application, grounded in the law of conflicts.[160] He offers a two-step test: first, the court should look to scope—whether the laws the parties invoke actually grant them rights;

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155. Knowles & Falkoff, *supra* note 9, at 648.

156. *Id.* at 641. While they briefly discuss the existence of this second step, the bulk of the article is focused on the question raised by the first—does the Government possess power over foreign nationals abroad?

157. *Id.* at 647 n.39.

158. One prominent example is the differing results in Agency for Int'l Dev. v. All. for an Open Soc'y Int'l, Inc. (*Alliance for Open Society I*), 570 U.S. 205 (2013) and Agency for Int'l Dev. v. All. for an Open Soc'y Int'l, Inc. (*Alliance for Open Society II*) 591 U.S. ____ (2020), 140 S. Ct. 2082 (2020). At issue was the same regulation of the same conduct, but the Court determined that while the First Amendment prohibited the application of the Leadership Act's restrictions on domestic NGOs, the same law could apply to foreign NGOs. A universalist would argue the result should be the same in both cases.

159. *Id.*

160. Kermit Roosevelt III, *Current Debates in Conflict of Laws: Application of the Constitution to Guantanamo Bay: Guantanamo and the Conflict of Laws:* Rasul *and Beyond*, 153 U. PA. L. REV. 2017 (2005). Roosevelt argues that the Constitution should have extraterritorial application because a mere accident of geography should not control the application of cherished constitutional freedoms. *Id.* at 2030–31. He notes that one of the major benefits to a limited government theory of extraterritorial application is that it avoids the knotty question of what rights nonresident noncitizens possess. *Id.* at 2049. ("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."). But this theory is not without its complications, which require looking at what rights apply abroad in any case. This is due to the fact that his reasoning would require limitations to the foreign affairs power that the Court so rarely finds. *Id.* at 2050–53.

if both parties have rights, the court should ask which has priority.[161] In looking at scope, Roosevelt suggests that the proper inquiry is whether enforcing the right abroad would serve its domestic purpose.[162] If it would, then the right should apply abroad. If not, then it should not.[163] Thus, according to Roosevelt, the question of whether rights apply to nonresident noncitizens "comes down to a question of what our values are."[164]

Like universalist theories, the limited government theories have not found champions within the judiciary. There are some nods to limited government theories in the *Insular Cases*, where the Court acknowledged that limits on Congress to act at all had to be respected in unincorporated territories. And there is a flavor of this argument underlying the majority's holding in *Boumediene*, extending the Suspension Clause to Guantanamo Bay. But no decision has rested its holding on the idea that the federal government has limited powers and therefore can be constrained overseas. On the contrary, as cases like *Curtiss Wright* demonstrate, the Court is more inclined to grant the government broad powers where foreign policy is concerned.[165]

C. Classes of Rights

A third set of theories argues that rights can be divided into sub-classes, such as fundamental or "uniquely American," civil or natural, or offensive or defensive. These theories argue that some of these classes should be extended while their opposite should not be or should require a special justification in order to extend beyond U.S. borders. One example of this type of theory was offered by Erin Creegan.[166] Creegan offers a modification to *Verdugo-Urquidez*'s

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161. *Id.* at 2063–64. Because Roosevelt is proposing this theory in the context of detention at Guantanamo Bay, he notes that issues of priority are not implicated. As a result, he fails to provide further detail on this step in this article.

162. *Id.* at 2065.

163. Importantly, the mere fact that the right applies abroad does not, in Roosevelt's theory, mean that a nonresident noncitizen should have the ability to bring a claim. *Id.* at 2067.

164. *Id.* at 2069.

165. *Supra* notes 89–93 and accompanying text.

166. Erin Creegan, *The Extraterritorial Constitutional Rights of Aliens in the Federal Circuit*, 19 FED. CIR. B.J. 273 (2009). All such theories, which divide the Constitution's protections into classes of rights, fall victim to Professor Kent's criticism of looking at the Constitution clause-by-clause rather than as a whole. While this criticism has some merit, it fails to account for the fact that the courts examine constitutional clauses differently in the domestic realm. Although it must be acknowledged that this clause-by-clause approach is particularly egregious in

"substantial connections" test. She argues that fundamental rights should be exempt from the test, while it would apply to those which are unique to the Anglo-American legal tradition.[167]

Christopher Ford offers a distinction between natural and civil rights, but unlike most writers in this field, argues that civil rights, rather than natural rights, should apply extraterritorially.[168] Ford draws a distinction between natural rights, which inhere in individuals regardless of the existence of civil society and civil rights, which are those rights granted by a particular society to individuals.[169] The distinction is that natural rights impose restrictions on government, while civil rights empower the individual.[170] According to Ford, civil rights only come into play when the government takes an action against an individual.[171] These rights restrict government action that is otherwise lawful—such as prosecuting someone suspected of a crime—but which have legal consequences—such as the need to provide counsel.[172]

In flipping the typical natural/fundamental versus civil rights dichotomy in terms of extraterritorial application, Ford explains that "[b]ecause natural rights underlie the system of constraints on government action, they are properly applicable only where the government has the authority to act: the sovereign territory of the nation. By contrast, however, civil rights are responsive to government action and so should apply wherever the government acts."[173] Thus, under Ford's schema, civil rights, such as those protected by the

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the courts' discussions of extraterritorial application. It is precisely this flaw that this article aims to address.

167. *Id.* at 290. She defines a fundamental right as "those which are widespread in the world's legal systems and contravening them is not an arbitrary choice between many alternate ways to seek justice, but rather an autocratic act of government."

168. Christopher S. Ford, *Rights and Remedies Under the Constitution: Extraterritorial Application of the Writ of Habeas Corpus*, 7 DUKE J. CONST. L. & PUB. POL'Y 25 (2011).

169. *Id.* at 38.

170. *Id.*

171. *Id.* at 39. As an example, Ford points to the Sixth Amendment right to counsel. First, the government is not prohibited from denying counsel. Rather, the individual is granted the right to access counsel. Second, the right to counsel is only implicated when the Government takes action to criminally prosecute an individual.

172. *Id.* at 40.

173. *Id.* at 42.

Fourth, Fifth, and Sixth Amendments, would apply abroad, while natural rights, such as the First and Fourteenth, would not.

Classes of rights theories, unlike the others discussed in this Part, have seen the most support from judges. The *Insular Cases* are commonly understood to have drawn a line between so-called fundamental rights and those which are particular to our Anglo-Saxon system of jurisprudence.[174] Likewise, the majority decision in *Verdugo-Urquidez* drew a distinction between rights that apply to "the people" and to others, though it did not say that the latter set of rights would apply overseas. Indeed, one of the key problems with judicial forays into this area is that they tend to be *ad hoc* with no underlying theory whatsoever.

D. International Law Theories

Still other scholars move away from a theory based on the types of rights or the constitutional framework and instead focus on those rights protected by international law. At the core of these theories is the idea that traditional interpretations of the Constitution's reach are grounded in 19th-century international law understandings of jurisdiction, which "largely limited the lawful jurisdiction of a sovereign state to its geographic territory."[175] In contrast, in the 21st century, international law now recognizes a broader reach of jurisdiction and a concomitant legal responsibility for states acting abroad.[176] Professor Sarah Cleveland notes the application of the Constitution to U.S. citizens abroad has mapped the transition in the international law of jurisdiction, while its application to nonresident noncitizens has remained entrenched in nineteenth-century thinking, leading to a bifurcation.[177] She argues that the appropriate test for the extraterritorial application of the Constitution is the international law concept of effective control, coupled with the "impracticable and anomalous" test relied upon in *Boumediene v. Bush*.[178]

Professor Diane Amann relies on a different Justice Kennedy opinion which looked to international law to determine the appropriate

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174. For a challenge to this conventional interpretation, see Mygatt-Tauber, *supra* note 20 (arguing that the *Insular Cases* are actually narrower than traditionally argued in the scholarly literature).

175. Sarah H. Cleveland, *Embedded International Law and the Constitution Abroad*, 110 COLUM. L. REV. 225, 229 (2010).

176. *Id.*

177. *Id.* at 230, 244.

178. *Id.* at 279.

reach of the Constitution beyond our borders. Relying on the 2003 decision in *Lawrence v. Texas*,[179] Professor Amann argues that courts should look to external norms of human rights and international law to determine if constitutional rights apply abroad.[180] She argues that while these norms may not be controlling, they are relevant and persuasive in domestic courts.[181] These external norms can help give content to the meaning of U.S. constitutional protections not just at home, as in *Lawrence*, but abroad as well, helping to identify which of those protections can be asserted against government actions overseas.

When it comes to rights for American citizens abroad, cases such as *Reid* and *Kinsella* fall into the mold identified by Professor Cleveland, though none do so in those terms. And when the Court has explicitly relied on international law to explicate the meaning of constitutional provisions, as it did in *Lawrence* and *Roper v. Simmons*,[182] it has received substantial negative commentary from certain sectors.[183]

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179. 539 U.S. 558 (2003).

180. Diane Marie Amann, *Guantanamo*, 42 COLUM. J. TRANSNAT'L L. 263, 266 (2004).

181. *Id.* at 299. But Professor Kent argues that there is no easy analogy between constitutional rights and international human rights. Kent, *supra* note 16, at 2133. He points out that many provisions in human rights treaties are limited to the jurisdiction of the signing state and that signatories know they would have discretion over to what extent such treaties would be enforced, as a matter of domestic law.

182. Roper v. Simmons, 543 U.S. 551, 575–78 (2005). The Court held that applying the death penalty to those who were under 18 at the time they committed the offense was cruel and unusual in violation of the Eighth Amendment. In making this determination, the Court surveyed the practices of foreign nations as well as the practices of the 50 states.

183. For example, following Justice Kennedy's citation to foreign law in Supreme Court opinions, 54 conservative members of the House of Representatives sponsored a resolution criticizing the use of foreign law by the Supreme Court. Jeffrey Toobin, *Swing Justice*, THE NEW YORKER, Sept. 12, 2005. Justice Scalia was also a sharp critic. *See, e.g.*, Thompson v. Oklahoma, 487 U.S. 815, 869 (Scalia, J., dissenting) (arguing that "however enlightened" the views of foreign courts are they "cannot be imposed upon Americans through the Constitution."); Lawrence v. Texas, 539 U.S. 558, 598 (2003) (Scalia, J., dissenting) (calling reliance on foreign law dangerous because the Court "should not impose foreign moods, fads, or fashions on Americans"). For a broad overview of the debate over the use of international law in Supreme Court opinions, see Austen L. Parrish, *Storm in a Teacup: The U.S. Supreme Courts Use of Foreign Law*, 2007 U. ILL. L. REV. 637, 649–652 (discussing the scholarly debate over the use of international judicial opinions to interpret the U.S. Constitution).

E. Multifactor Tests

Finally, a variety of authors have offered multifactor tests, like the one suggested by Justice Kennedy in *Boumediene v. Bush*.[184] These proposed multifactor tests typically add factors to the nonexclusive list offered by the Court. For example, Professor Fatma Marouf offers a five factor "composite" test built on earlier tests, such as *Boumediene*.[185] Professor Marouf's test looks to: 1) the citizenship and status of the individual asserting the right and the adequacy of the process used in making that determination; 2) the nature of the site where the alleged constitutional violation occurred, including the level of U.S. government involvement in the site; 3) practical obstacles inherent in recognizing the right; 4) the degree of connection between the person alleging the violations, or the violation itself, and the United States; and 5) the fundamental nature of the right at issue.[186] The first three factors are reformulations of the *Boumediene* test, the fourth takes account of the concerns raised in *Verdugo-Urquidez*, albeit through a broader perspective, and the fifth accounts for the fundamental nature of the rights, as recognized in the *Insular Cases*.[187] Courts are left to balance these factors against each other and conclude whether or not to extend a particular constitutional protection.

Writing in 1986, Roszell Hunter identified a three-prong test that he argued lower courts have relied upon in deciding whether to extend constitutional protections abroad.[188] The three factors he identified were 1) the status of the individual (citizen or not); 2) the locus of the governmental conduct (at home or abroad); and 3) the posture of the constitutional claim (offensive or defensive).[189] This last factor looked to whether the noncitizen was merely asserting protection from an exercise of the sovereign power of the United States—which Justice Blackmun had suggested in his *Verdugo-Urquidez* dissent—or whether they were seeking to use rights like a sword and pursue an affirmative claim against the United States.[190]

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184. Boumediene v. Bush, 553 U.S. 723 (2008).
185. Fatma E. Marouf, *Extraterritorial Rights in Border Enforcement*, 77 WASH. & LEE L. REV. 751, 829–31 (2020).
186. *Id.* at 829–30.
187. *Id.* at 830.
188. Roszell Dulany Hunter, IV, *The Extraterritorial Application of the Constitution—Unalienable Rights?*, 72 VA. L. REV. 649, 660 (1986).
189. *Id.*
190. *Id.* at 670.

He found that courts were much less likely to permit these offensive claims.[191]

These theories are the most consistent with how the federal courts have actually approached the extraterritorial application of the Constitution. At the Supreme Court level, they find support in Justice Harlan's *Reid* concurrence, both the majority and Justice Kennedy's concurrence in *Verdugo-Urquidez*, and, of course, *Boumediene*.[192] But as noted above, the Supreme Court has formulated new tests for each constitutional provision it has examined.[193] Nevertheless, precedent indicates that courts are most comfortable applying a multifactor test in order to make this determination.

These are just some of the many theories and tests academics and practitioners have suggested for how the courts should address the Constitution's reach abroad. Each has benefits and drawbacks, but none have been adopted by courts. Additionally, as noted in the next section, each misses the existence of an *a priori* question—which courts themselves rarely seem to ask—about whether a purported exercise of the Constitution is extraterritorial at all. Contextualized by all of the theories described *supra*, this Article proposes a new framework grounded in this question.

III. A THEORY PROPOSED

Any theory of extraterritorial application of the Constitution needs to be flexible enough to address numerous factual situations. However, those situations fall into four broad categories. First, reaching back to the *Insular Cases*, the theory would need to provide

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191. *Id.* Hunter himself rejected this test as outdated, offering instead the idea of reviving the "absorption" test of Palko v. Connecticut, 302 U.S. 319 (1937). Roszell, *supra* note 188, at 675. Only those rights considered fundamental to "ordered liberty" would extend abroad. Netta Rotstein, building on *Boumediene*, offered a three-step balancing test which looked to: 1) where the constitutional violation occurred; 2) appellant's legal status under the "substantial connections test;" and 3) evaluate the practical obstacles to extending the right. Rotstein, *supra* note 62, at 1392. Alina Veneziano offers her own simplification of Rotstein's test, which looks first to the location of the violation and second to the connection of the claimant to the United States. Veneziano, *supra* note 9, at 634.

192. Lower courts have also followed this pattern. *See, e.g.*, Lamont v. Woods, 948 F.2d 825 (2nd Cir. 1991) (applying the "impracticable and anomalous" test to the question of whether the Establishment Clause applies overseas).

193. *Compare* Reid v. Covert, 354 U.S. 1, 74 (1957) (Harlan J., concurring) *with* Boumediene v. Bush, 553 U.S. 723, 766–771 (2008) (articulating a different test to examine due process rights).

guidance to courts addressing the application of the Constitution in territories under United States control but that are not on the road to statehood. In the parlance of the times, it must determine to what extent the Constitution "follows the flag." Second, the theory would need to address situations—as in *Reid*—where U.S. citizens and others with "substantial ties" to the United States are subject to actions by the federal government abroad. One could describe these situations as ones in which the proper question is whether the U.S. Constitution "follows the passport."[194] Third, the theory would need to address what constitutional rights apply in transitional areas, such as at the border of the United States or other areas where the U.S. has extensive presence, but perhaps not sovereignty, like Guantanamo Bay. And finally, the theory must address claims by nonresident noncitizens, without substantial ties to the United States, who make claims arising from actions that occur overseas.

The theory proposed in this Part builds on the Court's "impracticable and anomalous" test. For one thing, the "impracticable and anomalous" test is the sole theory extending the Constitution beyond U.S. borders that has captured, however briefly, a majority on the Court. Thus, it is the most consistent with the Court's decisions. It also has the benefit of building on the work of lower courts. While this approach is not without its critics, this theory addresses the two biggest drawbacks. First, courts fail to ask the appropriate initial questions when confronted with a request to extend the Constitution's protections to U.S. citizens and foreign nationals residing overseas. And second, the Supreme Court has never provided a clear framework for addressing constitutional provisions holistically, instead preferring ad hoc approaches on a clause-by-clause basis. This theory aims to remedy these failings and thus prevent courts from arbitrarily denying rights or balancing them away.

The theory proposes asking courts to conduct a three-step analysis. First, courts should ask if the Constitution denies the government the power to act in the first instance. If so, the examination is at an end and the court should enforce the limit. Second, if the government possesses the power to act, courts should then determine the location of the alleged constitutional violation. If the violation occurs domestically, the court's inquiry is over, and it should apply the right. If the violation occurs extraterritorially, then the court should turn to the third step and determine how the right should apply overseas. Each step is discussed in more detail below.

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194. This formulation is borrowed from Neuman, *supra* note 15, at 965.

A. Step One—Is the Government Denied the Power?

Borrowing from the Supreme Court's holdings in the *Insular Cases*, courts should ask if the Constitution denies the government the power to act in a particular way in the first instance. Even when denying the application of certain constitutional provisions, the Justices who decided the *Insular Cases* still recognized that the Constitution placed limits on the power of Congress (and presumably the other branches) which it could not transcend in any event. Thus, Congress is denied from enacting an *ex post facto* law on the high seas just as surely as it is within the fifty states.[195] It may not establish a religion in Iraq any more than it could in Illinois.[196] In such cases, the Constitution is applied to ensure that the government does not overstep the authority with which it was entrusted.[197]

Of course, whether the government has the power to act in a particular way is not always an easy question to answer. For example, while some denials of power are obvious, others may be open to interpretation. For example, Professor Lobel has argued that the distinction between provisions imposing constitutional limitations on government and those recognizing individual rights is not clear cut.[198] Even within amendments, it is not always clear. The First Amendment begins by denying Congress the power to act but finishes by referring to the right of the people to peaceably assemble.[199] Likewise, the Fourth Amendment could be read as a protection of the right to be free from warrantless searches, or a restriction on the judiciary's power to issue a warrant in the absence of probable cause.

One solution is to use the distinction Ford has identified between civil and natural rights.[200] As he notes, natural rights are those which are innate in humans and precede the existence of government. As such, they serve as restrictions on government power. Civil rights, by contrast, do not prevent the government from acting, but instead grant affirmative rights to individuals which may be

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195. U.S. CONST. art. I, § 9

196. U.S. CONST. amend. I.

197. This approach was taken by Chief Justice Baker in his concurring opinion in United States v. Ali, 71 M.J. 256, 271 (CAAF 2012) (Baker, C.J., concurring) ("Only if one determines that Congress has an affirmative power to act, does one need to then consider whether it has done so in a manner consistent with the Bill of Rights and in particular the Fifth and Sixth Amendments.").

198. Jules Lobel, *Separation of Powers, Individual Rights, and the Constitution Abroad*, 98 IOWA L. REV. 1629, 1653 (2013).

199. *Id.* at 1658.

200. *See supra* Section II.C.

exercised when the power of government is brought to bear against them.[201]

Certainly, under the test proposed in this Article, adopting Lobel's view—that there is no principled distinction between limits on power and individual rights—would serve to greatly extend the Constitution beyond our borders. Under the proposed test, limits on power are enforced at Step One; thus the entire Bill of Rights would be enforced overseas under this conception.[202] But even if one were to take a restrictive view of what it means for the government to be wholly denied a power, it would still provide some content to the test and therefore must be the first question we ask. Of course, one can avoid the deep philosophical debate by looking to how courts currently treat the right in the domestic context—whether as a limit on government power or as the recognition or grant of a right to be enforced. Because the goal is not to grant more rights outside the United States than within our boundaries, this would be the best way to address the question in Step One.

B. Step Two—Where Does the Alleged Violation Occur?

Assuming the government has the power to act in the way it proposes, the court should then determine *where* any alleged constitutional violation would have taken place. It can reach this answer by starting with an examination of the nature of the right at issue, rather than assuming that allegations raised by a nonresident noncitizen or U.S. citizen located abroad *automatically* involves the extraterritorial application of the Constitution.[203] Often, it turns out that alleged violations, assumed to take place abroad, actually occur

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201. Ford, *supra* note 168. This also comports with the distinction drawn by the Supreme Court between those rights which are "fundamental" in the *Insular Cases* sense and those which are unique to our Anglo-American system of jurisprudence.

202. Adopting Lobel's view would mean that the Fourth Amendment does not just limit the use of evidence collected in violation of the Fourth Amendment—it would mean the Government lacks the power to conduct a search without a warrant in the first instance. Thus, under the proposed test, the Fourth Amendment, including the Warrant Clause, would apply abroad. But that is further than this theory is willing to go.

203. As I have noted elsewhere, courts have often failed to ask the key question of *where* an alleged constitutional violation took place. *See* Mygatt-Tauber, *supra* note 11 (demonstrating that courts rarely look into the question of where an alleged constitutional violation took place before launching into an analysis of the Constitution's extraterritorial application).

within the United States.[204] This is especially true depending on whether the focus of the inquiry is on the location of the conduct or the effects of the conduct.

While the effects of a decision may solely have impacts overseas, the decision itself is often made in the United States. Determining what factors courts should focus on will thus have an important impact on where one believes the violation to occur. For reasons argued elsewhere, courts should focus on the location of the conduct, since it is conduct that violates the Constitution.[205] Thus, for instance, a decision by USAID to deny aid to a foreign NGO based on its views regarding prostitution or abortion takes place in the United States.[206] Likewise, the decision to list a foreign NGO on a terrorist watchlist takes place entirely within the United States.[207]

To be sure, many alleged rights violations do in fact take place overseas. The Supreme Court was correct in *Verdugo-Urquidez* when it determined that any violation of the Fourth Amendment takes place at the time and location of the illegal search or seizure.[208] But this is the beginning of the inquiry, not the end. The reason courts need to make this *a priori* determination is that the extent of a right's protections can and has turned on where the violation is viewed to take place.[209] While courts have found that the rights protected by the Constitution apply differently—or not at all—outside the United States, they have consistently held that even noncitizens with minimal contacts with the United States are entitled to the same protections when they have entered the United States.[210] Thus, if the alleged

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204. *See, e.g., infra* note 206 and accompanying text (providing an example of a decision made in the United States resulting in violations abroad).

205. Mygatt-Tauber, *supra* note 11, at 550–61.

206. *But see* Agency for International Development v. Alliance for Open Society International, Inc. (*Alliance for Open Society II*), 140 S. Ct. 2082 (2020) (holding that foreign corporations challenging USAID regulations under the First Amendment lack such rights outside the United States).

207. *But see* 32 Cnty. Sovereignty Comm. v. Dep't of State, 292 F.3d 797 (D.C. Cir. 2002) (rejecting challenge by three Irish organizations to their designations as "foreign terrorist organizations" because they lack substantial connections to the United States and thus are not entitled to enforce constitutional rights overseas).

208. United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990).

209. *See* Mygatt-Tauber, *supra* note 11, at 538–40 (documenting the differential treatment of noncitizens' rights depending on whether the violation took place domestically or abroad).

210. *See, e.g. Verdugo-Urquidez*, 494 U.S. 259, 264 (recognizing that even though Verdugo-Urquidez lacked the necessary connections to receive the protections of the Fourth Amendment, he was entitled to all the protections of the Fifth and Sixth Amendments).

violation took place domestically, the courts should engage in the familiar application of those rights as normal and the inquiry under this test ends.

C. Step Three – How Does the Right Apply Overseas?

Only when the court has satisfied itself that Congress has the power to act and that the alleged violation in fact took place outside the United States should it turn to the final step to determine how the right applies overseas. Here, a court would enter into another three-step process. First, the court would determine if other constitutional or prudential doctrines would prevent its determination of a constitutional violation. Second, the court must determine if applying the right abroad in the same manner as it is applied domestically would be "impracticable and anomalous" as further explained below, and finally the court should determine if there exists, or if the court can craft, an equally effective alternative. Each of these steps is further discussed *infra*.

1. Do Other Doctrines Interpose?

The baseline assumption underlying this proposed theory is that noncitizens and citizens abroad do not receive greater protections than U.S. citizens at home. Thus, if the question before the court would raise a political question had the conduct taken place domestically, the court should decline to decide the issue on that basis for the same conduct overseas. The same is true of other doctrines including both constitutional and prudential standing requirements, questions of military necessity, or other abstention doctrines.[211] This conforms with the practice of courts which often determine if the claim at issue is justiciable.[212]

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211. Thus, a court faced with a Fifth Amendment Takings Claim based on military action abroad would be justified in denying relief based on military necessity. *See, e.g.*, American Mfrs. Mut. Ins. Co. v. United States, 197 Ct. Cl. 99 (1972) (holding there was no taking, or no compensable taking, for ship destroyed by U.S. military after it was seized by rebels in the Dominican Republic and opened fire on U.S. Army); Doe v. United States, 95 Fed. Cl. 546 (2010) (finding a taking in Iraq during Battle of Fallujah non-compensable on the basis of military necessity).

212. *See, e.g.*, Greenham Women Against Cruise Missiles v. Reagan, 755 F.2d 34 (1985) (rejecting the challenge by groups living in England against the deployment of cruise missiles at a U.S. base there as nonjusticiable). *But see* Dostal v. Haig, 653 F.2d 173 (1981) (jumping to the constitutional question despite the lower court deciding on non-constitutional grounds, such as laches).

The extraterritorial application of the Constitution does not entail the wholesale abandoning of other doctrines that apply in domestic cases. Thus, courts can and should conduct the typical analysis that can lead to the dismissal of even meritorious claims. After all, U.S. courts all sit within U.S. territory and are therefore bound by the restrictions of Article III. Therefore, they cannot issue advisory opinions, but must only address actual live cases and controversies in the extraterritorial context. But while these doctrines should apply, they should not apply with more vigor in the case of extraterritorial constitutional claims than they do at home.[213]

2. Is Applying the Right Abroad "Impracticable and Anomalous"?

If there are no judicial doctrines which would prevent reaching a decision, the court should then determine if enforcing the right would be impracticable or anomalous. Much ink has been spilled about the meaning of this term.[214] While it was relied upon by Justices Harlan and Kennedy, neither provided a clear outline of what makes application of a right impracticable or anomalous.[215] Justice Harlan offered a clue when he suggested that this meant courts should examine "the particular circumstances, the practical necessities, and

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213. It is possible that some of these doctrines, such as military necessity or political questions are more likely to arise in the international context. But that does not mean they should be applied any differently depending on who the plaintiff is.

214. *See, e.g.*, Merriam, *supra* note 51 (providing an in-depth discussion about the meaning of the test proposed by Justice Harlan and adopted by Justice Kennedy in *Verdugo-Urquidez* and a majority of the Court in *Boumediene*).

215. Indeed, despite the use of "and" scholars have disagreed about whether the test is conjunctive or disjunctive, with most concluding that application of the Constitution abroad should be restricted if it is either impracticable *or* anomalous to do so. *See, e.g.*, Merriam, *supra* note 51, at 233–37 (arguing that "it is most consistent with the purpose of the ["impracticable and anomalous"] standard to treat it as disjunctive); Daniel E. Hall, *Curfews, Culture, and Custom in American Samoa: An Analytical Map for Applying the U.S. Constitution to U.S. Territories*, 2 ASIAN-PAC. L. & POL'Y J. 69, 106 (2001) (calling the conclusion that impractical and anomalous represent two different tests "inescapable"); Stanley K. Laughlin, Jr., *The Application of the Constitution in United States Territories: American Samoa, A Case Study*, 2 U. HAW. L. REV. 337, n. 341–42 (1981) (arguing that, as a normative matter, the test should be treated as disjunctive); Stanley K. Laughlin, Jr., *Cultural Preservation in Pacific Islands: Still a Good Idea and Constitutional*, 27 U. HAW. L. REV. 331, 353 (2005) (concluding that "impracticable and anomalous" are separate tests, thus violating either would justify a departure from the Constitution's requirements).

the possible alternatives which Congress had before it."[216] The theory developed in this Article proposes a different analysis: courts should examine whether the right can be enforced outside the United States and the existence of practical obstacles to implementing the right that might require tailoring its application overseas.[217]

a. Can the Right Be Enforced Outside the United States?

By their nature, some rights are more given to extraterritorial application than others. Some rights are fully applicable overseas, others are limited by factual realities, and still other rights by their nature do not protect activities outside the United States at all. For example, the reasonableness requirement of the Fourth Amendment is fully applicable overseas, even if the warrant requirement is not.[218] Courts are well positioned to determine if a search conducted by American agents was reasonable regardless of whether or not it was conducted extraterritorially. The Sixth and Seventh Amendment rights to a jury trial, while theoretically amenable to overseas application, are not currently capable of being violated overseas because there are no longer civilian U.S. courts that sit outside the United States and its territories.[219] Finally, the First Amendment right to peaceably assemble is not capable of extraterritorial application, because the United States government can only impede this right where it is sovereign. Prohibitions on assembly in a foreign country would be pursuant to that country's laws and the Constitution can have no effect.

216. Reid v. Covert, 354 U.S. 1, 75 (1957) (Harlan, J., concurring).

217. This tailoring might narrow the right as it is recognized and protected within the United States, but it would not remove the right's protections entirely.

218. *Verdugo-Urquidez*, 494 U.S. 259 (1990).

219. Both courts martial and military commissions take place outside the United States. But a run of the mill criminal or civil trial, in an Article III court, is not currently possible outside the United States. Thus, the only question is whether a particular trial must be heard in an Article III court. If so, it must occur within the United States, where the Constitution fully applies. The U.S. Court for Berlin was an Article II court set up in Germany established in 1955 and abolished in 1990. *See* Treaty on the Final Settlement with Respect to Germany, 29 I.L.M. 1186 (1990). It was convened only once, in 1979, and the judge assigned determined that the Sixth Amendment right to jury trial applied to the criminal case before it. *See* United States v. Tiede, 86 F.R.D. 227 (D.D.C. 1979). No federal civilian courts have been created outside the territorial United States since the abolishment of the U.S. Court for Berlin.

b. Are There Practical Obstacles That Require Tailoring of a Right?

If a court determines that a right can extend overseas, it may still need to tailor the right to local circumstances. For example, under the Fifth and Sixth Amendments, criminal defendants are entitled to have an attorney present not just at trial, but during any questioning while held in custody by law enforcement officers.[220] Under the Supreme Court's decision in *Gideon v. Wainwright*, the government is required to provide such counsel if a defendant cannot afford an attorney.[221] However, when questioning takes place overseas, it may not be practical to provide counsel at government expense, or even to provide access to local counsel at all.[222] This does not mean that the police are free to coerce confessions from suspects. Instead, a different analysis may be necessary to protect the right at issue. In the case of a criminal suspect who is questioned in a location where local counsel cannot be provided, courts can look to other indicia of the voluntariness and reliability of any information provided by a defendant.[223] This examination was commonplace prior to the Supreme Court's decision in *Miranda v. Arizona*, which determined that statements given in the absence of the required warnings were *per se* involuntary.[224]

Likewise, the Supreme Court in *Verdugo-Urquidez* identified several practical obstacles to requiring compliance with the warrant requirement of the Fourth Amendment.[225] But as Justice Stevens pointed out in his concurrence, the reasonableness requirement of the Fourth Amendment could still be applied to the searches in Mexico.[226] Given the various exceptions recognized by the Supreme Court to the warrant requirement domestically,[227] it is not a stretch to treat

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220. *See, e.g.*, Escobedo v. Illinois, 378 U.S. 478, 485, 490-91 (1964); Miranda v. Arizona, 384 U.S. 436, 441, 467 (1966).

221. 372 U.S. 335 (1963).

222. *See, e.g.*, United States v. Bin Laden, 132 F. Supp. 2d 168, 188–89 (2001) (finding that appointed counsel cannot be guaranteed when a suspect is held by foreign officials in a foreign country).

223. *See, e.g.*, United States v. Molina-Chacon, 627 F. Supp. 1253, 1263 (1986) (looking to other indicia of voluntariness and reliability to determine if a confession obtained overseas in the absence of counsel is admissible).

224. 384 U.S. 436 (1966).

225. 494 U.S. 259 (1990).

226. 494 U.S. at 279 (Stevens, J., concurring).

227. *See, e.g.*, Weeks v. United States, 232 U.S. 383, 392 (1914) (search incident to arrest); Carroll v. United States, 267 U.S. 132, 158 (1925) (automobile exception); Virginia v. Moore, 553 U.S. 164 (2008) (search incident to illegal, though not

extraterritorial searches as an exception to the warrant requirement and to look instead to whether the search conducted by U.S. agents (or at their behest) was reasonable under the circumstances.

One concern is that courts could use this tailoring to eliminate rights, or to attenuate them so much that they are practically useless. Therefore, as a backstop, courts should look to international law as a source of permissible tailoring.[228] Treaties are the best source of minimum requirements, because they represent commitments into which the United States voluntarily entered. Thus, courts should not provide any lesser protections than those offered by treaties signed and ratified by the United States.[229] Of course, some fundamental norms of international law are mere custom. For well-defined customary international law, such as *jus cogens* norms from which no nation may derogate, these customs may provide enough guidance to courts to help with tailoring. While there are those who object to the use of international law to shape the meaning of the Constitution, because cases in which this reliance would arise involve cross-border actions by the United States it does not seem anomalous to conform our conduct to international law.

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unconstitutional, arrest); Washington v. Chrisman, 455 U.S. 1 (1982) (plain view exception); Mincey v. Arizona, 437 U.S. 385, 394 (1978) (exigent circumstances).

228. *See, e.g.*, Jules Lobel, *Fundamental Norms, International Law, and the Extraterritorial Constitution*, 36 YALE J. INT'L L. 307 (2011) (arguing that certain international law human rights norms, including prohibitions on torture, genocide, slavery, extrajudicial execution, and prolonged arbitrary detention without judicial review are nonderogable under any circumstances and thus provide a floor for constitutional protections abroad); Eric Bentley, Jr., *Toward an International Fourth Amendment: Rethinking Searches and Seizures Abroad After* Verdugo-Urquidez, 27 VAND. J. TRANSNAT'L L. 329, 387–99 (1994) (arguing that the International Covenant on Civil and Political Rights provides a basis for an international Fourth Amendment based on fundamental international human rights norms and shared standards of the world's major legal systems).

229. There is an argument to be made that when it comes to executive action, courts should be willing to enforce the limits made in treaties which the United States has signed, but not yet ratified. The President makes the determination whether to sign a treaty and as the head of the Executive Branch, which is charged with enforcing the law, it would not seem too great a burden to hold their agents to the commitments which they have determined are in the best interests of the United States to commit to. This is the strong form of the tailoring argument. But at the very least, courts should endorse the weaker form, where they hold the United States to its duly ratified treaty commitments, even in the absence of implementing legislation.

3. Is There an Equally Effective Alternative?

Finally, drawing on the majority's holding in *Boumediene*, courts should determine if there is an equally effective alternative to enforcing the constitutional right. If such an alternative exists, it would be appropriate to rely on that alternative as a means of protecting fundamental values enshrined in the Constitution. Only if such an alternative is lacking would courts be required to wrestle with the question of extraterritorial application of the Constitution. Thus, for example, as the Court recognized in *Boumediene*, if the executive set up a review process that provided an equally effective examination of the legality of a detainee's imprisonment, a court would not have to extend the writ of *habeas corpus* overseas.[230]

Under my proposed theory, this would be treated as an affirmative defense by the government in extraterritoriality cases. If the government can demonstrate that the process it provided to the aggrieved party was equally effective to what they would have received in the domestic context, courts do not need to worry about extending constitutional protections overseas. If the process provided offers the same protections as enforcing the Constitution would, then there is no need to extend the right beyond our borders. This could take the form of statutory protections, self-executing treaties, or government policies.

Additionally, the government could rely on courts to construct an equally effective remedial scheme, such as looking to the voluntariness of custodial statements when it is impracticable to provide an attorney during overseas questioning.[231] In any case, the court should satisfy itself that the concerns addressed by particular constitutional prohibitions are properly addressed, so that the government does not overstep its bounds when it is acting outside the United States. This also allows courts to vindicate the values

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230. Boumediene v. Bush, 553 U.S. 723, 732 (2008).

231. In cases such as this, the second and third steps of this inquiry may collapse into each other. But this would not always be the case. In the case of voluntariness review, the courts would be applying an older constitutional examination to overseas conduct. But, for example, a court could find that the Convention Against Torture provides an equally effective remedy to prevent the use of coercive interrogation techniques, without extending the Fifth Amendment's due process protections overseas, although it is important to note that money damages under a suit brought pursuant to the Torture Victims Protection Act does not provide an equally effective remedy to the introduction of a coerced confession. On the other hand, as the Court in *Verdugo-Urquidez* pointed out, violations of the Fifth Amendment's prohibition on the use of coerced confessions occur at trial, which would be a domestic application. *Verdugo-Urquidez*, 494 U.S. at 264.

undergirding constitutional rights, while restricting nonresident noncitizens to defensive applications of constitutional rights.

IV. Evaluating the Theory

This Part will test the proposed theory, both as an evaluative tool and as a means of providing guidance to courts that may choose to embark on the analysis. After all, the theory will never be adopted if it does not help practitioners and judges in court. The goal of this Part is to offer guidance to courts that are faced with actual questions of extraterritorial applications and give them the tools to reach consistent, coherent results.

A. Does the Theory Apply to All Potential Scenarios?

Part III of this Article argues that the proposed theory should be widely applicable and address four different factual scenarios: 1) it must determine to what extent the Constitution "follows the flag"; 2) it must address situations in which the question is whether the Constitution "follows the passport"; 3) the theory needs to address what constitutional rights apply in transitional areas; and 4) the theory must address claims by nonresident noncitizens arising from actions that occur overseas.

Unlike other theories of extraterritorial application, this theory is largely agnostic to location and citizenship of the complaining party. Rather than focusing on whose rights are being violated, it focuses more on where alleged violations occur. And to that extent, it eschews artificial distinctions between types of U.S. territory. This is in part because the *Insular Cases* are relics of the past which should be overruled.[232] However, to the extent the *Insular Cases* remain good law, the test is still fully applicable. Indeed, Step One is drawn from the *Insular Cases* themselves. The only potential difference would be at Step Two, when the court examines where the alleged constitutional violation took place. If it took place within one of the unincorporated territories, then, in a world in which the *Insular Cases* are still good law, perhaps the court would find that it was not a truly domestic violation. In that case, it would move to Step Three, where it would

232. *See* Mygatt-Tauber, *supra* note 20 (arguing that under the Court's traditional tests for overcoming *stare decisis*, most of the holdings of the *Insular Cases* should be overruled).

likely find a lack of practical obstacles to extending the right just as it is practiced on the mainland.

As for citizenship, while the current Supreme Court has largely drawn a distinction between citizens and noncitizens, this test is more focused on the limited nature of government power. As a result, the test does not draw an explicit distinction between the Constitution's extraterritorial application to citizens and noncitizens. To the extent any distinction matters, it would only occur in Step Three. If the government is denied the power to act at all—the Step One inquiry—it does not matter against whom it is attempting to act. Likewise, if the violation occurs domestically—the Step Two inquiry—the citizenship question drops out. Only if the court moves to Step Three would citizenship potentially be implicated.

Based on the content of Step Three, citizenship should not play a major role. If other doctrines, such as justiciability interpose, they would impact a citizen's case just as they would a noncitizen's. Likewise, if a right is incapable of being applied overseas, the citizenship of the victim of the alleged violation is meaningless. Practical obstacles are unlikely to differ based on citizenship. In the Sixth Amendment context, for example, either local counsel is available or it is not.

As for the latter two scenarios—liminal areas and nonresident noncitizens—the test applies equally well here. The application of the Constitution to transitional areas, assuming the government has the power to act, will turn on a court's findings in regard to Steps Two and Three. So long as courts are consistent in their treatment of these liminal areas, such as the U.S. border, the test will work well. Finally, as noted above, the test does not focus on citizenship or ties to the United States. Indeed, it does not explicitly rely on them at all. Thus, it addresses the fourth and final scenario. The test is truly universal, applicable to all constitutional provisions in all scenarios, which provides an improvement over the current ad hoc, provision-by-provision method of interpretation currently used by courts.

B. Road-Testing the Theory

How does the test work in practice? The following examples will offer insight to courts in how to determine if the Constitution applies extraterritorially. These examples are not meant to be definitive answers to the questions proposed, but rather to offer a look into how the analysis should be conducted. Lawyers will argue about the specifics and judges will make the final determinations, but these

examples show how the test is intended to work. Some scenarios are hypothetical and others are drawn from actual cases.

1. A Step One Example

Assume that drug cartels in South America have created a new designer drug, Hotspot, one not currently listed on any Schedule under the Controlled Substances Act. They begin to ship massive quantities on Colombian-flagged vessels from Cartagena to the United States. In July 2024, Congress begins debating a bill to designate Hotspot a Schedule I narcotic and forbid its importation to the United States, after it is found to be circulating in the United States. In August, the U.S. Coast Guard, while conducting drug interdiction on the high seas, stops one of the cartel vessels for a routine documents check. Due to issues with the documents, the boarding party enters a hold seeking the ship's hull number and sees numerous pallets containing Hotspot. The crew is arrested and charged with drug smuggling. In September, Congress returns from its recess and passes the bill, making it a crime to import Hotspot to the United States, which the President signs. The defendants challenge their arrests, arguing that their prosecution violates the *ex post facto* clause of the U.S. Constitution.[233]

A judge faced with this scenario would begin by asking whether the U.S. government is denied all power to enforce this law. While Article I, Section 8 grants Congress the power to "define and punish felonies committed on the high seas,"[234] Article I, Section 9 restricts this grant by denying Congress the power to pass *ex post facto* laws. Because the law in question was passed in September, the government lacks the power to criminalize the defendants' behavior in August 2024. Thus, the court would apply the *ex post facto* clause, terminate the test, and dismiss the indictment.

2. A Step Two Example

This example uses the facts from *Alliance for Open Society II*.[235] As noted above, Congress provides funds for both domestic and foreign NGOs to help combat the HIV/AIDS crisis, primarily in designated

233. U.S. CONST. art. I, § 9.
234. U.S. CONST. art. I, § 8.
235. United States Agency for International Development v. Alliance for Open Society International, Inc. (*Alliance for Open Society II*), 140 S. Ct. 2082 (2020).

African and Caribbean countries."[236] However, Congress placed a condition on the funds, requiring funded organizations to have or agree to have a "policy explicitly opposing prostitution and sex trafficking."[237] The Department of Health and Human Services (HHS) has issued regulations implementing this requirement.[238] In this hypothetical scenario, the plaintiff organizations are the foreign affiliates of U.S. NGOs operating in foreign countries. The plaintiffs file suit challenging the restriction, after being denied grants by USAID headquarters in Washington, D.C.[239]

First, the court would determine if Congress lacks the power to act at all. While the First Amendment uses absolutist language, courts do not read it as absolute and have allowed various regulations on speech, especially when the government is funding that speech.[240] Therefore, the Step One analysis does not end the inquiry. Instead, the court would turn to Step Two and ask where the alleged constitutional violation occurred. Here, the restriction on funding was passed by Congress, which meets and acts exclusively in Washington, D.C. Likewise, the regulation passed by HHS was promulgated and enacted in Washington. And, in our example, the decision to deny funding took place in Washington, D.C.[241] As all the conduct at issue occurred in the United States, the court should determine that the application of the First Amendment would be domestic, rather than extraterritorial in this case, and therefore apply the First Amendment as it would in the

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236. United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act, 117 Stat. 711, as amended, 22 U.S.C. §§ 7601 *et. seq.* (Leadership Act); *see also Alliance for Open Society II*, 140 S. Ct. 2082 (2020) (describing the Leadership Act).

237. 22 U.S.C. § 7631(f).

238. 45 C.F.R. § 89.1.

239. The actual plaintiffs in *Alliance for Open Society II* were the domestic organizations, arguing that their own First Amendment rights were infringed. Additionally, USAID administers some portion of its grant program overseas. For ease of analysis, I have modified the facts in the example to have the foreign affiliates serve as the plaintiffs and the decision to deny grants occur in the United States.

240. *See, e.g.*, Rust v. Sullivan, 500 U.S. 173 (1991) (upholding prohibition on the use of Title X funding for abortion counseling); National Endowment for the Arts v. Finley, 524 U.S. 569 (1998) (turning away a challenge to limits on NEA grants which took into account "general standards of decency and respect for the diverse beliefs and values of the American public" in making grant determinations).

241. While I believe that the passage of the statute and the making of the regulation in D.C. is enough to make this a strong case of domestic application, I recognize that if the final denial decision was made overseas, it would complicate the analysis.

domestic context. There is no need to proceed to the third phase of analysis.[242]

3. A Step Three Example

Once again, this examination of Step Three of the analysis is also drawn from an actual case and here, none the facts are altered.[243] Since 1994, Zoya Atamirzayeva was the owner of a cafeteria situated next to the U.S. Embassy in Tashkent, Uzbekistan. In 1999, allegedly at the behest of the United States, local Uzbek authorities seized the cafeteria and destroyed it. According to the plaintiff, there is now a security checkpoint where the cafeteria once stood. She brought suit in the Court of Claims alleging a taking under the Fifth Amendment. She has provided a letter from a local Uzbek official indicating that the action was taken at the behest of the United States.[244]

Assuming the court determined there was a basis for holding the United States responsible, it would first determine if the government is denied all power to take the action. Here, the Constitution expressly provides the government the authority to take private property for public use. The only restriction is that it must provide just compensation for doing so. Next, it would determine where the Constitutional violation, if any, took place. Here, the taking undeniably occurred outside the United States, as her property is located in Uzbekistan.[245]

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242. Note that under precedents such as *Rust* and *Finley*, the Government could still win this case. Although, in this particular example, courts would be much more likely to follow *Alliance for Open Society I*, where the Supreme Court held that the conditions on Leadership Act funds ran afoul of the First Amendment. I merely mean to point out that, just as in the domestic context, just because a constitutional right is determined to apply, it does not necessarily mean the plaintiff will prevail.

243. The facts from this example are taken from Atamirzayeva v. United States, 77 Fed. Cl. 378, 379 (2007).

244. The court would be required, as an initial step, to determine that the Uzbek government took action at the behest of the United States. There is no question that the Fifth Amendment does not apply to the Uzbek government. And nothing in my proposed test is meant to short circuit the normal fact-finding responsibility of courts. Rather, the analysis offered in this example is meant to demonstrate how a court would go about utilizing my test if it determined that the United States was responsible for the cafeteria's destruction.

245. There are two potential arguments against this view. First, one could argue that the decision to seize the property might have been made in Washington, D.C., which arguably makes it domestic. But this runs into the Court's holding in *Verdugo-Urquidez*. There, the DEA raid on the Mexican homes was planned in San

The court is thus faced with a clear-cut case of extraterritorial application of the Fifth Amendment and must engage in the Step Three analysis. First, the court looks to whether any doctrines intervene. Under current precedent, the court would dismiss the case for lack of standing, as the plaintiff lacks substantial connections to the United States.[246] But assuming that no such doctrines interposed, such as if the property taken belonged to an American ex-patriot, the court would then ask itself whether applying the Fifth Amendment to the taking of the cafeteria in Uzbekistan is impracticable or anomalous.

First, the court would examine whether the Takings Clause is capable of being applied overseas. Here, the answer is yes. There is nothing in the text or application of the Fifth Amendment that would prohibit it from being applied outside the United States. Next, the court would address the existence of any practical obstacles to enforcement. Because the remedy for a taking is just compensation, there are no practical obstacles to applying it here. Unlike a right to appointed counsel, which may not be available in Uzbekistan, here the United States is merely required to provide money. There are no practical issues with that.

Finally, the court would ask if there were any equally available alternatives to applying the Fifth Amendment's Takings Clause. Here, there are no obvious alternatives. And because the remedy is monetary compensation, it may not be necessary to craft any. Again, under the test, this is an affirmative defense the government can argue. If it could point to an alternative means of providing compensation, should the United States be required to do so, the court would examine the

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Diego. But the Court held that the Fourth Amendment violation would not have occurred until the search was actually conducted. Likewise, any Fifth Amendment violation would not occur until the property was actually taken. That occurs entirely in Uzbekistan. Second, one could make the argument that a constitutional violation is not completed until a request for "just compensation" is denied. However, courts have routinely determined that a physical taking occurs at the moment the property is seized or destroyed. *See, e.g.*, Knick v. Township of Scott, 139 S. Ct. 2162, 2167–68 (2019) (holding that a taking is complete when the property is seized).

246. *See* United States v. Verdugo-Urquidez, 494 U.S. 259 (1990) (denying application of constitutional rights overseas unless a noncitizen has substantial connections to the United States). Indeed, that is what the Court of Federal Claims did. *Atamirzayeva*, 77 Fed. Cl. at 387. For a critique of the Court's ruling in *Verdugo-Urquidez*, see Alan Mygatt-Tauber, *Rethinking the Reasoning in* Verdugo-Urquidez, 8 IND. J.L. & SOC. EQUAL. 240 (2020) (arguing that *Verdugo-Urquidez* was wrongly decided).

proposed alternative and determine if it meets the intent of the Takings Clause. If so, the court could rely on that alternative.

CONCLUSION

Courts in the United States have been struggling for over a century to determine which constitutional rights apply outside the United States and to what extent. Part of the problem is that courts lack a comprehensive theory for answering this question, instead taking each provision on a piecemeal basis. As a result, the application of the Constitution abroad has been on an entirely ad hoc basis, with no clear animating principle to guide courts when a new claim arises.

Other scholars have offered varying theories of extraterritorial constitutional application, broken down into five categories. These are: 1) universal application; 2) limited government theories; 3) extending classes of rights; 4) looking to international law; and 5) offering multi-factor tests built upon the Supreme Court's decision in *Boumediene v. Bush* and other historical decisions. So far, courts have not adopted any of these. And each fails to ask some critical questions. But each has something to offer. And so I draw on these different philosophies of extraterritorial constitutionality to offer my own three-part test.

First, borrowing from the limited government and fundamental rights theories, as embodied in the *Insular Cases*, courts should first ask if the government is wholly denied the power to act. If so, then courts should enforce these limits that the people have placed on their government and overturn the challenged action. While the contours of rights versus limits are not always clear, the contrast between fundamental and civil rights offers guidance.

Second, if the government is granted the power to take the challenged action, the next question the court should address is where the alleged constitutional violation took place. While each of these cases will involve some international aspect, it turns out that many violations that we think of as extraterritorial are, in fact, domestic. Focusing on where and when the violation occurs can help courts avoid the difficult question of whether to extend the Constitution beyond our borders.

Third, if the court finds that the government is empowered to take the challenged action, and the conduct which causes an alleged constitutional violation occurred overseas, it should then determine whether the cited constitutional provision applies. This is its own three-step inquiry. First, courts should determine whether the

complaint is justiciable. Second, if the case is justiciable, the court should determine whether applying the right would be "impracticable and anomalous" and if any tailoring of the right is required. Finally, the court should address any claims by the government that it has provided an equally effective means of vindicating the values underlying the constitutional right, or if the court itself can fashion one.

In determining justiciability, the court should look to traditional domestic abstention doctrines or other constitutional and prudential concerns. If these concerns would prevent a court from hearing the matter if it arose domestically, then those same concerns apply with equal force in the extraterritorial setting. In determining if applying a right is "impracticable and anomalous," the court should first ask if the right is capable of extraterritorial application and if so, if any tailoring of the right is required. While tailoring can narrow the application of the right, it can never eliminate it entirely, and courts should look to international law, in the form of ratified treaties and non-derogable *jus cogens* norms as a backstop to provide the absolute floor below which the right cannot be further tailored.

Finally, if the government raises it as an affirmative defense, the court should determine if there exists an equally adequate alternative or, barring that, if it can craft one. To do this, courts need to examine the values underlying the cited constitutional provision and the purpose for which it was included in the Constitution. If the proffered remedy serves those values and upholds the purpose, then the court can enforce the alternative as opposed to the right itself. This allows courts to consider the differing conditions in which U.S. officials have to act when outside of the United States and the practical realities of a world with independent sovereign states, each having their own legal systems which may differ from ours.

While the United States has an obligation to respect the laws and constitutional systems of other nations, if it intends to extend the sword of American power around the globe, it cannot do so without the shield of the Constitution travelling with it, for as the Supreme Court has repeatedly stated, the United States government is entirely a creature of the Constitution. While that document has no ability to constrain the actions of foreign governments, it reaches out to those acting under its power wherever in the world they may be. I have offered a means for courts to ensure that when the United States acts, it does so in conformance with our organic law and upholds the values underlying our system of government.