

J. Andrew Kent*

A Textual and Historical Case Against a Global Constitution

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INTRODUCTION

The United States government pursues its current “war on terror” and other national security objectives abroad through an extraordinary range of extraterritorial military, law enforcement, intelligence and diplomatic activity. According to the Pentagon, the U.S. military currently operates in “[m]ore than 146 countries.”¹ The FBI has 45 foreign offices; the DEA has 79 in 54 countries.² The exact extent of the overseas presence of the U.S. intelligence community is not publicly disclosed, but is no doubt extensive. Many aspects of the United States’ extraterritorial security operations could violate the Constitution if the affected noncitizens outside the United States had constitutional rights. A large number of prominent legal academics—whom I call globalists—contend that aliens outside the United States should have such rights, at least in some circumstances, and that U.S. courts should enforce constitutional limits on extraterritorial action by the U.S. government against noncitizens. Given the number and eminence of the globalists, the vigor of their arguments, and the frequency of their publications in the country’s leading law journals, it might be said that globalism is the conventional wisdom in the legal academy. In 2004 in *Rasul v. Bush*, the Supreme Court hinted that it may agree with the globalists.³

This article, in five parts, offers textual and historical arguments against a globalist reading of the Constitution. I make the historical argument that globalist claims about original intent of the Founders have not been supported with even minimally-sufficient evidence, and that the relevant evidence, once gathered, is inconsistent with globalism. I make the textual argument that globalist approaches to the constitutional text err in two important ways: employing an unacknowledged clear statement rule when reading the Bill of Rights, with a default presumption that rights exist for aliens abroad unless expressly restricted, and reading the Constitution clause-by-clause in isolation, rather than looking at the document as a whole. Although this article rejects globalism on textual and historical grounds, at the same time it adduces textual

* Lecturer on Law and Climenko Fellow, Harvard Law School. Thanks to Eric Columbus, Michael Farbiarz, Jack Goldsmith, Ryan Goodman, Carissa Hessick, Daryl Levinson, Gerald Neuman, Richard Primus, Kal Raustiala and Dan Sharfstein for helpful comments on earlier drafts. Thanks also to the participants in the Climenko Fellowship scholarship workshop.

¹ See *DoD 101: An Introductory Overview of the Department of Defense*, <http://www.defenselink.mil/pubs/dod101/>.

² See *FBI Facts and Figures*, <http://www.fbi.gov/priorities/priorities.htm>; *DEA Office Locations*, <http://www.usdoj.gov/dea/agency/domestic.htm#foreign>.

³ See *Rasul v. Bush*, 542 U.S. 466, 483 n.15 (2004). For a discussion of *Rasul*, see *infra* notes 64-67 and accompanying text.

and historical evidence that noncitizens were among the intended beneficiaries of important provisions and structures in the Constitution. But in contrast to globalism's desire to deploy a judicially-enforced Constitution abroad, I argue that noncitizens are to be protected through diplomacy, enforcement of international law, and nonconstitutional policy choices of the political branches.

Part I, a background section, discusses the historical context out of which globalism emerged, the modern variants of globalism, and the leading Supreme Court cases. This Part highlights the stakes in the debate by showing that globalism is inconsistent with entrenched legal positions taken by the political branches of the U.S. government. It also introduces the important question of constitutional method, asking what are more versus less legitimate ways to interpret the Constitution. In Part II, globalist scholarship is categorized by its approach to the constitutional history and text. One group of globalists makes the original intent claim that the Bill of Rights was written in general language because its protections were intended to be universal, unrestricted by territory or personal status. The second, larger group of globalists who do not make an original intent claim instead assert or assume that the text of the Bill of Rights is silent as to its geographic and personal scope and so supports or, at least, does not stand in the way of, application of normative constitutional theories that would find rights for aliens abroad.

Parts III through V are my positive reading of the Constitution, addressing both text and pre- and post-ratification history. I should note at the outset that the historical evidence I present from 1787-89 and earlier is not direct, but circumstantial. The historical sources with the most salience for orthodox practitioners of original intent, such as the records of the Philadelphia convention, the ratification debates in the press and the state conventions in 1787-88, and the congressional and public discussion of the proposed Bill of Rights, do not appear to directly discuss extraterritorial application of constitutional rights, for either citizens or aliens. Globalist scholars have not presented any direct evidence from these sources, and my own research has not uncovered any. While it is difficult to prove a negative, it appears that the issue was not discussed at that time. I do not claim, therefore, to have located and crystallized an original intent or original understanding of the Constitution or the Bill of Rights at the moments of their adoption. (Globalists, too, should eschew any such suggestion.) My far more modest historical goal is to describe both the "ambient law of the era"⁴ or the background assumptions and conceptions of the founding era regarding issues related to globalism, and the early practice and debates under the new Constitution in the 1790s and early decades of the nineteenth century. Indeed, it is only in the nineteenth century and thereafter that I have found direct evidence rejecting globalism.

⁴ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 714 (2004).

To attempt to recover the intellectual context at and around the time of the drafting and ratification of the Constitution and Bill of Rights, Part III consults a number of sources. English constitutional history, which was familiar to many of the American public figures most involved in the framing and ratification debates,⁵ provides context for some issues. Colonial charters of the seventeenth and eighteenth centuries and post-independence American state constitutions are important sources for understanding the U.S. Constitution,⁶ as is the Articles of Confederation. Helpful to understanding the political, legal and constitutional context of the U.S. Constitution are the writings of English judges Coke and Blackstone and of influential social contract, natural law and law of nations theorists such as Locke, Montesquieu, Hume, Vattel, Pufendorf, Burlamaqui, Grotius and Rutherford.⁷ Finally, I look at evidence of constitutional meaning found in the post-ratification history and traditions of the U.S. government, from 1789 through the first decades of the nineteenth century.⁸

Part III addresses the contemporary context of thought and debate in the late eighteenth and early nineteenth centuries regarding issues that bear on globalism, such as the rights of aliens, the territorial basis and limits of law and sovereignty, and distinctions between the sources and purposes of international law and domestic law (known at the time as the law of nations and municipal law, respectively). Part IV addresses the constitutional text by reading of certain parts of the original Constitution of 1787 and the subsequent Bill of Rights of 1789. I attempt to show that globalism errs by reading the provisions of the Bill of Rights in isolation from many other parts of the Constitution that inform its meaning, such as the Preamble and the structures for managing internal and

⁵ See FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 5-6 (1985) (noting that “most of the Framers” were familiar with the history of England, “at least since Elizabethan times,” and English constitutional history was an important guide to the shaping of the new American Constitution); see also John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955, 1987 n.36 (1999) (to the same effect). The American Founders would have learned English constitutional history by reading Blackstone and Hume, see McDONALD, *supra*, at 37 n.35, among other sources.

⁶ See, e.g., BERNARD SCHWARTZ, *THE GREAT RIGHTS OF MANKIND: A HISTORY OF THE AMERICAN BILL OF RIGHTS* 26-91 (1992); Donald S. Lutz, *Introductory Essay*, at xx-xxv, in *COLONIAL ORIGINS OF THE AMERICAN CONSTITUTION* (Donald S. Lutz ed., 1998).

⁷ Regarding the significant influence of these writers on the founding generation, see BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 27-32 (1967); DONALD S. LUTZ, *A PREFACE TO AMERICAN POLITICAL THEORY* 113-40 (1992); McDONALD, *supra* note 5, at 7, 60 & 80; GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC* 259-305 (1998 ed.) [hereinafter WOOD, *CREATION*]; Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843, 859-65 (1978).

⁸ On this method of constitutional interpretation, see Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127 (1998); H. Jefferson Powell, *The Founders and the President’s Authority over Foreign Affairs*, 40 WM. & MARY L. REV. 1471 (1999).

external affairs created by Articles I, II and III. This Part shows that external relations were to be managed by the political branches in a flexible manner, consistent with national defense exigencies. This is inconsistent with globalism's call for a judicially-enforceable Bill of Rights to govern external relations with noncitizens. In Part V, I review evidence of constitutional meaning derived from early practice of the U.S. government under the new Constitution.

The text and history of the Constitution, far from providing strong support for globalism, are more consistent with what I will call inclusive constitutional nationalism. Perhaps this name is too grand a term for what is primarily an anti-globalist reading of the Constitution. I call the Constitution nationalist instead of globalist because, generally speaking, it was designed to preserve America's liberty against a potentially hostile outside world, not to create or preserve liberty for any people outside the United States. I describe the Constitution's nationalism as inclusive – rather than, say, nativist – because the general language in the Bill of Rights is best read as protecting aliens while they are in the United States, in addition, of course, to protecting citizens.

I. BACKGROUND

Americans have long debated where, and for whose benefit, the Constitution applies. Examples include the debates about the constitutional status of slaves and ex-slaves, Indians, immigrants or would-be immigrants, residents of U.S. territories destined for statehood, and residents of island possessions acquired by the United States as a result of conquest (e.g., the Spanish-American War) and not destined for U.S. statehood.⁹

This article is focused on the most recent instantiation of this larger debate about the personal and territorial scope of U.S. constitutionalism, namely, whether the Bill of Rights constrains U.S. military, law enforcement, intelligence or diplomatic operations against aliens abroad.¹⁰ Simple fairness, and fidelity to the country's most enduring values, might seem to dictate that any person, anywhere, who is subject to coercive force by the United States should

⁹ See, e.g., GERALD L. NEUMAN, *STRANGERS TO THE CONSTITUTION* (1996); Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 *TEX. L. REV.* 1 (2002).

¹⁰ By using terms like "abroad" and "extraterritorial," I am not referring to territories under the pervasive and potentially indefinite governmental authority of the United States such as Puerto Rico when, early in the last century, the United States colonized the island but had not yet granted U.S. citizenship to the residents. These situations are sufficiently different from the type of episodic military, intelligence or law enforcement conduct addressed in this article that – except for a brief mention in the Conclusion – I do not discuss the so-called Insular Cases involving colonial administrations in Puerto Rico and the Philippines, e.g., *Downes v. Bidwell*, 182 U.S. 244 (1901), or the cases involving governments in U.S. territories before they became states of the union, e.g., *Reynolds v. United States*, 98 U.S. 145 (1878).

be entitled to assert basic constitutional protections against government overreaching. The United States was founded, after all, in protest against a distant English king and parliament that denied the colonists' their rights as Englishmen and, in the words of the Declaration of Independence, "transport[ed] us beyond Seas to be tried for pretended offences" and "abdicated Government here, by declaring us out of his Protection and waging War against us."¹¹ In the face of this, Americans rebelled, justifying their rebellion by declaring that "all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."¹² From the beginning, Americans welcomed foreigners to emigrate here to enjoy with them the opportunity and liberty they were creating.¹³ America's first literary best seller – Thomas Paine's enormously influential *Common Sense* – declared in 1776 that the new country should become "an asylum for mankind" where freedom would flourish.¹⁴ And James Madison, when advocating the adoption of the Bill of Rights in Congress in 1789, stated that his proposals "expressly declare the great rights of mankind."¹⁵ With these values and these beginnings as a nation, one might argue that Americans would never have tolerated that the constitutive document establishing their government deem a person entirely defenseless against government power simply on account of one's territorial location – in the United States or abroad – or personal status, be it citizen or alien.

For globalists, this elementary idea of justice draws strength from the fact that today U.S. citizens enjoy the full panoply of individual constitutional rights

¹¹ The Declaration of Independence ¶ 25 (U.S. 1776).

¹² *Id.* at ¶ 2.

¹³ The Declaration of Independence complained that George III "has endeavoured to prevent the population of these States; for that purpose obstructing the Laws for Naturalization of Foreigners; refusing to pass others to encourage their migration hither." *Id.* at X. Like many others at that time, George Washington believed that immigration would be a boon to the new nation. See *Letter of George Washington to Thomas Jefferson* (Jan. 1, 1788), in 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 282 (John P. Kaminski et al. eds., 1988) [hereinafter DOCUMENTARY HISTORY]. At the Philadelphia Convention in 1787, James Madison advocated that Americans "invite foreigners of merit & republican principles among us." 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 268 (Max Farrand ed., 1911) [hereinafter FARRAND, RECORDS]. Gouverneur Morris approvingly told the Convention that "the privileges which emigrants would enjoy among us . . . exceeded the privileges allowed to foreigners in any part of the world." *Id.* at 238.

But not all Americans were so welcoming, even to white European immigrants. See JOHN C. MILLER, CRISIS IN FREEDOM 43-44 (1951). Not surprisingly, immigration of criminals was discouraged. See, e.g., J. CONT. CONG. 105, 106 (1788) (recommending that states legislate against admission of "convicted malefactors"). And African "immigrants" were, of course, transported here in slave galleys and viciously subjugated and abused for hundreds of years.

¹⁴ THOMAS PAINE, COMMON SENSE 34 (1776). Paine was not writing in favor of immigration as such, but of America becoming a refuge for "freedom," which had been "hunted round the globe" by tyrannous governments and expelled from Europe, Africa and Asia. *Id.*

¹⁵ 1 ANNALS OF CONG. 449 (1789) (remarks of Rep. Madison).

when abroad and that aliens within the United States enjoy many constitutional rights, including important due process rights against arbitrary detention or punishment.¹⁶ Is it not, then, unfair and anomalous to leave only aliens who happen to be abroad outside the protection of our fundamental law? One globalist, Professor Kal Raustiala, argues that the notion that “constitutional protections are completely inapplicable to non-citizens abroad . . . is clearly at odds with the best spirit of our constitutional tradition.”¹⁷ In a similar vein, the globalist Louis Henkin asks, “[i]f constitutional limitations apply wherever the United States exercises authority, why not when governmental actions abroad affect aliens there? If constitutional provisions apply to both aliens and citizens at home, why not to both aliens and citizens abroad?”¹⁸

Almost all of the modern scholarship is globalist, including important works by influential academics such as Henkin,¹⁹ Gerald Neuman,²⁰ Harold Koh, George Fletcher, Jordan Paust, Jules Lobel, David Cole, Raustiala and Stephen Saltzburg.²¹ Former professor, now Justice Ruth Bader Ginsburg, has

¹⁶ See, e.g., LOUIS HENKIN, FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 306-07 (2d ed. 1996) [hereinafter HENKIN, FOREIGN AFFAIRS].

¹⁷ Kal Raustiala, *Does the Constitution Follow the Flag?: Iraq, the War on Terror, and the Reach of the Law*, Findlaw’s Writ (Apr. 9, 2003), <http://writ.news.findlaw.com>.

¹⁸ Louis Henkin, *The Constitution as Compact and as Conscience: Individual Rights Abroad and at our Gates*, 27 WM. & MARY L. REV. 11, 23-24 (1985) [hereinafter Henkin, *Compact*].

¹⁹ See, e.g., HENKIN, FOREIGN AFFAIRS, *supra* note 16; LOUIS HENKIN, CONSTITUTIONALISM, DEMOCRACY AND FOREIGN AFFAIRS (1990) [hereinafter HENKIN, CONSTITUTIONALISM] Henkin, *Compact*, *supra* note 18; see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§ 721 & 722 *cmt. m* (1987). Professor Henkin was the chief reporter for the American Law Institute on the Restatement.

²⁰ See, e.g., NEUMAN, STRANGERS, *supra* note 9; Gerald L. Neuman, *Extraterritorial Rights and Constitutional Methodology After Rasul v. Bush*, 153 U. PA. L. REV. 2073 (2005) [hereinafter Neuman, *Extraterritorial*]; Gerald L. Neuman, *Closing the Guantanamo Loophole*, 50 LOY. L. REV. 1 (2004) [hereinafter Neuman, *Guantanamo*]; Gerald L. Neuman, *The Abiding Significance of Law in Foreign Relations*, 2004 SUP. CT. REV. 111, 147 (2004) [hereinafter Neuman, *Abiding*]; Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909 (1991) [hereinafter Neuman, *Whose Constitution?*].

²¹ See, e.g., David Cole, *Are Foreign Nationals Entitled to the Same Constitutional Rights as Citizens?*, 25 T. JEFFERSON L. REV. 367, 370-73 (2003) [hereinafter Cole, *Foreign Nationals*]; David Cole, *Who They Are: The Double Standard that Underlies Our Torture Policies*, SLATE (Nov. 11, 2005) [hereinafter Cole, *Double Standard*]; Harold H. Koh, *The Supreme Court Meets International Law*, 12 TULSA J. COMP. & INT’L L. 1, 16-17 (2004); Jules Lobel, *The Constitution Abroad*, 83 AM. J. INT’L L. 871, 875-76 (1989); Jordan J. Paust, *Post-9/11 Overreaction and Fallacies Regarding War and Defense, Guantanamo, the Status of Persons, Treatment, Judicial Review Of Detention, and Due Process in Military Commissions*, 79 NOTRE DAME L. REV. 1335, 1350 (2004) [hereinafter Paust, *Post-9/11*]; Jordan J. Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 MICH. J. INT’L L. 1, 19 (2001) [hereinafter Paust, *Antiterrorism*]; Kal Raustiala, *The Geography of Justice*, 73 FORDHAM L. REV. 2501, 2521 (2005); 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, 752-53 (1980). Professor Paul Stephan’s work is an anti-globalist exception. See Paul B. Stephan, *Constitutional Limits on*

also expressed globalist views.²² Although globalists disagree among themselves about the scope of extraterritorial constitutional protections for aliens, this paper uses the single term “globalist” to contrast their position to the view that the Constitution does not protect noncitizens abroad whatsoever. For purposes of this paper, then, a globalist is one who advocates that, in some or all circumstances, aliens abroad enjoy the same or similar constitutional protections as American citizens would. This definition necessarily, though regrettably, elides some distinctions among globalists.

For methodological purposes, I group globalists into two categories according to their views of the constitutional history and text. One camp – exemplified by Professor Henkin – claims that the original intent animating the Bill of Rights, or at least many of its key provisions, was globalist and that this was expressed in the general language of the Bill, unrestricted as it is by person or place.²³ According to Henkin, the Framers intended the Bill of Rights to embody a “universal human rights ideology.”²⁴ The other, larger, camp of globalists asserts or assumes that the constitutional text is silent or underspecified regarding whether it applies to aliens abroad, and that the Bill of Rights’ general, unrestricted language therefore does not stand in the way of normative constitutional theories that produce globalist results.

There are many strains of non-originalist globalism; the breadth of the debate can best be understood by looking to the work of Professor Neuman, the most prolific non-originalist globalist scholar. Neuman describes three approaches used to argue that the Constitution should reach aliens abroad: “universalism,” “global due process,” and “mutuality of obligation.”²⁵ Universalism “require[s] that constitutional provisions that create rights with no express limitations as to the persons or places covered should be interpreted as applicable to every person and at every place.”²⁶ As Neuman notes, universalism is often justified by the historically important idea that all mankind has inalienable natural rights against the government. When justified by reference to the Founders’ belief in natural rights of all mankind, as it is by Professors Henkin and Lobel and Justice Ginsburg, globalist universalism could be described as originalism.. Global due process is a balancing approach, reducing the availability of constitutional protections for aliens abroad in situations where the U.S. “government has a reduced right to obedience and

the Struggle Against International Terrorism: Revisiting the Rights of Aliens Overseas, 19 CONN. L. REV. 831 (1987); Paul B. Stephan, *Constitutional Limits on International Rendition of Criminal Suspects*, 20 VA. J. INT’L L. 777 (1980).

²² See *infra* note 81.

²³ See, e.g., U.S. CONST. amend. I (“Congress shall make no law”); *id.* amend IV (“The right of the people”); *id.* amend V (“No person shall be held”); *id.* amend. VI (“In all criminal prosecutions”).

²⁴ HENKIN, CONSTITUTIONALISM, *supra* note 19, at 99-100.

²⁵ See NEUMAN, STRANGERS, *supra* note 9, at 5-8.

²⁶ *Id.* at 5.

reduced means of enforcement.”²⁷ This approach has been used by Justice Kennedy and the second Justice Harlan.²⁸ Neuman prefers the third approach, “mutuality of obligation,” a presumption that constitutional rights are available to aliens abroad “in contexts where the United States seeks to impose and enforce its own law.”²⁹ Globalists such as Professors Raustiala and Cole use a mutuality approach.³⁰

For Neuman, choosing among these approaches has “interrelated normative and descriptive aspects.”³¹ While Neuman professes that the constitutional text and other descriptive inputs are important, he finds little text in the Constitution that precludes globalism and so concludes that the question of the “scope” of a constitutional right “must be resolved primarily by deliberative choice among alternative approaches on the basis of their normative characteristics and their coherence with less unsettled constitutional practices.”³² As another globalist puts it, after rejecting a textual methodology, the question of constitutional rights for “aliens abroad more generally, comes down to a question of what our values are.”³³

Non-originalist globalists use a common set of normative values to read the Constitution’s allegedly silent or underspecified text. Neuman, for example, rejects global due process largely because its “touchstone” is “government flexibility,” not the protection of individual rights.³⁴ Many other globalists prominently emphasize the need to protect individual rights against U.S. government power, often by invoking the individual human rights protections under international law that have increased so substantially in recent years.³⁵ Neuman and many other globalists criticize any theory of extraterritorial rights that does not confine the government’s power to manipulate the physical location of persons and its actions against persons in order to exploit right-less areas of the globe.³⁶ Neuman and others also express normative concerns about the likelihood of government misconduct if any persons are declared to be entirely rightless. For example, Neuman worries

²⁷ *Id.* at 8.

²⁸ *United States v. Verdugo-Urquidez*, 494 U.S. 259, 277-78 (1990) (Kennedy, J., concurring); *Reid v. Covert*, 354 U.S. 1, 74 (1957) (Harlan, J., concurring).

²⁹ Neuman, *Extraterritorial*, *supra* note 20, at 2077.

³⁰ Cole, *Foreign Nationals*, *supra* note 21, at 382-83; Raustiala, *supra* note 21, at 2550.

³¹ NEUMAN, STRANGERS, *supra* note 9, at 97.

³² *Id.* at 98.

³³ Kermit Roosevelt III, *Guantanamo and the Conflict of Laws: Rasul and Beyond*, 153 U. PA. L. REV. 2017, 2069 (2005).

³⁴ NEUMAN, STRANGERS, *supra* note 9, at 103; *accord id.* at 114.

³⁵ Marie Amann, *Guantanamo*, 42 COLUM. J. TRANSNAT’L L. 263, 298, 312 & 314 (2004); David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 980 (2002); Henkin, *Compact*, *supra* note 18, at 29; Jordan J. Paust, *An Introduction to and Commentary on Terrorism and the Law*, 19 CONN. L. REV. 697, 723 (1987).

³⁶ NEUMAN, STRANGERS, *supra* note 9, at 102, 105 n.d. & 115.; Neuman, *Abiding*, *supra* note 20, at 151; Neuman, *Guantanamo*, *supra* note 20, at 50; Raustiala, *supra* note 21, at 2504.

that “If the Due Process Clause does not apply to detainees at Guantanamo, then the Government effectively has discretion to starve them, to beat them, to maim them, or to kill them, with or without hearings and with or without evidence of any wrongdoing.”³⁷ Most importantly, the normative preference underlying the choice of the mutuality of obligation model of globalism is the fundamental American constitutional norm of consent. In Neuman’s words, “rights are prerequisites for justifying legal obligation.”³⁸ It is simply illegitimate for the American government to subject anyone to its laws without also granting rights; this is an exercise of “naked force” that is alien to our constitutional tradition.³⁹

In contrast to universalism (constitutional rights available to everyone everywhere), and global due process (rights potentially available everywhere but always subject to balancing against government interests), the mutuality approach used by Neuman and others professes to be categorically limited and to eschew interference with the political branches’ conduct of military and other national defense operations abroad. As Neuman puts it, the Constitution does not impose a requirement of “due process of war.”⁴⁰ The “American constitutional tradition,” says Neuman, “has persistently left open” – that is, unregulated – “the substance of the United States’ international relations.”⁴¹ As discussed below, Neuman takes a narrow view of the category of extraterritorial national defense actions against aliens that is free from the Bill of Rights. But nominally, if not always in practice, the categorical limit of his mutuality model distinguishes it from universalism, which apparently would regulate with the Bill of Rights even military operations abroad against aliens. Professor Lobel, for example, has implied that it would have “violate[d] basic constitutional principles” for the United States to preemptively assassinate Hitler in 1938.⁴² Globalism, therefore, is certainly not a unified school of thought. My grouping of scholars under the single “globalist” rubric is merely intended to allow critical examination of the methodological claims about history and text that many of them have in common.

This article presents textual and historical arguments against a globalist interpretation of the Constitution, thereby addressing globalist’ textual and originalist claims on their own methodological terms. I offer no conclusions about the insoluble debate about the best method of interpreting the Constitution; my reliance on text and history should not be taken as a claim that those are the only legitimate methods. I rely on them because, besides meeting globalist

³⁷ Neuman, *Guantanamo*, *supra* note 20, at 52.

³⁸ NEUMAN, STRANGERS, *supra* note 9, at 8.

³⁹ Neuman, *Guantanamo*, *supra* note 20, at 52.

⁴⁰ Neuman, *Abiding*, *supra* note 20, at 151 n.166 (citing NEUMAN, STRANGERS, *supra* note 11, at 110-11).

⁴¹ NEUMAN, STRANGERS, *supra* note 9, at 110.

⁴² Lobel, *supra* note 21, at 879.

arguments on their own methodological terms, textual and historical methods have additional advantages. Most ways of reading the Constitution begin with the text, purposes and historical understandings, even if they then move beyond this starting point. Accordingly, even commentators who use an additional framework should nevertheless find it profitable to consider text and history as a threshold matter. In addition, reliance on constitutional text, informed by history and contextual sources,⁴³ is employed by legal scholars of all ideological stripes who write about foreign relations.⁴⁴ Moreover, historical and textual methods are often used by members of the political branches of government⁴⁵ and the courts, as shown by the Supreme Court's reliance on these methodologies in decisions concerning application of constitutional rights abroad or the reach and scope of habeas corpus review of executive detention.⁴⁶

There are five primary Supreme Court cases on which globalists focus their scholarship; none of them directly support a global Constitution, but several have been read expansively by globalists as support for their views. First, the Court's 1891 decision in *In re Ross*⁴⁷ held that a foreign seaman who committed murder on a U.S.-flagged vessel in Japanese waters could not invoke the Bill of Rights to challenge his criminal conviction in a U.S.

⁴³ Besides looking at the plain meaning of the language of the Constitution, I will attempt to draw inferences from the structure created by the text, viewed contextually in light of the entire Constitution. My reading of text and structure will also attempt to take account of the purposes animating the constitutional provisions, *see, e.g.*, JOHN HART ELY, *WAR AND RESPONSIBILITY* 5-7 (1993), pre- and post-ratification constitutional history and the "contemporary context of thought and debate," Jack N. Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 *CHL.-KENT L. REV.* 103, 113 (2000).

⁴⁴ *See, e.g.*, ELY, *supra* note 43; HENKIN, *CONSTITUTIONALISM*, *supra* note 19; HAROLD H. KOH, *THE NATIONAL SECURITY CONSTITUTION* (1990); ABRAHAM D. SOFAER, *WAR, FOREIGN AFFAIRS, AND CONSTITUTIONAL POWER* (1976); Michael J. Glennon, *Raising The Paquete Habana: Is Violation of Customary International Law by the Executive Unconstitutional?*, 80 *Nw. U. L. REV.* 321 (1986); Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 *YALE L.J.* 1259 (2002); Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power Over Foreign Affairs*, 111 *YALE L.J.* 231 (2001); Beth Stephens, *Federalism and Foreign Affairs: Congress's Power to "Define and Punish . . . Offenses Against the Law of Nations,"* 42 *WM. & MARY L. REV.* 447 (2000); William Michael Treanor, *Fame, the Founding, and the Power to Declare War*, 82 *CORNELL L. REV.* 695 (1997); Carlos Manuel Vazquez, *Laughing at Treaties*, 99 *COLUM. L. REV.* 2154 (1999); John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 *CAL. L. REV.* 167 (1996).

⁴⁵ *See, e.g.*, THE TAIWAN RELATIONS ACT, S. REP. NO. 96-7, at 18 (1979), *reprinted in* 1979 U.S.C.C.A.N. 36, 53 (discussing the treaty power by looking to constitutional text and the intent of the Framers); *Proposed Deployment of United States Armed Forces into Bosnia*, 19 Op. Off. Legal Counsel No. 327 (1995) (relying on constitutional text, structure and history).

⁴⁶ *See Rasul*, 542 U.S. at 473-74, 481-82; *id.* at 502-04 (Scalia, J., dissenting.); *INS v. St. Cyr*, 533 U.S. 289, 301-03 (2001); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264-68 (1990); *id.* at 284-89 (Brennan, J., dissenting).

⁴⁷ 140 U.S. 453 (1891).

consular court in Japan. The Supreme Court treated the seaman as if he was a United States citizen for purposes of reviewing his constitutional claim, and held that the “[C]onstitution can have no operation in another country.”⁴⁸ Many globalists use *Ross* to suggest that, until the mid-twentieth century, a dogma of strict “territoriality” – that is, the view that domestic law can have absolutely no force abroad – prevented American legal thought from conceiving that either citizens or noncitizens could have extraterritorial constitutional rights.⁴⁹ Once this rigid dogma of strict territoriality was rejected for citizens, globalists argue, it makes no sense to preserve it for noncitizens.⁵⁰

In 1950 in *Johnson v. Eisentrager*,⁵¹ the Supreme Court denied petitions for writs of habeas corpus filed in the U.S. District Court for the District of Columbia on behalf of German government intelligence operatives convicted of war crimes by a U.S. military court in China and imprisoned in U.S.-occupied Germany. Commentators dispute the precise holding of *Eisentrager* – for instance, whether the dismissal was on the merits, or based on lack of jurisdiction or lack of standing.⁵² Whatever the procedural nature of the decision, there is also debate as to whether the result – no Bill of Rights review available – turned on the fact that the petitioners were admitted agents of an enemy power during a formally declared war, or that they were confined as part of a military operation, or that they were noncitizens with no preexisting connection to the United States who were confined abroad.

In 1957 in *Reid v. Covert*,⁵³ the Supreme Court rejected *Ross* by holding unconstitutional the practice, sanctioned by international agreements with the host countries, of trying civilian dependents of U.S. military personnel stationed abroad in U.S. military courts lacking Bill of Rights protections. A plurality of the Court used such broad language to reach this result – stating that the U.S.

⁴⁸ *Id.* at 464.

⁴⁹ See NEUMAN, STRANGERS, *supra* note 9, at 7 (“Under a strictly territorial model, the Constitution constrains the United States government only when it acts within the borders of the United States. Strict territoriality prevailed as dogma for most of American constitutional history, until the Supreme Court overturned it in 1957 in *Reid v. Covert*.”); Neuman, *Guantanamo*, *supra* note 20, at 45 (“Pre-modern case law assists little in deciding how the Bill of Rights should apply to aliens abroad” because it reflects “the rigidly territorial methodology of turn-of-the-century conflict of laws” which assumed that “constitutional rights were unavailable—to both citizens and aliens—outside the borders of the United States.”).

⁵⁰ See, e.g., Neuman, *Guantanamo*, *supra* note 20, at 45; John A Ragosta, *Aliens Abroad: Principles for the Application of Constitutional Limitations to Federal Action*, 17 N.Y.U. J. INT’L L. & POL. 287, 293-94 (1985); Akash R. Desai, Note, *How We Should Think About the Constitutional Status of the Suspected Terrorist Detainees at Guantanamo Bay*, 36 VAND. J. TRANSNAT’L L. 1579, 1608-09 (2003).

⁵¹ 339 U.S. 763 (1950).

⁵² See, e.g., Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1400 (1953).

⁵³ 354 U.S. 1 (1957).

government “can only act in accordance with all the limitations imposed by the Constitution”⁵⁴ – that many globalists claim that *Reid* establishes, or at least strongly suggests, that the Constitution applies abroad to noncitizens as well.⁵⁵ But the Court used the words “citizen” or “American” at least 13 times in discussing the facts and law, raising questions about *Reid*’s applicability to aliens. In particular, *Reid*’s language that the U.S. government “can only act in accordance with all the limitations imposed by the Constitution” is both introduced and followed by explicit statements that the Court is discussing the unique relationship between the U.S. government and its “citizens.”⁵⁶ Many globalists misread this passage both by downplaying the importance of citizenship to the Court’s holding and by engaging in circular reasoning. According to Professor Paust, for example, this passage in *Reid* supports globalism by teaching that the question is not whether aliens abroad have rights, but “whether our government has any power or delegated authority to act inconsistently with the Constitution.”⁵⁷ But assuming that globalists are right that the Constitution is, as a general matter, always and everywhere operative, one must still determine what specific limits there are on the powers of the government under the Constitution. To do this, one must read the provisions of the Constitution that either grant rights or withhold powers. The *Reid* formulation, therefore, only begs questions about the personal or territorial scope of constitutional rights. Interpreting the personal and territorial scope of the Constitution and Bill of Rights is inescapable. Sophisticated globalists like Professor Neuman recognize this and avoid the circularity of the *Reid* argument.⁵⁸

In 1990, the Supreme Court decided, in *United States v. Verdugo-Urquidez*,⁵⁹ that the Fourth Amendment did not invalidate a warrantless search by U.S. and Mexican law enforcement of the Mexican residence of a Mexican national who had previously been kidnapped and brought to the United States, where he was in law enforcement custody awaiting indictment on drug-related charges. A plurality of the Court concluded that “the people” mentioned in the Constitution’s Preamble, Article I, and the First, Second, Fourth, Ninth and Tenth Amendments, “seems to have been a term of art” referring “to a class of persons who are part of a national community or who have otherwise developed

⁵⁴ *Id.* at 6.

⁵⁵ See, e.g., HENKIN, FOREIGN AFFAIRS, *supra* note 16, at 305-06; Paust, *Antiterrorism*, *supra* note 21, at 19; Raustiala, *supra* note 21, at 2520 n.98 & 2523-24.

⁵⁶ See *Reid*, 354 U.S. at 5-6.

⁵⁷ Paust, *Antiterrorism*, *supra* note 21, at 19. See also, e.g., Henkin, *Compact*, *supra* note 18, at 23-24; Lobel, *supra* note 21, at 872-73.

⁵⁸ Neuman, *Guantanamo*, *supra* note 20, at 44-45 (“The analytic starting point is the insight that the Constitution, taken as a whole, binds the conduct of the federal government wherever it acts Thus, the only open questions concern the interpretation of particular constitutional limitations – whether and how they apply to a particular situation.”).

⁵⁹ 494 U.S. 259 (1990).

sufficient connection with this country to be considered part of that community.”⁶⁰ The Court contrasted “the relatively universal term of ‘person’” in Fifth Amendment and the narrower term “the people.”⁶¹ Mr. Verdugo-Urquidez was found not to be among “the people.” Although Justice Kennedy (the fifth vote for the majority), the dissenting justices, and amici advocating for the defendant dismissed this textual argument,⁶² the distinction between “persons” and “people” has since been used by globalists to argue that the Due Process Clause of the Fifth Amendment has a broader scope than the Fourth Amendment and protects a wide range of noncitizens outside the United States.⁶³

The most recent Supreme Court decision is similarly open to varied readings. In 2004 in *Rasul v. Bush*, the Court purported to decide only that statutory jurisdiction existed for federal district courts to hear habeas petitions filed by noncitizens detained at Guantanamo Bay. But in dicta in a footnote, the majority hinted that it might embrace some form of globalism. Footnote 15 states that “[p]etitioners’ allegations – that, although they have engaged neither in combat nor in acts of terrorism against the United States, they have been held in Executive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing – unquestionably describe ‘custody in violation of the Constitution or laws or treaties of the United States.’”⁶⁴ By quoting the habeas statute in this fashion, the Court may simply have been restating, albeit in a confusing way, its statutory holding. But there are at least two other possibilities. One view, advanced by Professor Neuman, is that footnote 15 “confirm[s] that innocent alien detainees at Guantanamo have constitutional rights.”⁶⁵ An even broader reading, based on the view that the Court’s reasoning is “not restricted by geography or specific to Guantanamo in some other way,”⁶⁶ could see footnote 15 as stating that noncitizen detainees outside the United States have enforceable constitutional rights. The broader reading is quite aggressive, though, because *Rasul* emphasized that Guantanamo Bay is a “territory over which the United

⁶⁰ *Id.* at 265.

⁶¹ *Id.* at 269.

⁶² *Id.* at 276 (Kennedy, J., concurring); *id.* at 287 n.9 (Brennan, J., dissenting); Brief of Amici Curiae ACLU et al. at 11-12 & n.4, *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990) (No. 88-1353) [hereinafter ACLU Brief].

⁶³ See, e.g., Paust, *Antiterrorism*, *supra* note 21, at 19-20; Ronald J. Sievert, *War on Terrorism or Global Law Enforcement Operation?*, 78 NOTRE DAME L. REV. 307, 318 (2003); Brief of Amicus Curiae International Human Rights Law Group et al. at 8 & n.8, *Haitian Centers Council, Inc. v. McNary*, 969 F.2d 1326 (2d Cir. 1992) (No. 92-6090) [hereinafter IHRLG Brief].

⁶⁴ See *Rasul*, 542 U.S. at 483 n.15 (quoting 28 U.S.C. § 2241(c)(3)).

⁶⁵ Neuman, *Abiding*, *supra* note 20, at 147 (emphasis added).

⁶⁶ Neal K. Katyal, *Executive and Judicial Overreaction in the Guantanamo Cases*, 2004 CATO SUP. CT. REV. 49, 53.

States exercises plenary and exclusive jurisdiction,”⁶⁷ something which cannot be said about most of the rest of the world outside the United States. In sum, *Rasul* is ambiguous enough to provide support for globalist claims.

Although the weight of academic commentary and *Rasul* suggest that globalism may be ascendant, the Supreme Court has not yet accepted globalist arguments. This cannot be explained by a lack of opportunities for the issue to be raised. Globalist scholars have repeatedly pressed their views as counsel or *amici* in litigation against the U.S. government.⁶⁸ More generally, ever since declaring independence, the United States has operated extraterritorially, using force, conducting searches and seizures, capturing and detaining enemies and criminals, and exercising control over would-be immigrants. Nor can the Court’s failure to accept globalism fully be explained by the fact that courts often apply abstention doctrines, such as the political question doctrine, to foreign affairs issues; on several occasions, the Supreme Court has adjudicated on the merits the constitutional claims of Americans abroad.⁶⁹

If the arguments for global constitutional rights for aliens are to gain the force of law, it will be by judicial interpretation of the Constitution in the face of opposition by the political branches. Globalists do not point to any treaty, statute, executive order or other official statement by the political branches of the federal government that suggests a preference for deeming aliens abroad to have judicially-enforceable constitutional rights.⁷⁰ On the contrary, modern executive branch practice – across presidential administrations of widely varying political ideologies – has been to argue that aliens abroad do not have enforceable constitutional rights or a right to habeas corpus review.⁷¹ And

⁶⁷ See *Rasul*, 542 U.S. at 475. Later the Court suggests that Guantanamo is within or under the “territorial jurisdiction” of the United States. *Id.* at 480; see also *id.* at 487 (Kennedy, J., concurring) (“Guantanamo Bay is in every practical respect a United States territory. . .”).

⁶⁸ See Brief of Amici Curiae International Law and National Security Professors at 12, *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005) (No. 04-5393) (Professor Paust); Brief of Amici Curiae of Former U.S. Government Officials at 17-25, *Rasul v. Bush*, 542 U.S. 466 (2004) (Nos. 03-334 & 03-343) (Professors Koh and Neuman) [hereinafter *Rasul Amici Brief*]; IHRIG Brief, *supra* note 63 (Professor Neuman); Brief of Appellees at 37, *Haitian Centers Council, Inc. v. McNary*, 969 F.2d 1326 (2d Cir. 1992) (No. 92-6090) (Professors Koh and Lobel); ACLU Brief, *supra* note 62 (Professor Cole).

⁶⁹ See *Haig v. Agee*, 453 U.S. 280, 306-10 (1981); *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960); *Reid v. Covert*, 354 U.S. 1 (1957), *rev’ing on rehearing* *Kinsella v. Krueger*, 351 U.S. 470 (1956); *Neely v. Henkel*, 180 U.S. 109 (1901); *In re Ross*, 140 U.S. 453 (1891); *Mitchell v. Harmony*, 54 U.S. (13 How.) 115 (1851).

⁷⁰ *But cf.* S. Rep. No. 249 at 11, 56th Cong., 1st Sess. (1900) (stating, in the context of discussing whether inhabitants of colonial possessions like Puerto Rico have constitutional rights, that certain constitutional limitations on Congress’s power are always in effect, such as the prohibitions against ex post facto legislation, establishments of religion, slavery, bills of attainder, and laws impairing the validity of contracts or taking property without due process).

⁷¹ For examples from Democratic administrations, see Brief of Respondent Madeleine K. Albright at 11-12, *Miller v. Albright*, 523 U.S. 420 (1998) (No. 96-1060); Brief of Petitioners

Congress has enacted many rules governing the current U.S. national security structure that arguably are inconsistent with certain globalist tenets.⁷²

Although I conclude that the better reading of the Constitution's text and history is that the protections of the Bill of Rights are not global, this article nevertheless shows that the United States has a tradition of protecting foreigners abroad. But rather than being based on enforcing constitutional limitations, the American global tradition protected aliens abroad through international law, diplomacy, and the policy choices of the political branches of the U.S. government. Unlike judicial construction of the Constitution, these forms of global protection of aliens are, to a substantial degree, under the ultimate policy control of the political branches of government – which is precisely the point.

Before proceeding with the remainder of this article, it is necessary to clarify what it does *not* claim. Certain arguments against globalism have lately been associated with aggressive claims by Bush administration lawyers about presidential power to disregard statutes limiting coercive interrogation

Sec'y of Defense Johnson *et al.* at 7, 65-68, Johnson v. Eisentrager, 339 U.S. 763 (1950) (No. 49-306); Brief of Respondents Lt. Gen. Styer *et al.* in Opp. to Petition for Cert. at 29-30, *In re Yamashita*, 327 U.S. 1 (1946) (Nos. 45-61 Misc. & 45-672). For Republican administrations, see Reply Brief of Respondents Donald H. Rumsfeld *et al.* in Support of Motion to Dismiss for Lack of Jurisdiction at 18-20, Hamdan v. Rumsfeld (U.S. Feb. 13, 2006) (No. 05-184); Brief of Respondents United States *et al.* at 10-13, Rasul v. Bush, 542 U.S. 466 (2004) (Nos. 03-334 & 03-343); Brief of Petitioners Comm'r of INS *et al.* at 16 n.10, Sale v. Haitian Centers Council, Inc., 509 U.S. 155 (1993) (No. 92-344); Brief of Petitioner United States at 11-30, United States v. Verdugo-Urquidez, 494 U.S. 259 (1990) (No. 88-1353); *Constitutionality of Closing the Palestine Information Office*, 11 OP. OFF. LEGAL COUNSEL 104, 111-12 (Aug. 14, 1987); 5 *Intelligence Activities: The Nat'l Security Agency and Fourth Amendment Rights: Hearings on S. Res. 21 Before the S. Select Comm. to Study Governmental Operations with Respect to Intelligence Activities*, 94th Cong., 1st Sess., 66, 74 (1975) (testimony of Att'y Gen. Edward Levi).

⁷² For instance, The Detainee Treatment Act of 2005, Title X of Pub. L. 109-148, 119 Stat. 2680, at § 1005(e), overruled as to any "alien" the Supreme Court's statutory construction in *Rasul*, which had upheld habeas jurisdiction to review the legality of detentions at Guantanamo Bay, Cuba. The foreign intelligence surveillance framework assumes that aliens abroad do not have a Fourth Amendment interest in not being subject to U.S. intelligence collection. See 50 U.S.C. § 1801; *cf.* Exec. Order 12,333 § 1.8, 46 Fed. Reg. 59941 (Dec. 4, 1981) (giving the CIA broad authority to collect intelligence outside the United States). The War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973), codified at 50 U.S.C. § 1541 *et seq.*, can be read as congressional approval for the President to use military force abroad for several months, subject only to a reporting requirement. See 50 U.S.C. §§ 1542-1544. It requires no "due process" of any kind for the targets. Similarly, the statutory provisions governing executive covert actions do not impose any process requirements that protect the affected individuals outside the United States. See, *e.g.*, 50 U.S.C. §§ 413 & 413b. The Non-Detention Act, 18 U.S.C. § 4001(a), requires congressional authorization for all detentions of U.S. citizens, but omits aliens from this protection. Ideological restrictions in the immigration laws, *e.g.*, 8 U.S.C. 1424(a) (denying naturalization to any alien who, among others things, is "a member of or affiliated with" communist or totalitarian political parties), would be unconstitutional if applied to citizens.

techniques⁷³ and about the alleged inapplicability of many international legal protections to the “war on terror.”⁷⁴ Many commentators assert that these legal claims are not only mistaken but also have allowed serious abuses to occur at American detention facilities around the world. This article does not directly engage these debates because it is devoted to analyzing whether the textual and historical evidence supports a globalist reading of constitutional – not statutory or international law – rights.

This article does, however, provide support for critics of the more extreme legal claims of the current administration. For instance, in the process of showing why global constitutionalism is difficult to square with the constitutional text and history, this article shows that many Founders believed that aliens should find some protection from the coercive force of the U.S. government under treaties and the law of nations (now known as customary international law), as well as congressional statutes and the dictates of humanity and policy. In addition, this article’s conclusion that global constitutionalism is difficult to defend on a textual or historical basis suggests that proponents of better treatment for noncitizens caught up in the U.S. war on terror should focus on securing aliens’ rights through congressional intervention – such as the recent McCain amendment barring mistreatment of detainees⁷⁵ – or through international law, rather than arguing for a strained reading of the Constitution.

⁷³ See *Dep’t of Defense Working Group Report on Detainee Interrogations in the Global War on Terrorism* (Apr. 4, 2003) [hereinafter *DOD Report*], at 21 (“In order to respect the President’s inherent constitutional authority to manage a military campaign, 18 U.S.C. § 2340A (the prohibition against torture) must be construed as inapplicable to interrogations undertaken pursuant to [the President’s] Commander-in-Chief authority” because “Congress lacks authority under Article I to set the terms and conditions under which the President may exercise his authority as Commander-in-Chief to control the conduct of operations during a war.”); Jay S. Bybee, *Memo. for Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogations under 18 U.S.C. §§ 2340-2340A* (Aug. 1, 2002), at 31 (“Any effort to apply [the U.S. statute implementing the Convention Against Torture] in a manner that interferes with the President’s direction of such core war matters as the detention and interrogation of enemy combatants . . . would be unconstitutional.”).

⁷⁴ See Jay S. Bybee, *Memo. for Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, Dep’t of Defense, Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees* (Jan. 22, 2002), at 9-32 (concluding that the Geneva Conventions do not protect members of al Qaeda or the Taliban); *DOD Report*, *supra* note 73, at 67 (“Customary international law does not provide legally-enforceable restrictions on the interrogation of unlawful combatants under DOD control outside the United States.”).

⁷⁵ See *Detainee Treatment Act*, *supra* note 71, at § 1003(a) (“No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.”). Contrary to the claims of some Bush administration lawyers, the plain language of the Constitution is difficult to reconcile with the view that Congress lacks constitutional power to limit coercive interrogation techniques used by executive branch agents. See U.S. CONST. art. I, § 8, cls. 10, 11 & 13 (providing Congress with “Power” to “define and punish . . . Offenses against the Law of Nations,” “make Rules concerning Captures on Land and Water” and

II. GLOBALIST CONVENTIONAL WISDOM ABOUT THE CONSTITUTIONAL TEXT AND ORIGINAL INTENT

This part describes the globalist conventional wisdom regarding the constitutional text and original intent. It divides globalists into two groups.⁷⁶ One group makes the original intent claim that the Bill of Rights was written in general language because its protections were intended to be universal, unrestricted by territory or personal status. The larger group of globalists who do not make an original intent claim instead assert or assume that the text of the Bill of Rights is silent as to its geographic and personal scope and so supports or, at least, does not stand in the way of, application of normative constitutional theories that would find rights for aliens abroad.

A. *Intentional Textual Universality: Globalist Originalism*

Some globalists assert that the Founders' decision to write the individual rights provisions of the Bill of Rights in broad, even universal, terms evidences the affirmative intent that these rights be unlimited by geography or personal status, as a citizen or alien. Professor Henkin has been the most influential exponent of this originalist argument. He finds that the Constitution is "silent regarding its applicability beyond the borders of the United States. Little is said in the Constitution concerning citizens, and nothing about aliens."⁷⁷ This was intentional, according to Henkin:

"Our federal government must not invade the individual rights of any human being. The choice in the Bill of Rights of the word 'person' rather than 'citizen' was not fortuitous; nor was the absence of a geographical limitation. Both reflect a commitment to respect the individual rights of all human beings."⁷⁸

"make Rules for the Government and Regulation of the land and naval Forces"); *see also id.* art. I, § 8, cl. 17 (Necessary and Proper Clause).

⁷⁶ But not all globalists fit into the two methodological categories that I have described. A few reject a textual methodology and do not use a historical method either. *See* Nathan J. Diament, *Foreign Relations and Our Domestic Constitution: Broadening the Discourse*, 30 CONN. L. REV. 911, 912-13, 942-44 (1998); Roosevelt, *supra* note 33, at 2042-43, 2048. Others closely analyze whether aliens abroad have constitutional rights with minimal or no discussion of the constitutional text or original understandings. *See* Joan Fitzpatrick, *Sovereignty, Territoriality, and the Rule of Law*, 25 HASTINGS INT'L & COMP. L. REV. 303, 327-34, 340 (2002); Frank Tuerkheimer, *Globalization of U.S. Law Enforcement: Does the Constitution Come Along?*, 39 HOUS. L. REV. 307 (2002).

⁷⁷ Henkin, *Compact*, *supra* note 18, at 12; *see also id.* at 18 ("The Constitution does not state its geographic reach or, more specifically, whether it applies solely within the United States."); *id.* at 14 ("The Bill of Rights, added by amendment in 1791, does not specify whose rights it was designed to safeguard.").

⁷⁸ Henkin, *Compact*, *supra* note 18 at 32.

For Henkin, the original understanding of the Founders was a “universal human rights ideology.”⁷⁹ Professor Henkin does not cite any specific historical authority for these propositions about the Founders’ intent. Instead, he generally relies on (i) the broad dicta in *Reid v. Covert* to the effect that the Constitution applies to everything the federal government does, (ii) the founding generation’s belief in the pre-existing natural rights of “all men,” as the Declaration of Independence put it, and (iii) the fact that the Bill of Rights is textually general or unrestricted as to the persons or places protected.⁸⁰ Other globalist originalists, including Justice Ginsburg, tend to rely on Henkin’s work⁸¹ rather than specific historical evidence.

B. Textual Silence or Textual Generality

A larger number of globalists eschew reliance on original intent and state instead that the Constitution, or particular provisions of it, is silent or underspecified regarding its territorial and personal scope. So, for example, “[t]he Due Process Clause is phrased in universal terms, protecting any ‘person’ rather than ‘citizens’ or members of ‘the people.’ Nor does its wording specify limitations as to place.”⁸² Another globalist asserts that the language of the Bill of Rights is clear about who it protects (e.g., “any ‘person’ must [mean] literally any person”), but “says nothing about *where* a violation takes place” and contains “no explicit geographical limitation to its reach.”⁸³

⁷⁹ HENKIN, CONSTITUTIONALISM, *supra* note 19, at 99-100. It is not entirely clear how this comports with Professor Henkin’s characterization of the Bill of Rights as “a postscript, if not an afterthought, the price of getting the Constitution approved.” Louis Henkin, *Rights: American and Human*, 79 COLUM. L. REV. 405, 411 (1979).

⁸⁰ See HENKIN, CONSTITUTIONALISM, *supra* note 19, at 100 (“Nothing in the Constitution or in the framers’ conceptions suggested that they had in mind any territorial limitations [on the Constitution’s protections.]”) (relying on the Declaration of Independence, the preamble to the U.S. Constitution, and *Reid v. Covert*).

⁸¹ See *United States v. Balsys*, 524 U.S. 666, 701-02 (1998) (Ginsburg, J., dissenting) (citing *DKT Memorial Fund Ltd. v. Agency for Int’l Develop.*, 887 F.2d 275, 308 (D.C. Cir. 1989) (Ginsburg, J., concurring in part and dissenting in part) (in turn citing Henkin)); Ruth Bader Ginsburg, *Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication*, 40 IDAHO L. REV. 1, 8 (2003) (citing Henkin). For other globalist originalists who rely on Henkin, see Lobel, *supra* note 21, at 875-76 (1989); Ragosta, *supra* note 50, at 297-98 & 300; Bryan William Horn, Note, *The Extraterritorial Application of the Fifth Amendment Protection Against Coerced Self-Incrimination*, 2 DUKE J. COMP. & INT’L L. 367, 375 (1992).

⁸² Neuman, *Guantanamo*, *supra* note 20, at 49; see also Eric J. Bentley, Jr., *Toward an International Fourth Amendment: Rethinking Searches and Seizures Abroad After Verdugo-Urquidez*, 27 VAND. J. TRANSNAT’L L. 329, 335 (1994); IHRIG Brief, *supra* note 63, at 8 (same). Neuman does note that a few constitutional rights are personally or territorially restricted by their text. See NEUMAN, STRANGERS, *supra* note 9, at 102-03 (“The only provision of the Bill of Rights with a geographic referent is the venue clause of the Sixth Amendment.”).

⁸³ Zachary Margulis-Ohnuma, *The Unavoidable Correlative: Extraterritorial Power and the United States Constitution*, 32 N.Y.U. J. INT’L L. & POL. 147, 169 & 171 (1999). For other

As suggested by these references to “people” and “persons,” globalist textual claims rely heavily on the “open-textured”⁸⁴ language used by the Bill of Rights to describe the rights holders. Globalists often appear to apply a clear statement rule, which assumes that if constitutional rights were actually territorially or personally limited, the limitation would be specifically expressed in the text.⁸⁵ In other words, the default presumption is that constitutional rights

globalist claims along these lines, see Amann, *supra* note 35, at 314 (“Containing no territorial limitation akin to that in the European Convention, the text of the U.S. Constitution constrains neither the political branches from acting abroad nor the judicial branch from reviewing their actions.”); Neuman, *Whose Constitution?*, *supra* note 20, at 980 (“[T]he drafting of the Bill of Rights reflected inattention to the problematics of government activity abroad rather than a conscious effort to design entitlements solely for application within the territory.”); *id.* at 927 (“[T]he drafters of the federal Bill of Rights did not take care to distinguish between the respective rights of citizens and persons.”); Raustiala, *supra* note 21, at 2555 (“[T]he Constitution itself contains no textually demonstrable spatial limitation.”); *see also, e.g.*, George P. Fletcher, *Citizenship and Personhood in the Jurisprudence of War*, 2 J. INT’L CRIM. JUST. 953, 958-59 (2004); Paust, *Post-9/11*, *supra* note 21, at 1350; Paust, *Antiterrorism*, *supra* note 21, at 25; Saltzburg, *supra* note 21, at 752-53; Darin A. Bifani, Comment, *Tension between Policy Objectives and Individual Rights: Rethinking Extradition and Extraterritorial Abduction Jurisprudence*, 41 BUFF. L. REV. 627, 687 n.358 (1993); Desai, *supra* note 50, at 1601-02.

⁸⁴ Amann, *supra* note 35, at 301-02.

⁸⁵ *See, e.g.*, Mark A. Godsey, *The New Frontier Of Constitutional Confession Law--The International Arena: Exploring The Admissibility Of Confessions Taken By U.S. Investigators From Non-Americans Abroad*, 91 GEO. L.J. 851, 868 (2003) (“One might reasonably argue that the seemingly all-inclusive term ‘person’ renders the Due Process clause universally applicable to all human beings, wherever they may be located, in their dealings with the United States government.”); Margulis-Ohnuma, *supra* note 83, at 197 (arguing that the Constitution protects noncitizens abroad when the U.S. is “acting in a sovereign capacity over the alleged victim,” and stating that “[n]either the text of the Constitution nor Supreme Court precedents unequivocally states whether or not the Constitution generally applies overseas”) (emphasis added); Horn, *supra* note 81, at 375 (“[The text of the Fifth Amendment] does not restrict itself to trials involving citizens nor does it detail any geographical limits, as it could easily have done. . . . Therefore, to give the text its plain meaning, we must read ‘any’ as ‘any’ and ‘no person’ as ‘no person.’”).

Within his categorical “mutuality” framework, Professor Neuman essentially applies a clear statement rule as well, even though he is careful to leave room for unspecified “inputs” or “structural arguments” that might potentially rebut the clear statement presumption. *See* NEUMAN, STRANGERS, *supra* note 9, at 98 (“The rationale of the mutuality approach has been the presumption that American constitutional rights and the obligation of obedience to American law go together; particular provisions may be more narrowly interpreted because of textual or structural arguments, but in the absence of contrary indications the rights and obligations are coextensive.”); *id.* at 99 (“[S]pecific textual or other arguments may exceptionally demonstrate that a particular right is either reserved to citizens or geographically limited.”) (emphasis added); *id.* at 102 (“The mutuality of obligation approach respects the written Constitution by making all the rights it contains presumptively applicable; as an approach to interpretation it leaves room for textual references or other inputs to rebut the presumption.”); Neuman, *Extraterritorial*, *supra* note 20, at 2077 n.20 (stating that his mutuality “presumption is rebuttable, where the text expressly limits the personal or

should potentially exist for aliens abroad unless expressly restricted by the text of a particular constitutional provision. On this view, unrestricted language used to describe the rights holders – the term “people” found in the First, Second and Fourth Amendments, the term “person” found in the Fifth Amendment, and “the accused” in the Sixth Amendment – suggests that rights might be available globally. Other provisions of the Bill of Rights, such as the First and Eighth Amendments, can be viewed by globalists as absolute withdrawals of power from the federal government, with no express qualifications of any kind based on personal or territorial status, and therefore potentially applicable abroad.⁸⁶ Globalists differ among themselves about what types of rights are available and in what situations. But whatever their end point, most globalists share a clear statement presumption which holds that, unless expressly restricted by the constitutional text, a given right is potentially available to noncitizens abroad.

The clear statement argument based on the general and unrestricted language of the Bill of Rights has a solid historical pedigree, dating at least from Jeffersonian-Republican opposition to the Federalist’s so-called “Alien Friends Act” of 1798.⁸⁷ More recently, rhetoric suggestive of this clear statement rule has been used by a number of Supreme Court justices, typically in dissenting opinions.⁸⁸ The globalist clear statement argument gains some force by comparing the unrestricted language in the Bill of Rights with other provisions in the Constitution which do expressly delimit the scope of the rights by personal status or territorial location.⁸⁹

C. Globalist Errors

To the extent that globalists’ use a clear statement presumption, it is a serious error. The presumption is an unacknowledged “normative canon” of

geographical scope of a right, or where structural arguments demonstrate that the right should not be interpreted as applying”) (emphasis added).

⁸⁶ See John H. Mansfield, *The Religion Clause of the First Amendment and Foreign Relations*, 36 DEPAUL L. REV. 1, 27 (1986).

⁸⁷ See Neuman, *Whose Constitution?*, *supra* note 20, at 927-39. For a discussion of the Act and its context, see *infra* notes 291-319 and accompanying text.

⁸⁸ See *Verdugo-Urquidez*, 494 U.S. at 283 n.7 & 291 n.11 (Brennan, J., dissenting); *Reid*, 354 U.S. at 8 (plurality opinion by Black, J.); *In re Yamashita*, 327 U.S. 1, 26 (1946) (Murphy, J., dissenting); *Fong Yue Ting v. United States*, 149 U.S. 698, 738-39 (1893) (Brewer, J., dissenting).

⁸⁹ For instance, Article III, section 2 imposes a territorial limitation on the right of a criminal defendant to be tried by a jury near the location of the crime. Article IV, section 2 contains a personal status limitation, providing that “[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States,” thereby omitting noncitizens from the same protection. In addition, the right to hold the offices of President, Senator or Congressman is textually limited to citizens, see U.S. CONST. art. I, § 2 cl. 2; *id.* art. I, § 3, cl. 3; *id.* art. II, § 1, cl. 5, and only “throughout the United States,” but not elsewhere, are all congressionally-enacted rules regarding naturalization of citizens and bankruptcy required to be “uniform,” *id.* art. I, § 8 cl. 4..

textual construction⁹⁰ in that it advances a particular normative objective, that is, globalist protections of aliens abroad. Clear statement rules and other normative canons are by no means illegitimate. They can be useful when the text under consideration speaks, as the Bill of Rights often does, in “majestic generalities.”⁹¹ But the normative values or other objectives that allegedly justify the default presumption must be acknowledged and defended. As noted above, some globalists do this with a claim about the original intent of the Constitution’s drafters and ratifiers. But many non-originalist globalists make textual claims about the Constitution’s silence or generality as to persons or places, based on an unacknowledged clear statement rule and without explicitly defending the rule’s assumptions.

To deploy the clear statement presumption, many globalists commit what Professors Laurence Tribe and Michael Dorf refer to as the “dis-integration fallacy,” that is, “approaching the Constitution in ways that ignore the salient fact that its parts are linked into a whole—that it is a *Constitution*, and not merely an unconnected bunch of separate clauses and provisions”⁹² As demonstrated in Part IV, the constitutional text and structure speak to the viability of globalism in many places and many ways, besides the few clauses in the Bill of Rights where globalists look to see whether the personal or territorial scope of the rights has been expressly limited. Viewed as a whole, the Constitution does not read as a globalist document.

* * *

The next three parts of this paper discuss the validity of these globalist claims about history and text by looking at the legal and political views of the Founders, the constitutional text and structure, and inferences about constitutional meaning that can be drawn from early practice by the U.S. government under the Constitution.

III. THE AMBIENT LAW OF THE ERA

As globalists emphasize, it was common ground among the founding generation that certain personal rights were based on natural law, not positive law of any kind; many believed these that natural rights were God-given to all men.⁹³ Consistent with this, bills of rights of the state constitutions of 1776 and afterwards and the federal Constitution of 1789 were thought to declare and secure the pre-existing natural rights of mankind, not to grant rights.⁹⁴ Is it not,

⁹⁰ See Curtis Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 505-08 (1993) (describing the distinction between descriptive canons and normative canons of textual interpretation).

⁹¹ *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943).

⁹² LAURENCE H. TRIBE & MICHAEL C. DORF, *ON READING THE CONSTITUTION* 20 (1991).

⁹³ The most famous example is the Declaration of Independence.

⁹⁴ See generally Cole, *Foreign Nationals*, *supra* note 21, at 372; Lobel, *supra* note 21, at 875; Neuman, *Guantanamo*, *supra* note 20, at 51. As Professor Amar has noted, see Akhil

then, likely that the U.S. Bill of Rights, written as it is in general, non-exclusive language, was intended to protect and enforce the rights of everyone, even aliens abroad?

This Part answers this question in the negative by discussing the “ambient law” of the era – the background assumptions and conceptions – regarding issues central to the globalist project, such as the legal status of aliens; the territorial scope of individual rights against government power; the purposes of republican government generally and bills of rights specifically; and the important conceptual distinction between domestic and international law.

Based on these sources, this Part makes the following observations. In the eighteenth and early nineteenth centuries, legal rights and government regulatory powers were, to a greater degree than today, thought to be limited to persons and things within the territory over which a government exercised sovereignty. The availability of the writ of habeas corpus appears to have been limited to the sovereign’s own territory. But there were many exceptions to this general understanding that law was territorial. Indeed, the United States was a leader in projecting its regulatory power extraterritorially and, it appears, may also have had a nascent sense that the constitutional rights of U.S. citizens could potentially be available abroad. Aliens were sharply distinguished from citizens, however. Aliens residing or traveling within the United States were considered to be under the “protection” of the “municipal” – *i.e.*, domestic as opposed to international or external – laws of the United States. Consistent with this, aliens in the United States had access to the protective writ of habeas corpus, and many Americans appear to have assumed that aliens in the United States had U.S. constitutional rights. But aliens abroad were not under the protection of the municipal laws. In general, municipal law was not thought to govern external

Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1154 n.109 (1991) [hereinafter Amar, *Bill of Rights I*], the bill introducing in Congress the proposals that became the Bill of Rights referred to them as “further declaratory and restrictive clauses,” *Amendments to the Constitution of the United States*, 1 Stat. 97 (1789). See also U.S. CONST. amend. IX (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”).

relations. Rather, the more discretionary, flexible principles⁹⁵ of international law – the law of nations – governed the external realm. The purpose of republican government was to secure the rights of members of the political community against internal turmoil and external aggression. This Part concludes, based on these overlapping attitudes and rules, that aliens within the United States would generally have been thought to be protected by U.S. constitutional rights, whereas aliens abroad would not.

Although this evidence speaks only circumstantially, not directly, to whether the Constitution and Bill of Rights were, as a historical matter, globalist, the intellectual history presented in this Part is nevertheless valuable. When various currents of legal and political thought and practice all seem broadly consistent with one position and inconsistent with another, we can tentatively accept that one position and reject the other. In the case of globalist originalism, the evidence points against it and in favor of inclusive constitutional nationalism.

A. Republican Government and Bills of Rights

Simply because many Founders believed that all men were naturally equal in their God-given rights-bearing capacity, it does not necessarily follow that they also thought that government created by the U.S. Constitution would protect and enforce constitutional rights of all men everywhere. Indeed, the universal-sounding language in the Declaration of Independence and other texts must be understood in light of eighteenth century views about the nature and purpose of republican government generally, and bills of rights specifically.

By far the most important purpose of republican government was to protect the members of the society from internal and external dangers. Writing as Publius in *The Federalist*, John Jay instructed that, of first importance in considering the proposed new form of government, is “[t]he safety of the people. . . [including] security for the preservation of peace and tranquility, as well as dangers from foreign armies and influence, as from dangers of the like

⁹⁵ The flexible and discretionary nature of the law of nations is seen in Montesquieu’s famous statement that “[t]he *right of nations* is by nature founded on the principle that the various nations should do to one another in times of peace the most good possible, and in times of war the least ill possible, without harming their true interests. The object of war is victory; of victory, conquest; of conquest, preservation. All the laws that form the *right of nations* should derive from this principle and the preceding one.” CHARLES DE SECONDAT, BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* 7-8 (Anne M. Cohler *et al.* trans., 1989) (1748). Other translations of “le droit des gens” (the right of nations) render it “the law of nations.” See, e.g., *id.* at 7 n.n (translators’ note); see also 4 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 66 (1765-69) (paraphrasing this passage from Montesquieu on the “law of nations”). For other evidence of the flexibility of the law of nations, see, e.g., 3 DAVID HUME, *A TREATISE OF HUMAN NATURE* 190-91 (1739-40) (stating, in discussing the law of nations, that “tho’ the morality of princes has the same *extent*, yet it has not the same *force* as that of private persons, and may lawfully be transgress’d from a more trivial motive”).

kind arising from domestic causes.”⁹⁶ Preserving liberty was of crucial importance, but it was the liberty of the members of society that mattered. At the Philadelphia Convention, Charles Pinckney stated the uncontroversial point that “the great end of Republican Establishments” is “a Government capable of extending to its citizens all the blessings of civil & religious liberty.”⁹⁷ James Madison, in his 1789 speech in Congress introducing the proposed Bill of Rights, explained that his bill was intended to “satisfy the public that their liberties will be perpetual” and to “extinguish from the bosom of every member of the community” any apprehension about the security of their rights.⁹⁸

The focus on the rights of members of the community is seen in the explanatory preambles of many founding-era state constitutions. The influential Massachusetts Constitution of 1780, largely drafted by John Adams, describes its purpose as “to secure the existence of the body-politic, to protect it, and to furnish the individuals who compose it with the power of enjoying, in safety and tranquility, their natural rights and blessings of life” and that, to this end, a government is created “for ourselves and our posterity.”⁹⁹ Both the Pennsylvania and the Vermont Constitutions opened by stating that they created a government for “the protection of the community as such, and to enable the individuals who compose it to enjoy their natural rights.”¹⁰⁰ Even the Articles

⁹⁶ THE FEDERALIST NO. 3 (Jay); *see also* THE FEDERALIST NO. 45 (Madison) (stating that the Revolution had been fought and the Constitution framed to ensure that “the people of America should enjoy peace, liberty and safety”); 2 ADAM SMITH, THE WEALTH OF NATIONS ch. IV § ix, at 687-88 (Oxford Univ. Press 1976) (1776) (stating that government has “three duties of great importance,” “first, the duty of protecting the society from the violence and invasion of other independent societies; secondly, the duty of protecting, as far as possible, every member of the society from the injustice or oppression of every other member of it, or the duty of establishing an exact administration of justice; and, thirdly, the duty of erecting and maintaining certain publick works and certain publick institutions”); 3 EMMERICH DE Vattel, THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW 3 (Charles G. Fenwick trans., 1916) (1758) (stating that the purpose of a political society is to procure the members’ “mutual welfare and security”).

⁹⁷ 1 FARRAND, RECORDS, *supra* note 13, at 402; *see also* 1 *id.* at 423 (remarks of Roger Sherman) (“Govt. is instituted for those who live under it. It ought therefore to be so constituted as not to be dangerous to their liberties.”); *Remarks of Edmund Pendleton to Virginia Ratifying Convention* (June 12, 1788) (“The happiness of the people is the object of this Government, and the people are therefore made the fountain of all power.”), in 10 DOCUMENTARY HISTORY, *supra* note 13, at 1196; A Native of this Colony [Carter Braxton], *An Address to the Convention of the Colony and Ancient Dominion of Virginia on the Subject of Government* (1776) (“[A]ll writers agree in the object of government, and admit that it was designed to promote and secure the happiness of every member of society.”), in 1 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA 330 (Charles S. Hyneman & Donald S. Lutz ed., 1983).

⁹⁸ 1 ANNALS OF CONG. 449-50 (1789) (remarks of Rep. Madison).

⁹⁹ *See* MASS. CONST. of 1780, pmb.

¹⁰⁰ PENN. CONST. of 1776, pmb.; VT. CONST. of 1786, pmb.; *see also* N.H. CONST. of 1776, pmb. (creating a government “for the preservation of peace and good order, and for the

of Confederation, though different in nature from the constitutions because it formed a confederation of states, not individual people, announced a similarly inward-looking, domestic purpose and focus of the rights and protections it created.¹⁰¹ As of 1787, then, the most prominent exemplars of the American constitutional tradition stated that they were intended to benefit the members of society – to the apparent exclusion of outsiders.¹⁰² As discussed below, the U.S. Constitution states the same thing in its Preamble. The link between the purposes of government announced in the Preamble and the fact that the provisions of the Bill of Rights are “paradigmatically rights of and for American citizens” has been persuasively shown by Professor Akhil Amar.¹⁰³

Looking past these explicit declarations of the purpose of government, globalists instead emphasize the generality of the language in bills of rights. But for the founding generation, bills of rights had other purposes in addition to announcing enforceable restrictions on government power—for example, bills of rights were intended to educate and inculcate good republican values in the citizenry and government officials.¹⁰⁴ And historian Jack Rakove has written of the “deeper tendency in eighteenth-century thinking to regard rights not as absolute barriers against public regulation but rather as guarantees that when the state acted it must do so lawfully.”¹⁰⁵ So the rights announced in bills would

security of the lives and properties of the inhabitants of this colony”); N.Y. CONST. of 1777, pmbl. (creating a government “best calculated to secure the rights and liberties of the good people of this State”); VA. CONST. of 1776, Bill of Rights, pmbl. (stating that “the representatives of the good people of Virginia” framed an instrument containing rights which “do pertain to them and their posterity”).

¹⁰¹ ARTICLES OF CONFEDERATION, art. III (1781) (“The said States hereby severally enter into a firm league of friendship with each other, for their common defense, the security of their liberties, and their mutual and general welfare . . .”).

¹⁰² This theme is also found in one of the most important precedents for the U.S. Bill of Rights: the proposed amendments to the Constitution adopted by many of the state ratifying conventions in 1788. Many ratification statements recommended provisions that were later incorporated into the Bill of Rights while also describing the new U.S. Constitution as a social “compact,” see Massachusetts (Feb. 6, 1788), *reprinted in* 2 U.S. DEP’T OF STATE, DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA, 1786-1870, at 93 (1894) [hereinafter DEP’T OF STATE, DOCUMENTARY HISTORY]; New Hampshire (June 21, 1788), *reprinted in* 2 *id.* at 141; North Carolina (Aug. 1, 1788), *reprinted in* 2 *id.* at 266; Virginia (June 27, 1788), *reprinted in* 2 *id.* at 377, which suggests a government by and for members. On the prevalence and significance of social compact thinking on the founders, see JACK N. RAKOVE, ORIGINAL MEANINGS 320 (1996); WOOD, CREATION, *supra* note 7, at 283-91. For the argument that social compact thinking is not necessarily inconsistent with globalism, see Neuman, *Whose Constitution?*, *supra* note 20, at 935.

¹⁰³ AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 170 (1998) [hereinafter AMAR, BILL OF RIGHTS II]. Professor Amar notes that “[p]eripheral applications of the Bill” – such as to “resident aliens . . . for reasons of prudence, principle or both” – “should not obscure its core” meaning, namely protecting American citizens. *Id.*

¹⁰⁴ RAKOVE, *supra* note 102, at 306-09, 323-24, 333-36; Gerald L. Neuman, *Habeas Corpus Suspension After INS v. St. Cyr*, 33 COLUM. HUM. RTS. L. REV. 555, 577 (2002).

¹⁰⁵ RAKOVE, *supra* note 102, at 329.

have been secured primarily through the following of the regular processes of government. The fact that only members of society were represented and could participate in governmental decision-making means that the processes of republican government would likely not be good at protecting outsiders. All of this counsels some caution before assuming that generality of language in bills of rights necessarily represented an intent to encompass all the world within enforceable protections of those rights.¹⁰⁶

Interpretive caution is especially warranted because one purpose that the Constitution's Bill almost certainly did *not* have was introducing radical concepts or novel rights, as universal human rights for all would have been. As Leonard Levy relates, James Madison – the author of the Bill – “claimed that he had recommended only the familiar and avoided the controversial. He warned against enumerating anything except ‘simple, acknowledged principles,’ saying that amendments of a ‘doubtful nature’ might damage the constitutional system.”¹⁰⁷ The goal was to “protect basic rights without endangering the ‘structure’ and ‘stamina’ of the Government.”¹⁰⁸ The Bill's lack of novelty is evidenced by the familiar precedents¹⁰⁹ from which it was drawn, none of which purported to extend rights to foreigners abroad, and by the debate surrounding its adoption, none of which appear to have mentioned creating novel rights for aliens abroad.¹¹⁰

B. The Limits of “Territoriality”

Globalists present conflicting accounts of the original understandings about the territorial limits of law. For example, whereas globalist-originalists

¹⁰⁶ Cf. AKHIL REED AMAR, *AMERICA'S CONSTITUTION* 240 (2005) (stating that the original Constitution of 1789 was not “technical lawyers’ law,” but “embodied a very different, more populist kind of law – law that had indeed spring from the people themselves in an extraordinary ratification process”); LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 289 (2d ed. 1985) (stating that the Bill of Rights and other codifications reflected the view that “rules of criminal justice should be open, transparent, easy to know” so they could not be abused for political purposes).

¹⁰⁷ LEONARD W. LEVY, *ORIGINS OF THE BILL OF RIGHTS* 248 (1999).

¹⁰⁸ DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789-1801*, at 111 (1997). On the intent that the Bill be uncontroversial, see AMAR, *AMERICA'S CONSTITUTION*, *supra* note 106, at 319; Frank H. Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85, 95 (1982); Wythe Holt, “*To Establish Justice*”: *Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L. J. 1421, 1513-14.

¹⁰⁹ Precedents included the Magna Carta (1215); the English Petition of Right (1628); the Massachusetts Body of Liberties (1641); the English Bill of Rights (1689); common law rights publicized by Blackstone, Coke, and other jurists; the 1774 declaration of rights of the Continental Congress; the Declaration of Independence (1776); the post-independence constitutions of American states, many of which included bills of rights; the Northwest Ordinance (1787); and the resolutions of state ratifying conventions in 1788 and 1789 which suggested amendments for the new Constitution.

¹¹⁰ Cf. *Eisentrager*, 339 U.S. at 784 (discussing lack of historical or doctrinal support for application of the Fifth Amendment abroad to alien enemies).

apparently believe that the Constitution was originally conceived as a universal human rights ideology operative throughout the world, non-originalists suggest that the Founders could not have conceived of extraterritorial constitutional rights for either U.S. citizens or aliens because their thinking was bounded by a rigid territoriality that assumed that legal rights and duties were limited to the sovereign's own territory.¹¹¹ For globalist-originalists, then, globalism would be a recovery of a lost golden age, while for non-originalists it would be a correction of a pernicious anomaly – namely, why have only aliens who are abroad been left outside the protection of the Constitution, now that we live in a world where the U.S. government's coercive power operates throughout the world, the Supreme Court has recognized in *Reid v. Covert* that citizens enjoy constitutional rights abroad, and from a legal doctrinal standpoint, we have moved beyond strict territoriality.¹¹² Both globalist positions are materially incomplete.

It is undoubtedly true that eighteenth and nineteenth century legal thought was heavily territorial. Broadly speaking, a nation's law was viewed as territorially limited, meaning that neither its proscriptive power nor its protections were thought to operate extraterritorially.¹¹³ As Chief Justice Marshall put it, the “full and absolute territorial jurisdiction” of “every sovereign” is “incapable of conferring extra-territorial power.”¹¹⁴ The Founders would have imbibed this territorial understanding from many sources, including influential writers on the common law,¹¹⁵ the law of nations,¹¹⁶ and the social

¹¹¹ See NEUMAN, STRANGERS, *supra* note 9, at 7; Neuman, *Whose Constitution?*, *supra* note 20, at 973; Raustiala, *supra* note 21, at 2509; Mary Lynn Nicholas, Comment, *United States v. Verdugo-Urquidez: Restricting the Borders of the Fourth Amendment*, 14 *FORDHAM INT'L L.J.* 267, 277 (1990-1991); Cole, *Double Standard*, *supra* note 21; Rasul Amici Brief, *supra* note 68, at 20. Relatedly, while originalists must necessarily believe that the founding generation foresaw extraterritorial activity by the U.S. government impinging on the rights of aliens, some non-originalists appear to suggest that the Framers did not foresee extraterritorial activity sufficiently extensive to warrant considering whether aliens abroad should be protected by the Constitution. See Neuman, *Whose Constitution?*, *supra* note 20, at 980; Ragosta, *supra* note 50, at 288; Eric B. Fisher, Note, *The Road Not Taken: The Extraterritorial Application of the Fourth Amendment*, 34 *COLUM. J. TRANSNAT'L L.* 705, 707 (1996); Rozell Dulany Hunter, Note, *The Extraterritorial Application of the Constitution—Unalienable Rights?*, 72 *VA. L. REV.* 649, 649 (1986).

¹¹² See, e.g., Raustiala, *supra* note 21, at 2523 (“The rationale for the continuing commitment to legal spatiality in the area of alienage is hazy at best given the despatialized vision of the Constitution announced in *Reid v. Covert*.”).

¹¹³ See, e.g., NEUMAN, STRANGERS, *supra* note 9, at 7; 1 JOSEPH STORY, COMMENTARIES ON THE CONFLICT BETWEEN FOREIGN AND DOMESTIC LAWS §§ 7-8, 18-20 (5th ed. 1857); Larry Kramer, *Vestiges of Beale: Extraterritorial Application of American Law*, 1991 *SUP. CT. REV.* 179, 187; Raustiala, *supra* note 21, at 2509.

¹¹⁴ *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 137 (1812).

¹¹⁵ See Daniel J. Hulsebosch, *The Ancient Constitution and the Expanding Empire, Sir Edward Coke's British Jurisprudence*, 21 *LAW & HIST. REV.* 439, 439 (2003).

¹¹⁶ See, e.g., 3 VATTEL, *supra* note 96, at 138-39.

contract,¹¹⁷ as well as from the constitutional history of England during the turbulent seventeenth century.¹¹⁸

But while eighteenth and nineteenth century legal thought was heavily territorial, it does not appear to have been an absolutely “rigid” or “strict” “dogma.” It was always understood that a nation’s institutions of protective power could, of course, be used abroad.¹¹⁹ (Most globalists would, no doubt, agree.) More important, extraterritorial regulatory enforcement jurisdiction was recognized in certain circumstances, such as a nation’s relations with its own citizens. According to John Marshall, “[t]he jurisdiction of a nation extends to the whole of its territory, *and to its own citizens in every part of the world.*”¹²⁰ Numerous examples can be found where eighteenth and nineteenth century Congresses,¹²¹ courts¹²² and commentators¹²³ recognized that nations have the power to regulate the conduct of their own citizens or resident foreign nationals when they were abroad.¹²⁴

There were other exceptions to strict territoriality. The First Congress enacted in 1790 a statute allowing foreigners to sue in U.S. courts for torts committed against the law of nations;¹²⁵ some of these torts would occur

¹¹⁷ See, e.g., JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 9 (ed. C.B. Macpherson 1980) (1690).

¹¹⁸ See *infra* notes 145-47 and accompanying text.

¹¹⁹ See, e.g., *Church v. Hubbard*, 6 U.S. (2 Cranch) 187, 234 (1804) (stating that a nation’s “power to secure itself from injury, may certainly be exercised beyond the limits of its territory”).

¹²⁰ 10 ANNALS OF CONG. 597 (1800) (remarks of Rep. John Marshall) (emphasis added); see also *The Apollon*, 22 U.S. (9 Wheat.) 362, 370 (1824) (“The laws of no nation can justly extend beyond its own territory, except so far as it regards its own citizens.”).

¹²¹ See, e.g., *An Act for the Punishment of Certain Crimes*, 1 Stat. 112, ch. 9, § 1 (1790) (making treason a crime when committed abroad); *An Act to Regulate Intercourse with Indian Tribes*, 1 Stat. 137, 138, ch. 33, § 5 (1790) (punishing crimes by U.S. citizens or inhabitants against Indians in Indian territory); *An Act to Prevent Citizens of the United States from Privateering*, 1 Stat. 520, ch. 1, § 1 (1797) (banning citizens from privateering “without the limits of the [United States]” against the citizens or property of the United States or nations at peace with the United States); *Logan Act*, 1 Stat. 613, ch. 1 (1799) (criminalizing certain political communications with foreign governments by U.S. citizens residing at home or “in any foreign country”); *An Act to Suspend Commercial Intercourse*, 2 Stat. 351, ch. 9, § 1 (1806) (barring “any person or persons resident within the United States” from trading with those parts of St. Domingo then in a state of rebellion); *An Act to Punish Piracy*, 3 Stat. 600, ch. 113, § 4 (1820) (criminalizing the seizure of slaves “on any foreign shore” by U.S. citizens or crew of U.S. vessels).

¹²² See, e.g., *United States v. McGill*, 26 F. Cas. 1088, (C.C.D. Pa. 1806) (No. 15,676); *Williams’ Case*, 29 F. Cas. 1330 (C.C.D. Conn. 1799) (No. 17,708).

¹²³ See 1 BLACKSTONE, COMMENTARIES *369; HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW § 113 (1936) (1866); 3 VATTTEL, *supra* note 96, at 147.

¹²⁴ But this right might be limited by the sovereignty of a foreign state on its own territory. See, e.g., WILLIAM EDWARD HALL, A TREATISE ON INTERNATIONAL LAW § 75 (1884).

¹²⁵ See *Judiciary Act of 1789*, 1 Stat. 73, 76, ch. 20, § 9.

abroad¹²⁶ or on the high seas.¹²⁷ Under English common law doctrine developing in the late eighteenth century, “tort actions were considered to be transitory and could be brought wherever the tortfeasor was found,”¹²⁸ even by a nonresident non-British plaintiff.¹²⁹ Although most crimes were considered “local” and could only be prosecuted where they occurred,¹³⁰ the crime of piracy could be punished in national courts even if committed by noncitizens on the high seas.¹³¹ And extraterritoriality was not limited to jurisdiction in a nation’s own domestic courts. The United States and other countries deployed consuls¹³² to overseas ports to adjudicate disputes between their nationals there.¹³³

There are some indications that the protective umbrella of U.S. municipal rights, including constitutional rights, may have been thought to follow U.S.

¹²⁶ See *Bolchos v. Darrel*, 3 F. Cas. 810 (D.S.C. 1795) (No. 1,607); 1 Op. Att’y Gen. 57, 59 (1795).

¹²⁷ See *Martins v. Ballard*, 16 F. Cas. 923, 924 (D.S.C. 1794) (No. 9,175).

¹²⁸ Brief of Professors of Federal Jurisdiction and Legal History as Amici Curiae, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (Nos. 03-339, 03-485), reprinted in 28 HASTINGS INT’L & COMP. L. REV. 99, 116 (2004).

¹²⁹ See, e.g., *Rafael v. Verelst*, 96 Eng. Rep. 621 (K.B. 1776) (suit by Persian-Armenian merchant resident in Bengal against official of the East India Company complaining that defendant caused the independent ruler of the Indian state to imprison him); *Mostyn v. Fabrigas*, 98 Eng. Rep. 1021 (K.B. 1774) (suit by resident of Minorca against Governor of Minorca for false imprisonment and causing him to be deported to Spain). Professor James Pfander relies heavily on *Mostyn* as part of a larger globalist project in James E. Pfander, *The Limits of Habeas Jurisdiction and the Global War on Terror*, 91 CORNELL L. REV. 497, 499-500, 510-13 (2006) (relying in part on “cases from the British Empire” to claim that “federal courts do indeed possess broad authority to inquire into the legality of detention (and other military conduct) overseas, so long as the inquiry examines actions of the U.S. government”). But it should be noted that neither *Mostyn* nor *Rafael* provide direct support for globalism. First, as Pfander notes, Great Britain ruled Minorca under the Treaty of Utrecht of 1713 and therefore the native Minorcan plaintiff in *Mostyn* was a British subject. See *id.* at 511 n.92. By contrast, *Rafael* arose in Bengal, India, before the British government assumed direct control over that state as a colony. See 96 Eng. Rep. at 622 (tort occurred within the territory of “a foreign prince”). As one of the lawyers pointed out, the Indian ruler was “constitutionally independent of the East India Company,” the company that employed the defendant. *Id.* So the British defendant was not directly exercising sovereign government authority; instead, he was charged with procuring the tortious actions of the sovereign Indian government. *Id.* at 621-22.

¹³⁰ See Brief of Professors, *supra* note 126, at 116.

¹³¹ See, e.g., *United States v. Gibert*, 25 F. Cas. 1287 (C.C.D. Mass. 1834) (No. 15,204).

¹³² In the eighteenth century, a “consul” was a government official resident in a foreign port city who was legally entitled to resolve disputes among his countrymen there, and sometimes between his countrymen and natives. See, e.g., 3 VATTEL, *supra* note 96, at 209.

¹³³ See Treaty of Peace and Friendship, U.S.-Morocco, art. XX, July 18, 1787; Treaty of Amity and Commerce, U.S.-Prussia, art. XXV, July 9-Sept. 10, 1785, 8 Stat. 84 [hereinafter 1785 U.S.-Prussia Treaty]; Treaty of Amity and Commerce, U.S.-Sweden, art. XXVI, Apr. 3, 1783, 8 Stat. 60 [hereinafter 1783 U.S.-Sweden Treaty]. Consistent with this contemporaneous practice, Article II of the Constitution allows the President to appoint, with the advice and consent of the Senate, “Ambassadors, other public Ministers and Consuls.”

citizens abroad in some circumstances. For example, when, in 1823, the British government proposed to the U.S. government measures to suppress the slave trade from Africa, the United States rejected them, explaining that they would infringe the constitutional rights of American citizens abroad.¹³⁴ Another example is the case of *Mitchell v. Harmony*, decided in 1851 by the U.S. Supreme Court. While he was trading in Mexico during the war between the United States and Mexico, Manuel Harmony's goods were seized by the U.S. Army. Mr. Harmony, a naturalized U.S. citizen, sued the responsible Army officer for trespass in U.S. federal court and argued, among other things, that his rights under the Fourth Amendment and the Fifth Amendment's Takings Clause had been violated.¹³⁵ Although it was not explicit about the source of the law being applied, the Supreme Court affirmed a decision in favor of Mr. Harmony and described the officer's wrongful actions as a "taking" that violated "rights of private property" "guarded under the Constitution and laws of the United States."¹³⁶ A third example is a pair of decisions arising out of a punitive bombardment by a U.S. Navy vessel of a town in Nicaragua that had been harassing American citizens, in which the U.S. Court of Claims appeared to

¹³⁴ The British proposed that that vessels of each country be subject to search by the navy of the other, and that citizens of each country be liable to criminal trial in either admiralty courts of the other nation or in a "mixed commission" of judges of several nations held in Africa or the West Indies. See *Letter from Envoy Stratford Canning to Sec. of State J.Q. Adams* (Apr. 8, 1823), in ANNALS OF CONG., 18th Cong., 1st Sess, App. at 3007-08; *Letter from Sec. of State J.Q. Adams to Envoy Stratford Canning* (June 24, 1823), in ANNALS OF CONG., 18th Cong., 1st Sess, App. at 3011. Secretary of State John Quincy Adams rejected the proposals for foreign trials, citing a "Constitutional objection," namely that "the very question of *guilt* or innocence is that which the protecting care of their Constitution has reserved for the citizens of their Union, to the exclusive decision of their own countrymen." See *Adams Letter to Canning* (June 24, 1823), *supra*, at 3012; see also *id.* at 3015 (stating that the United States are bound, "by the injunctions of their Constitution," to enforce the congressional criminal statute against piracy by U.S. citizens only in U.S. courts). Earlier discussions of the same subject suggest that the U.S. government may have believed that mixed or foreign tribunals were objectionable because they would violate Article III's guarantee that the judicial power of the United States would be exercised in tribunals created by Congress with U.S.-appointed judges with life tenure. See *Letter from Sec. of State J.Q. Adams to Ministers Albert Gallatin and Richard Rush* (Nov. 2, 1818), in ANNALS OF CONG., 16th Cong., 2d Sess., App. at 1321.

¹³⁵ See 54 U.S. (13 How.) 115, 126-27 (1851) (argument of counsel).

¹³⁶ See *id.* at 134 & 136. Some contemporary treatises appear to have viewed *Mitchell* as a constitutional decision. See JOHN NORTON POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES 162-63 (1868); THEODORE SEDGWICK, A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND APPLICATION OF STATUTORY AND CONSTITUTIONAL LAW 612 n.† (1857). Justice Black's plurality opinion in *Reid v. Covert* states that *Mitchell* was a case where "federal courts have held or asserted that various constitutional limitations apply to the Government when it acts outside the continental United States." *Reid*, 354 U.S. at 8 & n10. But see IHRLG Brief, *supra* note 63, at 9 n.9 (stating that, prior to *Reid*, "the Supreme Court had never held that citizens had extraterritorial rights").

allow a U.S. corporation, but not an alien, to use the Constitution's Takings Clause to sue for the value of their destroyed property.¹³⁷

The final two examples are from congressional debates about extraterritorial actions by the U.S. military. The first debate concerned then-General Andrew Jackson's 1818 attack of Spanish-owned Florida and his execution of two British subjects he captured there.¹³⁸ Representative Henry Baldwin, later to be appointed by President Jackson to the U.S. Supreme Court, disparaged the notion that "the Constitution and laws of the country" had been violated by the executions because, as he put it, "neither have any bearing on the case of these men. They were found and executed outside of the territorial limits of the United States, where our laws or Constitution have no operation, *except between us and our own citizens*, and where *none other* could claim their benefit and protection."¹³⁹

The final example is found in congressional debates in early 1858 about the arrest in Nicaragua by the U.S. Navy of a group of American "filibusters" who were attempting to take control of the country and establish a pro-slavery government.¹⁴⁰ Many members of Congress – generally Democrats from slave states – denounced the arrests as illegal under various theories, such as violation of Nicaraguan territorial rights under international law, lack of power in the executive branch because it allegedly was not authorized by statute to effect arrests in a foreign country, and lack of jurisdiction or authority over the person of the leader of the filibusters, one William Walker, who may have renounced his U.S. citizenship during an earlier sojourn in Nicaragua when he led a military government that briefly held power. One Congressman argued that the constitutional rights of the arrestees – described as "American citizens" – had been violated.¹⁴¹ Supporters of the arrests generally did not take up the

¹³⁷ Compare *Wiggins v. United States*, 3 Ct. Cl. 412 (1867) (American corporation entitled to compensation) and *Perrin v. United States*, 4 Ct. Cl. 543 (1868) (French citizens not entitled to compensation), *aff'd* 79 U.S. 315 (1870). The reasoning of these cases is not explicit and, therefore, nothing definitive can be said about globalism based on their outcomes.

¹³⁸ For a detailed discussion of this incident and the resulting congressional investigation and debate, see *infra* notes 320-45 and accompanying text.

¹³⁹ 33 ANNALS OF CONG. 1042 (1819); *id.* ("These men were not our citizens, nor bound by our laws; they owed us no allegiance, and were entitled to no protection."); *id.* at 1044 ("[Jackson] has violated no Constitutional provision. It was not made to protect such men; they are no parties to it; owe it no obedience; and can claim no protection from it.").

¹⁴⁰ For background on these events, which took place soon after *Dred Scott* was decided and during bitter debates about Kansas statehood, see 5 HERMAN E. VON HOLST, THE CONSTITUTIONAL AND POLITICAL HISTORY OF THE UNITED STATES 470-84 (John A. Lalor trans., 1885); 6 *id.* at 158-64, 197-203.

¹⁴¹ See CONG. GLOBE at 258, 35th Cong., 1st Sess. (1858) (remarks of Rep. Moore of Alabama) ("The Constitution of the United States guarantees to every citizen protection from seizure in his person and in his property, unless upon due complaint, made and supported by oath or affirmation."); *id.* at 259 ("The citizen of the ancient Roman Republic, in whatever land he might be, no matter how the hand of power was sought to be laid upon him, could

constitutional argument. But one argued, referring to Walker alone, not his indisputably American followers, that this was “not the case of a citizen of ours that we are considering. It is the case of a man who is no citizen of ours; who has no right whatever to appeal to us for any of the rights of citizenship.”¹⁴²

These five examples suggest that extraterritorial rights for American citizens were “thinkable”¹⁴³ well before the mid-twentieth century, and therefore that the globalists’ reliance on the rise and fall of a supposedly strict dogma of territoriality is overstated. The possibility that constitutional rights for Americans were seen as potentially global is supported by the fact that the British empire, into which the founding generation was born, had a fairly robust conception of global rights for the subjects of the English crown. As a British government official stated in 1720, “Let an Englishman go where he will, he carries as much law and liberty with him, as the nature of things will bear.”¹⁴⁴

While the nation’s military and regulatory jurisdiction and, perhaps, certain constitutional rights of citizens, extended abroad, it seems that the English common law writ of habeas corpus did not extend abroad, because it was not capable of reaching anyone outside the crown’s dominions.¹⁴⁵ In *Rasul*, the Court’s majority and dissenting opinions both concluded that the English common law writ did not reach outside the dominions over which the crown exercised jurisdiction.¹⁴⁶ Additional evidence of this is found in the

stand up and proclaim ‘I am a Roman citizen!’ and forthwith he found protection in his rights, and his person was considered inviolate. Shall it not be so with an American citizen?”). Another Southerner, Rep. Stephens of Georgia, may also have believed that there was a constitutional violation. *See id.* at 202. This is interesting because he had earlier stated that the arrests were “a great outrage, unjustified by law or the semblance of law,” whether committed on “citizens of a foreign country, or American citizens.” *Id.* at 198.

¹⁴² *Id.* at 276 (remarks of Rep. Curtis of Iowa).

¹⁴³ Powell, *supra* note 81, at 671.

¹⁴⁴ SCHWARTZ, *supra* note 6, at 26. Many colonial charters granted by the British crown to settlers in America specifically provided that Americans would retain the customary rights of Englishmen. *See, e.g.*, GA. CHARTER of 1732 ¶ 7, in 2 FEDERAL AND STATE CONSTITUTIONS COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 773 (Francis Newton Thorpe ed., 1909); CAROLINA CHARTER of 1665 ¶ 7, in 5 *id.* at 2765; MASS. BAY CHARTER of 1691, in 3 *id.* at 1880-81. A major grievance that hastened the American Revolution was the claim that Americans’ rights as Englishmen were being violated. *See, e.g.*, Petition of Congress to the King, 1 J. CONT. CONG. 115, 118 (1774) (complaining of “[t]he apprehension of being degraded into a state of servitude from the pre-eminent rank of English freemen”).

¹⁴⁵ *See In re Ning Yi-ching*, 56 T.L.R. 3 (1939); 9 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 116-17, 124 (1982 ed.); Douglas E. Dayton, Comment, *A Critique of the Eisentrager Case: American Law Abroad—Habeas Corpus at Home?*, 36 CORNELL L.Q. 303, 310 (1951); *cf. Eisentrager*, 339 U.S. at 768. Numerous statements can be found in eighteenth-century sources stating that the territorial limit of the writ was the “dominions” of the crown. *See* 1 Op. Att’y Gen. 47 (1794); 3 BLACKSTONE, COMMENTARIES *131.

¹⁴⁶ *Compare Rasul*, 542 U.S. at 473-74, 481-82 & nn.11-13; *and id.* at 502-04 (Scalia, J., dissenting).

constitutional struggles of seventeenth century England.¹⁴⁷ Nevertheless, as a matter of English constitutional history and current American law, the extent and type of jurisdiction and dominion that the government must exercise in order to bring a given overseas territory within the reach of the writ is unclear.

Although American courts have long held that, “for the meaning of the term habeas corpus, resort may unquestionably be had to the common law,”¹⁴⁸ it is not clear whether the English writ’s domestic territorial limitation was imported into the judicial systems of the American states and the new federal court system created in 1787. The jurisdiction of state courts to issue writs of habeas corpus was likely limited to the territory of each state,¹⁴⁹ but more

¹⁴⁷ In a number of instances agents of the English crown detained accused persons in overseas prisons in order to avoid judicial scrutiny on habeas corpus. For example, according to impeachment charges brought by Parliament against the Earl of Clarendon in 1667, he had caused “divers of his majesty’s subjects to be imprisoned against law, in remote islands, garrisons, and other places, thereby to prevent them from the benefit of the law.” WILLIAM F. DUKER, *A CONSTITUTIONAL HISTORY OF HABEAS CORPUS* 53 (1980). Parliament was opposed to overseas detentions of subjects because, in the words of Sir Thomas Lee, “no *Habeas Corpus* can reach” the detainee there. DUKER, *supra*, at 53 (quoting 1 *DEBATES OF THE HOUSE OF COMMONS FROM THE YEAR 1667 TO THE YEAR 1694*, at 237 (Anchitell Grey ed., 1763)). Previously the Protectorate government had also sent prisoners “overseas . . . beyond the reach of the writ” of habeas corpus. DUKER, *supra*, at 51-52. Apparently, it was precisely because the habeas jurisdiction of the English courts was territorially limited that these overseas prisons were used. See 2 HENRY HALLAM, *THE CONSTITUTIONAL HISTORY OF ENGLAND* 128 (1887); HOLDSWORTH, *supra* note 145, at 116-17; Johan Steyn, *Guantanamo Bay: The Legal Black Hole*, 53 *INT’L & COMP. L.Q.* 1, 8 (2004). Parliament’s eventual reform measure – the famous Habeas Corpus Act of 1679 – is best read as confirming the domestic territorial limitation of the English writ. Political prisoners were also detained unlawfully within England, where the crown’s courts and agents cooperated to throw up a welter of procedural obstacles that delayed or prevented detainees seeking the writ to present their cases in court. See 3 BLACKSTONE, *COMMENTARIES* *135; HOLDSWORTH, *supra* note 145, at 116-17. Parliament long tried to remedy these two different problems – detention overseas beyond the reach of the writ of habeas corpus and intentional procedural delays to undermine habeas corpus in domestic cases – with different bills addressed to each. See DUKER, *supra* note 148, at 53-59; HOLDSWORTH, *supra* note 145, at 117. The two bills were later combined and finally passed as the Habeas Corpus Act of 1679. See HOLDSWORTH, *supra* note 145, at 117. Among other provisions, the Act instituted domestic procedural reforms and designated the domestic places to which the writ could issue and, separately, curtailed the imprisonment of subjects abroad and provided a civil damages remedy against government officials who detained a subject abroad unlawfully. See 3 BLACKSTONE, *COMMENTARIES* *136-37 (summarizing the Act); HOLDSWORTH, *supra* note 145, at 117 (same). Importantly, the Act did not purport to extend the English courts’ habeas jurisdiction to places outside the dominions of the crown. And its multiple provisions banning transport overseas would seem somewhat superfluous if, in fact, the writ was available overseas.

¹⁴⁸ *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 93-94 (1807).

¹⁴⁹ Only South Carolina had a habeas corpus statute at the time of the Declaration of Independence, see Dallin H. Oaks, *Habeas Corpus in the States, 1776-1865*, 32 *U. CHI. L. REV.* 243, 251 (1965), and jurisdiction to issue the writ was specifically limited to the territory of the state, see Act of Dec. 12, 1712, no. 332, § 4. By the time of the Philadelphia Convention in 1787, five more states – Georgia, Massachusetts, New York, Pennsylvania and Virginia – had enacted habeas statutes. See Oaks, *supra*, at 251. The statutes of New York,

historical research is needed. When the federal courts were created in the Judiciary Act of 1789, they were given power to issue writs of habeas corpus but neither the territorial or personal scope of the writ's protections were specified, perhaps suggesting that common law jurisdictional rules would be carried forward.

Territoriality, then, while undoubtedly a factor in American legal thinking, cannot fully explain why the early generations of Americans would have thought that aliens abroad did not have U.S. constitutional rights, even though aliens within the United States were protected by its laws. Regarding habeas corpus, however, the evidence suggests that the territorial limitation was likely strict.

C. *Domestic versus Foreign Affairs, Municipal Law versus International Law*

Generally speaking, international relations were thought to be governed by customary international law – then known as the law of nations – which gave substantial deference to national interests and the discretion of the political branches of government,¹⁵⁰ while domestic affairs were thought to be governed by municipal laws like statutes, constitutions, and the common law.¹⁵¹ In the late eighteenth and early nineteenth centuries, the customary law of nations consisted of rules governing relations between states, between states and individuals of other states, and between individuals of different states; the last category includes maritime law, the law merchant and the law of conflicts of laws.¹⁵² A sharp distinction between the law governing foreign affairs and domestic affairs appears to have been common ground among American courts¹⁵³ and political officials,¹⁵⁴ Madison, for example, in one of his *Helvidius*

Virginia and Massachusetts, modeled on the English Habeas Corpus Act, would have similarly seemed to be overkill if the writ was available to prisoners outside the state. *See Habeas Corpus Act*, §§ 9-10 (Mass. 1785); *Act of Feb. 21, 1787*, ch. 39, § 8 (N.Y.); *Habeas Corpus Act*, ch. 35, § 2 (Va. 1784).

¹⁵⁰ For example, the eighteenth century law of nations gave states wide discretion to use force when they believed that other states had violated the law of nations. *See* VATTEL, *supra* note 96, at 106-07 (“It is of the greatest importance to nations that the Law of Nations, which is the basis of their peace, be everywhere respected. If anyone openly treads it under foot all may and should rise against that nation; and by thus uniting their forces to punish their common enemy, they will fulfill their duties towards themselves and toward human society, of which they are members.”); *id.* at 8 (“[A]ll Nations may put down by force the open violation of the laws of the society which nature has established among them, or any direct attacks upon its welfare.”); *see also, e.g., Letter from Alexander Hamilton to George Washington* (May 2, 1793), in 14 THE PAPERS OF ALEXANDER HAMILTON 407 (Harold C. Syrett ed., 1969).

¹⁵¹ But note that American legal theory recognized that government could legislate regarding the domestic effects of relations with foreign nations and people. *See, e.g.,* U.S. CONST. art. I, § 8, cl. 10-11; *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 119 (1804); THE FEDERALIST NO. 53 (Madison).

¹⁵² *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 714-15 (2004); Stephens, *supra* note 44, at 463.

¹⁵³ *See, e.g., American Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 545-46 (1818) (stating that an admiralty case based on events outside the United States does not arise under the

essays, distinguished “external laws” designed to preserve “external peace” from “municipal laws” designed to preserve “internal peace.”¹⁵⁵

The distinction between internal municipal law and external international law derived from many sources, including the theories of Blackstone, Locke, Vattel, Pufendorf and other influential writers.¹⁵⁶ According to Montesquieu, for example, the external “right of nations” (or law of nations) governs “the relation that . . . peoples have with one another” while internal “political right” and “civil right” govern, respectively, “the relation between those who govern and those who are governed” “in a society” and “the relation that all citizens have with one another.”¹⁵⁷ He emphasized that the “things that belong to the right of nations must not be decided by the principles of civil laws [. . . or . . .] political laws.”¹⁵⁸ Similarly, Locke taught that the legislature enacts “municipal laws” which operate within the society and for the benefit of its

Constitution and laws of the United States but the law of nations); *Ware v. Hylton*, 3 U.S. (Dall.) 199, 260 (1796) (Iredell, J.) (suggesting that foreign policy is regulated by the law of nations and the discretion of the political branches); *see also* *The Sally*, 12 U.S. (8 Cranch) 382, 384 (1814); *Bingham v. Cabot*, 3 U.S. 19, 26 (1795) (argument of counsel by Mr. Tilghman); *Penhallow v. Doane’s Adm’rs*, 3 U.S. 54, 91 (1795) (opinion of Iredell, J.); *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 475 (1793) (opinion of Jay, J.); *Simpson v. Nadeau*, 1 N.C. 332 (N.C. Conf. 1801) (opinion of Hall, J.); *Camp v. Lockwood*, 1 U.S. (1 Dall.) 393, 402-03 (Pa. 1788).

¹⁵⁴ *See Letter of Sec. of State Thomas Jefferson to Minister George Hammond* (May 29, 1792), in 1 AMERICAN STATE PAPERS: FOREIGN RELATIONS 202 [hereinafter *Jefferson Letter to Hammond*] (stating that England considered the American Revolution an internal rebellion and therefore “did not conduct it according to the rules of war established by the law of nations, but according to her acts of Parliament”); *see also, e.g.*, 26 ANNALS OF CONG. 802-03 (1813) (remarks of Rep. John Lovett). There are, of course, exceptions and nuances to these generalizations. For example, many believed that the law of nations also contained duties which nations owed to themselves, *see, e.g.*, James Wilson, *Of the Law of Nations* (1790), in 1 WORKS OF JAMES WILSON 137 (James D. Andrews ed., 1896), and that both domestic and international law were often ultimately based on the same source, the law of nature or God, *see, e.g.*, Douglas J. Sylvester, *International Law as Sword or Shield? Early American Foreign Policy and the Law of Nations*, 32 N.Y.U. J. INT’L L. & POL. 1, 68-70 (1999).

¹⁵⁵ James Madison, *Letter of Helvidius No. 2* (Aug.-Sept. 1793), in 6 THE WRITINGS OF JAMES MADISON, 1790-1802, at 159-60 (Gaillard Hunt ed., 1906).

¹⁵⁶ 1 BLACKSTONE, COMMENTARIES *69, 108 & 263-64; 4 *id.* at *66-67; CORNELIUS BYNKERSHOEK, MONOGRAPH ON JURISDICTION OVER AMBASSADORS IN BOTH CIVIL AND CRIMINAL CASES 17-18 (Gordon L. Lang trans., 1946) (1744); 2 ALBERICO GENTILI, THREE BOOKS ON THE LAW OF WAR 3, 5 (John C. Rolfe trans., 1933) (1612); CHARLES JENKINSON, DISCOURSE ON THE CONDUCT OF THE GOVERNMENT OF GREAT-BRITAIN, IN RESPECT TO NEUTRAL NATIONS, DURING THE PRESENT WAR 7-8 (1759); SAMUEL FREIHERR VON PUFENDORF, THE LAW OF NATURE AND NATIONS 748-49 & 836 (5th ed. London 1749); JEAN JACQUES ROUSSEAU, A DISCOURSE UPON THE ORIGIN AND FOUNDATION OF THE INEQUALITY AMONG MANKIND 138 (1761 London ed.); 2 THOMAS RUTHERFORTH, INSTITUTES OF THE NATURAL LAW 43-64 (2d. ed. 1774); JAMES TYRRELL, A BRIEF DISQUISITION OF THE LAW OF NATURE xli (2d ed. 1701); 3 VATTEL, *supra* note 96, at 3-4, 6 & 8.

¹⁵⁷ MONTESQUIEU, *supra* note 95, at 7.

¹⁵⁸ *Id.* at 514-15.

members, while “all the transactions, with all persons and communities without the common-wealth,” are entrusted to an executive power of government, charged with “the management of the security and interest of the public” in the external realm.¹⁵⁹ Pennsylvania Judge Alexander Addison summarized this type of thinking, as applied to the United States: “The restrictions of the [U.S.] constitution are not restrictions of external and national right, but of internal and municipal right.”¹⁶⁰ Or as George Taylor, a Virginia legislator, put it in 1798, “municipal regulations, where citizens and others were concerned under the particular laws of the state” were distinguished from “cases between the government and aliens, which arise under the law of nations.”¹⁶¹

There was an intensely practical reason for the internal/external distinction that saw external relations as governed by the more forgiving standards of international law. Locke argued that, compared to domestic matters, foreign affairs “are much less capable to be directed by antecedent, standing, positive laws” because “what is to be done in reference to foreigners . . . must be left in great part to the prudence of those who have this power committed to them.”¹⁶² Similarly, Rutherford wrote that external executive power must often be “discretionary” because “the public understanding cannot direct by settled rules, which have been established beforehand, but must act if it acts at all as occasion offers.”¹⁶³

This view was understood by influential American Founders who argued that the Constitution – a municipal enactment – should not provide rigid, enforceable legal limits to the powers the federal government might need to defend against external aggression. Madison asked in *The Federalist* No. 41:

“With what color of propriety could the force necessary for defense be limited by those who cannot limit the force of offense? If a federal Constitution could chain the ambition and set bounds to the exertions

¹⁵⁹ LOCKE, *supra* note 117, at §§ 146-47; *see also id.* §§ 131, 134.

¹⁶⁰ Alexander Addison, *Analysis of the Report of the Committee of the Virginia Assembly* (1800), in 2 HYNEMAN & LUTZ, *supra* note 97, at 1070. As late as 1936, the Supreme Court stated that, regarding U.S. activities abroad, “operations of the nation . . . must be governed by treaties, international understandings and compacts, and the principles of international law,” rather than “the Constitution [or] the laws passed in pursuance of it.” *United States v. Curtiss-Wright Export Co.*, 299 U.S. 304, 318 (1936). Among other reasons, *Curtiss-Wright* is controversial for its suggestion that the external “power” of the United States government does not derive from the Constitution and laws but from international law and concepts of inherent sovereignty. Whatever the merits of this claim about power, it is a different claim than what the Court suggested about external relations being governed by international instead of municipal law.

¹⁶¹ VIRGINIA HOUSE OF DELEGATES, THE VIRGINIA REPORT OF 1799-1800 TOUCHING THE ALIEN AND SEDITION LAWS 35 (1850) [hereinafter VIRGINIA REPORT] (remarks of George Taylor in 1798).

¹⁶² LOCKE, *supra* note 117, at § 147; *accord id.* § 145.

¹⁶³ RUTHERFORTH, *supra* note 156, at 56, 60, 65.

of all other nations, then indeed it might prudently chain the discretion of its own government and set bounds to the exertions for its own safety. . . . The means of security can only regulated by the means and the danger of attack. They will, in fact, be ever determined by these rules and by no others. It is in vain to oppose constitutional barriers to the impulse of self-preservation.”¹⁶⁴

Alexander Hamilton concurred, arguing in one issue of *The Federalist* that national defense powers “ought to exist without limitation, because it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent and variety of the means which may be necessary to satisfy them. The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed.”¹⁶⁵

D. *The Rights of Aliens within the Country*

Eighteenth and early nineteenth century understandings about the legal status of aliens appear to have been inconsistent with globalism. Under the common law, aliens had fewer rights than citizens in important areas. For example, in England and early America they were largely barred from beneficially owning, devising or inheriting real property, and from voting and holding public or military office.¹⁶⁶ Nevertheless, aliens within the country were under the protection of the sovereign’s municipal laws.¹⁶⁷ Influential writers like Vattel and Blackstone emphasized that aliens residing or sojourning within one’s country were required to obey local laws and, reciprocally, were entitled to the “protection” of the sovereign and the laws while within the country.¹⁶⁸ Blackstone, for example, wrote that “as the prince affords his protection to an alien, only during his residence in this realm, the

¹⁶⁴ THE FEDERALIST NO. 41 (Madison).

¹⁶⁵ THE FEDERALIST NO. 23 (Hamilton). A civil libertarian defense of discretionary federal power against external enemies appears repeatedly throughout the ratification debates: robust national power must exist to protect American liberty against external foreign aggression. THE FEDERALIST NO. 3 (Jay); NOS. 8, 24-26, 29 (Hamilton); *id.* NOS. 41, 45 (Madison).

¹⁶⁶ *See, e.g.*, 1 BLACKSTONE, COMMENTARIES *371-72; 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 56 (1827); 1 ZEPHANIAH SWIFT, A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT 165-66 (1795).

¹⁶⁷ *See, e.g.*, *Constitutional Ordinance* § 3 (Conn. 1776) (“[A]ll the free Inhabitants of this or any other of the United States of *America*, and Foreigners in Amity with this State, shall enjoy the same Justice and Law within this States, which is general for the State, in all Cases proper for the Cognizance of the Civil Authority and Court of Judicature within the same . . .”), in ACTS AND LAWS OF THE STATE OF CONNECTICUT 2 (Timothy Green printer, 1784); MASS. BODY OF LIBERTIES, art. 2 (1641) (“Every person within Jurisdiction, whether Inhabitant or forreiner shall enjoy the same justice and law, that is generall for the plantation, which we constitute and execute one towards another, without partialitie or delay.”), *reprinted in* LUTZ, COLONIAL ORIGINS, *supra* note 6, at 71.

¹⁶⁸ *See* 3 VATTEL, *supra* note 96, at 87, 145 & 371.

allegiance of an alien is confined (in point of time) to the duration of such his residence, and (in point of locality) to the dominions of the British empire.”¹⁶⁹

The general principle that allegiance and protection were reciprocal duties and rights was common ground among many theorists read by the revolutionary generation,¹⁷⁰ and entered mainstream American thinking.¹⁷¹ Consistent with these general understandings, the protective writ of habeas corpus was available to friendly aliens resident or visiting within the country at common law in both England and in the United States at the time of the adoption of the Constitution.¹⁷²

The view that alien residents or visitors are under the protection of the sovereign’s municipal laws so long as they are within the country had roots in the Magna Carta,¹⁷³ and probably also in the Hebrew and Christian bibles. The Hebrew bible, in particular, emphasized equality under the laws for alien residents or sojourners,¹⁷⁴ as did early bilateral treaties of the United States¹⁷⁵ and official statements of U.S. government policy.¹⁷⁶ Treating aliens within

¹⁶⁹ See 1 BLACKSTONE, COMMENTARIES *370; see also *id.* at 369.

¹⁷⁰ See, e.g., J.J. BURLAMAQUI, THE PRINCIPLES OF NATURAL AND POLITIC LAW 28-29 (Thomas Nugent trans., 1791) (1735); 3 HUGO GROTIUS, OF THE RIGHTS OF WAR AND PEACE, ch. 24, at 349 (London 1715); 2 RUTHERFORTH, *supra* note 156, at 33.

¹⁷¹ For eighteenth century examples, see Case of Fries, 3 U.S. 515, 9 F. Cas. 826 (C.C.D. Pa. 1799) (No. 5,126) (Iredell, J.); *Letter of Sec. of State Jefferson to Minister Edmund Genet* (May 15, 1793), in 1 AMERICAN STATE PAPERS: FOREIGN RELATIONS 148; John Adams, *Thoughts on Government* (1776), in 1 HYNEMAN & LUTZ *supra* note 97, at 405; 1 SWIFT, *supra* note 166, at 164. For later examples, see *The Charming Betsy*, 6 U.S. at 120; 3 Op. Att’y Gen. 253, 254 (1837).

¹⁷² See, e.g., *INS v. St. Cyr*, 533 U.S. 289, 301 (2001) (“In England prior to 1789, in the Colonies, and in this Nation during the formative years of our Government, the writ of habeas corpus was available to nonenemy aliens as well as to citizens.”) (citing *Sommersett v. Stewart*, 20 How. St. Tr. 1, 79-82 (K.B. 1772); *Case of the Hottentot Venus*, 104 Eng. Rep. 344 (K.B. 1810); *King v. Schiever*, 97 Eng. Rep. 551 (K.B. 1759); *United States v. Villato*, 2 U.S. (2 Dall.) 370, 28 F. Cas. 377 (No. 16,622) (C.C. Pa. 1797)); see also *United States v. Lawrence*, 3 U.S. (3 Dall.) 42, 49 (1795) (argument of Att’y Gen. Bradford) (stating that a Frenchman in United States could employ the writ of habeas corpus).

¹⁷³ 4 BLACKSTONE, COMMENTARIES *69.

¹⁷⁴ See, e.g., *Leviticus* 24:22 (“Ye shall have one manner of law, as well for the stranger, as for one of your own country: for I am the LORD your God.”); *Deuteronomy* 24:17-18 (“Thou shalt not pervert the judgment of the stranger . . . But thou shalt remember that thou wast a bondman in Egypt, and the LORD thy God redeemed thee thence: therefore I command thee to do this thing.”); *Numbers* 15:16 (“One law and one manner shall be for you, and for the stranger that sojourneth with you.”); *Zechariah* 7:9-10 (“Thus speaketh the LORD of hosts, saying, Execute true judgment, and shew mercy and compassions every man to his brother: And oppress not the widow, nor the fatherless, the stranger, nor the poor.”).

¹⁷⁵ See Treaty of Amity, Commerce and Navigation, U.S.-United Mexican States, arts. XIV-XV (Apr. 5, 1832), 8 Stat. 410; Treaty of Friendship, Limits and Navigation, U.S.-Spain, art. XX, (Oct. 27, 1795) [hereinafter 1795 U.S.-Spain Treaty], 8 Stat. 138; 1785 U.S.-Prussia Treaty, *supra* note 133, art. II; 1783 U.S.-Sweden Treaty, *supra* note 133, art. XVII; Treaty of Amity and Commerce, U.S.-Neth., art. VIII (Oct. 8, 1782), 8 Stat. 32.

¹⁷⁶ See 1 Op. Att’y Gen. 192, 193 (1816); 1 Op. Att’y Gen. 30, 32 (1793).

the country equitably and generously was a refrain of many theorists,¹⁷⁷ and was an emerging norm of the law of nations in the eighteenth century.¹⁷⁸ The strong desire of many eighteenth-century Americans to stimulate economic development¹⁷⁹ and populate their new country by encouraging immigration,¹⁸⁰ would likely have contributed to the understanding that aliens within the country should be under the protection of the laws, as would the American social values of egalitarianism, opportunity, and hospitality to strangers.¹⁸¹

During the debates about the so-called Alien Friends Act in 1798, Jeffersonian Republican members of Congress argued that friendly – *i.e.*, not “enemy” – resident aliens were fully protected by the Constitution, by citing the reciprocal norms protection and allegiance.¹⁸² Given the strong influence of the social compact theory of constitutional government on many Founders, it is not surprising that some Americans, particularly Federalists, disputed that aliens, even those within the United States, were protected by the most important municipal law, the Constitution, because aliens were not parties to the Constitution’s social compact.¹⁸³ As discussed in detail below, there was bipartisan consensus that alien enemies – nationals of a state engaged in hostilities with the United States – were not protected by the Constitution or any other municipal laws, but only by the law of nations.

In sum, for the founding generation there were strong and overlapping traditions of thought that aliens were protected by the municipal laws of society, but only when physically present in the country’s territory during peacetime. Otherwise, aliens were protected only by the looser rules of the law of nations,

¹⁷⁷ See RICHARD HOOKER, AN ABRIDGEMENT OF THE ECCLESIASTICAL POLITY 32 (1773) (stating that the law of nations concerns itself with “the courteous entertainment of strangers”); see also, *e.g.*, VATTEL, *supra* note 96, at 145-48.

¹⁷⁸ See G.F. VON MARTENS, A COMPENDIUM OF THE LAW OF NATIONS FOUNDED ON THE TREATIES AND CUSTOMS OF THE MODERN NATIONS OF EUROPE, Bk. 3, ch. 3 at 83 & Bk. 8, ch. 2 at 273 (William Cobbett trans., 1802) (1795). The importance of treating aliens within the country equally under the law can be seen from the fact that “denial of justice” to alien nationals was viewed as a legitimate reason for the aliens’ home state to resort to war or reprisals against the offending nation. See THE FEDERALIST No. 80 (Hamilton); VATTEL, *supra* note 96, at 230-31. See generally Anthony D’Amato, *The Alien Tort Statute and the Founding of the Constitution*, 82 AM. J. INT’L L. 62, 64-65 (1988).

¹⁷⁹ See FRIEDMAN, *supra* note 106, at 238-39 & n.22 (noting the link between relaxation of bans on alien land ownership and the United States’ interest in economic growth, “build[ing] population and stimulat[ing] the land market”).

¹⁸⁰ See *supra* note 5; see also JAMES H. KETTNER, THE DEVELOPMENT OF AMERICAN CITIZENSHIP: 1608-1870, at 65-247 (1978).

¹⁸¹ See generally RICHARD B. MORRIS, THE FORGING OF THE UNION: 1781-1789, at 163 (1987); GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 222 & 237 (1991).

¹⁸² See, *e.g.*, 8 ANNALS OF CONG. 2012 (1798) (remarks of Rep. Livingston).

¹⁸³ See, *e.g.*, 8 ANNALS OF CONG. 2018 (1798) (remarks of Rep. Otis); VIRGINIA REPORT, *supra* note 161, at 34 (remarks of George Taylor in 1798). See *infra* notes 304-10 and accompanying text.

which gave significant deference to national interest and the discretionary decisions of sovereign governments.

IV. THE TEXTUAL BASIS FOR INCLUSIVE CONSTITUTIONAL NATIONALISM

The constitutional text reflects many of the understandings just discussed. It distinguishes internal and external powers and rights, and municipal and international law. Aliens abroad are protected in several ways, but under international law and diplomacy, which are largely under the substantive control of the political branches of the U.S. government. Habeas corpus is protected, but only domestically. Much of the Bill of Rights is written in language that generally appears to have a domestic limitation, though its descriptions of the rights holders are unrestricted by references to citizenship. By contrast with the internal realm where power is diffused among many institutions and textually limited as to its objects, external national defense powers are concentrated in the President and Congress and textually unlimited. All of this, interpreted on the background of the contemporary attitudes and understandings discussed in Part III, suggests that constitutional rights generally protected U.S. citizens and resident or visiting foreigners, but that aliens abroad would have been protected only by international law, diplomacy, and policy choices of the political branches.

A. Provisions for the Protection of Aliens

An important purpose of the Constitution, visible in its text, was to provide certain judicial and executive protections to foreign nations and foreign nationals.¹⁸⁴ One textual example – by no means the most important – is the President’s authority to “receive Ambassadors and other public Ministers” from foreign countries, who would be expected to spend much of their time attempting to protect the rights and interests of their co-nationals.¹⁸⁵ The Constitution shows the importance it accords to the role of foreign diplomats by protecting them with original jurisdiction in the Supreme Court.¹⁸⁶

A second and more important way that foreigners are protected under the Constitution is through treaties made by the President with the Senate’s consent, enforceable in federal court.¹⁸⁷ In the eighteenth century, as now, treaties

¹⁸⁴ See, e.g., FREDERICK W. MARKS, INDEPENDENCE ON TRIAL: FOREIGN AFFAIRS AND THE MAKING OF THE CONSTITUTION 142-43, 151-52 (1986 ed.); Holt, *supra* note 108, at 1452-53 & 1462-64; Ruth Wedgwood, *Extraterritorial Jurisdiction—Applicability of Constitutional Restraints to U.S. Officials Acting Abroad*, 84 AM. J. INT’L L. 747, 753 (1990).

¹⁸⁵ U.S. CONST. art. II, § 3. Of course, this clause also served many American interests, which were doubtless more important to the founding generation than protection of aliens.

¹⁸⁶ See *id.* art. III, § 2, cl. 2.

¹⁸⁷ U.S. CONST. art. III, § 2, cl. 2; *id.* art. VI, cl. 2. The inclusion in the Constitution of federal judicial power to enforce treaties was intended in part to benefit foreigners. See, e.g., RICHARD H. FALLON ET AL., HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 15 n.79 (4th ed. 1996).

commonly provided that each signatory grant certain rights and protections to the visiting or resident nationals of the other treaty state.¹⁸⁸ By the Supremacy Clause of the U.S. Constitution, treaties are deemed to be the “supreme Law of the Land,” binding on state and federal courts alike; and Article III extends the federal judicial power to cases arising under treaties. A leading purpose of the Constitution was to provide a national government under which treaties and the customary law of nations could be uniformly and fairly applied.¹⁸⁹ And if the new national legislature enacted discriminatory measures against aliens or foreign nations that would hamper America’s foreign policy goals, the President was given a veto.¹⁹⁰

It was common ground among the Founders that aliens, particularly merchants and lenders doing business in the United States, had not been adequately protected by state courts.¹⁹¹ The Constitution’s grants to federal courts of foreign diversity jurisdiction and admiralty-maritime jurisdiction were intended to protect foreigners,¹⁹² as were other provisions.¹⁹³ The Constitution’s promises to observe and enforce treaties and protect creditors were designed to, among other things, serve the strategic goals of avoiding international conflict, promoting commerce and reassuring foreign governments and businessmen that the United States would be a trustworthy and dependable international citizen.¹⁹⁴

¹⁸⁸ See *supra* note 133.

¹⁸⁹ See, e.g., THE FEDERALIST NO. 3 (Jay).

¹⁹⁰ See AMAR, AMERICA’S CONSTITUTION, *supra* note 106, at 143.

¹⁹¹ See *Sosa*, 124 S. Ct. at 2756-58; THE FEDERALIST NO. 42 (Madison); *Remarks of James Madison to Virginia Ratifying Convention*, in 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 583 (Jonathan Elliot ed., 1836) [hereinafter ELLIOT, DEBATES]; Sylvester, *supra* note 154, at 22-25. Foreign diversity jurisdiction in federal courts would help protect foreign lenders and businessmen, see 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1692 (1833); Wedgwood, *supra* note 184, at 753, while federal admiralty jurisdiction over prize cases would protect the foreign owners of ships captured by American privateers or naval vessels, see 1 STORY, *supra*, at § 484.

¹⁹² See FALLON ET AL., *supra* note 187, at 15; THE FEDERALIST NO. 80 (Hamilton); NEUMAN, STRANGERS, *supra* note 9, at 5. Federal removal jurisdiction of aliens’ suits, see *Judiciary Act of 1789*, 1 Stat. 73, 79, ch. 20, § 12, and federal appellate review of state court decisions implicating federal rights, see CHARLES WARREN, THE MAKING OF THE CONSTITUTION 168-69 (Fred B. Rothman & Co. 1993 ed.) (1928), were other ways that the Framers protected foreigners.

¹⁹³ The Constitution protects creditors who loaned money to Americans to fight the Revolutionary War, see 1 STORY, *supra* note 191, at § 470 (describing the purpose of U.S. CONST. art. VI, cl. 1), and bars state governments from passing laws reneging on contracts, see U.S. CONST. art. I, § 10, cl. 1. The Constitution also vastly diminished the ability of individual states to annoy foreign countries through discriminatory taxes on imports. See *id.* art. I, § 8, cl. 3; *id.* art. I, § 10, cl. 2.

¹⁹⁴ See AMAR, AMERICA’S CONSTITUTION, *supra* note 106, at 299; Sylvester, *supra* note 154, at 19-26.

Constitutional protection for aliens, including those residing abroad, can also be seen in the grant of power to Congress to “define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations.”¹⁹⁵ Foreigners as well as Americans could easily be the target of piracy and felonies committed on the high seas. The law of nations – the second head of Congress’ Define and Punish power – directly concerned the interests and rights of foreigners. Madison and others viewed the impunity with which American states and individuals had committed “[v]iolations of the law of nations and of treaties” to the detriment of foreigners as one of the principal vices of government under the Articles of Confederation.¹⁹⁶ As Professor Neuman notes, Article III of the Constitution “appears to ‘establish Justice’ for foreign citizens, subjects and even ambassadors by designing tribunals that will decide their cases impartially.”¹⁹⁷

These structures protecting aliens are not best understood as evidence of globalism. By recognizing the importance of aliens becoming citizens,¹⁹⁸ the Constitution signaled that citizens would have greater rights. Moreover, the Constitution’s protections of foreigners had inward-looking instrumental purposes: to promote commerce, increase population, and prevent friction with foreigners and foreigner nations from ripening into war or otherwise harming the United States.¹⁹⁹ The Constitution is not particularly concerned with the protection of foreigners for their own sake.

The constitutional text and structure display a preference for the political branches to manage the substance of external relations, even in the areas where the Constitution gives the courts a role in protecting foreigners. Some important protections for aliens, such as diplomatic protection and rules for naturalization, appear to be, as a textual matter, under the discretionary control of the President and Congress, respectively, with no role for the courts. The substantive content of other provisions protecting aliens are also controlled by the political branches, such as rights granted under treaties.²⁰⁰ The Constitution also gives the political

¹⁹⁵ U.S. CONST. art. I, § 8, cl. 10.

¹⁹⁶ James Madison, *Vices of the Political System of the United States* (1787), in 9 THE PAPERS OF JAMES MADISON 349 (1977); see also MARKS, *supra* note 184, at 142.

¹⁹⁷ NEUMAN, STRANGERS, *supra* note 9, at 5.

¹⁹⁸ U.S. CONST. art. I, § 8, cl. 4; *id.* art. IV, § 2.

¹⁹⁹ For example, the Constitution’s provision for better enforcement international law vis-a-vis foreigners had the instrumental purpose of preventing conflicts with foreign countries that might harm the United States. See THE FEDERALIST NO. 3 (Jay); 1 FARRAND, RECORDS, *supra* note 13, at 19 (remarks of Edmund Randolph); *id.* at 316 (remarks of James Madison); 1 STORY, *supra* note 191, at § 470. The grants of federal court jurisdiction over maritime law and foreign diversity cases, and Congress’ power to define and punish offenses against the law of nations were justified by instrumental arguments that they would benefit the United States and its people, primarily by increasing commerce. See THE FEDERALIST NO. 80 (Hamilton); 3 STORY, *supra* note 191, at § 1160.

²⁰⁰ Unless one believes that the President and Senate’s treaty-making power is constrained by Bill of Rights guarantees to the nonresident foreigners affected by a treaty. This is an

branches some control over the substance of the non-treaty law to be applied in court cases concerning aliens. The content of mercantile, admiralty and maritime law, and other form of customary international law, can be controlled to some extent by Congress – subject to presidential veto – through constitutional provisions such as the Define and Punish Clause, the Foreign Commerce Clause, the power to make rules concerning “captures,” and the combination of the grant of federal court jurisdiction with Congress’ necessary and proper legislative power.

In the eighteenth century, many violations of international law were not thought to give rise to private rights of action by the aggrieved individual, but only state-to-state political remedies. The primacy of the political branches is seen in the fact that the Constitution expressly makes treaties – negotiated by the President and approved by the Senate – the supreme law of the land, while omitting any mention of judge-made customary international law. Reading the Supremacy Clause together with the Define and Punish Clause of Article I, we see that the Constitution allows the political branches to “punish” violations of the customary law of nations, but makes no explicit provision for the political branches to *be punished* by courts for violations of customary international law. Besides controlling courts through substantive legislation, Congress is given important powers to control the jurisdiction or even the existence of federal courts. In sum, the constitutional text shows a role for federal courts in managing certain foreign relations disputes but gives the last word to the political branches.²⁰¹

B. Textual Indications that the Constitution Protects the People in the United States

As Professor Akhil Amar has noted, the Preamble and the Supremacy Clause “mark the Constitution’s most sustained meditation on itself.”²⁰² Both suggest that the Constitution is not globalist. The Supremacy Clause states that the Constitution and laws and treaties of the United States “shall be the supreme Law of the Land,”²⁰³ not of or for any other place. The Preamble states that the Constitution is intended to “insure domestic Tranquility”—not foreign. “Liberty” is “secure[d]” only to “ourselves and our Posterity.” The

extravagant idea, but it does seem to follow from the logic of some globalist arguments. After all, *Reid v. Covert*, the most important Supreme Court case for globalists, held that bilateral treaty provisions cannot trump Bill of Rights protections due to Americans abroad.

²⁰¹ Cf. SOFAER, WAR, *supra* note 44, at 5-6. This stands in some contrast to the interpretations of the Constitution. Although the political question doctrine and other rules of constitutional law often allow the political branches of the U.S. government a say in how the Constitution is interpreted, especially in regards to foreign affairs, it is nevertheless true, as a general matter, that the federal courts are the leading expounders of the meaning of the Constitution. Cf. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

²⁰² AMAR, AMERICA’S CONSTITUTION, *supra* note 106, at 299.

²⁰³ U.S. CONST. art. VI, § 2 (emphasis added).

Constitution is designed, and Congress given the power, to “provide for the common defense.” Textually, this refers to the defense of “the People of the United States” and the “Union,” not of any foreign people or places. The Preamble closes by announcing that the entire Constitution is “ordain[ed] and establish[ed] for the United States of America” – not for anyone else.²⁰⁴

The U.S. Constitution further discloses the relative value it places on the lives and liberties of residents in the United States versus foreigners through its provisions for political representation and protection of residents of the United States and lack of the same for anyone residing outside the states. People in territories of the United States and foreign nations, although expressly contemplated by the Constitution,²⁰⁵ have no representation in the House, the Senate or the electoral college.²⁰⁶ The Constitution directs that the federal government “protect” each state “against Invasion” and, upon request from the state government, from “domestic Violence.”²⁰⁷ Territories of the United States and other areas or peoples outside of the states are not so protected. The Constitution also directs the federal government to protect the political liberty of the people of the states, but no other peoples or places.²⁰⁸ The federal government guarantees that “[t]he Citizens of each State” receive protection and benefit of “all Privileges and Immunities of Citizens in the several States.”²⁰⁹ Foreigners (and even resident aliens) are excluded.

The Privileges and Immunities Clause cuts against a globalist reading of the Constitution. As Madison noted in *The Federalist*, “[t]he powers delegated by the proposed Constitution to the federal government are few and defined. . . . [These powers] will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce. . . . The operations of the federal government will be most extensive and important in times of war and danger.”²¹⁰ As a result, the liberties of people in America would be much

²⁰⁴ See Christopher C. Langdell, *The Status of Our Territories*, 12 HARV. L. REV. 365, 372-73 (1899) (“[T]here is a very strong presumption that when a constitution is made by a sovereign people, it is made exclusively for the country inhabited by that people, and exclusively for that people regarded as a body politic. . . . The preamble, however, does not leave it to presumption to determine for what regions of country and for what people the Constitution of the United States was made.”); see also *In re Ross*, 140 U.S. 453 (1891) (to the same effect); AMAR, BILL OF RIGHTS II, *supra* note 103, at 170 (similar).

²⁰⁵ U.S. CONST. art. IV, § 3, cl. 2; *id.* art. III, § 2, cl. 1.

²⁰⁶ See *id.* art. I, § 3, cls. 1 & 3; *id.* art. II, § 1, cl. 2.

²⁰⁷ See *id.* art. IV, § 4.

²⁰⁸ See *id.* art. IV, § 4. A duty of the federal government to protect the District of Columbia, though not part of any state, is implied by the purpose of the creation of the District (to be “the Seat of the Government of the United States”). Cf. *In re Neagle*, 135 U.S. 1 (1890) (federal government has implied constitutional power to protect itself).

²⁰⁹ See U.S. CONST. art. IV, § 2, cl. 1.

²¹⁰ THE FEDERALIST NO. 45 (Madison). Many Anti-Federalists disagreed with this. See, e.g., *Dissent of the Minority of the [Pennsylvania Ratifying] Convention* (Dec. 1787), in 2

more likely to be put at issue in their frequent interactions with state and local governments, which regulated the domestic field, than their interactions with the tiny, externally-focused federal government. Yet noncitizens were excluded from the Privileges and Immunities Clause's guarantee of rights against state governments. This choice arguably speaks to the value the Constitution places on the rights of aliens versus citizens.

The Article I, section 8 powers of Congress are another source of textual evidence that the Constitution is designed to protect the people in the United States to the exclusion of foreigners. The first power granted is to tax and spend "for the common Defence and general Welfare of the United States."²¹¹ This provision textually cross-references the Preamble; both are express directions that the national government concern itself with the care and protection of the people and territory of the United States.²¹² Article I, section 8 contains numerous powers which are designed to improve the domestic commercial prosperity of the United States. At the same time, Article I allows the United States to use unbridled coercion externally against foreigners. Congress can, for example, "declare War." There are no standards, no qualifications, no limits, no permissible or impermissible goals expressed by the constitutional text. The lesser war power of Congress to "grant Letters of Marque and Reprisal" is also textually unlimited. As Chief Justice Marshall put it, the Constitution "confers absolutely" the war power.²¹³

Unbridled constitutional powers to use force externally are distinguished from the internal powers, which are circumscribed as to the objects of the use of force. Internal force only may be used to the extent necessary to "execute the Laws of the Union," "suppress Insurrections," or "on Application" of the state government affected, protect states "against domestic Violence."²¹⁴ The Constitution's textual distinction between militia and army is suggestive of greater solicitude for the lives and liberties of Americans. The military is placed firmly under civilian control by the United States government, insuring that its strength, while needed against external foes, would not be turned inward to threaten domestic liberties. The militia, made up of part-time citizen-soldiers, arguably may only be used domestically.²¹⁵ This contrasts with the absence of territorial limitation on the deployment of "Armies" and the "Navy."²¹⁶ The use

DOCUMENTARY HISTORY, *supra* note 13, at 628 (complaining that the Constitution will effectuate the "total destruction of the state governments").

²¹¹ U.S. CONST. art. I, § 8, cl. 1.

²¹² *Cf.* 4 ANNALS OF CONG. 170-71 (1794) (remarks of Rep. Madison) (suggesting that Congress may lack constitutional power to spend "the money of their constituents" on relief for French refugees).

²¹³ *American Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 542 (1828).

²¹⁴ U.S. CONST. art. IV, § 4.

²¹⁵ *Id.* art. I, § 8, cl. 15 (Congress can call forth the militia to "suppress Insurrections and repel Invasions").

²¹⁶ *See id.* art. I, § 8, cls. 12-13.

of the territorially-limited militia to “execute the laws” is a textual cross-reference to Article II, which commands the President to “take Care that the Laws be faithfully executed.”²¹⁷ The President is therefore empowered to use the militia to the extent necessary to ensure that the rule of law prevails within the United States. There is no similar provision for external relations to be governed by domestic law.

The constitutional text is therefore fairly explicit in describing the personal and territorial scope of the people who are protected by the government it creates. The people protected are the same people who ordained and established the Constitution and who are politically represented by the government offices created under the Constitution: the People of the United States. The constitutional text and structure creates an internal republic of laws and liberty protected against the external world by an armored shell of force.

This reading of the Constitution is supported by a structural inference from the document’s dispersion of internal, domestic powers and concentration of external, foreign affairs powers. The constitutional text describes an intricate diffusion of power internally among state courts, state legislatures, state executives, the people of the states, the U.S. House of Representative, the U.S. Senate, the federal courts and the President. The phenomena I am describing are, of course, federalism, popular sovereignty and the separation of powers.²¹⁸ Shared powers, popular involvement, deliberation and check and balances are hallmarks of the domestic system structured with diffused powers. In external relations, the opposite is the case. Power is concentrated in the federal government, specifically in Congress and the President, while the states²¹⁹ and the people²²⁰ are largely excluded, in order to promote the initiative, efficiency,

²¹⁷ *Id.* art. II, § 3, cl. 4.

²¹⁸ See generally Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1442-44, 1448-50 (1987).

²¹⁹ See, e.g., U.S. CONST. art. I, § 8, cls. 1, 3, 11-13; *id.* art. I, § 9, cls. 5-6; *id.* art. I, § 10, cls. 1-3. See generally *United States v. Belmont*, 301 U.S. 324, 330 (1937) (discussing federal supremacy in the area of foreign affairs).

²²⁰ Private citizens are excluded in many ways from foreign relations. Influential Founders thought that juries should not hear cases arising under the law of nations, see THE FEDERALIST NO. 83 (Hamilton); *Letter from Thomas Jefferson to James Madison* (Dec. 20, 1787), in 12 THE PAPERS OF THOMAS JEFFERSON 440 (Julian P. Boyd ed., 1955), and indeed admiralty and maritime cases under the new Constitution were tried to the court, see *Judiciary Act of 1789*, ch. 20, 1 Stat. 73, 77; *The Sarah*, 21 U.S. (8 Wheat.) 391, 394 (1823). Any potential role of private individuals in foreign affairs was also limited by the Constitution’s provision for treason prosecutions and its concomitant implicit grant of power to Congress to determine the identity of the “Enemies” of the United States to whom Americans are forbidden to provide “Aid and Comfort.” U.S. CONST. art. III § 3. Early constitutional history confirms that Congress and the President thought it proper to exclude private individuals from foreign and military affairs. The Neutrality Act of 1794 barred individuals within the United States from planning or launching armed attacks against nations at peace with the United States, see 1 Stat. 381, ch. 50 (1794), while the Logan Act of 1799 criminalized many kinds of unauthorized communications by U.S. citizens with foreign governments, see 1 Stat. 613, ch. 1 (1799); see also PETER M. SHANE &

flexibility and power needed to protect the United States against external enemies.²²¹ That the key structural checks on government power and protections for civil liberties are active domestically and nearly absent externally suggests a Constitution designed for the benefit of people within the United States as against people outside the United States. This inference is strengthened by looking at which bodies exercised the federal government's law-making powers. Domestic legislation, which would primarily affect the people of the United States, could only be enacted by the combination of the House of Representatives, elected directly by the people, the Senate, and the President. By contrast, foreign affairs legislation – treaties – are enacted without the participation of the people's House.²²²

C. The Bill of Rights

To avoid the fallacy of dis-integration, all of the foregoing provisions of the Constitution must be used as interpretive context for reading the general language that the Bill of Rights uses to describe the rights holders (“person,” “people,” “accused”). Besides failing to consider the Constitution as a whole, there are real weaknesses in globalists’ textual and originalist claims about the Bill.

1. Contemporary Conceptions of the Bill of Rights

Globalists place too much weight on the generality of the language in the Bill of Rights. For one thing, the generality of the language in the Bill is overdetermined; the Bill's language is general and unrestricted in multiple ways at once. As David Currie has noted, “[e]xcept for the First and Seventh amendments, all provisions of the Bill as adopted are phrased in general terms that on their face seem equally applicable to both federal and state authorities. . . . Yet it was abundantly clear from the outset that none of these provisions was meant to limit the actions of state governments.”²²³ The Constitution is filled with other examples of this. Despite its absolutist phrasing (“Congress shall make no law . . .”), the First Amendment has never been interpreted to ban *all*

HAROLD H. BRUFF, SEPARATION OF POWERS LAW: CASES AND MATERIALS 636-37, 853-54 (2d ed., 2005) (citing the Neutrality and Logan Acts of examples of Congress and the President exercising their constitutional prerogative to exclusively manage foreign affairs).

²²¹ See, e.g., THE FEDERALIST NOS. 70, 74 (Hamilton); SOFAER, WAR, *supra* note 44, at 45-46; 1 STORY, *supra* note 191, at § 470.

²²² See generally JOHN YOO, THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11, at 23 (2005).

²²³ CURRIE, *supra* note 108, at 114. It was not until 1833 that the Supreme Court squarely held that the Bill of Rights was binding on the federal government only, in *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243 (1833). See generally Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1198-1215 (1992).

laws that abridge speech or religious exercise.²²⁴ Likewise, the universal-sounding protections of the Fourth, Fifth and Sixth Amendments have never been thought to cover many military activities during wartime.²²⁵ Another example is the Constitution's use of the word "person." Although the term is a general one, it is used in several places where it is clear that it does not intend to refer to all persons everywhere. For example, slaves are referred to as "persons" three times.²²⁶ The Constitution refers to a "person" accused of treason, but plainly this cannot comprehend aliens abroad with no prior connection to the United States.²²⁷ The Constitution requires that the President, Senators, and members of the House be citizens,²²⁸ but elsewhere refers to them as "person[s]."²²⁹ In sum, that general language is susceptible of broad interpretations does not mean that all interpretations are equally plausible. This does rule out that, say, constitutional "persons" might include aliens abroad; but it is a reason for interpretive caution.

The problems with a literalist reading of constitutional language is heightened by the fact that, in practical usage, words like "person" are almost inherently indistinct in scope. This can be seen in the bills of rights contained in state constitutions written in the aftermath of the Revolution. For example, Article 8 of Pennsylvania's Declaration of Rights states that "*every member of society* hath a right to be protected in his enjoyment of life, liberty and property."²³⁰ But the very next article states: "nor can *any man* be justly deprived of his liberty except by the laws of the land, or the judgment of his peers."²³¹ Because the substantive right in each article appear to be almost

²²⁴ See, e.g., *Gregory v. City of Chicago*, 394 U.S. 111, 125 (1969) (Black, J., concurring) ("Speech and press are, of course, to be free, so that public matters can be discussed with impunity. But picketing and demonstrating can be regulated like other conduct of men.")

²²⁵ See *Eisentrager*, 339 U.S. at 788; *United States v. Chem. Found. Inc.*, 272 U.S. 1, 11 (1926); *Juragua Iron Co. v. United States*, 212 U.S. 297, 308 (1909); *Stewart v. Kahn*, 78 U.S. (11 Wall.) 493, 506 (1870); *The Prize Cases*, 67 U.S. 635, 672-73 (1862); cf. *Jefferson Letter to Hammond*, *supra* note 154, at 201 n.± ("[I]t is a condition of war, that enemies may be deprived of all their rights.")

²²⁶ U.S. CONST. art. I, § 2, cl. 3, art. I, § 9, cl. 1, art. IV, § 2, cl. 3. See Remarks of James Iredell to North Carolina Ratifying Convention, 4 ELLIOT, DEBATES, *supra* note 191, at 106 ("The northern delegates, owing to their particular scruples on the subject of slavery, did not choose the word slave to be mentioned [in the Constitution].")

²²⁷ Cf. *United States v. Palmer*, 16 U.S. 610, 632 (1818) (construing the words "any person or persons" in the treason statute and noting that, though phrased in "general terms," the "words are necessarily confined to any person or persons owing permanent or temporary allegiance to the United States").

²²⁸ See U.S. CONST. art. I, § 2 cl. 2 (House); *id.* art. I, § 3 cl. 3 (Senate); *id.* art. II, § 1, cl. 5 (President).

²²⁹ See *id.* art. I, § 7 cl. 2 (referring to members of Congress as "Persons voting for and against the Bill"); *id.* art. II, § 1 cl. 3 (referring to candidates for the Presidency as "Persons"); *id.* amend. XII (same).

²³⁰ PENN. CONST. of 1776, Decl. of Rights, art. 8 (emphasis added).

²³¹ *Id.* art. 9; see also VT. CONST. of 1786, ch. 1, arts. 10 ("every member of society") & 11 ("any man").

identical, it would be strange if Pennsylvania intended that the difference in language should delimit two distinct categories of rights-holders. And it would also be somewhat strange if Pennsylvania had in mind a category of rights-holders truly distinct from those protected by, say, Massachusetts' similar clause ("*Every individual of the society* has a right to be protected by it in the enjoyment of his life, liberty, and property, according to standing laws"²³²).

If the differences in language signified differences in coverage, one might have expected to see public debate about word choice during the framing of the U.S. Bill of Rights. Instead, precise word choice to describe the rights-holders sometimes seems to have been an afterthought. The Virginia ratifying convention recommended, in June 1788, a series of constitutional amendments in the nature of a bill of rights for the federal Constitution. James Madison, the principal drafter of the U.S. Bill of Rights, was a leading member of the Virginia convention. Although the due process-type clause in the Virginia Bill of Rights of 1776 protected every "man," the 1788 recommendation protected every "freeman,"²³³ a more restrictive category. The U.S. Bill of Rights then used the word "person." Similarly, New York's ratification convention suggested a First Amendment-style assembly clause protected "the People," while its petition clause, found in the very same section, protected instead "every person."²³⁴ A similar variability in wording is found in the Declaration of Rights of the 1780 Massachusetts Constitution. Many rights are described as being held by "the people," while others are for "subjects." A few are for "inhabitants," "individual[s] of the society," "persons," and "citizen[s]." In all of these precursors to the U.S. Bill of Rights, it is hard to discern a comprehensive political theory that explains all of the great variability in wording. For example, in the Massachusetts Constitution the seemingly foundational and universal right to be tried only by independent and impartial judges is reserved for "citizen[s]," while the right to jury trial is given to "any person," and the right to "obtain justice freely, and without being obliged to purchase it" belongs to "[e]very subject of the commonwealth."²³⁵

In sum, there are reasons to be skeptical of our ability of discern important constitutional distinctions in the choice among various general words to describe rights-holders. The idea that aliens abroad would be protected by municipal rights found in the Constitution does not appear to be consistent with the debates and conceptions of the founding generation about, for example, the status of aliens, the territorial limits of law, and the distinction between internal and external laws and powers. This counsels against reading general language in the

²³² MASS. CONST. of 1780, Decl. of Rights, art. 10.

²³³ Ratification of the Constitution by the State of Virginia (June 26, 1788), in 2 DEP'T OF STATE, DOCUMENTARY HISTORY, *supra* note 102, at 379.

²³⁴ Ratification of the Constitution by the State of New York (July 26, 1788), in 2 *id.* at 192-93.

²³⁵ MASS. CONST. of 1780, Decl. of Rights, arts. 11, 12 & 29.

Bill of Rights in that manner. On the other hand, strong and overlapping currents of eighteenth century thought held that aliens within a sovereign's territory were entitled to the protection of the laws of that place. This vastly increases the plausibility of finding that the general language in the Bill encompasses aliens within the United States.

2. *The Amendments*

A few amendments receive the bulk of the globalists' attention, notably the Fourth and Fifth. On the other hand, there are several – the Second and Third – that are essentially ignored by globalists, likely because it would be absurd to think of them as protecting aliens abroad. But considering the Bill as a whole is crucial. All ten amendments were debated and adopted at the same time. In addition, the amendments all share the general, unrestricted language that globalists point to as evidence of applicability abroad. It is unfair to stack the deck in favor of globalism by simply ignoring the amendments that cut most strongly against it.

First Amendment. The language of the Amendment is broad and general—the rights-holders are “the people.” And it is written as an absolute deprivation of power—“Congress shall make no law.” For many globalists, these are the textual hallmarks of rights which should apply to aliens abroad.²³⁶ Yet it is rather incongruous to think of the Speech, Press, Assembly and Petition Clauses as limits on the U.S. government in favor of aliens abroad. The text and history of the antecedents of the Amendment²³⁷ show that the types of assembling, speaking, writing, publishing, reading and petitioning that are protected by these Clauses were primarily about the relation between the government and the governed.²³⁸ It would be surprising if the Constitution were to grant rights intimately related to popular sovereignty to aliens abroad, especially in light of the widespread concern among the Founders about pernicious foreign intrigue and foreign influence on the nascent U.S.

²³⁶ As noted in *supra* note 46, since *Verdugo-Urquidez* distinguished between “the people” and “persons,” it has become common for globalists to assert that parts of the Bill of Rights protecting “persons” are broader than parts, like the First Amendment, that protect “the people.”

²³⁷ *E.g.*, CONTINENTAL CONG., DECLARATION & RESOLVES (Oct. 14, 1774); MASS. CONST. of 1780, Decl. of Rights, arts. 16, 19, 21-22; PENN. CONST. of 1776, Decl. of Rights, art. 16; ENGLISH BILL OF RIGHTS (1689).

²³⁸ See AMAR, BILL OF RIGHTS II, *supra* note 103, at 29-31. That is why Justice Story could comment that the petition and assembly rights “would seem unnecessary to be expressly provided for in a republican government, since it results from the very nature of its structure and institutions.” 3 STORY, *supra* note 191, at § 1887. I do not mean to suggest that the First Amendment did not or cannot protect any other types of expression; my point is that popular sovereignty was a core purpose of the Amendment, and that this core purpose does not appear to be consistent with globalist ideals.

government.²³⁹ A textual methodology leads to the same conclusion, if one finds it significant that “the people” whose popular sovereignty rights are protected by the First Amendment is the same group (“the people of the several States”) who, as provided in Article I, vote for members of Congress, and who, according to the Preamble, ordained and established the Constitution for themselves and their posterity.²⁴⁰

The religion clauses of the First Amendment do not describe the rights holders but instead are phrased as restraints on Congress, perhaps suggesting broad or universal applicability. But the major purposes of the Clauses – for example, to be a bulwark against government tyranny; to prevent internal strife among different sects; to prevent establishment of a state religion²⁴¹ – suggest protection of domestic interests.²⁴²

Second Amendment. It is very hard – perhaps impossible – to conceive that the Constitution would protect a right to bear arms on behalf of noncitizens abroad. The first clause’s reference to the militia of the several states also anchors the Amendment to the domestic realm, notwithstanding its otherwise general language.

Third Amendment. This is the only explicit constitutional limit on the tactical exercise of Commander-in-Chief powers. Not even globalists would suggest that this Amendment grants such a check on the Commander-in-Chief’s discretion when he is operating the army abroad; it would be too inconsistent with deep-rooted constitutional concepts.²⁴³ The historical antecedents of the

²³⁹ See U.S. CONST. art. I, § 9, cl. 8 (barring U.S. government officers and employees from receiving things of value from foreign governments); see also, e.g., 2 FARRAND, RECORDS, *supra* note 13, at 68-69 & 235 (remarks of Morris); 2 *id.* at 112, 216 & 271-72 (remarks of Mason); 2 *id.* at 235 (remarks of Pinckney); THE FEDERALIST NOS. 22, 59 & 68 (Hamilton); *id.* NO. 62 (Madison); *Letter of John Jay to George Washington* (July 25, 1787), in 3 *id.* at 61; *Letter of Thomas Jefferson to James Madison* (Dec. 20, 1787), in 8 DOCUMENTARY HISTORY, *supra* note 13, at 251; *A Letter of His Excellency Edmund Randolph, Esq.* (Oct. 10, 1787), in 1 in 1 THE DEBATE ON THE CONSTITUTION 603 (Bernard Bailyn ed., 1993); *Letter of John Adams to Thomas Jefferson* (Dec. 6, 1787), in 1 *id.* at 473.

²⁴⁰ See *Verdugo-Urquidez*, 494 U.S. at 265-66 (reading “the people” as a term of art referring to “a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community”); see also AMAR, BILL OF RIGHTS II, *supra* note 103, at 26-30, 48-49, 64-68, 120-22 (reading “the people” in the Bill of Rights as a “collective noun” referring to “We, the people” in the Preamble).

²⁴¹ See, e.g., James Madison, *Memorial and Remonstrance against Religious Assessments* (1785), in 1 HYNEMAN & LUTZ, *supra* note 97, at 631-37; *Remarks of Iredell to the North Carolina Ratifying Convention* (1788), in 4 ELLIOT, DEBATES, *supra* note 191, at 191-200.

²⁴² On the other hand, the Founders’ concerns about the potential corruption of religion by entanglement with government could have salience if the U.S. government attempted to establish a religion abroad among foreigners.

²⁴³ Cf. *Eisentrager*, 339 U.S. at 788 (disparaging the view that it could somehow be considered “unconstitutional for the Government of the United States to wage a war in foreign parts”).

Amendment suggest that it protects the people against their own government.²⁴⁴ So although the language is general (“any house”), and the Amendment is written as an absolute deprivation of power (“No soldier . . .”), it is implausible to think that it protects aliens abroad.

Fourth Amendment. *Verdugo-Urquidez’s* textual reading of the term “the people” in the Preamble, Article I, and the Second, Third, Fourth, Ninth and Tenth Amendments has been discussed above, as have reasons to be skeptical of drawing much meaning from the difference between “people” and “persons.” Historical evidence of the Amendment’s purposes – protecting the homes and private effects of Americans against overzealous law enforcement using general warrants²⁴⁵ – points toward a domestic limitation.²⁴⁶ The text of the Amendment certainly does not foreclose a globalist reading.²⁴⁷ But without the globalist clear statement rule, the text provides no support for globalism either.

Judicial Process Rights. The Fifth through Eighth Amendments concern primarily judicial processes and procedural rights in the courts of the United States. The bill to establish the federal court system in the United States and Madison’s proposed Bill of Rights were both debated in Congress during the summer and fall of 1789; these texts are, in important respects, *in pari materia*.²⁴⁸ The Bill of Rights, adopted against the background of a wholly domestic court system, presupposed the existence of complex judicial institutions and processes, such as courts, courthouses, judges, magistrates, clerks, prosecutors, and grand and petit juries. The requirement of the existence of institutions in order to implement constitutional “process” rights seems somewhat at odds with the idea that these constitutional rights would be available to aliens abroad. Consistent with this, the text of the Sixth Amendment appears to contemplate providing rights only during “criminal prosecutions” held in a “State.”²⁴⁹ The other procedural amendments lack express geographic

²⁴⁴ See DECLARATION OF INDEPENDENCE (1776) (criticizing the King “for quartering large bodies of armed troops among us” – i.e., in America); PETITION OF RIGHT art. VI (1628) (protesting the quartering of English troops within “the realm” – i.e., England).

²⁴⁵ See, e.g., THOMAS M. COOLEY, TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 299-308 (1868); Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 553 & 601-10 (1999).

²⁴⁶ See *Verdugo-Urquidez*, 494 U.S. at 267.

²⁴⁷ Some precedents for the Fourth Amendment named the rights-holders are “subjects” or “citizen[s].” See Davies, *supra* note 245, at 595-96. This might provide some support for viewing the term “people” in a more globalist fashion.

²⁴⁸ See BERNARD BAILYN, TO BEGIN THE WORLD ANEW 106 (2003).

²⁴⁹ See *United States v. Balsys*, 524 U.S. 666, 672 (1998); *Cook v. United States*, 138 U. S. 157, 181 (1891).

limitations, but, as a textual matter, are rooted in federal courts proceedings²⁵⁰ which, under the Judiciary Act of 1789, could only occur in the United States.

This sketch of the Amendments as a judicial process framework is not dispositive of globalist arguments. There could exist rights that are enforced in judicial proceedings yet protect against harms that occur out of court, perhaps even out of the United States. And of course procedural rights could be applicable in other federal fora besides Article III courts located in the United States. The Fifth Amendment seems to recognize this potential by excepting from the grand jury requirement “cases arising” in the military and militia “when in actual service in time of War or public danger.” A similar exception has long been found by implication in the Sixth Amendment.²⁵¹ This carve-out for U.S. military courts suggests a structural reason to reject a globalist argument that alien combatants should be protected by the Bill of Rights: It would be strange to read the Bill as providing greater benefits to those persons than to American soldiers.²⁵²

Fifth Amendment’s Due Process Clause. As a textual and historical matter, the core meaning – but, again, not the only possible meaning – of the Due Process Clause is a quotidian one, consistent with this domestic judicial framework. This may seem crabbed or strange at the current time in our constitutional history, because we have assimilated the broad conceptions of “due process of law” created by the incorporation of the Bill of Rights against the U.S. states through the Due Process Clause of the Fourteenth Amendment.

Things were different in 1789. “Due process of law” was an English common law term which Sir Edward Coke identified with the phrase “by the law of the land” in the Magna Carta.²⁵³ Coke taught that these terms meant using the

²⁵⁰ The Seventh Amendment suggests that it applies only “in any Court of the United States.” U.S. CONST. amend. VII. The Eighth Amendment uses commonly-understood terms of the judicial process (“bail,” “fines,” “punishments”). The Fifth Amendment is likewise rooted in federal court procedures and rules: the grand jury, double jeopardy, the privilege against self-incrimination. Its text speaks the language of courts: “indictment,” “crime,” “offence,” “cases,” “witness,” “criminal case.”

²⁵¹ See *Ex parte Quirin*, 317 U.S. 1, 40 (1942); 10 ANNALS OF CONG. 596 (1800) (remarks of Rep. John Marshall).

²⁵² *Eisentrager*, 339 U.S. at 783 (noting the absurdity of reading the Fifth Amendment to accord more protections to alien enemy soldiers abroad than to the U.S. servicemen fighting them); see also Laurence H. Tribe, *Trial by Fury*, THE NEW REPUBLIC, at 18, 20 (Dec. 10, 2001) (offering a heavily qualified defense of aspects of President Bush’s November 2001 military tribunal order and noting that “[w]e consider military tribunals sufficiently impartial to judge our own military personnel accused of crime. Why should members of Al Qaeda and those who aid them enjoy a constitutional right to a theoretically purer form of justice than our own soldiers?”).

²⁵³ 1 EDWARD COKE, SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 50-53 (1796 ed.). See generally MAGNA CARTA § 39 (1215) (“No freemen shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land.”).

customary and fundamental common law judicial procedures in proceedings where the life, liberty or property of a subject was at issue.²⁵⁴ It is commonly thought that the founding generation understood “due process of law” as Coke had.²⁵⁵ Alexander Hamilton said as much in a pamphlet of 1784 and a speech in 1787,²⁵⁶ as did John Marshall in 1800.²⁵⁷ Indeed, there seems to be general agreement that the original understanding of the Due Process Clause was consistent with Coke’s earlier teachings.²⁵⁸ A unanimous Supreme Court, in its first case discussing the Clause at length, interpreted it this way.²⁵⁹

In the Constitution’s Bill of Rights, the customary and fundamental common law procedures identified by Coke were largely secured by other provisions besides the Due Process Clause.²⁶⁰ Some have suggested that the Clause was therefore almost irrelevant.²⁶¹ But reading the Clause as only a redundancy is not an accepted mode of textual analysis.²⁶² It must mean something more, but how much more? and what, exactly? There is some textual and drafting evidence that the Clause expressed broad, aspirational values.²⁶³ It is undeniable that the Due Process Clause, on its face, speaks in “relatively universal term[s],” as Chief Justice Rehnquist noted.²⁶⁴ Can it therefore be interpreted, based on historical or textual evidence, to grant rights to aliens abroad?

²⁵⁴ COKE, *supra* note 253, at 52-53.

²⁵⁵ AMAR, BILL OF RIGHTS II, *supra* note 103, at 200-02; 2 BLACKSTONE’S COMMENTARIES WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES 137 & n.24 (1803, ed. St. George Tucker); 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW *13 (12th ed. 1873); LEVY, *supra* note 107, at 248; 3 STORY, *supra* note 191, § 1783.

²⁵⁶ See 4 PAPERS OF HAMILTON, *supra* note 150, at 35 (speech before New York Assembly, Feb. 6, 1787) (“The words ‘due process’ have a precise technical import, and are only applicable to the process and proceedings of the courts of justice.”); see also 3 *id.* 485 & 488 (1784 Letter from Phocion to Citizens of New York).

²⁵⁷ See 10 ANNALS OF CONG. 612 (1800) (remarks of Rep. John Marshall).

²⁵⁸ JOHN HART ELY, DEMOCRACY AND DISTRUST 15 (1980); LEARNED HAND, THE BILL OF RIGHTS 35 (1958); WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 129 (1825); 3 STORY, *supra* note 191, § 1783.

²⁵⁹ *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276 (1856).

²⁶⁰ See LEVY, *supra* note 107, at 248.

²⁶¹ Easterbrook, *supra* note 108, at 98-99.

²⁶² Cf. *Murray’s Lessee*, 59 U.S. at 276; Amar, *Bill of Rights I*, *supra* note 94, at 1190 n.262.

²⁶³ The Clause’s invocation of “life, liberty, or property” mimics the inspiring language in many revolutionary declarations of principle issued by American colonists, invoking broad and inclusive natural rights theories to explain their opposition to King George’s tyranny. See, e.g., CONTINENTAL CONGRESS, DECLARATION & RESOLVES (Oct. 14, 1774); VA. CONST. of 1776, Bill of Rights § 1.

²⁶⁴ *Verdugo-Urquidez*, 494 U.S. at 270.

This would be a stretch. Globalists have not presented any founding-era evidence that “due process” was thought to protect aliens abroad. So globalists are left with a clear statement rule that defaults with constitutional rights for aliens abroad. But, as discussed throughout this paper, this default is highly debatable as a textual and historical matter. Stated another way, a domestic limitation for the Clause is suggested by its placement within a Bill of Rights and a larger Constitution which are themselves designed as internal, domestic rules for the benefit of people in the United States.

Ninth and Tenth Amendments. There are textual problems with reading the Ninth and Tenth Amendments as support for globalism. The Ninth states that the enumeration in the Constitution of certain rights of the people does not suggest that other unmentioned rights of the people do not exist or are not protected. To see who retains unenumerated rights, the text directs that we look at who is given enumerated rights, because the Amendment states that they are the same people. Some rights in the Constitution are expressly given to “citizens,” while many more are given to “the people” or “persons” or unspecified beneficiaries. None are expressly given to aliens, even though the Founders clearly knew how to refer to aliens when they wanted to (in Article III.). It is textually problematic to say that the Ninth Amendment’s protection of “the people[‘s]” unenumerated, inherent rights shows that *aliens* abroad could have rights, unless we can say that enumerated rights are extended to aliens. But we cannot say that. The only way that individual rights under the Constitution can be extended to aliens abroad is by implication from the generality of language. Relying on Ninth Amendment to support the globalist argument is bootstrapping.

“The people” in the Tenth Amendment to whom are reserved undelegated powers are apparently the same “people” who delegated their other powers to the federal government or the states in the constitutional instrument. The Preamble states that the “people” who delegated their powers to form the Constitution were “the People of the United States,” acting for themselves and their posterity, and “for the United States of America.” This appears to exclude aliens abroad.

D. Habeas Corpus Under the Constitution

Textual and structural evidence suggests that the constitutionally-protected writ of habeas corpus is only available within the United States. To understand the scope of the writ preserved by the Suspension Clause of the U.S. Constitution,²⁶⁵ courts and scholars have long looked to the history of the common law writ, on the assumption that it was essentially incorporated by

²⁶⁵ U.S. CONST. art. I, § 9, cl. 2 (“The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”).

reference into the Constitution.²⁶⁶ The English writ did not reach beyond the dominions of the crown, but it is a difficult question whether this understanding was, in practice, imported to America during the colonial period.

A textual and structural focus on the U.S. Constitution, rather than historical precedents, is more fruitful. The Clause allows suspension only in cases of “Rebellion or Invasion.” Both terms refer to conflicts internal to the country.²⁶⁷ If the only two permissible triggers for suspension are internal events, it follows that the writ cannot be suspended based on purely external threats. Textually, the closest relative of the Suspension Clause in the Constitution is the Article I power of Congress to call forth the militia to “execute the Laws of the Union, suppress *Insurrections* and repel *Invasions*.”²⁶⁸ The fact that the Militia Clause limits the use of temporary citizen-soldiers as opposed to professional troops might suggest a domestic limitation (because non-professional part-timers would desire to fight close to home).²⁶⁹ The history of the Militia Clause bears this out, and points to a structural connection to the Suspension Clause. Both English and colonial law had precedents allowing the use of militia outside the troops’ home territory only in cases of invasion, insurrection or rebellion.²⁷⁰ Similarly, the charters of several American colonial governments allowed martial law to be declared on occasions that track the language of the Suspension Clause. For example, the 1691 charter of Massachusetts Bay allowed the colonial government to “exercise the Law Martiall in time of actual Warr Invasion or Rebellion as occasion shall necessarily require.”²⁷¹ Tracking this language, the Massachusetts Constitution of 1780 provided that the government could exercise “the law-martial, in time of war or invasion, and also in time of rebellion, declared by the legislature to exist, as occasion shall necessarily require.”²⁷² It seems likely that the Suspension Clause invokes these concepts, therefore

²⁶⁶ See Jonathan L. Hafetz, *The Untold Story of Noncriminal Habeas Corpus and the 1996 Immigration Acts*, 107 YALE L.J. 2509, 2517 & n.56 (1998).

²⁶⁷ See *Hamdi v. Rumsfeld*, 542 U.S. 507, 124 S. Ct. 2633, 2682-83 (2004) (Thomas, J., dissenting); George P. Fletcher, *Black Hole in Guantanamo Bay*, 2 J. INT’L CRIM. JUST. 121, 131 (2004); Arthur E. Sutherland, *Freedom and Internal Security*, 64 HARV. L. REV. 383, 410 (1951); Note, *Habeas Corpus Protection Against Illegal Extraterritorial Detention*, 51 COLUM. L. REV. 368, 373-74 (1951). In the eighteenth century, the words apparently meant the same as they do today. See 2 FARRAND, RECORDS, *supra* note 13, at 213 (remarks of Luther Martin); see also 4 BLACKSTONE, COMMENTARIES *57; 1 *id.* *411.

²⁶⁸ U.S. Const. art. I, § 8, cl. 15 (emphasis added).

²⁶⁹ Cf. THE FEDERALIST NO. 29 (Hamilton) (“The power of regulating the militia and of commanding its services in times of insurrection and invasion are natural incidents to the duties . . . of watching over the internal peace of the confederacy.”).

²⁷⁰ Statute of 13 & 14 Charles II. ch. 3; *An Act Concerning the Levying of War* (Maryland 1650), ch. 26 §§ 1 & 3; 1 BLACKSTONE, COMMENTARIES *413-13.

²⁷¹ MASS. BAY CHARTER of 1691, in 3 THORPE, *supra* note 144, at 1884. See also GA. CHARTER of 1732 ¶ 11, in 2 *id.* at 776.

²⁷² MASS. CONST. of 1780, Decl. of Rights, ch. 2, art. 7.

contemplating that suspension could occur only during similarly severe domestic emergencies.

The Suspension Clause's domestic limitation suggests a structural problem with globalism enforced by federal courts. If courts extend constitutional rights to aliens abroad that are enforceable through habeas, and if the availability of some habeas review is found to be constitutionally required (that is, protected from "suspension"), there could occur situations where the lack of a domestic invasion or rebellion prevented suspension, even if the political branches correctly determined that "the public Safety . . . require[d] it."²⁷³ In this situation, the judiciary arguably would be encroaching on the primary province of the executive and Congress: the political branches are textually and structurally given the responsibility for national protection, especially beyond the borders of the United States. This structural reasoning might provide a way to think about the availability of the writ outside the 50 states of the United States. Assuming that the writ should not be available anywhere that the political branches could not, if the public safety required, temporarily suspend it, the writ should then only be available in territory over which the United States exercises such pervasive and persistent sovereignty that a hostile military incursion could be fairly described as an "invasion" vis-a-vis the United States, or an armed insurrection could fairly be described as a "rebellion" vis-a-vis the United States.²⁷⁴

Globalists have not adequately addressed the domestic limitation of the Suspension Clause. According to Professor Raustiala, for example, "the writ is aimed at ensuring that the government does not deprive a person of liberty without providing an adequate legal basis to a court of law. On its face, that idea seems unconnected to geographical location. Since the aim of habeas is to constrain executive power, it is not obvious why it ought to matter where that power is exercised."²⁷⁵ According to Professor Henkin, "[n]o reason exists why an alien held by United States authorities abroad should not have the right to bring a writ of habeas corpus in a United States court."²⁷⁶

²⁷³ U.S. CONST. art. I, § 9, cl. 2.

²⁷⁴ On the other hand, one could argue that no external conflict could sufficiently endanger the United States to justify so drastic a step as suspension of the writ. *Cf. Remarks of Edmund Randolph to Virginia Ratifying Convention* (June 10, 1788), in 9 DOCUMENTARY HISTORY, *supra* note 13, at 1099 (stating that the Suspension Clause can only be invoked "in cases of extreme emergency").

²⁷⁵ Raustiala, *supra* note 21, at 2529-30.

²⁷⁶ Henkin, *Compact*, *supra* note 18, at 32 n. 127; *see also* Fletcher, *supra* note 83, at 964 (suggesting that there is no reason why civilian judicial restraints on government power, such as habeas corpus, are not available extraterritorially); Neuman, *Abiding*, *supra* note 20, at 151 ("The Constitution contemplates the suspension of the privilege of the writ of habeas corpus by Congress *even within the United States* when necessitated by invasion or rebellion.") (emphasis added). Other scholars make this error. *See* Cleveland, *supra* note 9, at 19 ("[M]ost of the Constitution's provisions are not textually restricted by either the population or the

V. EARLY PRACTICE UNDER THE CONSTITUTION

Early practice under the Constitution appears to have been broadly consistent with the textual and historical analyses outlined above. The United States actively protected foreigners, but did so under international law. Many, but not all, Americans seem to have believed that aliens within the United States had constitutional rights, but it does not appear that there is evidence that aliens abroad had constitutional rights. A review of early practice also reveals a consensus that alien enemies, even within the United States, had limited rights, and those rights arose under international law, not the Constitution.

This Part first addresses the United States' early actions with regard to protecting aliens, using force, and defining and enforcing international law. Then, it presents two case studies of instances where the United States government engaged in explicit debates about the constitutional rights of aliens. The first instance occurred during the Quasi-War with France in the late 1790s;²⁷⁷ the second involved a congressional investigation of General Andrew Jackson's incursion into Spanish-owned Florida in 1818.

A. *Protecting Aliens, Using Force and Implementing International Law*

After the Constitution was ratified, the new U.S. government took a number of actions to protect aliens. None of them presupposed that aliens had constitutional rights. The Constitution left it entirely within the discretion of Congress to set the terms for naturalizing aliens into new citizens. The First Congress exercised its discretion liberally, allowing aliens (assuming they were "white") to become citizens after only two years residence.²⁷⁸ The Judiciary Act of 1789 contained a provision allowing aliens to sue in U.S. courts for torts suffered here or abroad.²⁷⁹ This protection came in the form of a grant of jurisdiction to federal courts to hear suits by aliens for torts "in violation of the law of nations or a treaty of the United States," not in violation of the U.S. Constitution or other municipal law.²⁸⁰ Reacting to several unpleasant incidents involving assaults of foreign diplomats in the United States, the First Congress used its "define and punish" power to make criminal assaults on ambassadors

geographic area to which they apply. . . . Article I *unqualifiedly* prohibits the suspension of habeas corpus. . . ." (emphasis added).

²⁷⁷ Professor Neuman and other scholars examine these debates to understand attitudes toward the rights of aliens. See, e.g., NEUMAN, STRANGERS, *supra* note 9, at 53-60; Cleveland, *supra* note 9, at 87-98.

²⁷⁸ *Naturalization Act of 1790*, 1 Stat. 103, ch. 3.

²⁷⁹ *Judiciary Act of 1789*, 1 Stat. 73, ch. 20, § 9. See generally Wedgwood, *supra* note 184, at 753 (stating that passage of the Alien Tort Statute showed the Framers' intent to protect aliens).

²⁸⁰ See *Judiciary Act of 1789*, § 9.

and violations of safe conducts.²⁸¹ Much of the United States' early law enforcement activity was directed against violations of the law of nations.²⁸²

The political branches largely controlled the substance of the law governing external interactions with aliens. This is seen in the numerous statutes that defined the law of nations and determined how and when it would be enforced, against whom.²⁸³ It is also seen in active treaty making by the United States government, covering issues ranging from providing religious, economic, testamentary and judicial rights and establishing consulates to protect each signatory's citizens within the territory of the other; granting rights of protection on the high seas or territorial waters; regulating searches and seizures of vessels on the high seas; settling boundary disputes; confirming the rights of neutrals during war and rules of prize; and promising to restrain persons within the country from attacking or molesting citizens or subjects of the treaty partner.²⁸⁴

The practice of the U.S. government appears to have been to treat the search or seizure of persons and goods seeking to enter the United States as unconstrained by the Constitution.²⁸⁵ And starting in the nineteenth century,

²⁸¹ See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 718-20 (2004) (discussing the statute).

²⁸² 1 FRANCIS WHARTON, A TREATISE ON CRIMINAL LAW § 330 n.2, at 417 (11th ed., 1912).

²⁸³ See *Neutrality Act*, 1 Stat. 381, 384, ch. 50, § 7 (1794) (enforcing U.S. policy of neutrality in war between France and Great Britain); *An Act to More Effectually Protect Commerce and Coasts of the United States*, 1 Stat. 561, ch. 48 (1798) (authorizing the President to use naval force to seize French vessels "committing depredations" against American commerce "and bring into any port of the United States, to be proceeded against according to the law of nations"); *An Act to Declare the Treaties heretofore Concluded with France, No Longer Obligatory on the United States*, 1 Stat. 578, ch. 67 (1798) (voiding treaties with France); *Trading with the Enemy Act*, 2 Stat. 778, ch. 129 (1812) (defining and punishing trading with the enemy, Great Britain); *An Act to Protect Commerce and Punish Piracy*, 3 Stat. 510-13, ch. 77, §§ 1-2 (1819) (punishing piracy, a crime against the law of nations); *An Act for Punishment of Contraventions of the Treaty between the United States and Russia*, 4 Stat. 276, ch. 57 (1828) (punishing violations of treaty barring sale of weapons and liquor in certain territory).

²⁸⁴ See, e.g., Treaty of Peace and Amity, U.S.-Tripoli (June 4, 1805), 8 Stat. 214; Treaty of Amity and Commerce, U.S.-Prussia (July 11, 1799), 8 Stat. 162; Treaty of Peace and Friendship, U.S.-Tunis (Mar. 26, 1799), 8 Stat. 157; Treaty of Peace and Amity, U.S.-Algiers (Sept. 5, 1795), 8 Stat. 133; 1795 U.S.-Spain Treaty, *supra* note 175; Treaty of Amity, Commerce and Navigation, U.S.-Great Britain (Nov. 19, 1794), 8 Stat. 116.

²⁸⁵ Both the First and Second Congresses gave executive branch customs agents and naval officers the discretion, without judicial supervision, to search any ships suspected to contain dutiable or smuggled goods, and to seize the offending goods. See *Collection of Duties Act*, 1 Stat. 29, 43, ch. 5, § 24 (1789); *Enrolling and Licensing Act*, 1 Stat. 305, 315, ch. 8, § 27 (1793). Apparently this did not seem to the founding generation, or later generations, inconsistent with the Fourth Amendment. See generally *Verdugo-Urquidez*, 494 U.S. at 267 ("There is likewise no indication that the Fourth Amendment was understood by contemporaries of the Framers to apply to activities of the United States directed against aliens in foreign territory or in international waters."); *Carroll v. United States*, 267 U.S. 132, 154

United States customs agents began to operate abroad, mainly in Canada, to enforce the revenue laws.²⁸⁶ Globalists have not presented any evidence that these operations were thought to implicate individual constitutional rights.

Early constitutional history is filled with instances of American use of the military or law enforcement against nonresident aliens.²⁸⁷ It does not appear that extraterritorial coercive force by the United States government was thought to implicate constitutional rights of noncitizens. By contrast, internal disturbances were governed by municipal law. In suppressing the Whiskey Rebellion in Pennsylvania in 1794, President Washington used militia instead of regular troops, and required that a federal judge and the U.S. District Attorney accompany the militia so that the rebels could be immediately turned over to civil authorities for trial.²⁸⁸ As Justice Iredell later emphasized in his charge to a Pennsylvania grand jury, the executive branch acted against the insurrection “by every *constitutional* means in its power.”²⁸⁹

Simply because the Constitution did not govern extraterritorial uses of coercive force did not mean that the Founders considered such actions to be extra-legal. Rather, there was a strong current of opinion that the law of nations constrained certain of the U.S. government’s actions abroad, at least in the absence of contrary congressional regulation. Numerous cases judged the actions of U.S. executive officials against aliens on the seas under international law, and awarded damages or other relief where the United States violated international law.²⁹⁰

B. Alien Friends and Enemies: The Quasi-War with France

By early 1793, the French Revolution had turned aggressively Jacobin and France was at war with Austria, England, Spain, Holland, and the many German

(1925) (stating that the Fourth Amendment does not apply to international border searches because of need for “national self-protection”).

²⁸⁶ See ETHAN A. NADELMANN, *COPS ACROSS BORDERS* 22-29 (1993).

²⁸⁷ See, e.g., SOFAER, *WAR*, *supra* note 44, at 120-22..

²⁸⁸ See JOAN M. JENSEN, *ARMY SURVEILLANCE IN AMERICA: 1775-1980*, at 12-14 (1991). Alexander Hamilton accompanied Judge Richard Peters and District Attorney William Rawle to help gather evidence for use in civilian trials. See LOUIS FISHER, *PRESIDENTIAL WAR POWER* 23 (2004).

²⁸⁹ *A Charged Delivered to the Grand Jury for the District of Pennsylvania, April 12, 1796*, *FEDERAL GAZETTE & BALTIMORE DAILY ADVERTISER* (Apr. 21, 1796), at 3 (emphasis added).

²⁹⁰ See, e.g., *The Marianna Flora*, 24 U.S. (11 Wheat.) 1 (1825); *The Apollon*, 22 U.S. (9 Wheat.) 362, 371 (1824); *Thirty Hogsheads of Sugar v. Boyle*, 13 U.S. (9 Cranch) 191, 198-99 (1815); see also H.R. COMM. ON NAVAL AFFAIRS, H.R. REP. NO. 207, 17th Cong., 1st Sess. (1822), in 1 *AMERICAN STATE PAPERS: NAVAL AFFAIRS* 787-88 (suggesting that international law and policy should guide U.S. naval actions in the Caribbean against pirates). *But cf.* *Brown v. United States*, 12 U.S. (8 Cranch) 110, 128 (1814) (stating that the law of nations “is a guide which the sovereign follows or abandons at his will”).

and Italian states.²⁹¹ Despite a military alliance cemented by treaty with France, President Washington determined to stay out of the European war, issuing the Neutrality Proclamation in 1793.²⁹² Disagreement over the merits of the French Revolution and other issues led American politics to polarize along regional, economic and ideological grounds.²⁹³ The rest of the 1790s saw domestic tensions and external problems, as U.S. shipping was harassed by the warring parties, particularly the French. After the United States ratified the Jay Treaty with Great Britain and President Washington was succeeded in 1797 by the Federalist John Adams of Massachusetts, France stepped up attacks on American shipping; some worried that France – which had openly campaigned against Adams in favor of Thomas Jefferson – contemplated an invasion of the United States.²⁹⁴

During the Adams presidency, Congress and the executive took a number of actions regarding France that illuminate contemporary understandings of the constitutional status of aliens and the relationship between municipal and international law. In 1798, Congress passed the so-called Alien Friends Act, which allowed the President, in his discretion, to deport “all such aliens as he shall judge dangerous to the peace and safety of the United States.”²⁹⁵ At about the same time, Congress also passed both the Sedition Act and a law concerning detention or deportation of “alien enemies.”²⁹⁶ The concepts of “alien friend” and “alien enemy” were drawn from the common law and the law of nations. They referred, respectively, to nationals of states at peace and at war with one’s country. Under the common law and the law of nations, the rights of aliens diminished substantially when their home state engaged in hostilities with their state of current residence – when they became alien enemies. Alien enemies, and, in particular, alien prisoners of war, had no right to use the courts, meaning that they could be imprisoned without judicial recourse.²⁹⁷ As Blackstone put it,

²⁹¹ See STANLEY ELKINS & ERIC MCKITRICK, *THE AGE OF FEDERALISM* 311 (1993).

²⁹² See ALEXANDER DECONDE, *A HISTORY OF AMERICAN FOREIGN POLICY: GROWTH TO WORLD POWER* 50-51 (3d ed. 1978).

²⁹³ To caricature a bit, northern Federalists generally supported improved relations with Great Britain, mercantile interests, a strong national government, especially militarily, and limits on immigration and naturalization of foreigners, while southern Jeffersonian Republicans supported French revolutionary aspirations and, at home, agrarian economic interests, more open immigration, and the rights of American states and individuals against the central government. See DANIEL G. LANG, *FOREIGN POLICY IN THE EARLY REPUBLIC* 91-156 (1985).

²⁹⁴ See *id.* at 119-22; DECONDE, *supra* note 292, at 62; SOFAER, *WAR*, *supra* note 44, at 139-40.

²⁹⁵ *An Act Concerning Aliens*, 1 Stat. 570, ch. 58, § 1 (1798).

²⁹⁶ *An Act Respecting Alien Enemies*, 1 Stat. 577, ch. 66 (1798); *Sedition Act*, 1 Stat. 596, ch. 74 (1798).

²⁹⁷ Regarding prisoners of war, see *The Three Spanish Sailors Case*, 96 Eng. Rep. 775 (K.B. 1779) (holding that alien prisoners of war were “not entitled to any of the privileges of Englishmen; much less to be set at liberty on a habeas corpus”). Regarding alien enemies generally, see *Crawford v. The William Penn*, 6 F. Cas. 778, 779 (C.C., D.N.J. 1815); *Moxon v. The Fanny*, 17 F. Cas. 942, 947 (D. Pa. 1793); *Rex v. Schiever*, 97 Eng. Rep. 551 (K.B.

“alien-enemies have no rights, no privileges, unless by the king’s special favour, during the time of war.”²⁹⁸ Generally speaking, this was the law in the United States at and after the time of the adoption of the Constitution.²⁹⁹

Enemy alien status and its concomitant civil disabilities did not turn on the existence of a formal, declared war between sovereign states under the laws of the United States³⁰⁰ or Great Britain.³⁰¹ Congress’s Alien Enemies Act of 1798 allowed the executive to detain alien without a formal declaration of war.³⁰² More generally, application of international legal rules applicable during wartime did not await a formal declaration.³⁰³

1759); *Sylvester’s Case*, 7 Mod. 150 (K.B. 1703); 1 JOHN COMYNS, A DIGEST OF THE LAWS OF ENGLAND 415 (4th ed. 1800); 9 HOLDSWORTH, *supra* note 145, at 198; JACOB, *supra* note 171, at 7.

²⁹⁸ 1 BLACKSTONE, COMMENTARIES *371-72.

²⁹⁹ *St. Cyr*, 533 U.S. at 301 (“In England prior to 1789, in the Colonies, and in this Nation during the formative years of our Government, the writ of habeas corpus was available to *nonenemy* aliens.”) (emphasis added); *Cruden v. Neale*, 2 N.C. 338 (1796) (holding that alien enemies are “exclud[ed] . . . from our courts of justice” during the hostilities); *Wilcox v. Henry*, 1 U.S. (1 Dall.) 69, 71 (Pa. 1782) (“An alien enemy has no right of action whatever during the war. . . .”); *Jefferson Letter to Hammond*, *supra* note 154, at 211 (noting that an “alien enemy” “cannot maintain an action”); *id.* at 201 n.± (“[I]t is a condition of war, that enemies may be deprived of all their rights.”) (quoting Cornelius Bynkershoek); *Remarks of James Madison to Virginia Ratifying Convention* (June 20, 1788), 3 ELLIOT, DEBATES, *supra* note 191, at 533 (“[A]n alien enemy cannot bring suit at all.”); Addison, *supra* note 160, at 1071 (“[A]lien enemies have no rights.”). This rule continued in force well past the eighteenth century. See *Ex parte Colonna*, 314 U.S. 510, 511 (1942) (per curiam); *Caperton v. Bowyer*, 81 U.S. 216, 236 (1871); *Levine v. Taylor*, 12 Mass. 8, 9 (1815); *Hutchinson v. Brock*, 11 Mass. 119, 122-23 (1814).

³⁰⁰ See 1 Op. Att’y Gen. 85 (1798) (directing that Frenchmen attempting to outfit military ships in the United States “should be apprehended” and if acting for the French government, “be treated as an enemy, and confined as a prisoner of war” even though there had been no declaration of war); 9 ANNALS OF CONG. 3000 (1799) (remarks of Rep. Albert Gallatin) (stating, at a time when no war was declared, that French were alien enemies).

³⁰¹ See 1 MATTHEW BACON, A NEW ABRIDGMENT OF THE LAW, ALPHABETICALLY DIGESTED UNDER PROPER TITLES (T. Cunningham ed., 1793) (see the heading “Aliens”); 1 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 162 (1800 ed. Thomas Dogherty); WILLIAM HAWKINS, TREATISE OF THE PLEAS OF THE CROWN 51 (6th ed. London 1787). From the British perspective, the American war of independence was an internal colonial rebellion, not a formal war between sovereign states. See, e.g., *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 228 (1796) (opinion of Chase, J.); *id.* at 263 (opinion of Iredell, J.); *Jefferson Letter to Hammond*, *supra* note 154, at 202. Yet English courts treated Americans as enemy aliens not entitled to use habeas corpus. See *Furly v. Newnham*, 99 Eng. Rep. 269 (K.B. 1780).

³⁰² See *Alien Enemies Act*, § 1.

³⁰³ See David Cole, *What Bush Wants to Hear*, N.Y. REV. OF BOOKS (Nov. 17, 2005) (“At the time of the Constitution’s drafting, a formal ‘declaration of war’ was *not* necessary for the exercise of war powers under either domestic or international law.”); see also *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 28 (1801); *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 40 (1800) (opinion of Washington, J.); *Cheriot v. Foussat*, 3 Binn. 220 (Pa. 1810) (opinion of Tilghman, C.J.).

While the Alien Enemies Act was relatively uncontroversial,³⁰⁴ Jeffersonian Republicans excoriated President Adams and Federalist in Congress about the Alien Friends and Sedition Acts, asserting that they violated various individual rights provisions of the Constitution. Republicans argued that resident aliens were protected by the same constitutional rights as citizens.³⁰⁵ Like today's globalists, they based this argument in part on the general, unrestricted language in the Bill of Rights.³⁰⁶ Federalists replied that the Constitution was a social compact protecting its members only, and that aliens – even those resident within the United States – were not parties to that compact³⁰⁷ and therefore did not have constitutional rights.³⁰⁸ Instead, aliens in the United States were protected only by the law of nations and dictates of humanity. According to Federalist judge Alexander Addison, the exercise of power over aliens in the United States “affects no party to the constitution, but a party to the law of nations; its exercise is to be regulated, not by the constitution or municipal law, but by the general law of nations.”³⁰⁹ This meant that that Suspension Clause did not protect habeas for aliens, because “here the Constitution leaves aliens, as in other countries, to the protection of the general principles of the law of nations, or of the particular provisions of treaties made between the United States, and the government whose subjects or citizens the aliens severally are.”³¹⁰ The most that Jeffersonian Republicans argued in response to these claims was that friendly *resident* aliens were under the protection of the U.S. Constitution while they were resident and while their home state was at peace with the United States.

For an excellent discussion emphasizing the nuances and disagreements about this issue, see Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543, 1575-89 (2002).

³⁰⁴ Cf. 8 ANNALS OF CONG. 1980 (1798) (remarks of Rep. Gallatin) (conceding that U.S. government has power over alien enemies, consistent with international law, by implication from the Article I power of Congress to declare war).

³⁰⁵ See, e.g., 8 ANNALS OF CONG. 2012 (1798) (remarks of Rep. Edward Livingston). See generally NEUMAN, STRANGERS, *supra* note 9, at 53-60.

³⁰⁶ See, e.g., 8 ANNALS OF CONG. 2012 (1798) (remarks of Rep. Livingston); 8 ANNALS OF CONG. 1956 (1798) (remarks of Rep. Albert Gallatin). See generally NEUMAN, STRANGERS, *supra* note 9, at 53-60; JAMES M. SMITH, FREEDOM'S FETTERS 87 (1956).

³⁰⁷ See, e.g., *Report of the Select Committee of the House of Representatives*, in 9 ANNALS OF CONG. 2986, 2987 (1799); 8 ANNALS OF CONG. 2018 (1798) (remarks of Rep. Harrison Gray Otis).

³⁰⁸ See, e.g., *Answer of the States—Massachusetts* (Feb. 18, 1799), in 4 ELLIOT, DEBATES, *supra* note 191, at 534-35; 8 ANNALS OF CONG. 2091 (1798) (remarks of Rep. Otis); 8 ANNALS OF CONG. 1984-85 (remarks of Rep. William Gordon); *Debate on the Virginia Resolutions*, in VIRGINIA REPORT, *supra* note 161, at 31 & 105 (remarks of Henry Lee).

³⁰⁹ Addison, *supra* note 160, at 1072; see also VIRGINIA REPORT, *supra* note 161, at 100 (remarks of William Cowan); *id.* at 62 (remarks of James Barbour). See generally SMITH, *supra* note 306, at 86-87.

³¹⁰ ALEXANDER ADDISON, CHARGE TO THE GRAND JURIES OF THE COUNTY COURTS OF THE FIFTH CIRCUIT OF THE STATE OF PENNSYLVANIA 18 (1799).

In 1800, the Virginia House of Delegates issued a report, authored by Madison, which responded to Federalist arguments in support of the Alien and Sedition Acts. The report replied to the Federalist argument that the Alien Friends Act violated no one's constitutional rights and was within the power of Congress because it was lesser included in the greater congressional power of exacting reprisals on foreigners.³¹¹ Madison's *Report of 1800* argued that removing a resident alien from the country was not a "reprisal" within the ordinary meaning of that word and, in any event, the Federalist argument "overlooked" "the distinction . . . between reprisals on persons within the country and under the faith of its laws, and on persons out of the country."³¹² Arguably this suggests that Madison, speaking for anti-Federalist Republicans, did not believe that the Constitution granted enforceable rights to aliens abroad.

Additional evidence comes from contrasting congressional debates about the Alien Friends Act (featuring Jeffersonian-Republican arguments that friendly resident aliens were protected by the Constitution) with the nearly contemporaneous House debate about a proposal to allow the United States to kill captured Frenchmen in certain circumstances in retaliation for French outrages against Americans,³¹³ during which there was no suggestion that the proposed retaliation implicated the French detainees' constitutional rights.³¹⁴ During the same period of time, Congress repeatedly authorized the discretionary use of force on the high seas against hostile French ships and crews,³¹⁵ without expressed concern about constitutional rights.³¹⁶

As noted above, the Alien Enemies Act was uncontroversial. Even staunch Republicans accepted that a state of armed conflict (not necessarily formal war) put aliens within the United States outside the fulsome protection of the Constitution, and instead under the lesser protections of the law of nations and policy.³¹⁷ There is evidence that, in the decades after the enactment of the

³¹¹ This argument was made in THE ADDRESS OF THE MINORITY IN THE VIRGINIA LEGISLATURE TO THE PEOPLE OF THAT STATE; CONTAINING A VINDICATION OF THE CONSTITUTIONALITY OF THE ALIEN AND SEDITION LAWS (1799).

³¹² *Report of Virginia House of Delegates regarding the Alien and Sedition Acts (1800)*, in 17 THE PAPERS OF JAMES MADISON 321 (David. B. Mattern *et al.* ed., 1991) [hereinafter *Report of 1800*].

³¹³ See *An Act Vesting Power of Retaliation*, 1 Stat. 743, ch. 45 (1799).

³¹⁴ See 9 ANNALS OF CONG. 2907-15, 3045-52 (1799); see also 2 JOURNAL OF THE SENATE 583 (1799).

³¹⁵ See *An Act to Protect Commerce*, 1 Stat. 561, ch. 47 (1798); *An Act for Defence of Merchant Vessels*, 1 Stat. 572, ch. 60 (1798); *An Act to Suspend Commercial Intercourse*, ch. 2, 1 Stat. 613 (1798).

³¹⁶ Cf. *Verdugo-Urquidez*, 494 U.S. at 268 ("[I]t was never suggested that the Fourth Amendment restrained the authority of Congress or of the United States agents to conduct operations such as [armed attacks against French shipping and naval vessels].").

³¹⁷ *Report of 1800*, *supra* note 312, at 321 (stating that the Alien Enemy Act "being conformable to the law of nations, is justified by the constitution" but the Alien Friends Act is "repugnant to the constitutional principles of municipal law"); *id.* at 320 ("Alien enemies are

Alien Enemies Act in 1798 and the ratification of various treaties protective of resident aliens, courts began to soften their treatment of *noncombatant* enemy aliens by allowing habeas corpus review of their detentions; but alien enemy combatants were still thought to have no rights against executive detention and no constitutional rights generally.³¹⁸ Greater judicial protection of aliens in the United States, at the instance of statutory and treaty policy crafted by the political branches, is more consistent with inclusive constitutional nationalism than globalism.

For Professor Neuman and some other globalists, “[t]he legacy of the Alien Act debates includes the fundamental rejection of the claim that citizenship is the key to rights-bearing capacity under the Constitution.”³¹⁹ But given the poles of debate in the 1790s – Federalists denying that any aliens had constitutional rights; Republicans arguing that friendly aliens resident in the United States had constitutional rights – it is difficult to imagine that any thought that *nonresident* aliens located abroad had constitutional rights, especially during military conflicts.

C. General Jackson’s Seminole War

Review of the congressional investigation and debates that followed General Andrew Jackson’s incursion into Spanish-owned Florida in 1818 shows that the prevailing view was that aliens abroad were protected only by international law and did not have U.S. constitutional rights.

While the United States was at peace with Spain, General Jackson led a force of U.S. troops, Tennessee volunteers and friendly Indians into Spanish Florida, ostensibly to punish hostile Seminole Indians and runaway slaves who were using Florida as a haven to attack Americans on the other side of the

under the law of nations . . . [while] [a]lien friends . . . are under the municipal law.”); 8 ANNALS OF CONG. 1582 (1798) (remarks of Rep. Albert Gallatin) (stating that alien enemies could be removed from the United States on the basis of the law of nations); *id.* at 1790 (remarks of Rep. Samuel Sewall) (stating that the status of alien enemies in the United States “would be regulated by treaties as well as by the law of nations”).

³¹⁸ See *Lockington’s Case* (Pa. 1813) (Tilghman, C.J.), in 5 AM. L.J. 92 (1814) (holding that enemy alien merchant was entitled to habeas corpus review of his detention, but noting that a prisoner of war would not be entitled to use habeas because they have “no municipal rights to expect from us”), *aff’d* 5 AM. L.J. 301 (1814). Some courts allowed non-hostile alien enemies resident within the United States to sue to enforce economic rights, stating that this was consistent with the law of nations and U.S. policy expressed in treaties and the Alien Enemies Act, see *Jackson ex dem. Johnston v. Decker*, 11 Johns. 418 (N.Y. 1814); *Clarke v. Morey*, 10 Johns. 69 (N.Y. 1813), but held that nonresident alien enemies were still subject to the common law inability to use the courts while hostilities lasted, see *Bell v. Chapman*, 10 Johns. 183 (N.Y. 1813). See generally Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 962, 992-94 (1998); Gerald L. Neuman & Charles H. Hobson, *John Marshall and the Enemy Alien: A Case Missing from the Canon*, 9 GREEN BAG 2d 39 (2005).

³¹⁹ NEUMAN, STRANGERS, *supra* note 9, at 103.

border.³²⁰ Either from weakness or deliberate policy or both, Spain had declined to take steps to stop the cross-border attacks, though obligated under a 1795 treaty with the United States.³²¹ According to President James Monroe, Jackson's orders had been to terminate the Indian attacks and punish the perpetrators but, in so doing, to enter Florida only if necessary in pursuit of the enemy and to refrain from molesting Spanish authorities.³²² Jackson had nevertheless proceeded directly into Florida and, while there, attacked and seized several Spanish garrisons and displaced the Spanish authorities, killed numerous Indians and runaway slaves, and captured and executed several men – both Indians and British subjects named Alexander Arbuthnot and Robert Ambrister – who were thought to have incited the Indian attacks.³²³

There was public outcry in Spain, Great Britain and the United States after it was learned that although the court martial had reconsidered its initial death sentence for Ambrister and instead recommended lashing and imprisonment, General Jackson had nevertheless ordered him shot. President Monroe's government disavowed the seizure of Spanish territory, but nevertheless supported Jackson's actions as justified by the facts on the ground, while still maintaining they had not been authorized in advance.³²⁴ Secretary of State John Quincy Adams wrote a lengthy defense of Jackson which, among other things, blamed Spain for failing to restrain the attacks against the United States and declared that the executions of the British were consistent with international law, because they had associated themselves with savages who violated the laws of war.³²⁵ Although the British government was mollified,³²⁶ highly-charged congressional investigations in the United States Congress ensued, apparently instigated by Speaker of the House Henry Clay of Kentucky, a political rival of Monroe, Adams and Jackson.³²⁷

³²⁰ See 2 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW 403-06 (1906).

³²¹ See *Message of President Monroe to House of Representatives* (Mar. 25, 1818), in 33 ANNALS OF CONG. 1473 (1819).

³²² See *id.*; see also, e.g., DECONDE, *supra* note 292, at 115-16.

³²³ See, e.g., 1 THOMAS HART BENTON, THIRTY YEARS' VIEW 169-74 (1854); 2 MOORE, *supra* note 138, at 403-04; 3 JAMES SCHOULER, HISTORY OF THE UNITED STATES UNDER THE CONSTITUTION, 1817-1831, at 59-95 (1895).

³²⁴ See, e.g., *Message of President Monroe to Congress* (Nov. 16, 1818), in 4 AMERICAN STATE PAPERS: FOREIGN RELATIONS 215; 2 MOORE, *supra* note 320, at 403-05; Abraham D. Sofaer, *Executive Power and Control of Information: Practice Under the Framers*, 1977 DUKE L.J. 1, 40-44.

³²⁵ See *Letter of Sec. of State J.Q. Adams to George W. Erving* (Nov. 28, 1818), in 4 AMERICAN STATE PAPERS: FOREIGN RELATIONS 539-45. Thomas Jefferson applauded the Adams opinion. See *Letter of Thomas Jefferson to President Monroe* (Jan. 18, 1819), in 10 THE WRITINGS OF THOMAS JEFFERSON 122-23 (Paul L. Ford ed., 1899).

³²⁶ See WHEATON, *supra* note 123, at 588-89 n.185.

³²⁷ See 1 CARL SCHURZ, THE LIFE OF HENRY CLAY 153-54 (1893); SOFAER, WAR, *supra* note 44, at 357.

In January 1819, a divided House Committee on Military Affairs reported that Jackson should be censured because, among other things, it could “find no law of the United States, authorizing a trial, before a military court, for such offenses as are alleged” under the law of nations, and because of procedural irregularities during the trials.³²⁸ Weeks of debate about the Constitution and law of nations ensued before a House Committee of the Whole; the galleries were crowded with spectators.³²⁹

Clay gave an impassioned speech severely criticizing Jackson’s actions; it was ambiguous regarding the source and nature of the law that governed the executions, but unambiguously held that the executions were illegal. Representative Alexander Smyth of Virginia then asserted that Clay had stated that the executions violated the Constitution and laws of the United States, and that the captives “should have been turned over to the civil authority. So soon as the stranger treads the American soil, he is encircled by the laws.”³³⁰ The *Annals of Congress* do not contain remarks of Clay to that effect. And, as Smyth himself pointed out, the captures and executions undisputedly took place in Spanish territory,³³¹ so it is not clear why Clay would have suggested otherwise. Based on his speech recorded in the *Annals*, Clay appears to have argued that (i) Jackson exceeded his authority because the charges against the captives were not authorized by the Articles of War governing courts-martial, approved by Congress;³³² (ii) nor had Congress authorized retaliations to be made for Indian war crimes; and (iii) the executions violated international law because foreigners joined to the armed forces of a recognized national entity, as the Indian tribe was, were entitled to be treated as regular prisoners of war, not outlaws. Therefore, because they were not sanctioned by international law or Congress, Clay concluded that the executions violated the right of every man “in this free country,” “native or foreigner, citizen or alien,” not to be executed “without two things being shown; 1st. That the law condemns him to death; and 2dly. That his death is pronounced by that tribunal which is authorized by law to try him.”³³³ Although Clay did not appear to argue that foreigners in Spanish-territory had individual rights under the U.S. Constitution, his remarks are ambiguous and could perhaps be construed that way. Another critic of Jackson, Representative Henry Storrs of New York, argued that the “proceedings [were] contrary to all those safeguards which the municipal law has provided for the security of personal liberty,”³³⁴ but he appears to have meant the procedures for courts-martial, not the Bill of Rights.

³²⁸ See 33 ANNALS OF CONG. 516-17 (1819).

³²⁹ See generally 2 JAMES PARTON, THE LIFE OF ANDREW JACKSON 533-34 (1885).

³³⁰ *Id.* at 693 (remarks of Rep. Alexander Smyth).

³³¹ *Id.* (remarks of Smyth).

³³² *Id.* at 643-45 (remarks of Rep. Henry Clay).

³³³ *Id.* at 645 (remarks of Rep. Clay).

³³⁴ *Id.* at 752 (remarks of Rep. Storrs).

In contrast, several Congressmen stated during the debates that the Constitution and U.S. municipal law did not govern extraterritorial actions by the U.S. government.³³⁵ Representative Philip Barbour of Virginia agreed that the “question must be settled according to the laws of war;” because “the civil power has no jurisdiction over it.”³³⁶ According to Smyth of Virginia: “It is alleged that these incidents, the execution of Arbuthnot and Ambrister, are at variance with the principles of our Constitution and laws. Our Constitution and laws were formed for the people of the United States. They have no force in Florida. . . . [The prisoners] never did tread on that portion of American ground where they could claim the benefit of our laws. Nor do those laws protect enemies in time of war.”³³⁷ He concluded that international law, not municipal law, governed external relations, stating that the President “may do beyond the jurisdiction of the United States whatever the law of nations or treaties authorize the United States there to do.”³³⁸ Representative Henry Baldwin of Pennsylvania, later a Supreme Court justice, rejected the claim that “the Constitution and laws of the country” had been violated because “neither have any bearing on the case of these men. They were found and executed outside of the territorial limits of the United States, where our laws or Constitution have no operation, except between us and our own citizens, and where none other could claim their benefit and protection.”³³⁹ Baldwin further explained that “the laws and usages of nations” governed the trial of the Englishmen, not municipal law.³⁴⁰

Ultimately, both the Committee of the Whole and the entire House of Representatives voted decisively not to condemn any of Jackson’s actions.³⁴¹ While these votes cannot be considered a constitutional decision on the merits, the preceding debates suggest that the dominant view was that constitutional rights were not available to Ambrister and Arbuthnot in Florida.

³³⁵ And several others implied as much, but in ambiguous language. *See id.* at 845-46 (remarks of Rep. Strother); *id.* at 852 (remarks of Rep. Walker).

³³⁶ *Id.* at 778 (remarks of Rep. Philip Barbour).

³³⁷ *Id.* at 693 (remarks of Rep. Smyth).

³³⁸ *Id.* at 679 (remarks of Rep. Smyth); *id.* at 684 (contending that Congress has no authority to legislate regarding territory of a foreign power, but that “[i]f treaties or the law of nations give the United States a right to act within the territory of a foreign Power, in peace or war, it is the Executive that must so act”); *id.* at 699 (“Let us leave the Executive to act with all its energy against foreign Powers, while we strongly restrain that branch from acting against the people.”).

³³⁹ *Id.* at 1042 (remarks of Rep. Henry Baldwin); *id.* (“There men were not our citizens, nor bound by our laws; they owed us no allegiance, and were entitled to no protection.”); *id.* at 1044 (“[Jackson] has violated no Constitutional provision. It was not made to protect such men; they are no parties to it; owe it no obedience; and can claim no protection from it.”).

³⁴⁰ *Id.* at 1042 (remarks of Rep. Baldwin).

³⁴¹ *See id.* at 1132-36. *See generally* DECONDE, *supra* note 292, at 116 (noting that the anti-Jackson resolutions failed by substantial majorities).

The Senate spent far less time on the matter than the House did. In February 1819, a Senate Select Committee issued a scathing report asserting that Jackson had repeatedly exceeded his orders by attacking the Spanish authorities instead of confining himself to action against Indians and former slaves.³⁴² Although the Committee discussed at length how General Jackson had acted unconstitutionally by ignoring orders from his civilian superiors and purporting to begin war with a foreign power without congressional authorization, the Committee did not hint that Jackson's attacks on Indians, Spaniards and the Englishmen aiding the Indians somehow violated the constitutional rights of those persons, or that the executions were improper.³⁴³ The full Senate took no action.³⁴⁴ Jackson, in a written defense, noted that the law of nations determined the legality of the conduct of the English because the offenses "were committed by foreigners beyond our own territorial limits and jurisdiction, [so] our municipal code contained nothing by which to test the offense."³⁴⁵

D. Globalist Rejoinders

The viability of globalist originalism is called into question by this evidence from the Quasi-War and Seminole War. Non-originalist globalism of the categorical "mutuality" variety has at least two serious responses to historical evidence that constitutional rights were not thought to apply to French sailors during the Quasi-War or English prisoners in Spanish Florida. First, that globalism does not contend that individual constitutional rights apply during active warfare, and therefore that evidence of the absence of such rights does not undercut globalism. As Professor Neuman describes his theory, the Constitution does not impose a requirement of "due process of war"³⁴⁶ and "[i]t cannot be expected that the [U.S. Supreme] Court would insert constitutional standards for treatment of foreign nationals into the disorder of an active war zone overseas."³⁴⁷ The second (non-originalist) globalist rejoinder to historical evidence is that no one – neither U.S. citizens nor aliens – were thought to have constitutional rights while abroad before the mid-twentieth century because of the impact of the dogma of strict territoriality, and therefore evidence about the French during the Quasi-War or the British in Florida cannot be said to show a special rule about aliens.³⁴⁸

³⁴² See 33 ANNALS OF CONG. 256-68 (1819).

³⁴³ See *id.* at 267-68.

³⁴⁴ See Sofaer, *Executive Power*, *supra* note 324, at 44 n.293.

³⁴⁵ *Memorial of Major General Andrew Jackson to the Senate*, in 34 ANNALS OF CONG. 2308, 2319 (1819); see also 33 ANNALS OF CONG. 516-17 (1819).

³⁴⁶ Neuman, *Abiding*, *supra* note 20, at 151 n.166 (citing NEUMAN, STRANGERS, *supra* note 9, at 110-11).

³⁴⁷ Neuman, *Abiding*, *supra* note 20, at 151.

³⁴⁸ See Neuman, *Guantanamo*, *supra* note 20, at 45; Neuman, *Whose Constitution?*, *supra* note 20, at 912.

These responses raise important and difficult questions, but are ultimately not entirely convincing. The first globalist rejoinder raises the question of how to cabin “war” from everything else, such as law enforcement, covert intelligence action, reprisals, ad hoc actions to protect U.S. citizens, “quasi-war,” counter-insurgency, counter-terrorism, counter-narcotics operations, *etc.* While certain extreme examples may be easy to distinguish, the huge middle ground is murky. Globalists do not provide clarity when they argue that the U.S. military’s operations against aliens outside the United States in the current “war on terror” are subject to constitutional rights constraints in some areas, for example, the detention of alleged terrorist combatants³⁴⁹ – even though this is an armed conflict that many would agree satisfies modern *de jure* and *de facto* requirements for a state of war.³⁵⁰

The force of the globalist distinction between war and everything else would be increased by a conceptually-coherent suggestion for drawing lines. Formal declaration of war is a possible line, yet only five out of the several hundred uses of force by the United States have been authorized by a declaration of war.³⁵¹ Moreover, application of the special legal regimes of armed conflict – such as alien enemy status, belligerent rights of search, ability to use military tribunals, and the like – did not, when the Constitution was ratified or thereafter, depend on a formal declaration.

In addition, in the eighteenth and nineteenth centuries, external military action and law enforcement operations – which, as noted above, were governed by international law and prudence, not the Constitution – do not appear to have always been neatly distinguished. In cases where Congress enacted criminal statutes with extraterritorial reach, it sometimes explicitly authorized the executive, in its discretion, to use military force instead.³⁵² Turning to a specific example, I am not aware of evidence that U.S. and allied government operations against pirates in the Caribbean or Mediterranean in the early nineteenth century were thought to be subject to the Bill of Rights. Yet the United States had

³⁴⁹ See, e.g., Neuman, *Abiding*, *supra* note 20, at 151.

³⁵⁰ See, e.g., *Authorization for the Use of Military Force*, Pub. L. 107-40 (2001) (recognizing that the 9/11 attacks presented “an unusual and extraordinary threat to the national security and foreign policy of the United States” and broadly authorizing the President to use military force in response); United Nations Security Council Res. 1368 (2001) (recognizing that the 9/11 attacks gave rise to the right to use armed force in self-defense under the U.N. Charter); North Atlantic Treaty Organization, Press Release (Sept. 12, 2001) (noting that NATO invoked Article 5 of its treaty in response to the 9/11 attacks, designating them “armed attacks” that justify the use of “armed force” in response). See generally *The Prize Cases*, 67 U.S. (2 Black) 635, 669 (1863) (holding that a state of war can arise because of enemy attacks even without a U.S. congressional declaration); *Bas v. Tingy*, 4 U.S. (4 Dall.) 37 (1800) (holding that Congress can declare war in all but name).

³⁵¹ See Yoo, *Continuation*, *supra* note 44, at 177.

³⁵² See *Neutrality Act*, 1 Stat. 381, 384, ch. 50, § 7 (1794); *An Act to Prohibit the Importation of Slaves*, 2 Stat. 426, 428, ch. 22, § 7 (1807); *An Act to Protect Commerce and Punish Piracy*, 3 Stat. 510-13, ch. 77, §§ 1-2 (1819).

previously enacted applicable criminal statutes,³⁵³ and enforced these statutes in domestic civilian court against captured pirates,³⁵⁴ meaning that U.S. military operations, deadly though they were,³⁵⁵ were also law enforcement operations.³⁵⁶

Other external uses of the military were justified, at least in part, as law enforcement measures, but were nevertheless thought to be governed by the law of nations and U.S. policy interests, not municipal rules. In 1817, Amelia Island in Spanish Florida was subdued by a U.S. naval force because “numerous violations of our laws have been latterly committed by a combination of freebooters and smugglers of various nations.”³⁵⁷ A report of the House Committee on Foreign Relations found that it had been a “duty” of the United States to stop this activity, in order to secure commerce, stop attacks on neutral shipping, and prevent violations of the United States’ “revenue and prohibitory laws.”³⁵⁸ Even though it had claimed to be advancing law enforcement-type interests, the U.S. government asserted that the operation was justified under

³⁵³ See, e.g., *An Act for the Punishment of Certain Crimes against the United States*, 1 Stat. 112, 113-14, ch. 9, § 8 (1790) (criminalizing piracy on the high seas by “any person”); *An Act to Continue in Force*, 3 Stat. 600, ch. 113, § 3 (1820) (same); *id.* § 4 (criminalizing actions taken to seize slaves “on any foreign shore” by U.S. citizens or by “any person whatever” on a vessel “owned in whole or part, or navigated for, or in behalf of, any citizen or citizens of the United States”).

³⁵⁴ In one action near Havana, in 1823, American navy and marines attacked pirates on land and on their moored boat, killing many of them. See *A Pirate Taken*, BALTIMORE PATRIOT, vol. 21, issue 94, at 2 (Apr. 29, 1823). And then they brought at least one of the captured pirates, a foreign national named Manuel Cartacho, to the United States for civilian trial in federal court. See *United States v. Cartacho*, 25 F. Cas. 312 (C.C.D. Va. 1823) (No. 14,738). See also *United States v. Gibert*, 25 F. Cas. 1287 (C.C.D. Mass. 1834) (No. 15,204) (seized by British navy on coast of Africa); *United States v. Tully*, 28 F. Cas. 226 (C.C.D. Mass. 1812) (No. 16,545) (seized by government of St. Lucia on that island); *United States v. Smith*, 27 F. Cas. 1172 (D. Ga. 1820) (No. 16,339a) (seized by American naval cutter on the high seas).

³⁵⁵ See MAX BOOT, *THE SAVAGE WARS OF PEACE* 41-45 (2002).

³⁵⁶ These lines are still blurry today. The United States invaded Panama in 1990 in part to enforce U.S. municipal laws against President Manuel Noriega. See *A Transcript of Bush’s Address on the Decision to Use Force in Panama*, N.Y. TIMES (Dec. 21, 1989), at A19. Noriega was captured and prosecuted in a domestic civilian court. See *United States v. Noriega*, 746 F. Supp. 1506, 1511 (S.D. Fla. 1990). More recently, John Walker Lindh, the “American Taliban,” was captured during U.S. military operations in Afghanistan in 2001 and later prosecuted in a domestic civilian court. See *United States v. Lindh*, 212 F. Supp. 2d 541, 545-47 (E.D. Va. 2002).

³⁵⁷ H.R. Comm. on Foreign Relations, Report on Suppression of Piratical Establishments (Jan. 10, 1818), in 4 AMERICAN STATE PAPERS: FOREIGN RELATIONS 133; see also *Message of President Monroe to Congress* (Dec. 2, 1817), in 4 AMERICAN STATE PAPERS: FOREIGN RELATIONS 130 (stating that the people occupying Amelia Island had made it “a channel for the illicit introduction of slaves from African into the United States, an asylum for fugitive slaves from the neighboring States, and a port for smuggling of every kind.”).

³⁵⁸ H.R. Comm. on Foreign Relations, Report on Suppression of Piratical Establishments (Jan. 10, 1818), in 4 AMERICAN STATE PAPERS: FOREIGN RELATIONS 133-34.

the law of nations.³⁵⁹ General Jackson's Seminole "war" was justified by President Monroe at least in part as a law enforcement operation. The President stated that "hordes" of Indians and "[a]dventurers from every country, fugitives from justice, [and] absconding slaves," living in Spanish Florida, "have violated our laws prohibiting the introduction of slaves, have practised various frauds upon our revenue, and committed every kind of outrage on our peaceable citizens, which their proximity to us enabled them to perpetrate."³⁶⁰ President Monroe determined that the United States had been justified in chasing them down in Florida "by the law of nations."³⁶¹

The second globalist response to historical evidence is also not entirely convincing. Some globalists would explain that no one – neither U.S. citizens nor aliens – were thought to have constitutional rights while abroad before the mid-twentieth century because of the impact of the dogma of strict territoriality, and therefore evidence about the French during the Quasi-War or the British in Florida cannot be said to show a special rule about aliens. As discussed above, eighteenth and nineteenth century legal and political thought was undoubtedly "territorial," but it did recognize extraterritorial legal relations between a state and its citizens. More specifically, I have given five examples above that suggest that the extraterritorial reach of U.S. law included individual constitutional rights for American citizens. At a minimum, these examples are evidence that citizenship was an important variable in deciding whether persons abroad had constitutional rights.

More historical research is needed on these and related topics; but this preliminary review of early practice under the Constitution suggests that the Constitution was not thought to protect aliens abroad, and that globalist critiques of the value of this evidence are not convincing.

CONCLUSIONS AND IMPLICATIONS

This article has endeavored to show that the textual evidence for globalism is weak, and the historical evidence for globalist originalism is even weaker. The claims of globalist originalism are not supported by any specific historical evidence beyond citations to natural rights ideas and the general phrasing of the

³⁵⁹ See SOFAER, WAR, *supra* note 44, at 377.

³⁶⁰ See, e.g., *Message of President Monroe to Congress* (Nov. 16, 1818), in 4 AMERICAN STATE PAPERS: FOREIGN RELATIONS 214.

³⁶¹ See *id.* There are many other examples of U.S. military force being used extraterritorially for law enforcement-type functions, including chasing down Mexican bandits, see Orders of Secretary of War to Gen. Sherman (June 1, 1877), reprinted in 2 MOORE, *supra* note 320, at 422, and punishing Pacific Islanders and Nicaraguans in the 1830s-1850s for robberies and attacks on U.S. citizens, 2 MOORE, *supra* note 320, at 414-16; MEMORANDUM OF THE SOLICITOR FOR THE U.S. DEP'T OF STATE, RIGHT TO PROTECT CITIZENS IN FOREIGN COUNTRIES BY LANDING FORCES 55-57 (3d ed. 1934). Globalists have not presented evidence that these or other non-war uses of external force were governed by municipal constitutional rights.

Declaration of Independence and the Bill of Rights. Given the large amount of primary source material from the founding era that is now available, the essentially unsupported claims of globalist originalism do not meet minimal evidentiary standards.

The failure of globalist originalism to prove its case need not undermine globalist textualism. A globalist clear statement rule for reading the Bill of Rights, with a default that rights are available to aliens abroad, could be supported by something besides historical understandings. This article has argued, however, that as an intra-textual matter, the clear statement rule is not especially consistent with the constitutional text. Globalism errs by reading the provisions of the Bill of Rights in isolation from many other parts of the Constitution that inform its meaning, such as the Preamble and the structures for managing internal and external affairs created by Articles I, II and III.

There are of course other methods of interpreting the Constitution besides the textual and historical approaches used in this paper. Globalist results follow from some other approaches. But, although beyond the scope of this article, it is worth noting that a doctrinal methodology based on Supreme Court precedent also presents problems for globalists. Many Supreme Court cases seem inconsistent with globalism generally or, at least, with arguments of certain globalists. For example, Supreme Court cases suggest – albeit often in dicta or by implication – that government’s war powers are subject to few rights-based limitations;³⁶² that foreign relations and national defense are largely controlled by the political branches, not the courts;³⁶³ that many aspects of external relations are governed by international law, not municipal law;³⁶⁴ that the Constitution allows sharp distinctions to be drawn by the federal government

³⁶² See, e.g., *Verdugo-Urquidez*, 494 U.S. at 273-74; *Eisentrager*, 339 U.S. at 785; *United States v. Caltex (Philippines) Inc.*, 344 U.S. 149, 155-56 (1953); *In re Yamashita*, 327 U.S. 1 (1946); *Hirabayashi v. United States*, 320 U.S. 81, 93 (1943); *Ex parte Quirin*, 317 U.S. 1 (1942); *Hamilton v. Regents*, 293 U.S. 245, 264 (1934); *Chem. Found.*, 272 U.S. at 11; *Juragua Iron*, 212 U.S. at 308; *Moyer v. Peabody*, 212 U.S. 78 (1909); *Neely v. Henkel*, 180 U.S. 109, 122 (1901); *Gates v. Goodloe*, 101 U.S. 612, 617-19 (1879); *New Orleans v. The S.S. Co.*, 87 U.S. (20 Wall.) 387, 394 (1874); *Miller v. United States*, 78 U.S. (11 Wall.) 268, 305 (1870); *Stewart v. Kahn*, 78 U.S. (11 Wall.) 493, 506 (1870); *Fleming v. Page*, 50 U.S. (9 How.) 603, 616-18 (1850).

³⁶³ See, e.g., *Balsys*, 524 U.S. at 697; *Haig v. Agee*, 453 U.S. 280, 292 (1981); *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952); *Eisentrager*, 339 U.S. at 944; *Chicago & S. Air Lines, Inc. v. Waterman S.S. Co.*, 333 U.S. 103, 111 (1948); *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918); *Juragua Iron*, 212 U.S. at 308; *Miller*, 78 U.S. at 305; *Kennett v. Chambers*, 55 U.S. (14 How.) 38 (1852); *Williams v. Suffolk Ins. Co.*, 38 U.S. (13 Pet.) 415, 420 (1839); *Garcia v. Lee*, 37 U.S. 511, 517 (1838); *Ware v. Hylton*, 3 U.S. (Dall.) 199, 260 (1796) (Iredell, J.).

³⁶⁴ See, e.g., *Curtiss-Wright*, 299 U.S. at 318; *Juragua Iron*, 212 U.S. at 308; *American Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 542 (1828); *The Sally*, 12 U.S. (8 Cranch) 382, 384 (1814).

between the rights of citizens and aliens,³⁶⁵ and that the Constitution, or at least many important constitutional rights, do not protect aliens outside the United States or seeking entry.³⁶⁶ All of this doctrine – even though it is not all internally coherent and often is implied rather than stated, or stated in dicta – presents a challenge for globalists who strive for a constitutional theory that coheres “with less unsettled constitutional practices” and doctrines.³⁶⁷

In contrast to both globalism and to the aggressive claims that aliens may lack any rights or protections against the U.S. government, this article has suggested a middle road – inclusive constitutional nationalism. This recognizes that the Constitution was designed to secure the liberties of Americans at home in part by giving the U.S. government freedom to act coercively against aliens abroad. My approach has also highlighted that aliens were intended beneficiaries of many constitutional provisions, and that the law of nations and treaties were seen as protective of aliens as against the national and state governments. Reading the generally-phrased provisions of the Bill of Rights to protect aliens within – but not without – the United States³⁶⁸ is, then, more consistent with constitutional text and history. My theory may also account for the Supreme Court cases, relied upon by some globalists, that assume that the Constitution protects the property in the United States of nonresident aliens.³⁶⁹ Because an important purpose of the Constitution was to protect foreign investors and businessmen in the United States, in order to benefit the security and economy of the United States and fulfill U.S. obligations under the law of nations, this paper suggests that these cases are not examples of globalism but of inclusive constitutional nationalism. Similarly, my theory may account for the doctrine of territorial incorporation, developed by the Supreme Court in the so-called Insular Cases and cases involving settled territories within the United

³⁶⁵ See, e.g., *Demore v. Kim*, 538 U.S. 510, 522 (2003); *Zavydas v. Davis*, 533 U.S. 678, 693 (2001); *Ludecke*, 335 U.S. at 173; *Harisiades*, 342 U.S. at 586-88.

³⁶⁶ See, e.g., *United States v. Alvarez-Machain*, 504 U.S. 655 (1992); *Verdugo-Urquidez*, 494 U.S. at 270-74; *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950); *Eisentrager*, 339 U.S. at 782-85; *United States v. Belmont*, 301 U.S. 324, 332 (1937); *Curtiss-Wright*, 299 U.S. at 318; *Russian Volunteer Fleet v. United States*, 282 U.S. 481, 491-92 (1931); *United States ex rel. Turner v. Williams*, 194 U.S. 279, 292 (1904).

³⁶⁷ NEUMAN, STRANGERS, *supra* note 9, at 98.

³⁶⁸ See *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (holding that the Fifth and Sixth Amendments are “universal in their application to all persons *within the territorial jurisdiction*, without regard to any differences of race, of color, or nationality”) (emphasis added) (citation omitted); *accord* *Matthews v. Diaz*, 426 U.S. 67, 77 (1976) (stating that Fifth and Fourteenth Amendments protect “aliens within the jurisdiction of the United States”).

³⁶⁹ See, e.g., *Asahi Metal Indus. Co. v. Sup. Ct. of Cal.*, 480 U.S. 102 (1987); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984); *Russian Volunteer Fleet*, 282 U.S. 481; *Disconto Gesellschaft v. Umbreit*, 208 U.S. 570 (1908). See, e.g., NEUMAN, STRANGERS, *supra* note 9, at 113 (relying on these cases).

States that had been designated for eventual statehood.³⁷⁰ Under this theory, residents in territories that Congress has decided will eventually become states of the Union are entitled to the full complement of constitutional rights, unlike residents of territories that will not be incorporated.³⁷¹ Although beyond the scope of this paper, this theory seems generally consistent with inclusive constitutional nationalism.

In addition to being broadly consistent with the constitutional text, history and – arguably – a decent amount of Supreme Court doctrine, inclusive constitutional nationalism explains the apparent anomaly mentioned at the beginning of this article: if location does not matter where the rights of U.S. citizens are concerned (they have full constitutional rights both here and abroad), and if alienage matters little within the United States (aliens have most of the same constitutional rights as citizens when they are in the United States), why then do alienage and location combine to place aliens abroad wholly outside the protections of the Constitution? This article shows that it is not anomalous or unprincipled to read the Constitution as protecting *people* within the United States but not *aliens* abroad.

³⁷⁰ See *supra* note 10.

³⁷¹ See, e.g., *Balzac v. People of Porto Rico*, 258 U.S. 298, 305-06 (1922).