A Textual and Historical Case against a Global Constitution

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# A Textual and Historical Case Against a Global Constitution

J. Andrew Kent*

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* Climenko Fellow and Lecturer on Law, Harvard Law School. © 2007, J. Andrew Kent. Thanks to Eric Columbus, Michael Farbiarz, Jack Goldsmith, Ryan Goodman, Carissa Hessick, Daryl Levinson, Gerald Neuman, Richard Primus, Kal Raustala, Dan Sharfstein, and Carlos Vázquez for helpful comments on earlier drafts. Thanks also to the participants in the Climenko Fellowship scholarship workshop.
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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." The FBI has forty-five foreign offices; the DEA has seventy-nine in fifty-four countries. 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 individual 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 emerging conventional wisdom in the legal academy. In 2004, in Rasul v. Bush, the Supreme Court hinted that it may agree with the globalists.

This Article offers textual and historical arguments against a globalist reading of the Constitution. 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. I make the historical argument that globalist claims about the
AGAINST A GLOBAL CONSTITUTION

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. Although this Article rejects globalism on textual and historical grounds, at the same time it adduces textual and historical evidence that noncitizens were among the intended beneficiaries of important provisions and structures in the Constitution and that aliens within the United States are to be protected by the Constitution and Bill of Rights. But in contrast to globalism's desire to deploy a judicially enforced Constitution abroad, I argue that noncitizens outside the United States are to be protected only by diplomacy, treaties, the law of nations (today's customary 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. Part II categorizes globalist scholarship by its approach to constitutional history and text. One group of globalists makes an original intent claim that the Bill of Rights was written in general language because its protections were intended to be universal, unrestricted by territorial location, in the United States or abroad, or personal status, be it citizen or alien. The second, larger group of globalists who do not make an original intent claim instead asserts or assumes 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 to 1789 is not direct, but circumstantial. The historical sources with the most salience for orthodox practitioners of original intent interpretation, such as the records of the Philadelphia Convention, the ratification debates in the press and the state conventions in 1787—1788, and the congressional and public discussion of the proposed Bill of Rights, do not appear directly to 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 more modest historical goal is to describe both the
"ambient law of the era"—the background assumptions and conceptions of the Founding era regarding issues related to globalism—and the 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.

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, 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, as is the most important precedent for the Constitution, 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 Rutherforth. 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.

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 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 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 governmental structures for managing internal and external affairs created by Articles I, II, and III. This Part shows that external

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 that English constitutional history was an important guide to the shaping of the new American Constitution). The American Founders would have learned English constitutional history by reading Blackstone and Hume, see id. at 37 n.35, among other sources.
relations were to be managed by the political branches in a flexible manner, consistent with national defense exigencies, treaties, and the law of nations. This is inconsistent with globalism’s call for a judicially enforceable Bill of Rights to govern external relations with noncitizens. Part IV also shows that globalists have not confronted the implications of the Constitution’s domestic limitation on the habeas suspension power (the constitutional text allows suspension only “in Cases of Rebellion or Invasion,” which are domestic events). I argue that the writ cannot exist in any situations where the political branches—which are given the leading constitutional task of preserving and protecting the Constitution, government, and people of the United States—cannot temporarily suspend it if “the public Safety may require it.” Because they cannot suspend based on purely external threats, the writ should not be constitutionally protected on behalf of aliens abroad.

In Part V, I review evidence of constitutional meaning derived from early practice of the U.S. government under the new Constitution. The evidence supports the view that treaties, the law of nations, and U.S. statutes, not the Bill of Rights, provided the law applicable to the United States’ relations with noncitizens outside the country.

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.

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. 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

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9. Id.
11. 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 its residents. Those situations are different from the type of episodic military, intelligence, or law enforcement conduct addressed in this Article. 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 overreach. 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 “abdicat[ed] Government here, by declaring us out of his Protection and waging War against us.”

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.” From the beginning, Americans welcomed foreigners to emigrate here to enjoy the opportunity and liberty they were creating. 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. 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.” 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 because 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 when abroad and that aliens within the United States enjoy many constitutional rights, including important due process rights against arbitrary detention.

12. The Declaration of Independence paras. 21, 25 (U.S. 1776).
13. Id. para. 2.
14. 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. para. 9. Many Founders believed that immigration would be a boon to the new nation. See, e.g., Letter from 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., 34 Journals of the Continental Congress 528 (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.

15. Thomas Paine, Common Sense 42 (Willey Book Co. 1942) (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.
or punishment. 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.” In a similar vein, the globalist Professor 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?”

Almost all of the modern scholarship is globalist, including important works by influential academics such as Henkin, Gerald Neuman, David Cole, George Fletcher, Jules Lobel, Jordan Paust, Kal Raustiala, and Stephen Saltzburg. Former professor, now Justice Ruth Bader Ginsburg, has also expressed globalist views. Although globalists disagree among themselves about the scope of extraterritorial constitutional protections for aliens, this Article uses the single term “globalist” to contrast their position to the view that the Constitution does not protect the individual rights of noncitizens abroad.


20. See, e.g., LOUIS HENKIN, CONSTITUTIONALISM, DEMOCRACY AND FOREIGN AFFAIRS (1990) [hereinafter HENKIN, CONSTITUTIONALISM]; HENKIN, FOREIGN AFFAIRS, supra note 17; Henkin, Compact, supra note 19; 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.


23. See infra note 99.
whatsoever. For purposes of this Article, then, a globalist is one who advocates that, in some or all circumstances, aliens abroad enjoy the same or similar individual 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.24 According to Henkin, the Framers intended the Bill of Rights to embody a “universal human rights ideology.”25 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.”26 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.”27 As Neuman notes, universalism is often justified by the historically important idea that all mankind has inalienable natural rights against the government.28 When justified by reference to the Founders’ alleged belief in natural rights of all mankind, as it is by Professors Henkin and Lobel and Justice Ginsburg, globalist universalism is 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 reduced means of enforcement.”29 This approach has been used by Justice Kennedy and the second Justice Harlan.30 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

24. 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 . . . .”); see also infra notes 95–98 and accompanying text.
26. See Neuman, Strangers, supra note 10, at 5–8. Neuman also describes a fourth “membership” approach that has been used historically to restrict constitutional rights to members of the political community. Id. at 6–7.
27. Id. at 5.
28. Id. at 6.
29. Id. at 8.
to impose and enforce its own law." Globalists such as Professors Cole and Raustiala use a mutuality approach like Neuman's.

For Neuman, the proper approach has "interrelated normative and descriptive aspects." 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." As another globalist put 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."

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. Many other globalists 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. 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 rightless areas of the globe. 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 that "[i]f 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." Most importantly, the normative preference underlying the choice of the mutuality of obligation model of globalism is a version of the fundamental American constitutional

31. Neuman, Extraterritorial, supra note 21, at 2076, 2077.
32. See Cole, Foreign Nationals, supra note 22, at 382–83; Raustiala, supra note 22, at 2550.
33. NEUMAN, STRANGERS, supra note 10, at 97.
34. Id. at 98.
36. NEUMAN, STRANGERS, supra note 10, at 103, 114.
38. See NEUMAN, STRANGERS, supra note 10, at 102, 105 n.d, 115; Neuman, Abiding, supra note 21, at 151; Neuman, Guantanam0, supra note 21, at 50; see also Amann, supra note 37, at 295; Joan Fitzpatrick, Sovereignty, Territoriality, and the Rule of Law, 25 HASTINGS INT'L & COMP. L. REV. 303, 321–22 (2002); Raustiala, supra note 22, at 2504.
39. Neuman, Guantanam0, supra note 21, at 52.
norm of consent. In Neuman’s words, “rights are prerequisites for justifying legal obligation.” 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.

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 to globalism 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.” The “American constitutional tradition,” says Neuman, “has persistently left open—that is, unregulated—the substance of the United States’ international relations.” 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. Globalism, therefore, is certainly not a unified school of thought. Grouping 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 globalists’ 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 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 these starting points. 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, in-

41. See Neuman, Guantanamo, supra note 21, at 52.
42. Neuman, Abiding, supra note 21, at 151 n.166 (citing Neuman, Strangers, supra note 10, at 110–11).
43. Neuman, Strangers, supra note 10, at 110.
44. Lobel, supra note 22, at 879.
formed by history and contextual sources, is employed by legal scholars of all ideological stripes who write about foreign relations. Moreover, historical and textual methods are often used by members of the political branches of government 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.

There are five primary Supreme Court cases on which globalists focus their scholarship; none directly supports a global constitution, but several have been read expansively by globalists as support for their views. First, the Court's 1891 decision in *Ross v. McIntyre* 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. consular court in Japan. The Supreme Court treated the seaman as if he were a U.S. citizen for purposes of reviewing his constitutional claim, and held that the "[C]onstitution can have no operation in another country." 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 no force abroad—prevented American legal thought from conceiving that either citizens or noncitizens could possibly have extraterritorial constitutional rights. Once this rigid dogma of strict territorial-

45. 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 CHI.-KENT L. REV. 103, 113 (2000).


49. 140 U.S. 453 (1891).

50. See id. at 480.

51. Id. at 464.

52. See NEUMAN, STRANGERS, supra note 10, 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
ity was rejected for citizens, globalists argue, it made no sense to preserve it for noncitizens. 53

In 1950, in *Johnson v. Eisentrager*, 54 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. 55 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. 56 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, 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*, 57 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. 58 A plurality of the Court used such broad language to reach this result—stating that the U.S. government “can only act in accordance with all the limitations imposed by the Constitution” 59—that many globalists claim that *Reid* establishes, or at least strongly suggests, that the Constitution’s individual rights protections also apply abroad to noncitizens. 60 But the Court used the words “citizen” or “American” at least thirteen 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

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55. Id. at 790–91.


57. 354 U.S. 1 (1957).

58. Id. at 39–41.

59. Id. at 6.

"citizens." Many globalists misread this passage both by downplaying the importance of citizenship to the Court's holding and by engaging in question begging. 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." But assuming that globalists are right that the Constitution is, as a general matter, always and everywhere operative, one still must determine how it specifically limits the powers of the government. 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.

In 1990, the Supreme Court decided, in *United States v. Verdugo-Urquidez*, 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 sufficient connection with this country to be considered part of that community." The Court contrasted "the relatively universal term of 'person'" in the Fifth Amendment and the narrower term "the people." 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, 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 noncitizens outside the United States.

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61. See *Reid*, 354 U.S. at 5–6.
64. 494 U.S. 259 (1990).
65. Id. at 274–75.
66. Id. at 265.
67. Id. at 269.
68. See id. at 271.
69. Id. at 276 (Kennedy, J., concurring); id. at 287 n.9 (Brennan, J., dissenting); Brief for Amici Curiae ACLU et al. in Support of Respondent at 11–12 & n.4, *Verdugo-Urquidez*, 494 U.S. 259 (1990) (No. 88-1353) [hereinafter ACLU Brief].
70. See, e.g., Paust, *Antiterrorism*, supra note 22, at 19–20; Ronald J. Sievert, *War on Terrorism or Global Law Enforcement Operation?*, 78 NOTRE DAME L. REV. 307, 318 (2003); see also Brief of
A 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 by the United States at Guantanamo Bay, Cuba. But in dicta in a footnote, the majority hinted that it might embrace some form of globalism. Footnote 15 states:

Petitioners’ 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.”

By quoting the habeas statute in this fashion, the Court simply may 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.” An even broader reading sees footnote 15 as stating that noncitizen detainees anywhere 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 States exercises plenary and exclusive jurisdiction,” 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.

In June 2006, the Supreme Court decided *Hamdan v. Rumsfeld*—the Guantanamo military commission case. Like *Rasul*, *Hamdan* contains ambiguity about extraterritorial constitutional rights for aliens that will likely be seized upon by globalists. Although an alien confined outside the territorial United States at Guantanamo Bay, *Hamdan* asserted individual constitutional rights by arguing that reading a congressional statute to strip federal courts of habeas power.

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Amicus Curiae International Human Rights Law Group et al. at 8 & n.8, Haitian Ctrs. Council, Inc. v. McNary, 969 F.2d 1326 (2d Cir. 1992) (No. 92-6090) [hereinafter IHRLG Brief].
72. See id. at 484.
73. Id. at 483 n.15 (quoting 28 U.S.C. § 2241(c)(3) (2000)).
76. 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 . . . .”).
77. 126 S. Ct. 2749 (2006). The decision in *Hamdan* was reached after the substantive work on this Article was completed and thus the discussion of its impact is limited.
jurisdiction over his case would render the statute invalid under the Suspension Clause and the Equal Protection Clause. The Court declined to reach these issues, relying instead on "[o]rdinary principles of statutory construction." The Court's holding on the merits also relied on congressional statutes and international law incorporated by reference into those statutes, but not on the Constitution. Yet ambiguity can be seen in the Supreme Court's handling of the government's contention, with which the D.C. Circuit had suggested it agreed, that Hamdan's lack of constitutional rights as an alien outside the United States precluded him from raising a constitutional separation of powers argument. Although the Supreme Court did not reach this argument, in finding the military commission illegal the Court did reference, in a general fashion, concerns that sound in separation of powers. Although globalists might disagree, the better reading of *Hamdan* is that the majority opinion does not *sub silentio* hold that Hamdan had enforceable constitutional rights. First, the Court did not in fact hold that the military commission violated the Constitution. It was very careful to say that it relied only on statutes and international law—which, it is worth noting, are the sources of law to which this Article contends the Supreme Court should look for any applicable protection of aliens abroad. Second, the issue raised by the circuit court and the government was whether structural separation of powers challenges to the commission could be invoked by an alien outside the United States, not whether individual constitutional rights were available. Whether or not aliens abroad have enforceable individual rights, it is a different question—and one that seems more plausible to answer in the affirmative—

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78. See Petitioner's Opposition to Respondents' Motion to Dismiss at 32–39, *Hamdan*, 126 S. Ct. 2749 (No. 05-184).
79. *Hamdan*, 126 S. Ct. at 2764. The Court did not even bother to mention Hamdan's (arguably frivolous) equal protection argument.
80. The government argued that alien enemy combatants outside U.S. territory receive no constitutional protections of any kind whatsoever. See Brief of Respondents Donald Rumsfeld et al. at 43, *Hamdan*, 126 S. Ct. 2749 (No. 05-184) ("Petitioner's argument that the President lacks the authority to convene a military commission to try and punish him for his alleged war crimes fails for the many independent reasons discussed above. Because that argument is predicated on the proposition that the Constitution places structural limits on the President's authority to convene military commissions, however, it fails for an additional, even more fundamental reason. As an alien enemy combatant detained outside the United States, petitioner does not enjoy the protections of our Constitution."); see also *Hamdan* v. Rumsfeld, 415 F.3d 33, 37 (D.C. Cir. 2005), *rev'd on other grounds*, 126 S. Ct. 2749 (2006).
82. See id. at 2759 ("[W]e conclude that the military commission convened to try Hamdan lacks power to proceed because its structure and procedures violate both the UCMJ [Uniform Code of Military Justice] and the Geneva Conventions.").
83. The Court's most explicit reference to separation of powers concerns came in a portion of the opinion joined by only four Justices, discussing whether conspiracy is a cognizable offense against the laws of war. See id. at 2780. That being said, the fifth Justice for the majority, Justice Kennedy, expressly invoked separation of powers concerns in his concurrence. See id. at 2800 (Kennedy, J., concurring in part). It seems from *Verdugo-Urquidez* that Justice Kennedy believes that, in some circumstances at least, aliens outside the United States can invoke the protection of the Constitution. See United States v. Verdugo-Urquidez, 494 U.S. 259, 276 (1990) (Kennedy, J., concurring).
whether the structural checks and balances created by the Constitution are always and everywhere operational and may be invoked by any litigant who is otherwise properly before the court.  

So, although the weight of academic commentary and Rasul suggest that globalism may be ascendant, the Supreme Court has not yet accepted globalist arguments. The Court's failure to date to embrace globalism cannot be explained by a lack of opportunities for the issue to be raised. 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. And in Hamdan and many other cases against the U.S. government, alien plaintiffs and globalist scholars—as counsel or amici—have repeatedly pressed their views. 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 addressed the merits of constitutional claims of Americans abroad in cases raising foreign affairs issues.

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 United States. So, if the structural commands in the Constitution are ever enforceable by aliens outside the United States, then a central contention of this Article—that aliens abroad were thought by the Founders to be protected by international law—would be undermined. For it is the Supremacy Clause of the Constitution which makes treaties the supreme law of the land. See U.S. CONST. art. VI, cl. 2.

84. If no structural commands in the Constitution are ever enforceable by aliens outside the United States, then a central contention of this Article—that aliens abroad were thought by the Founders to be protected by international law—would be undermined. For it is the Supremacy Clause of the Constitution which makes treaties the supreme law of the land. See U.S. CONST. art. VI, cl. 2.


86. See Haig v. Agee, 453 U.S. 280, 306–10 (1981) (considering a constitutional challenge to the revocation of the passport of a U.S. citizen ex-CIA officer residing abroad who had publicized identities of undercover intelligence operatives); Kinsella v. United States ex rel. Singleton, 361 U.S. 234, 235 (1960) (considering whether the Bill of Rights barred a trial abroad by a military court of a U.S. citizen wife of a U.S. soldier); Reid v. Covert, 354 U.S. 1 (1957), rev’g on reh’g Kinsella v. Krueger, 351 U.S. 470 (1956) (same); Ross v. McIntyre, 140 U.S. 453, 463–64 (1891) (considering whether the Bill of Rights applied in the trial of an American sailor by a U.S. consular court in Japan); Mitchell v. Harmony, 54 U.S. (13 How.) 115 (1851) (considering a takings claim by a U.S. citizen against a U.S. army officer for trespass in Mexico during war); cf. Neely v. Henkel, 180 U.S. 109, 122–23 (1901) (considering whether, were a U.S. citizen extradited to U.S.-occupied Cuba to face criminal charges, he would be entitled there to protections of the U.S. Constitution); Cooper v. Telfair, 4 U.S. (4 Dall.) 14, 18–19 (1800) (considering whether the Georgia Constitution barred the attaint for treason of a U.S. citizen who had fled, during the Revolutionary War and before filing suit, to British-owned Jamaica). In Afroyim v. Rusk, the plaintiff, who convinced the Supreme Court that the Fourteenth Amendment barred his involuntary expatriation by the U.S. on account of having gone to Israel and voted in an election there, see 387 U.S. 253, 262 (1967), may have remained abroad while he pursued his lawsuit, see 250 F. Supp. 686, 687 (S.D.N.Y. 1966).
the federal government that suggests a preference for deeming aliens abroad to have judicially enforceable constitutional rights. On the contrary, 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. Moreover, Congress has enacted many rules governing the current U.S. national security structure that arguably are inconsistent with certain globalist tenets.

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

87. But cf. S. Rep. No. 56-249, at 11 (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).


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 techniques, and about the alleged inapplicability of many international legal protections to the “war on terror.”

Many commentators assert that these legal claims are not only mistaken but also have allowed egregious 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 some 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 suggests 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, as well as congressional statutes and the dictates of humanity, diplomacy, 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 detainees—or through international law, rather than

90. 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. This report asserts:

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.

Id.; see also 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, at 31 (Aug. 1, 2002) (“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.”).

91. 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 9–32 (Jan. 22, 2002) (concluding that the Geneva Conventions do not protect members of al Qaeda or the Taliban); see also DOD Report, supra note 90, at 67 (“Customary international law does not provide legally-enforceable restrictions on the interrogation of unlawful combatants under DOD control outside the United States.”).

92. Resolving the difficult and much-debated questions of exactly how or even whether customary international law binds the executive branch or Congress, and whether or when it is judicially enforceable against executive branch action or congressional statutes, is beyond the scope of this Article.

arguing for a strained reading of the Constitution.

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. 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 assert or assume instead 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. 94

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 concerning its applicability beyond the borders of the United States. Little is said in the Constitution concerning citizens, and nothing about aliens." 95 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.

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94. 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 35, 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 Fitzpatrick, supra note 38, at 327–34, 340; Frank Tuerkheimer, Globalization of U.S. Law Enforcement: Does the Constitution Come Along?, 39 Hous. L. Rev. 307 (2002).

95. Henkin, Compact, supra note 19, at 12; see also id. at 14 ("The Bill of Rights, added by amendment in 1791, also does not specify whose rights it was designed to safeguard."); id. at 18 ("The Constitution does not state its geographic reach or, more specifically, whether it applies solely within the United States.").
Both reflect a commitment to respect the individual rights of all human beings.\footnote{96}

For Henkin, the original understanding of the Founders was a “universal human rights ideology.”\footnote{97} Professor Henkin does not cite any specific statements by the Founders or other conventional historical authority for these propositions about the Founders’ intent. Instead, he generally relies on (i) the broad dicta in \textit{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.\footnote{98} Other globalist originalists, including Justice Ginsburg, tend to rely on Henkin’s work\footnote{99} rather than specific historical evidence.

\section*{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. For example, Neuman writes that “[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.”\footnote{100} Another globalist asserts that the language of the Bill of Rights is clear about whom 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.”\footnote{101}

\footnote{96. Id. at 32.}
\footnote{97. \textit{HENKIN, CONSTITUTIONALISM}, supra note 20, at 99–100.}
\footnote{98. See \textit{id.} 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 \textit{Reid v. Covert}).}
\footnote{100. Neuman, \textit{Guantanamo}, \textit{supra} note 21, at 49 (footnote omitted); \textit{see also} IHRLG Brief, \textit{supra} note 70, at 8; Eric J. Bentley, Jr., \textit{Toward an International Fourth Amendment: Rethinking Searches and Seizures Abroad After Verdugo-Urquidez}, 27 VAND. J. TRANSNAT'’L L. 329, 335 (1994) (“The Constitution neither specifies the extent of its geographical reach nor identifies the ‘people’ or ‘persons’ it protects.”). Neuman notes that a few constitutional rights are personally or territorially restricted by their text. \textit{See NEUMAN, STRANGERS, supra} note 10, at 102–03 (“The only provision of the Bill of Rights with a geographic referent is the venue clause of the Sixth Amendment . . . .”).}
As suggested by these references to "people" and "persons," globalist textual claims rely heavily on the "open-textured" language used by the Bill of Rights to describe the rights holders.\textsuperscript{102} Globalists often 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.\textsuperscript{103} In other words, the default presumption is that constitutional rights 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 term "the accused" found in the Sixth Amendment—suggests that rights are available globally unless expressly restricted. Other provisions of the Bill of Rights, such

\begin{footnotes}
\item[102] Amann, \textit{ supra} note 37, 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, \textit{Whose Constitution?}, \textit{ supra} note 21, at 980 ("The drafting of the Bill of Rights reflected inattention to the problematic of government activity abroad rather than a conscious effort to design entitlements solely for application within the territory."); id. at 927 ("The drafters of the federal Bill of Rights did not take care to distinguish between the respective rights of citizens and persons."); Raustiala, \textit{ supra} note 22, at 2555 ("The Constitution itself contains no textually demonstrable spatial limitation."); see also, \textit{e.g.}, George P. Fletcher, \textit{Citizenship and Personhood in the Jurisprudence of War}, 2 J. INT'L CRIM. JUST. 953, 958–59 (2004); Paust, \textit{Antiterrorism}, \textit{ supra} note 22, at 25; Paust, \textit{Post-9/11}, \textit{ supra} note 22, at 1350; Saltzburg, \textit{ supra} note 22, at 752–53; Darin A. Bifani, \textit{Comment, Tension Between Policy Objectives and Individual Rights: Rethinking Extradition and Extraterritorial Abduction Jurisprudence}, 41 BUFF. L. REV. 627, 687 n.358 (1993); Desai, \textit{ supra} note 53, at 1601–02.

\item[103] See, \textit{e.g.}, Mark A. Godsey, \textit{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, \textit{ supra} note 101, 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, \textit{ supra} note 99, 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 "inputs" or "structural arguments" that might potentially rebut the clear statement presumption. \textit{See Neuman, Strangers, supra} note 10, 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 the obligations are coextensive."); id. at 99 ("Specific 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, \textit{Extraterritorial}, \textit{ supra} note 21, at 2077 n.20 ("The mutuality presumption is rebuttable, where the text expressly limits the personal or geographical scope of a right, or where structural arguments demonstrate that the right should not be interpreted as applying." (emphasis added)).
\end{footnotes}
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.\(^{(104)}\) 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 Federalists' so-called “Alien Friends Act” of 1798.\(^{(105)}\) More recently, rhetoric suggestive of this clear statement rule has been used by a number of Supreme Court Justices, typically in dissenting opinions.\(^{(106)}\) The globalist textual 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.\(^{(107)}\)

C. GLOBALIST ERRORS

Both originalist and non-originalist globalists commit serious methodological errors. As discussed below, globalist originalism has not been supported by even minimally sufficient evidence from the Founding period. Moreover, to the extent that globalists use a clear statement presumption, it too is a serious error. The presumption is arguably an unacknowledged “normative canon” of textual construction\(^{(108)}\) 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


\(^{(105)}\) See, e.g., Neuman, Whose Constitution?, supra note 21, at 927–38. For a discussion of the Act and its context, see infra notes 356–89 and accompanying text.

\(^{(106)}\) See United States v. Verdugo-Urquidez, 494 U.S. 259, 283 n.7, 291 n.11 (1990) (Brennan, J., dissenting); Reid v. Covert, 354 U.S. 1, 8 (1957) (plurality opinion); 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).

\(^{(107)}\) 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. U.S. Const. art. III, § 2. 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. Id. art. IV, § 2. In addition, the right to hold the offices of President, Senator, or Congressman is textually limited to citizens. Id. art. I, § 2, cl. 2; id. art. I, § 3, cl. 3; id. art. II, § 1, cl. 5. Article I, Section 8 states that 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.

consideration speaks, as the Bill of Rights often does, in "majestic generalities." 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 default assumptions.

To deploy the clear statement presumption, many globalists commit what Professors Laurence Tribe and Michael Doff 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." As demonstrated in Part IV, the constitutional text and structure speak against the viability of globalism in many places and many ways, besides the few words in a few clauses of 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 is not a globalist document.

The next three Parts of this Article discuss the validity of 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 for members of the Founding generation to assert that certain personal rights were based on natural law and were God-given to "all men." Globalists suggest that, consistent with this rhetoric, bills of rights of the state constitutions of 1776 and afterwards and the federal Constitution of 1789 were thought to declare and secure the preexisting "natural rights" of mankind, not to grant rights; globalists thus use the concept of rights derived from nature or God to untether constitutional rights from a particular territorially organized group of people. Since American bills of

111. That is why it is incorrect to suggest, as some have, that I—and not the globalists—employ a clear statement presumption. Reading the text of the Constitution holistically and in light of eighteenth-century understandings, I contend that there is no good reason to read terms such as "person" or "people" in the Bill of Rights as literally encompassing anyone anywhere in the world.
112. The Declaration of Independence para. 2 (U.S. 1776).
113. See Cole, Foreign Nationals, supra note 22, at 372 ("[W]hen adopted, the rights enumerated in the Bill of Rights were viewed not as a set of optional contractual provisions enforceable because they were agreed upon by a group of states and extending only to the contracting parties, but as inalienable
rights merely declared preexisting natural rights of mankind, is it not then likely, as many globalists suggest, that the U.S. Bill of Rights, written as it is in general, non-exclusive language, was intended by the Founders 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 constitutive 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 this method, 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"—that is, 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 relations. Rather, the more discretionary, practical, and flexible principles

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natural rights that found their provenance in God."); Lobel, supra note 22, at 875 ("The view of the Framers that the 'compact' required government to respect the rights of all human beings is reflected in their notion that constitutional rights were derived from the natural rights of all people and not from any agreement."); Neuman, Guantánamo, supra note 21, at 51 ("[T]he Constitution recognizes, it does not merely create rights. The Framers regarded certain fundamental constitutional rights like physical liberty and freedom of conscience as natural rights of mankind.").

114. See infra Part III.C.

115. The flexible and discretionary nature of the law of nations is seen in Montesquieu's famous statement that

[the 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." E.g., id. at 7 n.n (translators' note); see also WILLIAM BLACKSTONE, 4 COMMENTARIES *66 (paraphrasing this passage from Montesquieu on the "law of nations"). For other evidence of the
of international law—the law of nations and, where they existed, treaties—
governed the external realm. Not a loose, universal-sounding rhetoric of natural
rights, but specific claims to positive constitutional rights tied to membership in
a national-constitutional community, formed the basis of Americans' claims
against Great Britain during the revolutionary period. The purpose of republican
governments built during and after the Revolution was to secure the rights of
members of the political community against internal turmoil and external
aggression. There was no significant strain of Founding-era thought that held
that concrete and enforceable rights were found in nature and thus available to
all mankind everywhere. 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 a reading of the Constitution under
which aliens in the United States were thought to be protected by the Constitu-
tion, but aliens abroad were protected by international law and diplomacy.

A. REPUBLICAN GOVERNMENT AND BILLS OF RIGHTS

Although many Founders may have believed that “all men” were naturally
equal in their God-given rights-bearing capacity, as the Declaration of Indepen-
dence suggested, it does not necessarily follow that they also thought that the
government created by the U.S. Constitution would protect and enforce the
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 limited utility of natural rights
rhetoric and the nature and purpose of sovereignty and republican government
generally, and bills of rights specifically.

The Declaration of Independence followed its ringing affirmation of universal-
sounding individual rights by immediately locating the new American project
within what we might call—borrowing Justice Frankfurter’s words—the “world
order based on politically sovereign States.”116 For the Declaration concluded
by stating that the American states were now “Free and Independent States,”

flexibility of the law of nations, see, for example, David Hume, A Treatise of Human Nature 619
“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”).

116. Harisiades v. Shaughnessy, 342 U.S. 580, 596 (1952) (Frankfurter, J., concurring) (“It is not for
this Court to reshape a world order based on politically sovereign States. In such an international
and therefore "have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do."117 Of "necessity," the United States would henceforth hold Britons, "as we hold the rest of mankind, Enemies in War, in Peace Friends."118 From the beginning, then, American sovereignty and independence implied an important legal, political, and moral distinction between Americans and everyone else.

As John Phillip Reid, the leading scholar of the constitutional history of the American Revolution, has shown, Americans' natural rights rhetoric was just that: rhetoric. The claimed natural rights of men were, Reid writes, "abstract" and "nebulous" concepts, "void of any practical application"; they were "the shared platitudes of mankind, not standards for controlling governmental conduct that [could] be translated into legal rights."119 Instead, Americans claimed rights as British subjects under the unwritten British constitution; these rights were seen as concrete and positive and hence legally enforceable.120 Positive constitutional rights, tied to membership in a national-constitutional community, formed the basis of Americans' claims against Great Britain. Accordingly, it is unlikely that the Founders approached the task of writing a constitution or bill of rights in 1787–1789 with the intent to enshrine natural rights of all mankind.

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 No. 3, John Jay instructed that the primary consideration for the proposed new form of government was "[t]he safety of the people" including "security for the preservation of peace and tranquility, as well as dangers from foreign arms and influence, as from dangers of the like kind arising from domestic causes."121 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..." ordering of the world a national State implies a special relationship of one body of people, i.e., citizens of that State, whereby the citizens of each State are aliens in relation to every other State.").}

117. The Declaration of Independence para. 31 (U.S. 1776).
118. Id. para. 32.
120. See, e.g., id. at 90–91.
121. The Federalist No. 3, at 42 (John Jay) (Clinton Rossiter ed., 1961); see also The Federalist No. 45, at 289 (James Madison) (Clinton Rossiter ed., 1961) (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, An Inquiry Into the Nature and Causes of the Wealth of Nations ch. IV, § ix, at 687–88 (R.H. Cambell et al. eds., 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").
the blessings of civil & religious liberty.”122 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 his rights.123

The focus on the rights of members of the community is seen in the explanatory preambles of many Founding-era state constitutions. The “objects” of the influential Massachusetts Constitution of 1780 were “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, to this end, a government was created “for Ourselves and Posterity.”124 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.”125 Even the Articles 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 on the rights and protections it created.126 By 1787, then, the most prominent exemplars of the new American constitutional tradition stated that they were intended to benefit the members of society—to the apparent exclusion of outsiders.127 As discussed below, the U.S. Constitution states the same thing

122. 1 FARRAND, RECORDS, supra note 14, at 402; see also id. at 423 (statement 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.").


125. Pa. Const. of 1776, pmbl.; Vt. Const. of 1786, pmbl.; see also N.H. Const. of 1776, pmbl. (creating a government "for the preservation of peace and good order, and for the 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").

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

127. 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, e.g., Massachusetts (Feb. 6, 1788), reprinted in 2 U.S. DEP’T OF STATE, DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 93 (1894) [hereinafter DEP’T OF STATE, DOCUMENTARY HISTORY]; New Hampshire (June 21, 1788), reprinted in id. at 141; North Carolina (Aug. 1, 1788), reprinted in id. at 266; Virginia (June 27, 1788), reprinted in id. at 377, recommended provisions, some of which were later incorporated into the Bill of Rights, and described
in its Preamble.\textsuperscript{128} 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.\textsuperscript{129}

Looking past these explicit declarations of the purpose of government, globalists instead emphasize the generality of the language in bills of rights. But the broad language would most likely not have been understood by the Founding generation to include everyone everywhere within the protection of the rights. It appears that many Founders believed that only "constituent members of the society" or "citizens"—meaning essentially free, adult, non-alien, Protestant, white males who held property or paid taxes—were entitled to the franchise and full political and civil rights in the pre- and post-revolutionary periods.\textsuperscript{130} Globalists have not presented evidence that this view—what historian Jack Greene calls a "deep and abiding commitment... to political inequality"\textsuperscript{131}—had been radically altered by 1789 when the federal Bill was adopted. Moreover, 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.\textsuperscript{132} 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."\textsuperscript{133} So the rights announced in bills would have been secured primarily through the regular processes of government. The fact that only members of society were represented and could participate in governmental decisionmaking means that the processes of democratic government would likely not be good at protecting outsiders. Moreover, at the time the Constitution and Bill of Rights were written and ratified, the idea that federal courts would enforce the Constitution against the political branches was highly controversial. The older and still more common view was, as documented by Larry Kramer, that each coordinate branch of government

\textsuperscript{128} See infra Part IV.B.
\textsuperscript{129} Akhil Reed Amar, The Bill of Rights: Creation and Reconstruction 170 (1998). 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.
\textsuperscript{131} Greene, supra note 130, at 4.
\textsuperscript{133} Rakove, supra note 127, at 329.
interpreted and applied the Constitution for itself in its own sphere and that, standing above the government in authority, "the people" were the ultimate source and thus enforcer of constitutional limits, through petitioning, elections, public demonstrations, constitutional amendments, and other "political" means. It seems undeniable that the people who were the font of this "popular constitutionalism"—Kramer's term—were the American people. 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.

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." The Bill's lack of novelty is evidenced by the familiar precedents 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.

B. THE LIMITS OF "TERRITORIALITY"

Globalists present conflicting accounts of the original understandings about the territorial limits of law. For example, whereas globalist-originalists apparently believe that the Constitution was originally conceived as a universal human rights document 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

136. 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.
137. Cf. Johnson v. Eisentrager, 339 U.S. 763, 784 (1950) ("[E]xtraterritorial application of organic law [to alien enemies] would have been so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to excite contemporary comment. Not one word can be cited. No decision of this Court supports such a view.").
rigid territoriality that assumed that legal rights and duties were limited to the sovereign's own territory. 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 only aliens who are abroad have 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. 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. As Chief Justice Marshall put it, the "full and absolute territorial jurisdiction" of "every sovereign" is "incapable of conferring extra-territorial power." The Founders would have derived this territorial understanding from many sources, including influential writers on the common law, the law of nations, and the social contract, as well as from the constitutional history of England during the turbulent seventeenth century and the American colonists' constitutional arguments against Parliamentary legislative power in America.


139. See, *e.g.*, Raustiala, *supra* note 22, 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]*.").


143. See, *e.g.*, 3 VATTEL, *supra* note 121, at 138–39.


145. See infra note 176 and accompanying text.

146. Before events had made reconciliation with England impossible, many Americans had argued that while foreign affairs (such as war, foreign trade, and the like) could be controlled by England
But while eighteenth- and nineteenth-century legal thought was heavily territorial, it does not appear to have been an absolutely rigid dogma. It was always understood that a nation's institutions of protective power could, of course, be used abroad.147 (Most or all 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, "the jurisdiction of a nation extends to the whole of its territory, and to its own citizens in every part of the world."148 Numerous examples can be found in which eighteenth- and nineteenth-century legislatures, courts, and commentators recognized that nations have the power to regulate the conduct of their own citizens or resident foreign nationals when they were abroad.152 Some globalists, apparently in the thrall of a vision of strict territoriality, overlook this evidence.153

There were other exceptions to strict territoriality. The First Congress enacted in 1789 a statute allowing foreigners to sue in U.S. courts for torts committed


147. See, e.g., Church v. Hubbart, 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").


149. For acts of the U.S. Congress, see, for example, Act of May 15, 1820, ch. 113, § 4, 3 Stat. 600 (criminalizing the seizure of slaves "on any foreign shore" by U.S. citizens or crew of U.S. vessels); Act of Feb. 28, 1806, ch. 9, § 1, 2 Stat. 351 (barring "any person or persons resident within the United States" from trading with those parts of St. Domingo then in a state of rebellion); Act of Jan. 30, 1799, ch. 1, 1 Stat. 613 (criminalizing certain political communications with foreign governments by U.S. citizens residing at home or "in any foreign country"); Act of June 14, 1797, ch. 1, § 1, 1 Stat. 520 (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); Act of July 22, 1790, ch. 33, § 5, 1 Stat. 137, 138 (punishing crimes by U.S. citizens or inhabitants against Indians in Indian territory); Act of Apr. 30, 1790, ch. 9, § 1, 1 Stat. 112 (making treason a crime when committed abroad). For acts of state legislatures, see, for example, Act of Oct. 1784, ch. 63, § 3, 3 Stat. 137, 138 (punishing murder, arson, robbery, and "other crime" committed by "any citizen of this Commonwealth who left Virginia and then committed the crime in the territory of any Christian nation or Indian tribe, in amity with the United States").

150. See, e.g., The Apollon, 22 U.S. (9 Wheat.) 362, 370 (1824); United States v. McGill, 26 F. Cas. 1088, 1090 (C.C.D. Pa. 1806) (No. 15,676); Williams' Case, 29 F. Cas. 1330, 1331 (C.C.D. Conn. 1799) (No. 17,708).

151. See 1 Blackstone, supra note 115, at *369; Henry Wheaton, Elements of International Law § 113 (Boston, Little, Brown, & Co., 8th ed. 1866); 3 Vattel, supra note 121, at 147.

152. 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 (Oxford, Clarendon Press, 2d ed. 1884).

153. See Wilson, supra note 75, at 168–69 ("Jurisprudence on the extraterritorial application of the Constitution has, for most of United States history, been dominated by a 'strict territorial' approach that defines the reach of the U.S. Constitution as extending to 'the water's edge' of U.S. sovereign territory, but not beyond. . . . International law . . . recognizes that states may exercise authority over their nationals beyond their territories, though U.S. law did not reflect this principle until 1957, with the seminal case of Reid v. Covert.").
against the law of nations; some of these torts would occur abroad or on the high seas. 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," even by a nonresident non-British plaintiff. Although most crimes were considered local and could only be prosecuted where they occurred, the crime of piracy could be punished in national courts even if committed by noncitizens on the high seas. And extraterritoriality was not limited to jurisdiction in a nation's own domestic courts. The United States and other countries deployed consuls to overseas ports to adjudicate disputes between their nationals there.

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

154. See Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76.
156. See Martins v. Ballard, 16 F. Cas. 923, 924 (D.S.C. 1794) (No. 9,175).
158. See Rafael v. Verelst, (1776) 96 Eng. Rep. 621 (K.B.) (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); cf. Mostyn v. Fabrigas, (1774) 98 Eng. Rep. 1021 (K.B.) (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 globalization. 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 in Rafael 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.
159. See Brief of Professors, supra note 157, at 116.
161. 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 VATTEN, supra note 121, at 209.
infringe the constitutional rights of American citizens abroad. 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. 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." 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 allow a U.S. corporation, but not an alien individual, to use the Constitution's Takings Clause to sue for the value of its destroyed property.

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163. 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'y of State J.Q. Adams (Apr. 8, 1823), in 42 ANNALS OF CONG., App. at 3007–08 (1824); Letter from Sec'y of State J.Q. Adams to Envoy Stratford Canning (June 24, 1823), in 42 ANNALS OF CONG., App. at 3011 (1824). 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." Id. 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'y of State J.Q. Adams to Ministers Albert Gallatin and Richard Rush (Nov. 2, 1818), in 37 ANNALS OF CONG., App. at 1321 (1818).

164. 54 U.S. (13 How.) 115 (1851).

165. See id. at 126–27 (argument of counsel).

166. 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 (New York, Hurd & Houghton 1868); Theodore Sedgwick, A Treatise on the Rules Which Govern the Interpretation and Application of Statutory and Constitutional Law 612 n.† (New York, John S. Voorhies 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 v. Covert*, 354 U.S. 1, 8 & n.10 (1957). But see IHRLG Brief, supra note 70, at 9 n.9 (stating that prior to Reid, "the Supreme Court had never held that citizens had extraterritorial rights").

167. Compare *Wiggins v. United States*, 3 Ct. Cl. 412 (1867) (American corporation entitled to compensation), with *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 always explicit and, therefore, nothing definitive can be said about globalism based on their outcomes. But the *Perrin* court found dispositive that *Wiggins* had concerned a claim by a United States citizen, while the foreign citizenship of Perrin at the time of the incident rendered the claim an "international political question[ ]." Id. at 547.
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 on Spanish-owned Florida and his execution of two British subjects he captured there. Representative Henry Baldwin, later appointed by President Jackson to the U.S. Supreme Court, disparaged the notion that "the Constitution and laws of the country have 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." 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. 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. Supporters of the arrests generally did not take up the constitutional argument. But one argued, referring to Walker and not his indisputably American followers, that this was "not the case of a citizen of our own country that we are considering. It is the case of a man who is no citizen of ours; who

168. For a detailed discussion of this incident and the resulting congressional investigation and debate, see infra Part V.C.
169. 33 ANNALS OF CONG. 1042 (1819) (emphases added); see also 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.").
170. For background on these events, which took place soon after Dred Scott was decided and during bitter debates about Kansas statehood, see 5 HERMANN E. VON HOLST, THE CONSTITUTIONAL AND POLITICAL HISTORY OF THE UNITED STATES 470-84 (John J. Lalor trans., Chicago, Callaghan & Co. 1885); 6 id. at 158-64, 197-203.
171. See CONG. GLOBE, 35th Cong., 1st Sess. 258 (1858) (statement 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 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, Representative Stephens of Georgia, also may 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.
has no right whatever to appeal to us for any of the rights of citizenship."  

These five examples suggest that extraterritorial rights for American citizens were “thinkable” well before the mid-twentieth century, and therefore that the reliance by many non-originalist globalists 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 in the British empire, into which the Founding generation was born, many 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 of law and liberty with him, as the nature of things will bear.”

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. In *Rasul*, the Supreme 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. Additional evidence of this is found in the constitutional struggles of seventeenth-century England. 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," it is also unclear 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 1787–1789. The jurisdiction of state courts to issue writs of habeas corpus was likely limited to the territory of each state, but more historical research is needed on this point. When the U.S. federal courts were created in the Judiciary Act of 1789, they were given power to issue writs of habeas corpus to prevent the detention of 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. Id. (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 by the executive. See 2 Henry Hallam, The Constitutional History of England 126–28 (Garland Publishing, Inc. 1978) (1846); 9 Holdsworth, supra note 174, at 116–17; see also 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 had also been 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 from presenting their cases in court. See 3 Blackstone, supra note 115, at *135; 9 Holdsworth, supra note 174, 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, at 53–59; 9 Holdsworth, supra note 174, at 117. The two bills were later combined and finally passed as the Habeas Corpus Act of 1679. See 9 Holdsworth, supra note 174, 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, supra note 115, at *136–37 (summarizing the Act); 9 Holdsworth, supra note 174, at 117 (same). Importantly, the Act did not purport to extend the English courts’ habeas jurisdiction to places outside the dominions of the Crown.

177. Ex parte Bollman, 8 U.S. (4 Cranch) 75, 93–94 (1807).

178. Cf. Leonard S. Goodman, Eighteenth Century Conflict of Laws: Critique of an Erie and Klaxon Rationale, 5 Am. J. LEGAL Hist. 326, 328 (1961) (explaining that "colonial courts were established under the authority of the governors’ commissions [which] generally authorized judicial power that ended at the boundary of a particular colony, but there are examples of where it extended further"). 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. 330, § 4, in The Public Laws of the State of South Carolina 21 (John Faucherad Grinke ed., 1790). 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, Virginia, and Massachusetts were modeled on the English Habeas Corpus Act which, as noted above, appears to have confirmed the domestic territorial limitation of the writ. See Habeas Corpus Act, ch. 39, §§ 9–10, 1785 Mass. Acts 270, 272; Act of Feb. 21, 1787, ch. 39, § 8, 1787 N.Y. Laws 424, 428; Habeas Corpus Act, ch. 35, § 2, 1784 Va. Acts 19, 20.
of habeas corpus, but neither the territorial nor the personal scope of the writ’s protections was 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. A fuller answer must account for the unique protective relationship existing between the U.S. government and U.S. citizens and other residents of the country. The evidence regarding habeas corpus, however, suggests that the territorial limitation on the writ was likely strict.

C. DOMESTIC VERSUS FOREIGN AFFAIRS, MUNICIPAL LAW VERSUS INTERNATIONAL LAW

Generally speaking, insofar as international relations were thought to be governed by law, rather than policy, they were governed by treaties and customary international law—known in the eighteenth century as the law of nations—which gave substantial deference to national interests and the discretion of the political branches of government, while domestic affairs were thought to be governed by municipal laws like statutes, constitutions, and the common law. 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. A sharp distinction between the law governing foreign affairs and domestic affairs appears to have been common ground.

179. 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 3 VA・TEL, supra note 121, 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 406–07 (Harold C. Syrett ed., 1969) (“There is no principle better supported by the Doctrine of Writers, the practice of Nations, and the dictates of right reason, than this—that whenever a Nation adopts maxims of conduct tending to the disturbance of tranquility and established order of its neighbours, or manifesting a spirit of self-aggrandisement—it is lawful for other Nations to combine against it, and, by force, to controul the effects of those maxims and that spirit. The conduct of France ... was an offence against Nations, which naturally made it a common cause among them to check her career.”).

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

among American courts, political officials, and commentators. Madison, for example, in one of his *Helvidius* essays, distinguished "external laws" designed to preserve "external peace" from "municipal laws" designed to preserve "internal peace."

The distinction between internal municipal law and external international law and diplomacy would have made sense to Americans who, in the previous decade, had generally conceded that "external" affairs including war and foreign policy were lawfully the province of the British government but had fought a revolution to reject the notion that the same overseas government could lawfully regulate the "internal police" or the local, domestic affairs of American colonists. The distinction between internal municipal law and external international law derived from many other sources, including the theories of Black-

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182. See, e.g., *Am. Ins. Co. v. 356 Bales of Cotton*, 26 U.S. (1 Pet.) 511, 545-46 (1828) (stating that an admiralty case based on events outside the United States does not arise under the Constitution and laws of the United States but the law of nations); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 260 (1796) (opinion of 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) (holding that a prize of war would be adjudicated under the law of nations not "mere municipal regulations" found in U.S. statute); *Penhallow v. Doane's Adm'rs*, 3 U.S. (3 Dall.) 54, 91 (1795) (opinion of Iredell, J.) (suggesting that all prize cases should be decided under the law of nations not "mere municipal regulation"); *Bingham v. Cabot*, 3 U.S. 19, 26 (1795) (argument of counsel by Mr. Tilghman) (asserting that common law courts may address some aspects of prize cases because the exclusive jurisdiction of admiralty courts is based on the nature of a prize case as a "controversy, arising on the high seas, affecting, usually, the rights and interests of different States; and, consequently, . . . ought to be decided by the law of nations, and not by the municipal law of either country"); *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 475 (1793) (opinion of Jay, C.J.) (distinquishing cases affecting foreign diplomats and admiralty cases from cases arising under the Constitution or laws of the United States and concluding that the former are to be regulated by the law of nations and fall exclusively within the jurisdiction of the federal courts); *Camp v. Lockwood*, 1 U.S. (1 Dall.) 393, 402-03 (Pa. 1788) (determining that a U.S. citizen was subject to municipal law and could not be considered a public enemy under the law of nations).

183. See *Letter from Sec'y of State Thomas Jefferson to Minister George Hammond* (May 29, 1792), in 1 *AMERICAN STATE PAPERS: FOREIGN RELATIONS* 202 (Walter Lowrie & Matthew St. Clair Clarke eds., Washington, Gales & Seaton 1833) [hereinafter Jefferson Letter to Hammond] (stating that Great Britain 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").

184. For example, in one of his influential *Crisis* essays, Thomas Paine argued that, by the Declaration of Independence and the 1778 treaty with France recognizing her independence, the United States then came, in her relations with Great Britain, "within the law of nations, [and] out of the law of Parliament." *The Crisis No. VII, PENNSYLVANIA PACKET, OR THE GENERAL ADVERTISER, NOV. 12, 1778.* 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 *THE WORKS OF JAMES WILSON* 137-38 (James DeWitt Andrews ed., Chicago, Callaghan & Co. 1896), 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), and that municipal law applied in court cases implicating external events could incorporate, where appropriate, the law of nations, see infra note 242.


stone, Locke, Vattel, Pufendorf, and other influential writers.\footnote{187} 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."\footnote{188} 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."\footnote{189} Similarly, Locke taught that the legislature enacts "municipal laws" which operate within the society and for the benefit of its 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.\footnote{190} 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."\footnote{191} 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."\footnote{192} There was an intensely practical reason for the internal/external distinction


\footnote{188. Montesquieu, supra note 115, at 7.}

\footnote{189. Id. at 514–15.}

\footnote{190. Locke, supra note 144, §§ 146–47; see also id. §§ 131, 134 (suggesting that legislatures by consent establish "standing laws" for the common good of the society, but that external relations are governed by force, not law).}

\footnote{191. Alexander Addison, Analysis of the Report of the Committee of the Virginia Assembly (1800), reprinted in 2 American Political Writing During the Founding Era, supra note 122, 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 Exp. 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 regulated by international instead of municipal law.}

that saw external relations as governed by the more forgiving standards of international law and discretion. 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." 193 Similarly, Rutherforth 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." 194

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 that 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 or set bounds to the exerions of all other nations, then indeed it might prudently chain the discretion of its own government, and set bounds to the exerions for its own safety.

> ... The means of security can only be 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. 195

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. 196

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

193. Locke, supra note 144, § 147 (emphases omitted); see also id. § 145.
194. 2 Rutherforth, supra note 187, at 56, 60, 65.
196. The Federalist No. 23, at 153 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis omitted). 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. See, e.g., The Federalist No. 3 (John Jay); Nos. 8, 24–26, 29 (Alexander Hamilton); Nos. 41, 45 (James Madison).
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. Nevertheless, aliens within the country were under the protection of the sovereign's municipal laws. Influen
tial writers like Vattel and Blackstone emphasized that aliens residing or sojourning within their countries were required to obey local laws and, reciprocally, were entitled to the "protection" of the sovereign and the municipal laws while within the country. Blackstone, for example, wrote that "as the prince affords his protection to an alien, only during his residence in this realm, the 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." The general principle that allegiance and protection were reciprocal duties and rights was common ground among many theorists read by the revolutionary generation and entered mainstream American thinking. Consistent with these general understandings, the common law writ of habeas corpus was available to friendly aliens resident or visiting within the country in both England and in the United States at the time of the adoption of the Constitution.

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

197. See, e.g., 1 BLACKSTONE, supra note 115, at *371–72; 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 56 (New York, O. Halstead 1827); 1 ZEPHANIAH SWIFT, A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT 165–66 (Windham, John Byrne 1795).

198. See, e.g., An Act Containing an Abstract and Declaration of the Rights and Privileges of the People of this State, and Securing the Same of 1776 para. 3, reprinted in ACTS AND LAWS OF THE STATE OF CONNECTICUT, IN AMERICA 2 (New London, Timothy Green 1784) ("[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... "); 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 THE COLONIAL LAWS OF MASSACHUSETTS 33 (1995).

199. See 3 VATTEL, supra note 121, at 87, 145, 371.

200. See 1 BLACKSTONE, supra note 115, at *370; see also id. at *369.


202. For eighteen century examples, see 1 SWIFT, supra note 197, at 164; Letter from Thomas Jefferson, Sec'y of State, to Jean Baptiste de Ternant, Minister Plenipotentiary of France (May 15, 1793), in 1 AMERICAN STATE PAPERS: FOREIGN RELATIONS, supra note 183, at 148; John Adams, Thoughts on Government (1776), in 1 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA, supra note 122, at 405. For later examples, see Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 120 (1804); 3 Op. Att'y Gen. 253, 254 (1837).

203. 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."); 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 the United States could employ the writ of habeas corpus).
the Magna Carta, and probably also in the Hebrew and Christian Bibles. The Hebrew Bible, in particular, emphasized equality under the laws for alien residents or sojourners, as did early bilateral treaties of the United States and official statements of U.S. government policy. Treating aliens within the country equitably and generously was a refrain of many theorists, and was an emerging norm of the law of nations in the eighteenth century. The strong desire of many eighteenth-century Americans to stimulate economic development and to populate their new country by encouraging immigration 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.

During the debates about the so-called Alien Friends Act in 1798, Jeffersonian Republican members of Congress argued that friendly—that is, not “enemy”—resident aliens were fully protected by the Constitution by citing the reciprocal norms of protection and allegiance. Given the strong influence of

204. See 4 Blackstone, supra note 115, at *69.
205. 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.”); Numbers 15:16 (“One law and one manner shall be for you, and for the stranger that sojourneth with you.”); 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.”); 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....”).
208. See Richard Hooker, An Abridgement of the Ecclesiastical Polity 32 (Dublin, J.A. Husband 1773) (stating that the law of nations concerns itself with “the courteous entertainment of strangers”); see also, e.g., 3 Vattel, supra note 121, at 145–48.
209. 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 (Alexander Hamilton); 3 Vattel, supra note 121, 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) (stating that unjust treatment of aliens abroad was “the major excuse for war”).
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. 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 much looser rules of the law of nations, which gave significant deference to national interest and the discretionary decisions of sovereign governments.

IV. THE TEXTUAL BASIS OF A CONSTITUTION FOR THE PEOPLE OF THE UNITED STATES

The Constitution's 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 generally 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. One textual example 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.\textsuperscript{216} The Constitution shows the importance it accords to the role of foreign diplomats by protecting them with original jurisdiction in the Supreme Court.\textsuperscript{217}

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.\textsuperscript{218} In the eighteenth century, as now, treaties of amity and commerce commonly provided that each signatory grant certain rights and protections to the visiting or resident nationals of the other treaty state.\textsuperscript{219} 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;\textsuperscript{220} and Article III extends the federal judicial power to cases arising under treaties.\textsuperscript{221} 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 for the benefit of foreigners.\textsuperscript{222} 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.\textsuperscript{223}

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 after independence from Britain.\textsuperscript{224} The Constitution's
grants to federal courts of alienage jurisdiction and admiralty jurisdiction were intended to protect foreigners, as were other provisions. 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." 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.

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.” 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’s “define and punish” power—directly concerned the interests and rights of foreigners. Madison and others viewed the impunity with which American states 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.

These structures protecting aliens are not best understood as evidence of globalism. By recognizing the importance of aliens becoming citizens, 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 foreign nations from ripening into war or otherwise harming the
United States. 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. The Constitution also gives the political 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 forms of customary international law can be controlled to some extent by Congress—subject to presidential veto—through constitutional provisions such as the Law of Nations Clause, the Foreign Commerce Clause, and the power to make rules concerning "captures." Indeed, if it is true that the Founders viewed the law of nations as a form of general common law, to be applied by courts interstitially, it is significant that the Founders generally also believed that common law was subject to legislative modification or override.

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.\textsuperscript{236} 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 customary international law. Reading the Supremacy Clause together with the Law of Nations Clause of Article I (giving Congress power "to define and punish Offences against the Law of Nations"), 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.\textsuperscript{237} Besides controlling courts through substantive legislation, Congress is given important powers to control the jurisdiction or even the existence of federal courts.\textsuperscript{238} 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.\textsuperscript{239}

B. TEXTUAL INDICATIONS THAT THE CONSTITUTION PROTECTS THE PEOPLE IN THE UNITED STATES

As Akhil Amar has noted, the Preamble and the Supremacy Clause "mark[] the Constitution's most sustained meditation upon itself."\textsuperscript{240} Both suggest that the Constitution is not globalist. The Supremacy Clause states that the Constitution, laws, and treaties of the United States "shall be the supreme Law of the Land,"\textsuperscript{241} not of or for any other place. In eighteenth-century usage, the "law of the land" referred to domestic law, often the common law, and was explicitly

\textsuperscript{236} See, e.g., A Charge Delivered to the Grand Jury for the District of North Carolina by Justice James Iredell (June 2, 1794), in 2 Life and Correspondence of James Iredell 410, 423 (Griffith J. McRee ed., New York, Peter Smith 1949) (1857) ("In whatever manner the law of nations is violated, it is a subject of national, and not personal complaint."); see also 4 Blackstone, supra note 115, at *68 ("[O]ffences against this law ["the law of nations"] are principally incident to whole states or nations: in which case recourse can only be had to war; which is an appeal to the God of hosts, to punish such infractions of public faith, as are committed by one independent people against another.").

\textsuperscript{237} There is, however, some evidence that the "Laws," which the President is charged with "faithfully execut[ing]." U.S. Const. art. II, § 3, were thought to include the law of nations. See, e.g., Helvidius No. II (1793), reprinted in 15 The Papers of James Madison 86 (Thomas A. Mason et al. eds., 1985). For contemporary debates about this, see, for example, Curtis A. Bradley, The Alien Tort Statute and Article III, 42 Va. J. Int'l L. 587, 602 n.65 (2002).

\textsuperscript{238} U.S. Const. art. III, § 2.

\textsuperscript{239} This stands in some contrast to 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 have asserted that they are the leading expounders of the meaning of the Constitution. Cf. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

\textsuperscript{240} Amar, supra note 135, at 299.

\textsuperscript{241} U.S. Const. art. VI, cl. 2 (emphasis added).
contrasted to the law of nations. 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 Constitution is designed, and Congress given the power, to "provide for the common defence." 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.

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, have no representation in the House, the Senate, or the electoral college. The Constitution directs that the federal government "protect" each state "against Invasion" and, upon request from the state government, from "domestic Violence." 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.

The Privileges and Immunities Clause cuts against a globalist reading of the Constitution. The federal government guarantees that "[t]he Citizens of each State" receive the protection and benefit of "all Privileges and Immunities of Citizens in the several States." Foreigners (and even resident aliens) are

242. See, e.g., Read v. Read, 9 Va. (5 Call) 160, 173 (1804); 3 BLACKSTONE, supra note 115, at *69; 1 MATTHEW HALE, HISTORIA PLACITORUM CORONAE: THE HISTORY OF THE PLEAS OF THE CROWN 94 (Lawbook Exchange, Ltd. 2003) (1736). But note that the law of nations was often said to be incorporated into the common law or law of the land, while still being conceptually distinct. See, e.g., Respublica v. De Longchamps, 1 U.S. (1 Dall.) 111, 114 (Ct. Oyer & Terminer Phila. 1784) (argument of counsel); Nathan v. Virginia, 1 U.S. (1 Dall.) 77 note (Philadelphia C.P. 1781) (argument of counsel).

243. See U.S. CONST. pmbl.

244. Id.

245. Id.

246. See id.

247. Id.

248. See Christopher C. Langdell, The Status of Our Territories, 12 HARV. L. REV. 365, 372 (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 Ross v. McIntyre, 140 U.S. 453, 464 (1891) (to the same effect); AMAR, supra note 129, at 170 (similar).

249. U.S. Const. art. III, § 2, cl. 1; id. art. IV, § 3, cl. 2.

250. See id. art. I, § 2, cl. 1, 2; id. art. I, § 3, cl. 1, 3; id. art. II, § 1, cl. 2.

251. See id. art. IV, § 4.

252. See id. 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. Id. art. I, § 8, cl. 17; cf. In re Neagle, 135 U.S. 1, 60–62 (1890) (federal government has implied constitutional power to protect itself).

253. See U.S. CONST. art. IV, § 2, cl. 1.
excluded. As Madison noted, "The 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." 254 As a result, the liberties of people in America would be much more likely to be put at issue in their frequent interactions with state and local governments, which regulated the domestic field, than in 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." 255 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. 256 Article I, Section 8 contains numerous powers that are designed to improve the domestic 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." 257 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. 258 As Chief Justice Marshall put it, the Constitution "confers absolutely" the war power. 259

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," 260 "suppress Insurrections," 261 or "on Application" of the state government affected, protect states "against domestic Violence." 262 The Constitution's textual distinction between militia and army is suggestive of

254. THE FEDERALIST No. 45 (James Madison). Many Anti-Federalists disagreed with this. See, e.g., Dissent of the Minority of the Pennsylvania Ratifying Convention (Dec. 1787), in 2 DOCUMENTARY HISTORY, supra note 14, at 628 (complaining that the Constitution will effectuate the "total destruction of the state governments").
256. Cf. 4 ANNALS OF CONG. 170–71 (1794) (statement of Rep. Madison) (suggesting that Congress may lack constitutional power to spend "the money of their constituents" on relief for French refugees).
257. U.S. CONST. art. I, § 8, cl. 11.
258. Id.
261. Id.
262. Id. art. IV, § 4.
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 only may be used domestically. This contrasts with the absence of territorial limitation on the deployment of "Armies" and the "Navy." The use 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." 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 create 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 its contrasting 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 Representatives, 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. Shared powers, popular involvement, deliberation, and checks 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 states and the people are largely excluded, in order to

263. Id. art. I, § 8, cl. 15 (granting Congress the power to call forth the militia to, among other things, "suppress Insurrections and repel Invasions").
265. Id. art. I, § 8, cl. 15.
266. Id. art. II, § 3, cl. 4.
269. 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 (Alexander Hamilton); Remarks of James Wilson to Penn. Ratifying Convention (Dec. 11, 1787), in 2 ELLIOT, DEBATES, supra note 224, at 516–17; 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
promote the initiative, efficiency, flexibility, and power needed to protect the United States against external enemies.\textsuperscript{270} That the key structural checks on government power and protections for civil liberties are active domestically but 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 lawmaking 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—is enacted without the participation of the popular House.\textsuperscript{271} Thus, in multiple and overlapping ways, the original Constitution is inconsistent with globalism and instead creates a government to protect and benefit the people within the United States.

C. THE BILL OF RIGHTS

To avoid the fallacy of dis-integration, all of the foregoing provisions of the Constitution must be interpretive context for reading the general language that the Bill of Rights uses to describe the rights holders ("person," "people," "accused").\textsuperscript{272} Globalists conspicuously fail to consider the Constitution as a whole. Besides this, there are other real weaknesses in their 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:

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, ch. 50, 1 Stat. 381, barred individuals within the United States from planning or launching armed attacks against nations at peace with the United States, while the Logan Act of 1799, ch. 1, 1 Stat. 613, criminalized many kinds of unauthorized communications by U.S. citizens with foreign governments. See Peter M. Shane & Harold H. Bruff, Separation of Powers Law: Cases and Materials 636–37, 853–54 (2d ed. 2005) (citing the Neutrality and Logan Acts as examples of Congress and the President exercising their constitutional prerogative to exclusively manage foreign affairs).

270. See, e.g., The Federalist Nos. 70, 74 (Alexander Hamilton); SopAER, supra note 46, at 45–46.
272. Because adoption of the original Constitution was, in important respects, conditioned on the later adoption of a bill of rights, and because the Bill was, of course, adopted in order that it become "Part of this Constitution," U.S. Const. art. V, it makes "originalist" sense to read the two texts together.
Except 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.\textsuperscript{273}

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 laws that abridge speech or religious exercise.\textsuperscript{274} Likewise, the universal-sounding protections of the Fourth, Fifth, and Sixth Amendments have never been thought to cover many military activities during wartime.\textsuperscript{275} Another example is the Constitution's use of the word "person." Although the term is seemingly 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.\textsuperscript{276} The Constitution refers to a "person" accused of treason, but plainly this term cannot comprehend aliens abroad with no prior connection to the United States.\textsuperscript{277} The Constitution requires that the President, Senators, and members of the House be citizens,\textsuperscript{278} but elsewhere refers to them as "person[s]."\textsuperscript{279} In sum, that the general language is susceptible to broad interpretations does not mean that all interpretations are equally plausible. This does not rule out, say, that constitutional "persons" might include aliens abroad, but it is a reason for interpretive caution.

The problems with an ahistorically literalist reading of constitutional lan-

\textsuperscript{273} Currie, supra note 135, 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, 250–51 (1833). See generally Akhil Reed Amar, The Bill of Rights and the Fourteenth Amendment, 101 Yale L.J. 1193, 1198–1215 (1992) (analyzing the Barron decision in a historical context).

\textsuperscript{274} 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.").

\textsuperscript{275} See Johnson v. Eisentrager, 339 U.S. 763, 788 (1950); 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. (2 Black) 635, 671–72 (1862); cf. Jefferson Letter to Hammond, supra note 183, at 201 n.ii ("[I]t is a condition of war, that enemies may be deprived of all their rights.").

\textsuperscript{276} 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, in 4 Elliot, Debates, supra note 224, at 176 ("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.").

\textsuperscript{277} Cf. United States v. Palmer, 16 U.S. 610, 631 (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").

\textsuperscript{278} See U.S. Const. art. I, § 2, cl. 2 (House); id. art. I, § 3, cl. 3 (Senate); id. art. II, § 1, cl. 5 (President).

\textsuperscript{279} 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. 4 (referring to candidates for the presidency as "Persons"); id. amend. XII (same).
guage are heightened because, in practical usage, words like “man,” “people,” “subject,” “individual,” or “person” are almost always indistinct in scope. This can be seen in the bills of rights contained in state constitutions written in 1776 and thereafter. 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.” 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.”

Because the substantive rights in each article appear to be almost identical, it would be strange if Pennsylvania intended that the difference in language 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: “Each 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.”

If the differences in language signified immensely important differences in coverage, one might have expected to see detailed public debate about word choice during the framing of the U.S. Bill of Rights and consideration of the possible scope of different choices. Globalists have not presented any evidence of deliberations about word choice that reflect an intent to expand the scope of rights holders to include aliens abroad. And the great variation in how rights holders were described in different documents is often hard to understand as deliberate choices about scope. 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 convention recommendation protected every “freeman,” apparently 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 protecting “the People,” while its petition clause, found in the very same section, protected instead “every person.” 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 held by “subject[s].”

280. PENN. CONST. of 1776, Decl. of Rights, art. 8 (emphasis added).
281. Id. art. 9 (emphasis added); see also VT. CONST. of 1786, ch. 1, art. 10 (“every member of society”), id. art. 11 (“any man”).
282. MASS. CONST. of 1780, Decl. of Rights, art. 10 (emphasis added).
283. Ratification of the Constitution by the State of Virginia (June 26, 1788), in 2 DEP’T OF STATE, DOCUMENTARY HISTORY, supra note 127, at 379.
284. U.S. CONST. amend V.
286. MASS. CONST. of 1780, Decl. of Rights, art. XXIX.
287. Id. arts. XI, XII.
rights protect "inhabitants," "individual[s] of the society," "person[s]," 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 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."

In sum, there are reasons to be skeptical of our ability to discern important constitutional distinctions in the selection of 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. Nor is it consistent with the differing structures of government for external and internal affairs found in Articles I, II, and III of the original Constitution. This counsels against reading general language in the 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 territory. This concept vastly increases the plausibility of finding that the general language in the Bill encompasses aliens within the United States.

2. Amendments One Through Ten

A few amendments receive the bulk of the globalists’ attention, notably the Fourth and Fifth. On the other hand, there are several—for instance, 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, and the amendments all share the general, unrestricted language that globalists highlight 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. Yet it is rather incongruous to think of the Speech, Press, Assembly, and Petition Clauses

288. Id. arts. IX, X, XII, XXIX.
289. Id. arts. XI, XII, XXIX.
290. U.S. Const. amend. I.
291. As noted in supra note 67, 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, as in the First Amendment, that protect “the people.”
as limits on the U.S. government in favor of aliens abroad. The text and history of the antecedents of the Amendment reveal that the types of assembling, speaking, writing, publishing, reading, and petitioning that are protected by these Clauses primarily concern the relation between the government and the governed. It would be surprising if the Constitution were to grant rights intimately related to popular sovereignty in the United States 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. government. 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") that, as provided in Article I, votes for members of Congress, and that, according to the Preamble, ordained and established the Constitution for itself and its posterity.

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 religion—suggest


293. See *Amar*, supra note 129, 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 224, 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.


296. See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265–66 (1990) (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*, supra note 129, 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).

protection of domestic interests.  

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. That the first clause refers 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 directing the army abroad; it would be too inconsistent with deep-rooted constitutional concepts. The historical antecedents of the Amendment suggest that it protects the people against their own government. Therefore, although the language is general (“any house”), and the Amendment is written as an absolute deprivation of power (“No soldier . . . ”), it is highly 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 our ability to draw 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 warrants—points toward a domestic limitation. The text of the Amendment certainly does not foreclose a globalist reading. But without a 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.

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298. 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.

299. Cf. Johnson v. Eisentrager, 339 U.S. 763, 788 (1950) (disparaging the view that it could somehow be considered “unconstitutional for the Government of the United States to wage a war in foreign parts”).

300. See The Declaration of Independence para. 19 (U.S. 1776) (criticizing the King “for quartering large bodies of armed troops among us”—that is, in America); Petition of Right art. VI (1628) (protesting the quartering of English troops within “the realm”—that is, England).

301. U.S. Const. amend. III.


304. Some precedents for the Fourth Amendment named the rights holders as “subjects” or “citizen[s].” See Davies, supra note 302, at 595–96. This might provide some support for viewing the term “people” in a more globalist fashion.
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.”

The other procedural amendments lack express geographic limitations, but, as a textual matter, are rooted in federal court proceedings 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. But this carve-out for U.S. military courts suggests a structural reason to reject a globalist argument that aliens abroad 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.

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.

307. 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”). U.S. Const. amend. VIII. The Fifth Amendment is likewise rooted in federal court procedures and rules: the grand jury, double jeopardy, and the privilege against self-incrimination. U.S. Const. amend. V. Its text speaks the language of law courts: “indictment,” “crime,” “offence,” “cases,” “witness,” and “criminal case.” Id.
308. Judiciary Act of 1789, ch. 20, §§ 1–4, 1 Stat. 73, 73–75.
309. U.S. Const. amend. V.
311. Johnson v. Eisentrager, 339 U.S. 763, 783 (1950) (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, Dec. 10, 2001, at 18, 20 (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?”).
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 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.312 Coke taught that these terms meant using the customary and fundamental common law judicial procedures in proceedings where the life, liberty, or property of a subject was at issue.313 It is commonly thought that the Founding generation understood "due process of law" as Coke had.314 Alexander Hamilton said as much in a pamphlet of 1784 and a speech in 1787,315 as did John Marshall in 1800.316 Indeed, there seems to be general agreement that the original understanding of the Due Process Clause was consistent with Coke's earlier teachings.317 A unanimous Supreme Court, in its first case discussing the Clause at length, interpreted it this way.318

In the Constitution's Bill of Rights, the customary and fundamental common law procedures were largely secured by other provisions besides the Due Process Clause.319 Some have suggested that the Clause was therefore almost irrelevant as an original matter.320 But we must be wary of too quickly concluding that any part of the Constitution is an empty redundancy.321 There is some textual and drafting evidence that the Clause expressed broad, aspirational values.322 It is undeniable that the Due Process Clause, on its face and divorced of context, speaks in "relatively universal term[s]," as Chief Justice Rehnquist

312. 1 EDWARD COKE, SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 50–53 (Lawbook Exchange, Ltd. 2002) (1642). 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.").
313. COKE, supra note 312, at 52–53.
314. AMAR, supra note 129, 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 (St. George Tucker ed., Lawbook Exchange Ltd. 1996) (1803); 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW *13; LEVY, supra note 135, at 248; 3 STORY, supra note 224, § 1783.
315. See ALEXANDER HAMILTON, REMARKS ON AN ACT FOR REGULATING ELECTIONS (Feb. 6, 1787), reprinted in 4 THE PAPERS OF ALEXANDER HAMILTON, supra note 179, at 35 ("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 LETTER FROM PHOCION TO THE CONSIDERATE CITIZENS OF NEW YORK (Jan. 1784), reprinted in 3 THE PAPERS OF ALEXANDER HAMILTON, supra note 179, at 485, 488.
317. 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 224, § 1783.
319. See LEVY, supra note 135, at 248.
322. 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
Can it therefore be interpreted, based on historical or textual evidence, to grant rights to aliens abroad? 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 Article, 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 is expressly given to aliens, even though the Founders clearly knew how to refer to aliens when they wanted to (as 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 the Ninth Amendment to support the globalist argument is bootstrapping.

"The people" in the Tenth Amendment to whom undelegated powers are reserved 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. CONSTITUTIONAL HABEAS CORPUS

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. Constitu—

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324. U.S. CONST. amend. IX.
325. Id. amend. X.
326. Id. pmbl.
courts and scholars have long looked to the history of the common law writ, on the assumption that it was essentially incorporated by reference into the Constitution. 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. The divergent views of the majority and dissent in Rasul about the territorial limitations of the eighteenth-century common law writ show the limits of historical analogy for resolving contemporary questions.

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. 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." The fact that the Militia Clause limits the use of temporary citizen-soldiers as opposed to professional troops might suggest a domestic limitation because nonprofessional part-timers would desire to fight close to home. 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. 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 actuall Warr Invasion or Rebellion.

327. Id. 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.").
330. See Hamdi v. Rumsfeld, 542 U.S. 507, 593–94 (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 Luther Martin, Genuine Information, in 3 FARRAND, RECORDS, supra note 14, at 213. For uses of the words where context suggests internal events are described, see 2 FARRAND, RECORDS, supra note 14, at 47–48 (statements of various speakers regarding rebellion); 1 id. at 113 (statement of Mason regarding rebellion and invasion); 1 id. at 340 (statement of Mason regarding rebellion).
332. Cf. THE FEDERALIST NO. 29, at 182 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("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.").
333. Militia Act, 1662, 13 & 14 Car. 2, c. 3, § 27; An Act Concerning the Levying of War, Within This Province of 1650, ch. 26, paras. 1, 3, reprinted in LAWS OF MARYLAND AT LARGE (Annapolis, Jonas Green 1765); 1 BLACKSTONE, supra note 115, at *413.
against a Global Constitution

as occasion shall necessarily require." 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." It seems likely that the Suspension Clause invokes these concepts, therefore contemplating that suspension could occur only during similarly severe domestic emergencies.

The Suspension Clause's domestic limitation suggests a serious 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 prevent suspension, even if the political branches correctly determined that "the public Safety ... require[d] it." In this situation, the Judiciary 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 provides a way to think about the availability of the writ outside the fifty 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 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-à-vis the United States, or an armed insurrection could fairly be described as a "rebellion" vis-à-vis the United States.

Globalists have not adequately addressed the domestic limitation of the Suspension Clause. According to Professor Raustiala, for example:

[T]he 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.

According to Professor Henkin, "[n]o reasons exist why an alien held by United States authorities abroad should not have the right to bring a writ of habeas

337. 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 14, at 1099 (stating that the Suspension Clause can only be invoked "in cases of extreme emergency").
corpus in a United States court." The Supreme Court, too, seems unmindful of textual and structural reasons for reading the Suspension Clause as having only domestic effect. In the recent *Hamdan* decision, for example, the Court appeared to entertain the possibility that there might be "Suspension Clause problems" with construing a congressional statute to prevent Guantanamo detainees from filing habeas petitions in federal court. Before holding that aliens outside the United States have rights under the Suspension Clause, the Court should consider why the Clause is phrased to refer only to domestic events.

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 through international law and policy choices. 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; 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 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

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339. Henkin, *Compact*, supra note 19, at 32 n.127; see also Fletcher, *supra* note 101, 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 21, 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."


341. Professor Neuman and other scholars examine these debates to understand Founding era attitudes toward the rights of aliens. See, e.g., Neuman, *Strangers*, *supra* note 10, at 52–60; Cleveland, *supra* note 10, at 87–98.
its discretion liberally, allowing aliens (assuming they were "white") to become citizens after only two years of residence. The Judiciary Act of 1789 contained a provision allowing aliens to sue in U.S. courts for torts suffered here or abroad—the Alien Tort Statute. 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. Likely reacting to several assaults on the prerogatives or persons of foreign diplomats in the United States, the First Congress used its "define and punish" power to criminalize assaults on ambassadors and violations of safe conducts. Much of the United States' early law enforcement activity was directed against violations of the law of nations.

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 and against whom. It is also seen in active treaty making by the United States government, covering issues ranging from providing religious, economic, testamentary, and judicial rights; 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. When expanding the United States by acquiring new territory peacefully (Louisiana Purchase) or through conquest (Mexican-American War), the United States government provided by treaty that the people in the added territory would in the future obtain the full constitutional rights of U.S. citizens, implying that

343. Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76. See generally Wedgwood, supra note 215, at 753 (suggesting that passage of the Alien Tort Statute showed the Founders' intent to protect aliens).
346. See 1 FRANCIS WHARTON, A TREATISE ON CRIMINAL LAW § 330 n.2, at 417 (11th ed. 1912).
347. See Act of May 19, 1828, ch. 57, 4 Stat. 276 (punishing violations of treaty barring sale of weapons and liquor in certain territory); Act of March 3, 1819, ch. 77, § 5, 3 Stat. 510, 510–13 (punishing piracy, a crime against the law of nations); Trading with the Enemy Act of 1812, ch. 129, § 7, 2 Stat. 778, 780–81 (repealed 1815) (defining and punishing trading with the enemy, Great Britain); Act of July 7, 1798, ch. 67, 1 Stat. 578, 578 (1798) (voiding treaties with France); Act of May 28, 1798, ch. 48, 1 Stat. 561 (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, any such armed vessel"); Neutrality Act, ch. 50, § 7, 1 Stat. 381, 384 (1794) (repealed 1818) (enforcing U.S. policy of neutrality in wars among foreign powers).
they had not previously had such rights. 349

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. 350 And starting in the nineteenth century, United States customs agents began to operate abroad, mainly in Canada, to enforce the revenue laws. 351 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. 352 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. 353 As Justice Iredell later emphasized in his charge to a Pennsylvania grand jury, the executive branch acted against the rebellion "by every constitutional means in its power." 354

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 treaties and the law of nations provided the legal framework governing 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


350. 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 Enrolling and Licensing Act, ch. 8, § 27, 1 Stat. 305, 315 (1793); Collection of Duties Act, ch. 5, § 24, 1 Stat. 29, 43 (1789). Apparently, this did not seem to the Founding generation, or later generations, inconsistent with the Fourth Amendment. See generally United States v. Verdugo-Urquidez, 494 U.S. 259, 267 (1990) ("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 (1925) (stating that the Fourth Amendment does not apply to international border searches because of the need for "national self-protection").


352. See, e.g., MAX BOOT, THE SAVAGE WARS OF PEACE 13-14 (2002); SOFAER, supra note 46, at 120-22.


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 and Italian states. 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. Disagreement over the merits of the French Revolution and other issues led American politics to polarize along regional, economic, and ideological grounds. 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 Jay’s 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.

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.” At about the same time, Congress also passed both the Sedition Act and a law concerning detention or deportation of “alien enemies.” 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, lacked any legally enforce-

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359. Sofaer, supra note 46, at 139-40.
360. See id. at 119-22; see also DeConde, supra note 357, at 62.
361. Alien Friends Act, ch. 58, § 1, 1 Stat. 570, 570-71 (1798).
able rights.\textsuperscript{365} As Blackstone put it, “alien enemies have no rights, no privileges, unless by the king’s special favor, during the time of war.”\textsuperscript{366} This was the law in the United States at and after the time of the adoption of the Constitution.\textsuperscript{367}

Enemy alien status and its concomitant civil disabilities did not turn on the existence of a formal, declared war between sovereign states, under either the laws of the United States\textsuperscript{368} or Great Britain.\textsuperscript{369} Congress’s Alien Enemies Act of 1798 allowed the Executive to detain an alien without a formal declaration of war.\textsuperscript{370} More generally, application of international legal rules applicable during wartime did not await a formal declaration.\textsuperscript{371}


\textsuperscript{366} 1 Blackstone, supra note 115, at *372–73.

\textsuperscript{367} INS \textit{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 . . . .” (emphasis added)); Cruden \textit{v.} Neale, 2 N.C. (1 Hayw.) 338 (1796) (holding that alien enemies are excluded from our courts of justice during the hostilities); Wilcox \textit{v.} Henry, 1 Dall. 69, 71 (Pa. 1782) (“An alien enemy has no right of action whatever during the war . . . .”); Addison, supra note 191, at 1071 (“[A]lien enemies have no rights.”); Jefferson Letter to Hammond, supra note 183, at 211 (noting that an “alien enemy” “cannot maintain an action”); id. at 201 n.11 (“[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), in 3 Elliot’s Debates, supra note 224, at 533 (“[A]n alien enemy cannot bring suit at all.”). This rule continued in force well past the eighteenth century. See \textit{Ex parte Colonna}, 314 U.S. 510, 511 (1942) (per curiam); Caperton \textit{v.} Bowyer, 81 U.S. (1 Wall.) 216, 236 (1871); Levine \textit{v.} Taylor, 12 Mass. (11 Tyng) 8, 9 (1815); Hutchinson \textit{v.} Brock, 11 Mass. (10 Tyng) 119, 122–23 (1814).

\textsuperscript{368} See 1 Op. Att’y Gen. 84 (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) (statement of Rep. Albert Gallatin) (stating, at a time when no war was declared, that French were alien enemies).

\textsuperscript{369} See 1 Matthew Bacon, A New Abridgment of the Law 164 (Henry Grimill ed., London, A. Strahan 1832) (see the heading “Aliens”); 1 Matthew Hale, The History of the Pleas of the Crown 162 (Thomas Dogherty ed., London, E. Rider 1800) (1736); William Hawkins, Treatise of the Pleas of the Crown 51 (Thomas Leach ed., Dublin, Elizabeth Lynch 1787) (explaining that aliens “who in a hostile manner invade the kingdom, whether their king were at war or peace” with Great Britain would be dealt with “by martial law”). 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 \textit{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 183, at 202. Yet English courts treated Americans as enemy aliens not entitled to use habeas corpus. See Furly \textit{v.} Newnham, (1780) 99 Eng. Rep. 269 (K.B.).

\textsuperscript{370} See Alien Enemies Act, ch. 58, § 1, 1 Stat. 577 (1798).

\textsuperscript{371} See David Cole, What Bush Wants to Hear, N.Y. Rev. Books, Nov. 17, 2005, at 8, 9 (“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 . . . .”) (reviewing John Yoo, The Powers of War and Peace (2005)); see also Talbot \textit{v.} Seeman, 5 U.S. (1 Cranch) 1, 28 (1801); Bas \textit{v.} Tingy, 4 U.S. (4 Dall.) 37, 40 (1800) (opinion of Washington, J.); Cherriot \textit{v.} Foussat, 3 Binn. 220, 251–52 (Pa. 1810) (opinion of Tilghman, C.J.). For an excellent discussion emphasizing the nuances and disagreements
While the Alien Enemies Act was relatively uncontroversial, Jeffersonian Republicans excoriated President Adams and other Federalists about the Alien Friends and Sedition Acts, asserting that they violated various provisions of the Constitution. Republicans argued that resident aliens were protected by the same constitutional rights as citizens. Like today's globalists, they based this argument in part on what they believed was the general, unrestricted language of the Bill of Rights. 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 compact and therefore did not have constitutional rights. Instead, aliens in the United States were protected only by the law of nations and dictates of policy. 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.” This meant that the 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.”

about this issue, see Michael D. Ramsey, Textualism and War Powers, 69 U. Chi. L. Rev. 1543, 1575–89 (2002).

372. See 8 ANNALS OF CONG. 1980 (1798) (statement 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).


374. See, e.g., 8 ANNALS OF CONG. 2012 (1798) (statement of Rep. Livingston) (“[A]lien friends . . . residing among us are entitled to the protections of our laws. . . . [T]here is [n]o distinction between citizen and alien. . . . All are entitled to the same equal distribution of justice. . . .”). See generally NEUMAN, STRANGERS, supra note 10, at 53–60.

375. See, e.g., 8 ANNALS OF CONG. 2012 (1798) (statement of Rep. Livingston) (“[The Constitution] speaks of all ‘judicial power,’ all ‘trials for crimes,’ all ‘criminal prosecutions,’ all ‘persons accused.’ No distinction between citizen and alien. . . . All are entitled to the same equal distribution of justice. . . .”); 8 ANNALS OF CONG. 1956 (1798) (statement of Rep. Gallatin) (stating that the Due Process Clause “speaks of persons, not of citizens; so far as relates to personal liberty, the Constitution and common law include aliens as well as citizens”). See generally NEUMAN, STRANGERS, supra note 10, at 53–60; JAMES M. SMITH, FREEDOM’S FEETERS 87 (1956).


377. See, e.g., Answer of the States—Massachusetts (Feb. 18, 1799), in 4 ELLIOT, DEBATES, supra note 224, at 534–35 (objecting to the Virginia Resolutions and stating that the rights of aliens “were not particularly contemplated in the Constitution” and aliens “are entitled only to a temporary protection while they yield a temporary allegiance”); 8 ANNALS OF CONG. 2019 (1798) (statement of Rep. Otis); 8 ANNALS OF CONG. 1984–85 (1798) (statement of Rep. William Gordon); VIRGINIA REPORT, supra note 192, at 31–32, 105 (statement of Del. Henry Lee).

378. VIRGINIA REPORT, supra note 192, at 52 (statement of Del. John Allen) (stating that friendly aliens in the United States had rights “derived to them from the laws of nature, nations, and humanity”) 379. Addison, supra note 191, at 1072; see also VIRGINIA REPORT, supra note 192, at 100 (statement of Del. William Cowan); id. at 62 (statement of Del. James Barbour).

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 in the United States and while their home state was at peace with the United States.

In 1800, the Virginia House of Delegates issued a report, authored by James Madison, which responded to Federalist arguments that the Alien Friends Act did not violate constitutional rights and was within the power of Congress to exact reprisals on foreigners. 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." This statement suggests that Madison, speaking for anti-Federalist Republicans, did not believe that the Constitution granted rights to aliens abroad.

Additional evidence comes from contrasting congressional debates about the Alien Friends Act, which featured 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 American prisoners. During the latter debate, there was no suggestion that the proposed retaliation implicated the French detainees' constitutional rights. During the same period of time, Congress repeatedly authorized the discretionary use of force on the high seas against hostile French ships and crews without expressed concern about constitutional rights.

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. There is evidence that, in the decades after the enactment of the Alien

381. 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).


384. See 9 Annals of Cong. 2907-15, 3045-52 (1799); see also 5 Journal of the Senate 583 (1799).


386. See United States v. Verdugo-Urquidez, 494 U.S. 259, 268 (1990) ("[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].").

387. Report of 1800, supra note 382, at 321 (stating that the Alien Enemy Act "being conformable to the law of nations, is justified by the constitution," but that the Alien Friends Act is "repugnant to the constitutional principles of municipal law"); id. at 320 ("Alien enemies are under the law of nations . . . [while]
Enemies Act in 1798 and the ratification of various treaties protective of resident aliens, American 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.\footnote{388} 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 my reading of the Constitution than with 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."\footnote{389} 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 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 by international law but 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 border.\footnote{390} 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. 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. 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, tried, and executed several men—including two British subjects named Alexander Arbuthnot and Robert Ambrister, who were thought to have incited the Indian attacks.

There was public outcry in Spain, Great Britain, and the United States, especially after it was learned that although a 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. 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. Although the British and Spanish governments were fairly quickly mollified, 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.

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

391. See Message from President Monroe to House of Representatives (Mar. 25, 1818), in 32 Annals of Cong. 1473 (1819).
392. See id.; see also, e.g., DeConde, supra note 357, at 115–16.
394. See, e.g., Message from President Monroe to Congress (Nov. 16, 1818), in 4 American State Papers: Foreign Relations 215 (Walter Lowrie & Walter S. Franklin eds., Washington, Gales and Seaton 1834); see also 2 Moore, supra note 390, at 403–05; Abraham D. Sofaer, Executive Power and Control of Information: Practice Under the Framers, 1977 Duke L.J. 1, 40–44.
396. See Weeks, supra note 393, at 118–22, 147–49; see also Robert V. Remini, Andrew Jackson and His Indian Wars 166 (2001).
397. See 1 Carl Schurz, Life of Henry Clay 153–54 (Cambridge, Riverside Press 1893); Sofaer, supra note 46, at 357; Weeks, supra note 393, at 158–59.
irregularities during the trials. 398 Weeks of debate about the Constitution and law of nations ensued before a House Committee of the Whole; the galleries were crowded with spectators. 399

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 of the British, but unambiguously held that the executions were illegal. Representative Alexander Smyth of Virginia then rose and characterized Clay as having 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.” 400 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, 401 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; 402 (ii) Congress had not 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.” 403 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,” 404 but he appears to have meant the procedures for courts-martial, not the Bill of Rights.

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. 405 Representative Philip Barbour of Virginia agreed that the “ques-
tion must be settled according to the laws of war” because “the civil power has no jurisdiction over it.” 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.

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.” 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.” Baldwin further explained that “the laws and usages of nations” governed the trial of the Englishmen, not municipal law.

Ultimately, both the Committee of the Whole and the entire House voted decisively not to condemn any of Jackson’s actions. 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 but that international law governed instead.

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

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407. Id. at 693 (statement of Rep. Smyth).
408. Id. at 679 (statement of Rep. Smyth); id. at 684 (statement of Rep. Smyth) (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 (statement of Rep. Smyth) (“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.”).
409. Id. at 1042 (statement of Rep. Baldwin); id. (statement of Rep. Baldwin) (“These men were not our citizens, not bound by our laws; they owed us no allegiance, and were entitled to no protection.”); id. at 1044 (statement of Rep. Baldwin) (“[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.”).
410. Id. at 1042 (statement of Rep. Baldwin).
411. See id. at 1132–36; Weeks, supra note 393, at 160 (“Jackson (and the administration) stood completely vindicated.”).
of confining himself to action against Indians and former slaves.\footnote{See 33 ANNALS OF CONG. 256–68 (1819).} 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.\footnote{See id. at 267–68.} The full Senate took no action.\footnote{See Sofaer, Executive Power, supra note 394, at 44 n.293.} 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.”\footnote{Memorial from Major General Andrew Jackson to the Senate, in 34 ANNALS OF CONG. 2308, 2319 (1819); see also 33 ANNALS OF CONG. 516–17 (1819).}

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 would have 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 is 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”\footnote{Neuman, Abiding, supra note 21, at 151 n.166 (citing Neuman, Strangers, supra note 10, at 110–11).} 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.”\footnote{Id. at 151.} 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.\footnote{See Neuman, Guantanamo, supra note 21, at 45; Neuman, Whose Constitution?, supra note 21, 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 combatants—even though this is an armed conflict that many would agree satisfies modern de jure and de facto requirements for a state of war.

The force of the globalist distinction between war and everything else would be increased by a conceptually coherent way to draw 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. 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, diplomacy, and policy judgments, 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. 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 previously enacted applicable criminal statutes, and en-

419. See, e.g., Neuman, Abiding, supra note 21, at 151.
421. See Yoo, supra note 46, at 177.
423. See, e.g., Act of Apr. 30, 1790, ch. 9, § 8, 1 Stat. 112, 113–14 (criminalizing piracy on the high seas by "any person"); see also Act of May 15, 1820, ch. 113, § 3, 3 Stat. 600, 600 (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").
forced these statutes in domestic civilian court against captured pirates, meaning that U.S. military operations against pirates, deadly though they were in purpose and effect, were also law enforcement operations.

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 had been latterly committed by a combination of freebooters and smugglers of various nations." 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." Even though it had claimed to be advancing law enforcement-type interests, the U.S. government asserted that the operation was justified under the law of nations.

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 on our revenue, and committed every kind of outrage on our peaceable citizens, which their proximity to us enabled them to perpetrate." Notwithstanding the law enforcement purposes, President Monroe determined that the United States had been justified

424. 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, BALT. PATRIOT, Apr. 29, 1823, at 2. 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. Smith, 27 F. Cas. 1172 (D. Ga. 1820) (No. 16,339a) (seized by American naval cutter on the high seas); 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).

425. See Boot, supra note 352, at 41-45.

427. H.R. Comm. on Foreign Relations, Report on Suppression of Piratical Establishments (Jan. 10, 1818), in 4 AMERICAN STATE PAPERS: FOREIGN RELATIONS, supra note 394, 133; see also Message of President Monroe to Congress (Dec. 2, 1817), in 4 AMERICAN STATE PAPERS: FOREIGN RELATIONS, supra note 394, at 130 (stating that the people occupying Amelia Island had made it "a channel for the illicit introduction of slaves from Africa into the United States, an asylum for fugitive slaves from the neighboring States, and a port for smuggling of every kind").

428. H.R. Comm. on Foreign Relations, supra note 427, at 133-34.
429. See SOFAER, supra note 46, at 377.
430. See, e.g., Message of President Monroe to Congress (Nov. 16, 1818), in 4 AMERICAN STATE PAPERS: FOREIGN RELATIONS, supra note 394, at 214.
in chasing them down in Florida "by the law of nations."  431

The second globalist response to historical evidence is also not entirely convincing. Some globalists contend that no one—neither U.S. citizens nor aliens—was 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.  432 At a minimum, these examples are evidence that citizenship was a very 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 international law, but not the Constitution, was 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 specific historical evidence beyond citations to natural rights ideas and the general phrasing of the 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

431. 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 Sec'y of War to Gen. Sherman (June 1, 1877), in 2 Moore, supra note 390, at 422, and punishing Pacific Islanders and Nicaraguans in the 1830s–1850s for robberies and attacks on U.S. citizens, 2 Moore, supra note 390, 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.

432. See supra notes 163–72 and accompanying text.
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 Article. Globalist results could follow from some other approaches, especially explicitly normative approaches that privilege universal protection of human rights and significant restraints on U.S. government power. 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 the government’s war powers are subject to few rights-based limitations;\(^{433}\) that foreign relations and national defense are largely controlled by the political branches, not the courts;\(^{434}\) that many aspects of external relations are governed by international law, not municipal law;\(^{435}\) that the Constitution allows sharp distinctions to be drawn by the federal government between the rights of citizens and aliens;\(^{436}\) and that the Constitution, or at least many important constitutional rights, do not protect aliens outside the United States or those seeking entry.\(^{437}\) All of this doctrine—even though it is not all internally coherent and is often implied rather than stated, or stated in dicta—presents a challenge for globalists who strive for a doctrinally-based constitutional theory


that coheres "with less unsettled constitutional practices" and doctrines.⁴³⁸

In contrast to both globalism and to claims that aliens may lack any rights or protections against the U.S. government, this Article has suggested a middle road. This middle road recognizes that the Constitution was designed to secure the liberties of Americans at home in part by giving the U.S. government a good deal of freedom to act coercively against aliens abroad. My approach has highlighted that aliens were intended beneficiaries of many constitutional provisions and structures, and that the law of nations and treaties were seen as potentially protective of aliens as against the national and state governments. Reading the generally phrased provisions of the Bill of Rights to protect aliens within⁴³⁹—but not without—the United States, and looking to international law, diplomacy, and policy choices to protect aliens outside the United States is, then, more consistent with constitutional text and history than is globalism.

In addition to being broadly consistent with the constitutional text, history, and arguably a decent amount of Supreme Court doctrine, my reading of the Constitution 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. And notwithstanding globalist claims that declining to apply the Constitution to protect aliens abroad will leave them entirely defenseless against American power, this Article has suggested that aliens abroad were understood to be protected by international law, diplomacy, and policy set by Congress and the President.

⁴³⁸ Neuman, Strangers, supra note 10, at 98. My theory may also help 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 States that had been designated for eventual statehood. See supra note 11. 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. See, e.g., Balzac v. People of Porto Rico, 258 U.S. 298, 304–06 (1922). This theory seems more generally consistent with my reading of the Constitution (rights available to citizens and aliens within the United States, but only citizens without) than with the many forms of globalism which reject territorial-based limits on the application of constitutional rights and see the judiciary rather than the political branches as the primary decision-maker.

⁴³⁹ See Wong Wing v. United States, 163 U.S. 228, 238 (1896) (extending the notion that the provisions of the Fourteenth Amendment are "universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or nationality" to the Fifth and Sixth Amendments) (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").