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The Geography of Justice

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INTRODUCTION

The Guantanamo Bay Naval Base ("Guantanamo") has been under the control of the United States since 1903. Despite its century-long presence, the official position of the U.S. government is that Guantanamo is not American territory. An unusual agreement declares that Cuba retains "ultimate sovereignty" over Guantanamo. The United States, however, exercises "complete jurisdiction and control." The precise legal status of Guantanamo is no mere historical curiosity. Since the attacks of September 11, 2001, the United States has detained hundreds of foreign nationals at the base. Over the last year, several attempted to challenge their detention via habeas petitions. These petitions, brought by citizens of friendly states, drew support from many quarters. Former U.S. ambassadors argued that the detentions harm U.S. interests abroad; former prisoners of war ("POWs") stressed the implications for Americans captured abroad; allied governments brought heavy diplomatic pressure to bear; and several senators demanded that the President try or release the detainees.

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2. See, e.g., Gherebi v. Bush, 352 F.3d 1278 (9th Cir. 2003); Al Odah v. United States, 321 F.3d 1134 (D.C. Cir. 2003).
4. See Brief of Former American Prisoners of War as Amici Curiae in Support of Petitioners, Rasul (Nos. 03-334, 03-343).
5. The attention to the issue in Britain has been relentless. See, e.g., James Meek, The People the Law Forgot, Guardian (London), Dec. 3, 2003, Features Pages, at 1, available at http://www.guardian.co.uk/guantanamo/story/0,13743,1098604,00.html;
Nonetheless, initially, these habeas petitions all failed. And they failed for a deceptively simple reason. The reason was not that the petitioners are enemy aliens or unlawful combatants. Rather, the reason was their geographic location. Enemy combatants detained on American soil are not per se barred from contesting their detention in American courts. But federal courts have generally held that foreigners—enemy or otherwise—detained outside the geographic boundaries of the United States lack legal protections. The U.S. Supreme Court's decision last June in Rasul v. Bush surprised many observers by holding that the federal habeas statute encompassed the Guantanamo petitions. But the majority opinion rested on a narrow issue of statutory interpretation: Did the federal habeas statute apply to aliens as well as citizens abroad? The Court held that the statute did so apply. Yet the decision said almost nothing about the constitutional rights of aliens outside U.S. territory. And of course, Congress can (and may) amend the habeas statute to deny access to the writ to aliens held abroad. The decision in Rasul, while highly


6. See Neil A. Lewis, Try Detainees or Free Them, 3 Senators Urge, N.Y. Times, Dec. 13, 2003, at A14 (quoting Senator John McCain, a former POW during the Vietnam War, as stating that "[t]hey may not have any rights under the Geneva Conventions as far as I'm concerned... but they have rights under various human rights declarations. And one of them is the right not to be detained indefinitely"). Several American officials reportedly doubt the utility of the detention strategy in Guantanamo, in particular in light of the adverse public response around the globe. See David Rose, Operation Take Away My Freedom: Inside Guantanamo Bay on Trial, Vanity Fair, Jan. 2004, at 88, 136 (discussing the debate).

7. Indeed, they are not enemy aliens as that phrase is usually understood—they include Australians, Kuwaitis, and British citizens. Al Odah, 321 F.3d at 1140. The degree to which the status of enemy alien turns on nationality, and the impact of this status on prior Supreme Court precedent, is contested in the Al Odah case. The designation as an enemy alien is distinct from that of lawful or unlawful combatant. See Louis Fisher, CRS Report for Congress, Military Tribunals: The Quirin Precedent 33-34 (Mar. 26, 2002) (discussing the latter designation), available at http://www.fas.org/irp/crs/RL31340.pdf.


11. Footnote fifteen of Rasul, while dicta, implicitly claims that the Constitution applies to aspects of the detention of aliens in Guantanamo (and, again implicitly, other analogous U.S.-controlled territory). See id. at 2698 n.15; see also infra Part III (discussing this issue extensively).
significant for the petitioners, did not in any meaningful sense alter the question of the constitutional rights of aliens abroad.

Why is geographic location thought to be determinative of the rights of aliens abroad? The supposition that law and legal remedies are connected to, or limited by, territorial location—a concept I term "legal spatiality"—is commonplace and intuitive. Many Americans have watched footage of Cuban refugees swimming ashore in Florida, desperately trying to reach land before U.S. officials can grasp them. Touching the territory of the United States—the physical soil itself—is critical to the legal determination of their status: the difference between a life of freedom in the United States and forced return to an autocratic Cuba. This is a dramatic example of the power of legal spatiality, but not an unusual one. The concept is suffused throughout the law. Yet, perhaps precisely because it so commonplace, the assumptions embedded in legal spatiality are rarely examined and surprisingly ill-defended.


This Article explores legal spatiality and its contemporary implications. As I will show, there are persuasive reasons to take spatial location into account when interpreting legal rules. Current doctrine, however, does a poor job of accounting for these reasons and provides no coherent and consistent theory of the role of spatiality within our legal order. The last century has witnessed a progressive relaxing of legal spatiality. Yet with regard to noncitizens, the federal courts continue to cling to the notion that American law is tethered to territory—that simply by moving an individual around in space, the rights that individual enjoys wax and wane. This Article argues that this strictly territorial approach ought to be rejected. Instead, the spatial reach of legal rules ought to be evaluated functionally and flexibly, with a rebuttable presumption that when legal power is brought to bear, so too are legal protections. This is not to suggest that territorial borders do not matter: They clearly do. Rather, my claim is that a narrow fixation on sovereignty and territoriality is at odds with contemporary concepts of jurisdiction, with the intensifying trend of globalization, and with our most cherished principles of constitutionalism.

The Article proceeds as follows. After briefly describing the roots of legal spatiality in the deep structure of the international legal system, I analyze the evolution of legal spatiality across a number of doctrinal areas. These areas are rarely considered together, but all implicate legal spatiality in one way or another. They also demonstrate that legal spatiality has been substantially transformed in the last century. I then look at the particularities of the connection between Guantanamo and the United States and critique the position that conceptions of territoriality and sovereignty or the Guantanamo lease agreement somehow bar the application of those legal rights noncitizens possess when held within the fifty states. Finally, I consider some alternative conceptualizations of legal spatiality, and argue that spatial location ought not woodenly foreclose the existence of constitutional rights for noncitizens subject to American power outside the boundaries of the United States.

I. THE CONCEPTUAL BASIS OF LEGAL SPATIALITY

In several recent cases, federal courts have faced the question of whether noncitizen detainees held outside U.S. territory by the U.S. government could challenge their detention via the writ of habeas corpus.14 In Al Odah v. United States, the predicate case to Rasul, the

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U.S. Court of Appeals for the D.C. Circuit ruled the Guantanamo detainees could not.\textsuperscript{15} In January of this year, Judge Leon of the U.S. District Court for the District of D.C. similarly ruled that the petitioners "lack any viable theory under the United States Constitution to challenge the lawfulness of their continued detention at Guantanamo."\textsuperscript{16} The reason, in short, is that "[n]on-[r]esident [a]liens [c]aptured and [d]etained [o]utside the United States [h]ave [n]o [c]ognizable [c]onstitutional [r]ights."\textsuperscript{17} The decisions to deny these habeas petitions reflect fundamental ideas about territory, sovereignty, and constitutionalism. It is critical at the outset to underscore a fundamental idea not implicated: that wartime itself blocks non-citizens' access to U.S. courts.

Wartime plainly provides a very important context to any case involving aliens, friendly or otherwise. The President wields extraordinary powers during war.\textsuperscript{18} But whatever the nature of the current conflict, the Supreme Court has previously made clear that enemy aliens detained by the United States within American territory may in fact avail themselves of the judicial process.\textsuperscript{19} That the petitioners in the Guantanamo cases are enemy aliens is itself unclear. Defining the category of enemy alien in the age of al-Qaeda is undoubtedly complex. But the petitioners in Rasul, for example, were not enemy aliens as that term is traditionally understood. They are citizens of Australia, the United Kingdom, and Kuwait—all close allies of the United States.\textsuperscript{20} (The United States argues that the Guantanamo detainees nonetheless qualify as enemy aliens "because they were seized in the course of active and ongoing hostilities against United States and coalition forces.")\textsuperscript{21} Most significantly, however,
the precedents upon which the D.C. Circuit rested its decision in *Al Odah* make clear that the enemy alien designation is unnecessary. The holding in *Johnson v. Eisentrager*, a World War II era case heavily relied on by the Bush Administration in the Guantanamo litigation, "was not dependent on the aliens' status as enemies, but rather on the aliens' lack of presence inside the sovereign territory of the United States." Consequently, while the nature of the current struggle against al-Qaeda and in Afghanistan and Iraq provides a very important milieu for these cases, the resolution of the question of habeas corpus—and of the broader question of constitutional rights—does not wholly or even primarily rest on the exigencies of wartime.

These decisions instead rest on a specific conception of territoriality. This conception can be stated as follows: *The physical location of an individual determines the legal rules applicable and the legal rights that individual possesses.* In this Article, I refer to this concept as "legal spatiality." The concept of legal spatiality can readily be generalized: The scope and reach of the law is connected to territory, and therefore, spatial location determines the operative legal regime. More plainly, where you sit determines what rules you sit under.

Assumptions of legal spatiality suffuse our legal system. As the D.C. Circuit stated in *Al Odah*, for example:

> We cannot see why, or how, the writ [of habeas corpus] may be made available to aliens abroad when basic constitutional protections are not... If the Constitution does not entitle the detainees to due process, and it does not, they cannot invoke the jurisdiction of our courts to test the constitutionality or the legality of restraints on their liberty.24

According to this view, the protections of the Bill of Rights are not untethered from the territory of the United States. Rather, they are spatially bound: operative only within the fifty states and other territories unequivocably possessed by the United States. Since the petitioners are aliens outside the territorial borders of the United

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23. Brief for the Respondents in Opposition at 13, *Rasul* (Nos. 03-334, 03-343). Judge Leon's decision in *Khalid* echoes this, stating that "nothing in *Rasul* alters the holding articulated in *Eisentrager* and its progeny." *Khalid*, 2005 U.S. Dist. LEXIS 749, at *27. See also the Ninth Circuit's statement in *Gherebi*:
> The dispositive issue, for purposes of this appeal, as the government acknowledges, relates to the legal status of Guantanamo, the site of petitioner's detention...
> ... [T]he government does not dispute that if Gherebi is being detained on U.S. territory, jurisdiction over his habeas petition will lie, whether or not he is an "enemy alien."

*Gherebi* v. Bush, 352 F.3d 1278, 1285 (9th Cir. 2003).
In deciding in favor of the detainees in Rasul, the Supreme Court did not so much as challenge this set of assumptions as sidestep them. The Court's holding rested on the particular language of the federal habeas statute, which, said the majority, does not distinguish between citizens and aliens. Since citizens can clearly petition for habeas relief from Guantanamo, so—as a matter of statutory right—can aliens. In so ruling, the Rasul Court distinguished earlier and arguably contrary precedents on the ground that underlying understandings of the reach of the habeas statute had changed in recent years. The result was a victory for the Rasul detainees, but one that does not challenge in any fundamental way prevailing conceptions of legal spatiality.

25. As I describe below, while territoriality is critical to the D.C. Circuit's decision in Al Odah, so is alienage. See infra note 176 and accompanying text. As even the dissent in Rasul notes, federal courts would have habeas jurisdiction over an American citizen imprisoned in Guantanamo as a constitutional as well as a statutory matter. See Rasul, 124 S. Ct. at 2686 (Scalia, J., dissenting).


27. Implicit in this is the notion that the default assumption in interpreting a statute silent on the distinction between citizens and aliens is to assume no distinction.

28. Specifically, the majority argued that despite the language of the statute suggesting that a detainee must be within the territorial jurisdiction of the district court receiving the petition, in fact, if the custodian is within that district, that is sufficient. Rasul, 124 S. Ct. at 2695.

29. This is evidenced by the flat assertion in Khalid that "[n]on-[r]esident [a]liens [c]aptured and [d]etained [o]utside the United States [h]ave [n]o [c]ognizable [c]onstitutional [r]ights." Khalid v. Bush, Nos. 1:04-1142, 1:04-1166, 2005 U.S. Dist. LEXIS 749, at *21 (D.D.C. Jan. 19, 2005). The Supreme Court has left the door open for the claim that some constitutional rights may be available to aliens outside the United States, though it has not clarified the issue. In Zadvydas v. Davis, for example, the Court stated: "It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside the United States, though it has not clarified the issue. In Zadvydas v. Davis, for example, the Court stated: "It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside our geographic borders. But once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United States . . . ." Zadvydas v. Davis, 533 U.S. 678, 693 (2001) (citations omitted). The Court's invocation of "certain constitutional protections" at least suggests that other such rights may be available to aliens outside the borders of the United States. For example, in the area of personal jurisdiction, extraterritorial rights exist for foreign nationals. Asahi Metal Industry Co. v. Superior Court, for example, awards some level of due process rights to noncitizens abroad. Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987). Consider also the holding of the Ninth Circuit in United States v. Davis: "In order to apply extraterritorially a federal criminal statute to a defendant consistently with due process, there must be a sufficient nexus between
A. Historical Foundations

The importance of place to legal rules and protections—the belief that law derives from land—has deep historical roots. Defining law in spatial terms accords with the traditional conception of the Westphalian sovereign state. Legal spatiality concurs as well with commonplace intuitions about the territorial nature of governance, which reflect the continuing dominance of the Westphalian model in contemporary political thinking.\textsuperscript{30} The Treaty of Westphalia, penned in 1648, ended the Thirty Years War and is generally credited with ushering out the medieval system of overlapping loyalties and allegiances in Europe, and heralding a new system of political rule based on territoriality and absolute secular power.\textsuperscript{31} The Westphalian conception of the state represented a break with the past because it drew all legitimate power into a single sovereign, who controlled absolutely a defined territory and its associated population.\textsuperscript{32} That defined territory demarcated, for most purposes, the reach of the sovereign’s law.

The Westphalian ideal of statehood is thus fundamentally a spatial conception of sovereignty. Sovereignty and territoriality in turn provided the bedrock principles for the development of international law in the Westphalian era. As John Herz writes:

From territoriality resulted the concepts and institutions which characterized the interrelations of sovereign units, the modern state system... Only to the extent that it reflected their territoriality and took into account their sovereignty could international law develop in modern times. For its general rules and principles deal primarily with the delimitation of the jurisdiction of countries... [S]overeign units must know in some detail where their jurisdictions end and those of other units begin; without such standards, nations would be

the defendant and the United States, so that such application would not be arbitrary or fundamentally unfair.” United States v. Davis, 905 F.2d 245, 248-49 (9th Cir. 1990) (citation omitted).

30. As David Johnson and David Post write, “[t]erritorial borders, generally speaking, delineate areas within which different sets of legal rules apply. There has until now been a general correspondence between borders drawn in physical space... and borders in ‘law space.’” David R. Johnson & David Post, Law and Borders—The Rise of Law in Cyberspace, 48 Stan. L. Rev. 1367, 1368 (1996).


32. The fullness of the break is generally overstated, but it is nonetheless conventional to refer to the Treaty of Westphalia this way. See Krasner, supra note 31, at 3; Daniel Philpott, Revolutions in Sovereignty (2001); Kal Raustiala, Rethinking the Sovereignty Debate in International Economic Law, 6 J. Int’l Econ. L. 841, 857-62 (2003).
involved in constant strife over the implementation of their independence.\footnote{33}

Westphalian sovereignty thus creates a system in which legal jurisdiction is congruent with sovereign territorial borders.\footnote{34} This territorial form of sovereignty became supreme in Europe and the greater Christian world throughout the eighteenth and nineteenth centuries. Broadly speaking, by the nineteenth century, each sovereign state\footnote{35} was understood to "possess[] and exercise[] exclusive sovereignty and jurisdiction throughout the full extent of its territory. . . . [N]o State can, by its laws, directly affect, bind, or regulate property beyond its own territory, or control persons who do not reside within it, whether they be native-born subjects or not."\footnote{36} This understanding of sovereignty and territoriality provided the basis not only for nineteenth-century international relations, but also for relations among the constituent states of the United States. Justice Joseph Story's highly influential approach to jurisdiction drew directly upon Westphalian territorial principles.\footnote{37} One need only read Justice Stephen Johnson Field's opinion in \textit{Pennoyer v. Neff}\footnote{38} to see the connection between Westphalian territorial sovereignty as understood in international law and the prevailing jurisdictional principles of nineteenth-century American law.\footnote{39}
To be sure, the ideal of Westphalian territorial sovereignty was riddled with exceptions from the beginning. An ancient example, dating to the Renaissance, is the embassy. As Garrett Mattingly recounts:

[The late medieval civilians had worked out a pretty consistent theory of diplomatic immunity. While an ambassador was on mission his person was inviolable, and he, his suite and his goods enjoyed a wide immunity from any form of civil or criminal action, either in the country where he was accredited or in any through which he might pass.]

Ambassadorial residences have traditionally been treated as within the jurisdiction of the ambassador's state, though they physically exist within the host state's borders. Perhaps equally ancient is the notion that sovereigns enjoy universal jurisdiction with regard to piracy on the high seas—which by definition occurs beyond their territory. Another related pre-Westphalian practice was the existence of sanctuaries: zones, such as monasteries, that were plainly within a prince's territorial realm yet into which secular law could not reach. Sanctuary was akin, in a broad sense, to the practice of embassies in that both were physical locations carved out of a larger territorial entity and treated distinctly by the law.

Territorial sovereignty was thus never a hard and fast rule. Numerous exceptions to strict territoriality existed and even thrived. States have long sought to penetrate the territorial sovereignty of other states even as they sought to protect their own territory from incursion. Imperialism, in which one polity's territory is absorbed into or ruled by another, is perhaps the most striking example. Overt imperial possessions are today rarely sought. Indeed, few colonies exist today: Since the mid-twentieth century, formal empire has been devalorized, though many would contend that the United States continues to maintain—in part through its extraterritorial legal

40. See Krasner, supra note 31, at 24-25.
42. Lori Fisler Damrosch et al., International Law: Cases and Materials 1284 (4th ed. 2001); see also Vienna Convention on Diplomatic Relations and Optional Protocol on Disputes, done Apr. 18, 1961, art. 22, 23 U.S.T. 3227, 3237-38, 500 U.N.T.S. 96, 106 (guaranteeing that embassy land shall be inviolable). Embassies fit within the contours of Neuman's concept of "anomalous zones": geographic areas "in which certain legal rules, otherwise regarded as embodying fundamental policies of the larger legal system, are locally suspended." Neuman, Anomalous Zones, supra note 13, at 1201. Neumann offers several examples, of which the naval base at Guantanamo is one. The others include the District of Columbia, and less formally, red light zones such as Storyville in New Orleans.
44. See Neuman, Anomalous Zones, supra note 13, at 1206-07.
45. This is the primary claim of Krasner. See Krasner, supra note 31, at 24-25.
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assertions—an informal empire, an empire, in Samuel Huntington’s words, “of functions, not territory... characterized not by the acquisition of new territory but by their penetration.”46 While direct imperialism was common among the great powers, sovereign states after Westphalia also maintained a keen interest in their subjects or citizens who happened to be outside their borders in independent polities.47 Prior to World War II, western powers regularly maintained “consular courts” within non-western nations such as Turkey, Morocco, and China.48 These courts, typically founded on coercive treaties, adjudicated claims among western citizens abroad as well as between western citizens and locals, on the theory that the local law was barbaric, unpredictable, and strange. In other words, westerners in places like Shanghai lived under their home state’s laws (or an amalgam of western laws) rather than Chinese law—a profound violation of Westphalian territorial principles.49 In the early twentieth century, Congress even created a special “U.S. District Court for China,” which answered to the Ninth Circuit.50 This court lasted well into the twentieth century, and it was only in 1956 that the United States finally abandoned consular jurisdiction in a foreign state.51

B. Extraterritoriality Today

Since the close of the Second World War, “unequal treaties” have been frowned upon and consular courts no longer exist. While the demise of nineteenth-century extraterritorial jurisdiction is a testament to the enduring power of Westphalian sovereignty, territorial sovereignty has nonetheless been gradually eroding across many other fronts. States today regularly and increasingly assert prescriptive jurisdiction beyond their territorial limits. This is often done via regulatory statutes (discussed further below) but perhaps most notably in military deployments abroad, which commonly employ “Status of Forces Agreements” that alter host state legal

47. Indeed, one of the five well-accepted heads of jurisdiction to prescribe is the nationality principle. See Restatement (Third) of the Foreign Relations Law of the United States § 402(2) (1987).
49. Of course, among themselves, the western powers would never permit such an intrusion into their territorial sovereignty. It was only permissible because these states were deemed “uncivilized.” See David P. Fidler, The Return of the Standard of Civilization, 2 Chi. J. Int’l L. 137 (2001) (discussing the standard of civilization).
50. See Scully, supra note 48, at 6. Congress would later create a similar court for the Panama Canal Zone, answering to the Fifth Circuit. See, e.g., Egle v. Egle, 715 F.2d 999 (5th Cir. 1983).
51. The last American consular court was in Morocco, and was disbanded in 1956.
regimes in certain respects with regard to foreign service members.\textsuperscript{52} The United States, with its far-flung force commitments, relies upon these agreements extensively. (Significantly, the only U.S. military bases that do not employ such agreements are the base at Guantanamo Bay and those bases in Iraq which remain from the US occupation.) The U.S.-Japan agreement, for instance, states that "the military authorities of the United States shall have the right to exercise within Japan all criminal and disciplinary jurisdiction conferred on them by the law of the United States over all persons subject to the military law of the United States."\textsuperscript{53} Principles of international law limit these varied extraterritorial assertions but do not prohibit them. Territoriality and nationality remain the principal bases of prescriptive jurisdiction, but these bases are subject to contextual considerations such as fairness and reasonableness.\textsuperscript{54} It is also now generally accepted that states may regulate extraterritorial acts that have effects within their territory, and, at times, may regulate acts against their nationals who are abroad.\textsuperscript{55} States may even assert universal jurisdiction beyond the traditional area of piracy. Some acts, such as genocide, are held to be so heinous that any state may prosecute the perpetrator.\textsuperscript{56}

Each of these examples—and there are others—illustrates that while Westphalian territorial sovereignty remains an important ideal, geographic borders in fact coincide quite imperfectly with the reach of national laws. An increasingly interdependent and globalized world has rendered strict territorial limits on jurisdiction increasingly unworkable, just as increasing national unity in the United States led to the demise of the nineteenth-century rules of personal jurisdiction. The result of this evolution is that where one sits does not necessarily determine what legal rules one sits under. As the Supreme Court

\textsuperscript{52} See GlobalSecurity.org, Status-of-Forces Agreement (SOFA), at www.globalsecurity.org/military/facility/sofa.htm (last visited Mar. 15, 2005) (describing these agreements); see also infra note 82 and accompanying text (discussing regulatory statutes).


\textsuperscript{55} This is known as passive personality jurisdiction. See Restatement, supra note 47, § 402 cmt. g.

\textsuperscript{56} Traditionally, universal jurisdiction was limited to piracy, but its scope has expanded in recent decades, though not uncontroversially. See Princeton Project on Universal Jurisdiction, The Princeton Principles on Universal Jurisdiction (2001); Kontorovich, supra note 43; Steven R. Ratner, Belgium's War Crimes Statute: A Postmortem, 97 Am. J. Int'l L. 888 (2003); Henry A. Kissinger, The Pitfalls of Universal Jurisdiction, Foreign Aff., July-Aug. 2001, at 86.
made clear a decade ago in *Hartford Fire Insurance Co. v. California*, sitting in London and dutifully abiding by English competition law provides no insulation from the reach of U.S. competition law when effects on U.S. markets can be demonstrated—even if the actors in question are British citizens or corporations. See generally Kenneth W. Dam, *Extraterritoriality in an Age of Globalization: The Hartford Fire Case*, 1993 Sup. Ct. Rev. 289. The United States has many statutes that explicitly assert extraterritorial jurisdiction, and others that do not but have been so construed by the Executive branch and the courts. Other states have done the same. While such assertions of extraterritoriality are ever more common, in some cases, spatial location itself becomes hard to determine—as in many recent Internet cases. As technology evolves, legal spatiality becomes harder to apply and, increasingly, harder to justify as a jurisprudential principle.

In sum, legal spatiality has deep conceptual roots. It is part and parcel of the Westphalian model of sovereignty that undergirds the modern territorial state system. In practice, however, the spatial basis of Westphalian sovereignty has never been absolute and is increasingly compromised. Sovereignty, as I demonstrate below, has become progressively "unbundled" from territoriality. This unbundling, while uneven, can be detected in myriad areas of the law.

II. SPATIALITY IN AMERICAN LAW

The law has long looked to spatiality as a principle or guide for decisions. Courts traditionally derived jurisdiction from principles of territoriality (though personality—in the form of citizenship—never


59. However, they have generally done so less aggressively. See, e.g., David J. Gerber, *The Extraterritorial Application of the German Antitrust Laws*, 77 Am. J. Int'l L. 756 (1983).


62. See Kal Raustiala, *The Evolution of Territoriality: International Relations & American Law*, in *Territoriality and Conflict*, *supra* note 34 (discussing similar themes that are tracked and condensed in this part).
went away as a head of jurisdiction). Consequently, in the nineteenth century, assertions of extraterritorial jurisdiction were, outside of the context of pirates and consular courts in "uncivilized" states, quite uncommon. Courts of the time viewed the notion that one state could impose its laws within another state’s territory as highly dubious and even dangerous. This conception of legal spatiality, in which Westphalian territoriality was the operative principle, was manifested in a number of legal domains.

A. Statutory Law

In 1909, the Supreme Court first addressed the spatial limitations of federal regulatory law. The specific question was whether the Sherman Antitrust Act applied to actions overseas that impacted U.S. markets. The American Banana Company sued the United Fruit Company, arguing that it had been injured by actions undertaken at the behest of United Fruit in Panama. American Banana Co. v. United Fruit Co. provided an early opportunity to consider the nature of the linkages among territory, jurisdiction, and regulation in the new era of a more economically-interventionist state. Justice Oliver Wendell Holmes, writing for the Court, argued that U.S. courts lacked jurisdiction because U.S. law did not reach into the territories of other sovereign states. Holmes declared the following:

No doubt in regions subject to no sovereign, like the high seas, or to no law that civilized countries would recognize as adequate, such countries may treat some relations between their citizens as governed by their own law, and keep to some extent the old notion of personal sovereignty alive.

Holmes was referring to the consular jurisdiction still common at the start of the twentieth century. In such aberrant situations, a civilized state like the United States could extend its law into the territory of another sovereign. But, he insisted,

the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done. . . . For another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts, not

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63. As Justice Robert Jackson notes in Eisentrager, this concept "was old when Paul invoked it in his appeal to Caesar." See Johnson v. Eisentrager, 339 U.S. 763, 769 (1950).
64. See supra Part I.
67. See Scully, supra note 48, at 163-64.
only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations... 68

United States law, in short, did not apply to acts that occurred abroad because the geographic scope of national law was defined by territorial borders. Under the spatial assumptions of the time, only within a sovereign's territory could the sovereign's law apply, absent very special circumstances, such as activity on the high seas. 69 Over the course of the twentieth century, this strict conception of legal spatiality gradually gave way. As early as the 1920s, regulatory cases began to chip away at the spatial assumptions of American Banana. 70 At about the same time, the Supreme Court also recognized that Westphalian territoriality was problematic in criminal cases when the statutes in question are "not logically dependent on their locality for the Government's jurisdiction, but are enacted because of the right of the Government to defend itself against obstruction, or fraud wherever perpetrated." 71 And by 1945, Judge Learned Hand, in a landmark opinion, enunciated the so-called "effects test," by which acts that had effects within the United States but occurred abroad were fair game for U.S. law. 72 In other words, the conception of legal spatiality articulated in American Banana radically shifted within a few decades. The doctrinal reversal is now so complete that, recently, the D.C. Circuit went so far as to hold that even foreign plaintiffs could sue foreign defendants under the Sherman Act for harms that occurred overseas, as long as some harmful effect was felt within the United States. 73 In other areas of regulation, the United States is equally aggressive in projecting its regulatory powers beyond its borders. In 1985, the Securities and Exchange Commission created a special office solely devoted to international enforcement matters. 74

68. Am. Banana, 213 U.S. at 356 (citations omitted).
69. On the high seas, of course, no other sovereign could object. Similar logic was at play in the decision in Environmental Defense Fund, Inc. v. Massey, involving the application of the National Environmental Policy Act ("NEPA") to Antarctica. There, the D.C. Circuit held that NEPA did apply. Envtl. Def. Fund, Inc. v. Massey, 986 F.2d 528 (D.C. Cir. 1993); see also Sean D. Murphy ed., Contemporary Practice of the United States Relating to International Law, 97 Am. J. Int'l L. 962 (2003). Subsequent cases held that NEPA did not apply to U.S. military bases abroad, in part due to foreign policy concerns raised by the presence of another sovereign. See, e.g., NEPA Coalition v. Aspen, 837 F. Supp. 466, 467-68 (D.D.C. 1993).
72. United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945); see also Lowenfeld, supra note 65, at 373-411.
73. This holding was reversed by the Supreme Court. See F. Hoffmann-La Roche Ltd. v. Empagran S.A., 124 S. Ct. 2359 (2004). While the Justice Department has long supported such extraterritorial assertions, it opposed the D.C. Circuit's holding before the Supreme Court.
Many other agencies have done the same.\textsuperscript{75} In essence, the Executive branch has endeavored, and the federal courts have permitted the United States to "set the competitive ground rules for the world economy" even where other major economies have sizeable and perhaps disproportionate stakes.\textsuperscript{76} And in the criminal law, the United States frequently asserts jurisdiction over a wide range of crimes that occur abroad but, like cartels abroad, have effects on the United States. In some cases, these extraterritorial assertions pertain to criminal acts that once occurred solely domestically. But in many, the crimes themselves are relatively new: insider trading, money laundering, computer fraud, terrorism, and the like.\textsuperscript{77}

Similar moves to decouple law and location were afoot in domestic understandings of jurisdiction during the early twentieth century. As the American economy increasingly nationalized in the 1930s and 1940s, and legal realism grew ascendant, "minimum contacts" with a state by an out-of-state entity became sufficient to justify assertions of jurisdiction.\textsuperscript{78} The strict territoriality of \textit{Pennoyer}, based on Story's interpretation of the underlying principles of territorial sovereignty within the law of nations, yielded by 1945 to the functionalism of \textit{International Shoe Co. v. Washington}.\textsuperscript{79} \textit{International Shoe} replaced "the strict territorial theory" of \textit{Pennoyer} with "a single overriding principle: that a state court can exercise personal jurisdiction over a defendant if he has 'certain minimum contacts with it such that the maintenance of the suit does offend traditional notions of fair play and substantial justice.'"\textsuperscript{80} In short, judges in the mid-twentieth century increasingly embraced a set of pragmatic, instrumental, and contextual considerations that, while not ignoring spatial location, acknowledged the profound changes in the national, and global,
By the 1960s, the United States was routinely asserting extraterritorial prescriptive jurisdiction based on the effects concept under a number of different regulatory statutes. Legal spatiality again yielded to functional considerations of effects on markets. Courts no longer argued that one sovereign could not invade another's territory with its law, as Holmes had stated so emphatically in 1909. Rather, from the 1950s onward, courts simply looked to what Congress intended in a given statute and found—at least in many areas of economic regulation—that Congress intended to regulate globally. A "preference against extraterritoriality" in ambiguous cases remains, but frequently, that presumption is readily rebutted. Foreign states have complained vociferously about the United States' aggressive extraterritoriality, but this has had little impact on the trend.

B. Constitutional Claims

Much like regulatory law during the era of American Banana, legal spatiality was central to considerations of constitutional law in the nineteenth century. Here too, decisions reflected Story's understanding—derived from international law principles—of the spatial limits of sovereignty. Courts of the time viewed the Constitution as operative only within the acknowledged territory of the United States. Outside the United States, the Constitution had no force. This position was laid out squarely in 1891 in In re Ross, a case that set the doctrinal pattern for nearly seventy years. In Ross, the Supreme Court faced the question of whether the Constitution applied to trials by U.S. consular courts of American citizens abroad.

81. See Lea Brilmayer, The Extraterritorial Application of American Law: A Methodological and Constitutional Appraisal, Law & Contemp. Probs., Summer 1987, at 11 (discussing developments in conflicts of laws and in U.S. foreign relations law pertaining to extraterritoriality); Lowenfeld, supra note 65; Raustiala, supra note 75 (discussing the causality behind this shift).
82. See, e.g., Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597 (9th Cir. 1976).
83. See Born, supra note 13; Dodge, supra note 13.
84. See, e.g., Alan C. Swan & John F. Murphy, Cases and Materials on the Regulation of International Business and Economic Relations 905 (2d ed. 1999) (discussing the Sherman Act). "Almost without exception our friends are particularly offended by what they consider the readiness of the United States to engage in extraterritorial application of what, to many, is a wholly idiosyncratic body of law." Id.
85. As discussed below, this question of what territory was actually U.S. territory for constitutional purposes was hotly debated but not easily answered. See infra text accompanying notes 86-98.
86. 140 U.S. 453 (1891).
87. Id. at 463. In fact, Ross was not a U.S. citizen. Id. at 462. But since he was working on a U.S. ship, he was constructively a citizen for the purposes of this case.
These consular courts, discussed above, operated extraterritorially and were clearly and uncontestedly an arm of the U.S. government. 

*Ross* involved a sailor who was convicted of murder by a U.S. consular court sitting in Japan. Ross appealed on the grounds that the consular court—the local consul sitting in judgment—violated his Sixth Amendment right to trial by jury. But the Supreme Court emphatically rejected the idea that a U.S. court located abroad could possibly violate the protections of the Constitution. This was impossible, the Court said, because "*[t]he Constitution can have no operation in another country.*"88 As in *American Banana*, territory and sovereignty were declared to be inseparable and coterminous. Since the Constitution was spatially bound, Ross, regardless of his citizenship, had no constitutional rights outside U.S. territory. (The Supreme Court did not, however, invalidate the existence of the consular court. How a U.S. court acquired the power to operate in Japan, given this conceptualization of legal spatiality, was never adequately explained.)89

The Supreme Court's decision in *Ross* defined the legal landscape with regard to spatiality and constitutional rights for decades.90 Yet by the middle of the twentieth century, the view that the Constitution's legal protections stopped at the water's edge began to be reconsidered, just as it had been reconsidered in the area of statutory law. That constitutional powers were not spatially limited was never in doubt. What was at issue now, rather, was whether the constitutional rights also extended beyond the borders of the United States. A 1953 case, for example, held that the Takings Clause of the Fifth Amendment applied to takings by the U.S. government of property located abroad, despite the government's claim that the constitutional right to just compensation was spatially bound.91 Then, *Reid v. Covert*,92 a 1957 case involving the murder in the United Kingdom of a U.S. air force officer by his wife, rejected in a sweeping manner the prevailing spatial theory of constitutional rights. *Reid*

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88. *Id.* at 464 (emphasis added).

89. The majority argued essentially that Japan's acquiescence permitted the United States to operate there, but that does not directly answer the question of the constitutional power to create and operate an instrumentality of the United States abroad. *Id.*

90. I discuss the related *Insular Cases* below. See infra notes 136-43 and accompanying text.


established the notion that the protections of the Bill of Rights apply to U.S. government action wherever it occurs, so long as the defendant or suspect is a U.S. citizen. In so doing, the Court dramatically altered the prevailing conception of legal spatiality.

In *Reid*, the civilian defendant, pursuant to a status of forces agreement with the United Kingdom, was convicted by a U.S. court-martial. This was a common practice during the Cold War; court-martial of dependent civilians occurred daily. As in *Ross*, the defendant in *Reid* challenged her conviction on Sixth Amendment grounds. The government argued that the *Ross* rule straightforwardly rejected her claim. Yet the *Reid* Court unequivocally rejected the legal spatiality of *Ross*. The Court in *Reid* seemed to find the underlying territorial logic of *Ross*, which the government relied upon in its argument in *Reid*, abhorrent. Indeed, Justice Black called it "a relic from a different era." More tellingly, the decision stated that we reject the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights. The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution. When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide . . . should not be stripped away just because he happens to be in another land.

As a doctrinal matter, this holding was limited to American citizens. But the underlying rationale for this limitation was unclear. *Ross* had been based on a particular and strict conception of territoriality, in which law was spatially delimited for citizens and aliens alike. Both citizens and aliens enjoyed the rights of the Constitution when within the United States' sovereign territory, and both citizens and aliens lost those rights when outside that territory. Law and spatial location were, according to the *Ross* rule, intrinsically connected. Consequently, by accepting the idea that the Constitution was not in fact spatially delimited, in *Reid* a profound conceptual break occurred.

Why did the *Reid* Court choose to extend constitutional protections to citizens without regard to territorial location? *Reid* certainly seems reflective of the rising rights consciousness of the 1950s—it was decided just a few years after *Brown v. Board of Education* and has a ringing, landmark tone. But it also reflected the realities of the Cold

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93. *Id.* *Reid* was in certain limited respects presaged by *United States v. Belmont*, in which the Court stated that "our Constitution, laws, and policies have no extraterritorial operation, unless in respect of our own citizens." *United States v. Belmont*, 301 U.S. 324, 332 (1937).
95. *Id.* at 5-6 (emphasis added). The holding of *Reid* was extended to civilian employees of the armed services. See *Kinsella v. United States*, 361 U.S. 234 (1960).
War, which, for the first time, entailed large numbers of U.S. troops and their dependents stationed for long periods in far-flung corners of the globe. Cognizant of the nearly one million U.S. soldiers and 250,000 civilian dependents stationed abroad, who were, under the government's theory, effectively without constitutional rights, the Reid Court declared the Ross version of legal spatiality archaic and wrong. The Constitution was understood in Reid to be a global document, untethered from the particular soil of the United States. It was declared to be a constitutive text which, while creating a political entity also restrained that entity. These elements—both constitutive and restraining—operated regardless of where the federal government acted. From now on, courts would have to justify the residual spatiality of American law—if they chose to justify it—without simple recourse to the strict territorial principles of the past. The key distinction they often relied upon was alienage.

C. Citizens and Aliens

Perhaps the most striking example of such an alienage-based justification of legal spatiality occurred fifteen years ago in United States v. Verdugo-Urquidez. U.S. courts have traditionally held that the Fourth Amendment's restraints on search and seizure applied, like all constitutional rights, to citizens as well as aliens within the United States. But in Verdugo, the Supreme Court held that a Mexican citizen's home in Mexico could be searched by U.S. Drug Enforcement Agency officials without a warrant, and the evidence seized used against that individual in a U.S. court. The defendant challenged the search on Fourth Amendment grounds. The Ninth Circuit suppressed the evidence, finding that Mr. Verdugo possessed Fourth Amendment rights despite the foreign location of the search. The Supreme Court reversed.

Chief Justice William Rehnquist, writing for a plurality in Verdugo, acknowledged that U.S. courts extend Fourth Amendment protection to foreigners and their property within our borders. But, the decision argued, it does not follow that they must extend it to an

97. Raustiala, supra note 62.
98. See Supplemental Brief for Appellant and Petitioner on Rehearing at 6-7, Reid (Nos. 701, 713). Indeed, the language in the decision, read on its own terms, implies a result far more sweeping than the limited holding to citizens: "The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution." Reid, 354 U.S. at 5-6.
100. Verdugo also illustrates the rise of international policing by American agents. Just as the internationalization of production led to an increase in extraterritorial application of antitrust law, so too have American police officials increasingly worked with their counterparts abroad. See generally Nadelmann, supra note 74.
alien's property outside our borders. While Reid had established that the Constitution was no longer spatially bound for citizens, the Verdugo Court asserted that spatial location was still determinative of the rights of aliens. The interesting twist was that in Verdugo, the defendant was actually within American territory at the time of the search. Having been arrested in Calexico, California and detained in San Diego, he was unquestionably within the border. His property, however, was not. For the Court, this spatial fact was critical. Had the property been in San Diego, but he in Mexico, a warrantless search would likely have run afoul of the Fourth Amendment. It was the location of Verdugo's home, not his person, that seems to have ultimately determined the outcome of the case.

This reasoning was significant because, as noted above, U.S. law has long held that aliens in the United States enjoy many of the same rights as citizens as a strictly territorial conception of law would predict. As early as 1886, during the height of strict territoriality, the Equal Protection Clause of the Fourteenth Amendment was held to apply to a Chinese national present in the United States. As Verdugo shows, however, despite the demise of strict territoriality heralded by Reid, United States v. Aluminum Co. of America, United States v. Bowman, and other cases, geography is nonetheless a critical determinant of the rights of aliens. It is true that U.S. law at times looks to the formal entry of aliens into the United States rather than pure spatial location. In Sale v. Haitian Centers Council, Inc.,

102. Id. at 273-75.
103. Id. at 262. Justice John Paul Stevens's concurrence in Verdugo argued that the search was governed by the requirements of the Fourth Amendment because the respondent was "lawfully present in the United States... even though he was brought and held here against his will." Id. at 279 (Stevens, J., concurring).
104. The plurality responded to the fact that the Fourth Amendment refers to "the people" by distinguishing Verdugo from the people. According to Chief Justice William Rehnquist's opinion, the phrase "the people" in the text of the Fourth Amendment refers 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." Id. at 265. I discuss this idea further below. See infra Part IV.B.
106. See Wong Wing v. United States, 163 U.S. 228 (1896); Yick Wo, 118 U.S. at 356.
107. 148 F.2d 416 (2d Cir. 1945).
109. Leng May Ma v. Barber, 357 U.S. 185 (1958) (holding that an alien physically present within the United States was nonetheless not within the United States for certain statutory purposes).
for example, the Supreme Court noted that under the Immigration and Naturalization Act, aliens who were within our territory were treated “as though they had never entered the United States at all; they were within the United States territory but not ‘within the United States.’” And the exact location of the territorial borders of the United States is occasionally unclear. Shaughnessy v. United States ex rel. Mezei, for example, held that “harborage at Ellis Island is not an entry into the United States,” despite the fact that Ellis Island is incontrovertibly sovereign U.S. territory. These exceptions aside, the general rule of the last 125 years has been that aliens enjoy nearly all the rights of citizens while within the United States.

Whether aliens also enjoy constitutional rights against the U.S. government when abroad received heightened attention after Reid. Many commentators at the time suggested, not unreasonably given the prior parallelism between citizen and alien rights, that they ought to. Some courts agreed. In the 1974 case of United States v. Toscanino, which like Verdugo, involved a Fourth Amendment claim, the Second Circuit argued that there is no rationale for “a different rule with respect to aliens who are victims of unconstitutional action abroad, at least where the government seeks to exploit the fruits of its unlawful conduct in a criminal proceeding against the alien.”

Even during this pre-Verdugo period, however, the constitutional rights of aliens abroad did not receive the same vigorous level of protection as those of citizens. Post-Verdugo, the distinction between citizen and alien became much sharper. For example, in United States v. Davis, the Ninth Circuit extended the Verdugo test to


111. Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 213 (1953). Justice Robert Jackson argued in dissent that the taking of liberty “within the United States or its territorial waters, may be done only by proceedings which meet the test of due process of law.” Id. at 227 (Jackson, J., dissenting). Insular possessions of the United States pose another set of problems. See, e.g., Valmonte v. Immigration & Naturalization Serv., 136 F.3d 914 (2d Cir. 1998) (holding that birth in the Philippines during the territorial era does not constitute birth in the United States under the Citizenship Clause of the Fourteenth Amendment, despite the United States' exercising complete sovereignty over the Philippines); see also infra Part II.D (discussing further the insular possession of the United States).

112. “[R]elatively little turns on citizenship status. The right to vote and the right to run for federal elective office are restricted to citizens, but all of the other rights are written without such limitation.” Cole, supra note 20, at 978.


115. Toscanino, 500 F.2d at 280.

searches on the high seas, holding that nonresident aliens on ships in international waters have no Fourth Amendment protections either. More dramatically, in 2003, United States v. Esparza-Mendoza held that an excludable criminal alien present in the United States illegally also lacks Fourth Amendment protections. The court argued that such an individual, while clearly within U.S. territory, was not one of the people as that term was interpreted by the Verdugo Court. Verdugo was on U.S. territory legally but involuntarily. Esparza-Mendoza was here illegally but voluntarily. The court held that in both cases, there was no constitutional protection against unreasonable search and seizure. This decision, like Verdugo itself, evinces a move away from a purely spatial understanding of the Fourth Amendment’s scope and toward one that is status-based, regardless of the locus of the search. Nonetheless, this particular approach has not (yet) been picked up by other federal courts.

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. But it is perhaps best understood as a combination of two ideas: a vestigial notion of legal spatiality—held over from the nineteenth-century era of strict territoriality—coupled to the idea that the alien is a guest within the borders of the United States. Allusions to the guest theory appear frequently in cases involving aliens. A canonical statement is Justice Jackson’s in Johnson v. Eisentrager: “The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society.” Mere presence grants some rights; these rights grow as the relationship deepens. This conception of rights is frequently cited, but in fact, it is not especially consistent with American practice. It does not take numerous years of residence, or even intent to naturalize, to enjoy many constitutional rights. Aliens who have spent almost no time in the United States are treated, for most purposes, the same as those who have lived here for years.

Prior to Reid, the guest theory made some sense, since for all individuals—citizen or alien—the Constitution was spatially delimited. Today, however, continued adherence to a guest theory rests on an

117. United States v. Davis, 905 F.2d 245 (9th Cir. 1990).
119. See United States v. Gorshkov, No. CR00-550C, 2001 WL 1024026, at *1 (W.D. Wash. May 23, 2001) (holding that the Fourth Amendment did not apply to the defendant-alien’s property located abroad because the alien’s single voluntary entry into the United States for criminal purposes did not establish the voluntary community connection demanded by the Verdugo decision).
122. See infra text accompanying notes 279-80.
uncertain foundation. It is difficult to discern a coherent underlying theory that can both cast the Constitution as a document that controls the exercise of government power wherever that power is exercised, while at the same time construing it as a document that limits those controls—which are facially-neutral as to citizenship—only to citizens when power is exercised outside the territory of the United States. How, in other words, can spatial location both matter to the reach of the Constitution and yet not matter? Possible answers exist, of course, and I address these further below. But the question is not easy to answer.

In short, while spatial location is now irrelevant to the constitutional rights of American citizens, that principle has been only unevenly extended to noncitizens. It has long been true, for instance, that foreign firms with no presence in the United States have due process rights, such as the Fourteenth Amendment right to be free of the jurisdiction of American courts when they lack sufficient minimum contacts with the forum state. And, as noted above, a handful of unusual cases over the last forty years have argued that noncitizens abroad enjoy certain protections of the Constitution. The Restatement of Foreign Relations (Third), published in 1986—before the Supreme Court’s decision in Verdugo—even went so far as to state that “at least some actions by the United States in respect of foreign nationals outside the country are also subject to constitutional limitations.” But, the Restatement notes, this “has not been authoritatively adjudicated,” having been neither endorsed by the Supreme Court nor aggregated to any appreciable pattern. Verdugo weakened this largely aspirational statement further. Yet while Verdugo may well stand for the proposition that spatial location remains essential to the rights of aliens against the U.S. government, that decision offered no coherent theory for why this was true—when


124. See, e.g., Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 113 (1987) (“The strictures of the Due Process Clause forbid a state court to exercise personal jurisdiction over Asahi under circumstances that would offend ‘traditional notions of fair play and substantial justice.’” (citation omitted)). Indeed, the Asahi Court found that the defendant’s location in Japan was in fact part of the reason the assertion of jurisdiction was “unreasonable and unfair.” Id. at 114, 116.

125. See, e.g., Cardenas v. Smith, 733 F.2d 909 (D.C. Cir. 1984); United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974); United States v. Tiede, 86 F.R.D. 227 (U.S. Ct. Berlin 1979); see also Stephan, supra note 123; supra notes 114-15 and accompanying text.

126. Restatement, supra note 47, § 722 cmt. m. The Chief Reporter was Louis Henkin, who has long championed this idea.

127. Id. As one commentator noted (with some understatement) with regard to the constitutional rights cases, these decisions “form a curious mosaic.” Hunter, supra note 113, at 671.
territoriality so demonstrably no longer applied to citizens—nor what might explain the various anomalies in the case law.

D. Indian Country and Insular Possessions

I have discussed the various cases relating to legal spatiality as if the territorial borders of the United States were clearly demarcated—which in a sense they are. Yet not all American territory is the same. For example, since the founding of the Republic, the United States has treated some areas of its territory as “Indian country”: land partially under the control of Indian tribes. Since John Marshall’s famous opinion in Cherokee Nation v. Georgia, tribes were understood to be semi-sovereign entities; “domestic dependent nations,” in his artful, if confusing, phrase. The tribes possess inherent sovereignty, Marshall said, but that sovereignty is subject to the sovereignty of the United States. What this exactly means is a mystery. Though congressional power over the tribes is plenary, the tribes retain (an increasingly depleted) degree of jurisdiction over certain internal matters. Until 1924, even birthright citizenship was not extended to Indians born on reservations, despite the plain language of the Fourteenth Amendment. Thus, Indian Country is distinctive legally even though it is wholly and unquestionably within the geographic borders of the United States.

Similarly, despite the significant moves away from legal spatiality in cases such as Reid and Hartford Fire, the Supreme Court has never retreated from the differential treatment of territory that is ruled by the United States yet not granted statehood. These territories—such as Hawaii until 1957 and Puerto Rico today—are constitutionally distinct from “normal” American territory: the territory of the fifty states.

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129. Id. A core principle of federal Indian law is “that those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers... but rather inherent powers of a limited sovereignty which has never been extinguished.” Aleinikoff, supra note 13, at 97 (quoting Felix S. Cohen, Handbook of Federal Indian Law 122 (1942) (quotation marks omitted)).
This geographic distinction between states and territories—found in the Constitution itself—first emerged as the United States expanded westward. But it is most famously associated with the Insular Cases, involving the imperial possessions acquired by the United States in the wake of the Spanish-American War. That war marked the emergence of the United States as a great military and imperial power. In victory, the United States acquired several overseas possessions of Spain, in particular, the Philippines. The question of whether "the Constitution follow[ed] the flag" was hotly debated at the time. Incorporating the former colonies of Spain meant, in practice, the unprecedented act of infusing distant, blue water colonies and a large number of nonwhites into the United States.

The Supreme Court answered the question of whether the Constitution followed the flag by holding that the new territories, though sovereign U.S. possessions, were distinct from other American territory. Some fundamental constitutional rights applied in these regions. But others, such as the Sixth Amendment right to trial by jury, did not. In so declaring, the Supreme Court drew a clear distinction between types of sovereign territory (as well as between types of rights). The United States is sovereign in both the states and in its colonies. But the Constitution does not apply fully in the latter. As Elihu Root famously quipped, "as near as I can make out the Constitution follows the flag—but doesn’t quite catch up with it."

The fever for empire in the United States eventually abated, and the Philippines, Cuba, and other territories were granted independence during the first half of the twentieth century. The United States nonetheless retains a vestigial empire: Puerto Rico, Guam, the Virgin Islands, and so forth. Congress retains plenary

134. The Territories Clause reads as follows: “The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . .” U.S. Const. art. IV, § 3, cl. 2.


136. This phrase refers to several cases involving overseas possessions, beginning with De Lima v. Bidwell, 182 U.S. 1 (1901), and ending with Balzac v. Porto Rico, 258 U.S. 298 (1922).


138. Frederick R. Coudert, The Evolution of the Doctrine of Territorial Incorporation, 26 Colum. L. Rev. 823 (1926); Lowell, supra note 26; see also Fairman, supra note 26.

139. I use the term "incorporate" colloquially here; the term "incorporate" acquired a quite specific and momentous meaning due to its use in the Insular Cases. Hawaii raised many of the same issues, and became a U.S. state in 1957. See generally Scheiber & Scheiber, supra note 133.

140. 1 Phillip C. Jessup, Elihu Root 348 (1938) (internal quotation marks and citation omitted).
powers in insular territories just as it does in Indian Country. For example, Congress has extended the full protections of the Bill of Rights to Puerto Rico by statute. But plenary power dictates that it can rescind that extension at any time. Puerto Ricans do not vote for President, nor do they have voting representation in Congress. These distinctions all reflect a conception of legal spatiality in which the core territory of the sovereign state is distinguishable from the periphery. The Insular Cases continue to be cited as good authority for the notion that the United States can constitutionally distinguish different types of territory.

In short, the odd—or oxymoronic—phrases that U.S. courts have fashioned to describe Indian Country and insular possessions—“foreign... in a domestic sense”; “domestic dependent nations”—starkly highlight the uneasy fit between the Westphalian conception of absolute territorial sovereignty and the reality of a more multilayered connection between law and territory. The Insular Cases have never been repudiated. The ironic—even absurd—result is that post-Reid, an American citizen appears more firmly protected against American government action by the Bill of Rights when in Japan than when in Puerto Rico.

E. The Uneven Demise of Territoriality

A century ago, when Guantanamo was first acquired by the United States, Westphalian territoriality was relatively robust. Exceptions existed, but they were limited. Today, Westphalian territoriality persists in many areas, but both constitutional doctrine and statutory interpretation evidence a marked transformation in legal spatiality. Territorial location is no longer a bar to constitutional protections for American citizens. And it is now routine for U.S. statutes to apply to actions that occur entirely abroad, as long as these actions have effects in the United States. These changes illustrate how legal doctrine can evolve to accommodate exogenous changes in context. Yet this transformation in legal spatiality is decidedly partial. American courts maintain and occasionally deploy a presumption against extraterritoriality when interpreting statutes. Insular possessions and other “anomalous zones” are constitutionally distinct from the fifty

141. Cleveland, supra note 132.
142. Aleinikoff, supra note 13, at 89.
143. See, e.g., United States v. Ntreh, 279 F.3d 255 (3d Cir. 2002); Romeu v. Cohen, 265 F.3d 118 (2d Cir. 2001).
146. “It is hard to see the coherence of an approach that leads to the conclusion that American citizens cannot be tried by the federal government for capital offenses without jury trial in Japan but can be so tried in Puerto Rico.” Strangers to the Constitution, supra note 13, at 101.
147. See Raustiala, supra note 62.
states.148 And aliens, as discussed above, continue to face geographic limits to their legal rights.

No one seriously argues that the reach of domestic law ought to be coterminous with the territorial borders of the sovereign. The implications are far too radical and frequently unsustainable—as conflicts scholars in the United States long ago recognized.149 But while the norm of Westphalian territoriality has endured, in practice, Westphalian territoriality is increasingly compromised and anachronistic, and lacks a coherent underlying theory to justify its continued use as a conclusive jurisdictional principle. There is wide variation in the treatment of legal spatiality, and this variation sometimes rests on pragmatic principles. But it frequently rests on little more than accidents of history and sheer inertia, since the doctrine has evolved in a haphazard and under-theorized manner over many decades. The rarity of cases addressing geographical location leads to a bumpy doctrinal path at best, schizophrenia at worst.150

Given this ambivalent relationship between law and territory, the choice to rely on principles of legal spatiality in contemporary judicial decision making is not self-evident in any particular case. While perhaps reasonable in the nineteenth century, when legal spatiality was treated more coherently, it is insufficient for a court today simply to point to spatial location as determinative of legal outcomes.151 Spatial location has a role to play in legal decisions, but that role must be justified. I explore this role more fully after turning to the particularities of the American presence in Guantanamo.

III. HABEAS AND THE QUESTION OF GUANTANAMO

Legal spatiality has received little systematic scholarly attention. The connection between law and land has come into sharp focus, however, over the issue of the detention of suspected al-Qaeda and Taliban members in Guantanamo as well as in other, less well-known facilities in Afghanistan and other foreign locations.152 In this part, I

149. The transition from the approach of Beale to that of Currie makes this clear. See Brilmayer, supra note 60; Kramer, supra note 58.
150. Some areas of the law have had many cases involving extraterritorial application; antitrust is an excellent example. See Born, supra note 13; Lowenfeld, supra note 65, at 373-411.
152. See James Risen & Thom Shanker, Hussein Enters Post-9/11 Web of U.S. Prisons, N.Y. Times, Dec. 18, 2003, at A1. Guamnamo has played a key role in debates over legal spatiality before. See, for example, the discussion in Haitian Centers Council, Inc. v. McNary.

It does not appear to us to be incongruous or overreaching to conclude that the United States Constitution limits the conduct of United States personnel with respect to officially authorized interactions with aliens brought to and
briefly survey the history of wartime habeas corpus petitions and their connection to territory. I then examine the history of the Guantanamo Naval Base and the complex questions of sovereignty it raises. All of the overseas American detention facilities implicate questions of legal spatiality. But because of its unique history, distinctive prominence, and unusual legal basis, Guantanamo is the most important and most interesting case.

A. War, Habeas, and Spatiality

The litigation over the Guantanamo detainees has largely turned on their ability to invoke the writ of habeas corpus in American courts. In Rasul, the Supreme Court declared the writ available to the detainees as a matter of statutory law without reaching directly the question of whether aliens abroad have, as a constitutional matter, a right to the writ. Yet habeas corpus has significant constitutional underpinnings. Of ancient lineage in English law, the writ is aimed at ensuring that the government does not deprive a person of liberty without providing an adequate legal basis to a court of law. Since detention by such personnel on a land mass exclusively controlled by the United States.

Haitian Ctrs. Council, Inc. v. McNary, 969 F.2d 1326, 1343 (2d Cir. 1992); see also Cuban Am. Bar Ass'n v. Christopher, 43 F.3d 1412, 1425 (11th Cir. 1995) (“The district court here erred in concluding that Guantanamo Bay was a ‘United States territory.’ . . . We disagree that ‘control and jurisdiction’ is equivalent to sovereignty.”).

153. The facility at Guantanamo is not the only such detention center. Though it appears to be the largest and is the best-known, the United States has reportedly created a network of overseas detention centers. In addition, some individuals are detained by friendly nations, such as Egypt. See Risen & Shanker, supra note 152 (describing the network of prisons run by the Pentagon and the Central Intelligence Agency in Afghanistan, Thailand, and other undisclosed locations). The Bush Administration’s stated intent is to try many of these detainees via military commissions. See U.S. Dep’t of Def., Military Commission Order No. 1, Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism (Mar. 21, 2002), available at http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf. These trials have recently begun. Scott Higham, Hearings Open with Challenge to Tribunals, Wash. Post, Aug. 29, 2004, at A12.


155. As the commonwealth lawyers’ brief in the certiorari petition in Al Odah explains, “[a]s a matter of English law jurisdiction for the purposes of the writ of habeas corpus is established when the detained person is placed under the control of the Crown or enters territory under the Crown’s control whether or not the Crown claims sovereignty over that territory.” Brief for the Commonwealth Lawyers Association as Amicus Curiae in Support of the Petitions at 8, Rasul (Nos. 03-334, 03-343).
the aim of habeas is to constrain executive power, it is not obvious why it ought to matter where that power is exercised. Indeed, many scholars contend that English law has long held that habeas does not turn on the petitioners' locality, but simply on the exercise of state power.\textsuperscript{156}

Wartime is nonetheless a special context.\textsuperscript{157} The Constitution states in Article I that "[t]he 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."\textsuperscript{158} Consistent with English practice, in the founding era, noncitizens—even enemy aliens—enjoyed the protections of habeas corpus.\textsuperscript{159} Lincoln (in)famously suspended the writ during the Civil War.\textsuperscript{160} The usual starting point for discussion on the meaning of the suspension clause is \textit{Ex parte Milligan}, a Civil War case holding that the military trial of a noncombatant citizen was unconstitutional while the civilian courts were open and functioning.\textsuperscript{161} The next major milestone occurred during the Second World War, in

\textsuperscript{156} The writ of habeas corpus was available under the common law whenever the place in question was "under the subjection of the Crown of England." Brief Amici Curiae of Legal Historians Listed Herein in Support of the Petitioners at 18, \textit{Rasul} (Nos. 03-334, 03-343) (quoting Lord Mansfield's opinion in \textit{Rex v. Cowle}, 97 Eng. Rep. 587, 599 (K.B. 1759)). For example, habeas was available in India well before Britain declared formal sovereignty over parts of India: Importantly, judicial power to issue writs of habeas corpus in India did not turn on the existence of formal sovereignty. To the contrary, Britain intentionally delayed assertions of formal sovereignty over the range of territories controlled by the [British] East India Company until 1813—nearly \textit{four decades} after judges had begun issuing writs of habeas corpus on behalf of individuals detained by Company officials in those same lands. \textit{Id.} at 14 (citation omitted).


\textsuperscript{158} U.S. Const. art. I, § 9. The writ stands, the Supreme Court has declared, as "the precious safeguard of personal liberty and there is no higher duty than to maintain it unimpaired." \textit{Bowen v. Johnston}, 306 U.S. 19, 26 (1939).

\textsuperscript{159} Brief Amici Curiae of Legal Historians Listed Herein in Support of the Petitioners at 25, \textit{Rasul} (Nos. 03-334, 03-343) ("Similarly, alleged 'enemy aliens' have been able to seek review of their legal status on habeas corpus.").

\textsuperscript{160} Mark E. Neely, Jr., \textit{The Fate of Liberty: Abraham Lincoln and Civil Liberties} 9 (1991). News accounts indicate that the Bush Administration tried, in the USA Patriot Act, to suspend habeas corpus. Early drafts of the Patriot Act "included a provision entitled 'Suspension of the Writ of Habeas Corpus.'" Representative James Sensenbrenner, Chairman of the House Judiciary Committee, later told reporters, "[t]hat stuck out like a sore thumb. It was the first thing I crossed out." Petitioners' Brief on the Merits at 14 n.12, \textit{Rasul} (No. 03-334) (citing Roland Watson, \textit{Bush Law Chief Tried to Drop Habeas Corpus}, Times (London), Dec. 3, 2001, at 14 (alteration in original)). As the petitioners' brief notes, there is no indication that Congress ever intended to suspend habeas in the war on terror and indeed this story suggests that it resisted any such effort by the Executive. See Petitioners' Brief on the Merits at 7, \textit{Rasul} (No. 03-334).

\textsuperscript{161} \textit{Ex parte Milligan}, 71 U.S. (4 Wall.) 2 (1866); see also Neely, supra note 160, at 179-82.
the Ex parte Quirin decision.\textsuperscript{162} Quirin involved an unusual set of protagonists: German saboteurs who landed on beaches in Florida and Long Island, changed into civilian clothes, and proceeded to infiltrate American cities. At least one of the would-be saboteurs was actually an American citizen.\textsuperscript{163} After one of the participants had a change of heart and alerted the FBI, the saboteurs were imprisoned in Washington, D.C. and tried by military commission.\textsuperscript{164}

The Supreme Court declared that although the Nazi saboteurs were avowedly enemy aliens, that status did not foreclose jurisdiction by U.S. courts. The Roosevelt Administration had argued that the saboteurs lacked access to American courts. As the Supreme Court put it (referring to an executive proclamation about the saboteurs issued by President Franklin D. Roosevelt), the U.S. government

insists that petitioners must be denied access to the courts, both because they are enemy aliens or have entered our territory as enemy belligerents, and because the President's Proclamation undertakes in terms to deny such access to the class of persons defined by the Proclamation. . . . It is urged that if they are enemy aliens or if the Proclamation has force no court may afford the petitioners a hearing. . . . [N]either the Proclamation nor the fact that they are enemy aliens forecloses consideration by the courts of petitioners' contentions that the Constitution and the laws of the United States constitutionally enacted forbid their trial by military commission.\textsuperscript{165}

The Quirin decision was not aberrational. In In re Yamashita,\textsuperscript{166} the Supreme Court similarly reviewed on the merits a habeas petition brought by a Japanese general who was detained and sentenced to death by a military commission during World War II. The detention and trial occurred in the Philippines, still American territory at the time of the detention.

In 1950, the Supreme Court faced a broadly similar question about the scope of habeas jurisdiction in Johnson v. Eisentrager.\textsuperscript{167} Like Quirin, Eisentrager involved German belligerents. But this time, the defendants were detained, prosecuted, and convicted not on the eastern seaboard nor in a U.S. colonial outpost but in China, by American forces.\textsuperscript{168} The Court in Eisentrager acknowledged, as

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  \item 163. Quirin, 317 U.S. at 20.
  \item 164. Id. at 1. The Supreme Court issued a terse per curiam decision, followed by a fuller decision after several of the saboteurs had been executed. See Fisher, supra note 7, at 27-34 (supplying the details).
  \item 165. Quirin, 317 U.S. at 24-25 (emphasis added).
  \item 166. 327 U.S. 1 (1946).
  \item 167. 339 U.S. 763 (1950).
  \item 168. Id. at 765-66.
\end{itemize}
Quirin and Yamashita had earlier held, that enemy aliens do not necessarily lose the right to avail themselves of a U.S. court. In Yamashita, the Court stated that Congress “has not withdrawn, and the Executive branch of the Government could not, unless there was suspension of the writ, withdraw from the courts the duty and power to make such inquiry into the authority of the commission as may be made by habeas corpus.” Eisentrager nonetheless held that the prisoners had no right to the writ of habeas corpus.

The Eisentrager Court distinguished Quirin (and Yamashita), both of which had entertained habeas petitions on the merits, on territorial grounds. As the Court noted, the petitioners in those cases were plainly captured, imprisoned, and tried within U.S. territory. In Eisentrager, by contrast, the petitioners never set foot in the United States: they were captured, tried, and convicted abroad. Previous judgments had emphasized that when the judiciary extends constitutional protections beyond the citizenry, “it was the alien’s presence within its territorial jurisdiction that gave the Judiciary power to act.” Presence on U.S. soil “implied protection.” Since no such protective relationship existed for the defendants in Eisentrager, no correlative duty existed either. Not guests in our collective home, even impliedly so, the Court held that the defendants lacked any constitutional protections. The decision in Eisentrager thus firmly and unequivocally rested on Westphalian territoriality.

Eisentrager served as the basis of the Bush Administration’s position in Rasul and continues to guide the Administration’s litigation stance today. The Bush Administration has consistently argued that Eisentrager stands for the proposition that, as far as aliens are concerned, habeas jurisdiction only lies where the United States is sovereign. Hence, because the Guantanamo lease declares Cuba sovereign the detainees cannot bring a habeas petition in U.S. courts while they remain detained in Guantanamo. The D.C. Circuit agreed with this claim, stating in Al Odah that it could not see how the “the writ [of habeas corpus] may be made available to aliens abroad

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169. See id. at 776.
172. Eisentrager, 339 U.S. at 771.
173. Id. at 777-78.
174. Brief for the Respondents in Opposition at 10, Rasul (Nos. 03-334, 03-343).
175. Al Odah v. United States, 321 F.3d 1134 (D.C. Cir. 2003); see also Gherebi v. Bush, 352 F.3d 1278, 1287-88 (9th Cir. 2003).
when basic constitutional protections [were] not.”

Similar views were recently expressed in *Khalid v. Bush*. Rasul, while important, has not altered the Administration’s position. In *Rasul*, the Supreme Court sidestepped any constitutional questions, holding instead that the federal habeas statute provided access to the writ. This year, sharply conflicting decisions on what habeas actually entailed came out of the D.C. district court. *Khalid* held that *Rasul* simply established jurisdiction, and that, because of their geographic location, the petitioners lack any substantive rights that run to the merits of their claims. Yet a mere ten days later, a different judge of the D.C. district court stated that “there [is] nothing impracticable [or] anomalous in recognizing that the detainees at Guantanamo Bay have the fundamental right to due process of law under the Fifth Amendment.” These two decisions present radically different, even diametrically opposed, views of legal spatiality.

Of course, whether Guantanamo is unambiguously foreign territory is itself unclear. In *Rasul*, the Supreme Court implied it was not, or at least was somehow distinctive. At the same time, the majority’s holding did not rest on any special qualities attributed to Guantanamo—as Justice Scalia’s heated dissent points out. Lower courts have been divided on this question. The Ninth Circuit, in *United States v. Gherebi*, had earlier argued that Guantanamo was U.S. territory for the purposes of habeas jurisdiction and, in the alternative, that the base was U.S. sovereign territory as well. By

176. *Al Odah*, 321 F.3d at 1141; see also People’s Mojahedin Org. v. United States Dep’t of State, 182 F.3d 17, 22 (D.C. Cir. 1999) (“A foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise.” (citing United States v. Verdugo-Urquidez, 494 U.S. 259, 271 (1990)); *Pauling v. McElroy*, 278 F.2d 252, 254 n.3 (D.C. Cir. 1960) (“The non-resident aliens here plainly cannot appeal to the protection of the Constitution or laws of the United States.” (citation omitted)).


181. *Gherebi v. Bush*, 352 F.3d 1278, 1288-89, 1294 (9th Cir. 2003). The Ninth Circuit interpreted *Johnson v. Eisentrager* differently than did the D.C. Circuit. *Gherebi* argues that the Supreme Court’s holding in *Eisentrager* does not rest on sovereignty: “[T]he Court nowhere suggested that ‘sovereignty,’ as opposed to ‘territorial jurisdiction,’ was a necessary factor. . . . In short, we do not believe that *Johnson* may properly be read to require ‘sovereignty’ as an essential prerequisite of habeas jurisdiction.” *Id.* at 1288. The D.C. District Court in *In re Guantanamo Detainee Cases* likewise held that “[i]n light of the Supreme Court’s decision in *Rasul*, it is clear that Guantanamo Bay must be considered the equivalent of a U.S. territory in which fundamental constitutional rights apply. Accordingly, . . . the respondent’s contention that the Guantanamo detainees have no constitutional rights is
contrast, the D.C. Circuit in *Al Odah* held that Guantanamo was unequivocally foreign territory. The confusion in the lower courts about the status of Guantanamo was no accident.

B. Leases and Litigation

Given a century of control by the United States, it is not surprising that litigation over the status of Guantanamo has arisen before. Federal courts have previously been asked to determine whether the forty-five square mile base is foreign territory for statutory and constitutional purposes. The Haitian refugee litigation of the 1990s raised this issue squarely—with mixed results—and a raft of other cases have likewise considered Guantanamo’s legal status.\(^1\)

Relying on language in the lease purporting to retain ultimate sovereignty in Cuba, the majority of these cases have maintained that the base is Cuban, not American, soil.\(^2\)

*Bird v. United States,*\(^3\) for example, involved a Navy physician at the base who allegedly misdiagnosed a civilian’s cancer. The patient sued the United States for medical malpractice under the Federal Tort Claims Act. Since the Claims Act has a spatial limitation built in—it bars claims arising from a “foreign country”—the issue was whether Guantanamo was U.S. territory or rather, part of a “foreign country.” The Supreme Court had, in *United States v. Spelar,* previously defined “foreign country” as a “territory subject to the sovereignty of another nation.”\(^4\)

Referring to the lease, the Court held that Cuba retained ultimate sovereignty and thus, Guantanamo was a foreign country for purposes of the statute. In *Colon v. United States,*\(^5\) a federal district court faced a similar claim arising from a personal injury on Guantanamo. The court likewise concluded that Cuba retained sovereignty, making the base a foreign country for purposes of the Federal Tort Claims Act. And in *Cuban American Bar Ass’n v. Christopher,* the Eleventh Circuit had to determine whether aliens detained in Guantanamo could assert various statutory and constitutional rights.\(^6\) It held that jurisdiction and control were not

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\(^2\) But see Rasul, 124 S. Ct. at 2699-701 (Kennedy, J., concurring); Gherebi, 352 F.3d at 1278; In re Guantanamo Detainee Cases, 2005 U.S. Dist. LEXIS 1236, at *1.

\(^3\) 923 F. Supp. 338 (D. Conn. 1996).


\(^5\) No. 82 Civ. 34, 1982 U.S. Dist. LEXIS 16071, at *1 (S.D.N.Y. Nov. 24, 1982).

\(^6\) Cuban Am. Bar Ass’n, Inc. v. Christopher, 43 F.3d 1412, 1417 (11th Cir. 1995).
equivalent to sovereignty, and that military bases abroad therefore remain under the sovereignty of the host state.\(^{188}\)

Guantanamo is nonetheless an unusual place.\(^{189}\) For several reasons, it strains credulity to argue that Guantanamo is foreign soil, no different than Al Udeid Air Base in Qatar or Ramstein Air Base in Germany. For every American military base abroad, there is an international legal agreement governing the relationship with the host state, known as a “Status of Forces Agreement.”\(^{190}\) Uniquely, there is no such agreement with Cuba. Moreover, the circumstances of the Guantanamo lease’s genesis, as well as the precise provisions, are quite unusual. Most strikingly, the “lease” is effectively permanent, since Cuba cannot unilaterally terminate it.

C. Sovereignty and Spatiality in Cuba

The U.S. government’s claim of exclusive Cuban sovereignty raises several difficult questions. Can Guantanamo reasonably be analogized to ordinary military bases and thus treated legally as foreign territory? Is Cuban sovereignty necessarily exclusive of U.S. sovereignty? Is the lease valid under international law? Even if, as a formal matter, the base is clearly Cuban territory, what bearing ought this have on the constitutional rights of individuals detained there by the U.S. government? Below I sketch the history of Guantanamo. In light of that history, I offer three arguments about the lease, the most compelling of which interprets the lease language to accord Cuba a form of reversionary sovereignty and accords the United States sovereignty for the duration of the lease. I then turn to the larger question of whether sovereign control is a necessary or appropriate touchstone for the application of legal rights.

1. American Empire

The genesis of the U.S. base in Guantanamo lies in the American victory in the Spanish-American War of 1898.\(^{191}\) While the United States had long asserted a strong measure of control over Latin America—as evidenced by the Monroe Doctrine—the acquisition of Spain’s colonies marked the emergence of the United States as an imperial power. Americans had mixed reactions to this imperial episode. A blue water empire was considered by many to be the birthright of a great power. Others thought imperialism inconsistent

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188. Id. at 1425.
190. See supra note 52 and accompanying text.
with republican government, and sought to grant independence to the former Spanish colonies as soon as practicable. In some cases, such as Puerto Rico, independence was never granted; the United States continues to rule these territories as colonies. In others, such as Cuba, independence arrived after a short period of American rule. The United States nonetheless maintained a powerful presence in Cuba right up to the Cuban Revolution.

The Guantanamo lease grew directly out of U.S. sovereignty over Cuba. U.S. occupation and military government ended in 1902 when Cuba was granted nominal independence. Independence was conditioned, however, on a formal role for the United States in the future of Cuba. This role was manifested in several ways. For one, the new Cuban constitution included the notorious Platt Amendment, which permitted the United States to intervene in Cuba at any time for “the preservation of Cuban independence, the maintenance of a government adequate for the protection of life, property, and individual liberty.” The lease for Guantanamo was linked to the Platt Amendment and reflected the relationship—one of highly compromised Cuban sovereignty—that the Platt Amendment reflected and sustained. Two, the United States expressly retained control of the strategic harbor at Guantanamo Bay after ceasing to occupy the remainder of Cuba. The terms of the Guantanamo lease were originally drafted as an act of Congress in 1901, while the United States still controlled Cuba. Language concerning the lease was then incorporated into the draft constitution. The agreement was signed by the new President of independent Cuba and President Theodore Roosevelt in early 1903. Independent Cuba consequently never has controlled Guantanamo; it has remained in U.S. hands continuously since Cuba’s capture in the Spanish-American War of 1898. In short, Guantanamo Bay became an American possession (along with the rest of Cuba) as a spoil of war, and was then immediately leased to the United States upon the granting of Cuban independence. The lease,
with its clause providing for termination only by the will of both
parties, was renewed as part of a treaty with Cuba in 1934.\footnote{200}

While the Platt Amendment was ultimately stripped out of the
Cuban Constitution, the United States continues to occupy the base
and to issue an annual rent check for it. The Castro government,
which forcibly took power in 1959 and considers the base a fraudulent
and illegitimate vestige of Cuba's former colonial status, does not cash
these checks.\footnote{201} In 1960, Fidel Castro called Guantanamo "a base
thrust upon us by force, in a territory that is unmistakably ours...imposed by force and a constant threat and a constant cause for
concern."\footnote{202} In the early 1960s, Cuban hostility was such that there
was significant attention to the idea that Cuba might invade
Guantanamo.\footnote{203} Invasion never occurred, though Cuba did shut off all
water supplies to the base, which now employs its own water source.
And the border between the base and Cuba (or, if the U.S. position is
correct, between Cuba and Cuba) is lined with landmines.\footnote{204}
Despite the evident hostility between Washington and Havana, the United
States continues to adhere to the letter of the accord, claiming that
since the United States does not seek termination of the agreement,
Cuba cannot unilaterally repatriate Guantanamo. Today, the forty-
five square mile naval base, at which about 2500 Americans serve, is a
fully self-sufficient simulacrum of an American town, with a movie
theater, several fast food outlets, and a souvenir shop.\footnote{205}

As this history reflects, the nature of U.S. jurisdiction in
Guantanamo is different than that in \textit{Johnson v. Eisentrager}. In
\textit{Eisentrager}, as one of the \textit{Rasul} petitioners argued, "[t]he Executive
could not convene a military commission to try the \textit{Johnson}
petitioners unless it first secured permission from the Chinese
Government. The same is true for Landsberg prison [in Allied-
occupied Germany], where the \textit{Johnson} petitioners were
detained."\footnote{206} In Guantanamo, by contrast, Cuba exercises no effective control over
the United States or its use of the naval base, and the United States is
in no way constrained as it pursues, as it now has begun to, trials of
some detainees by military commission.\footnote{207}

\begin{footnotes}
\item[200] Treaty Between the United States of American and Cuba Defining Their
\item[201] The annual rent is $4085. \textit{See} Toobin, \textit{supra} note 14, at 37.
\item[202] Montague, \textit{supra} note 195, at 472 (quoting Fidel Castro, Address at the United
Nations General Assembly (Sept. 26, 1960)).
\item[203] \textit{See id}.
\item[204] Toobin, \textit{supra} note 14, at 37.
\item[205] Rose, \textit{supra} note 6, at 91. These establishments may violate the Guantanamo
lease itself, which provides that no commercial or industrial enterprises can be
established on the base.
(No. 03-334) (citation omitted).
\item[207] \textit{See, e.g.}, Curtis A. Bradley & Jack L. Goldsmith, \textit{The Constitutional Validity
of Military Commissions}, 5 Green Bag 2d 249 (2002); Neal K. Katyal & Laurence H.
The United States has made use of Guantanamo as a detention facility in the past. In the 1980s and 1990s, the United States housed Haitian refugees there. After the attacks of September 11, 2001, and the subsequent war in Afghanistan, the Pentagon sought to use the base as a holding pen for alleged al-Qaeda and Taliban fighters. The first detention facility, dubbed “Camp X-Ray,” gave way to a second, more permanent structure, known as “Camp Delta.”

The approximately 500 Guantanamo detainees are, by several accounts, largely low-level figures. The most significant suspects are reportedly held in interrogation centers established elsewhere around the globe: at Bagram Air Base in Afghanistan, by the Thai government in Thailand, and in some cases, on United States naval ships at sea. Indeed, some American officials question the wisdom of the Guantanamo detentions, which have incurred markedly negative responses both here and abroad. Whether wise or not, however, the detention of foreigners there raises many intriguing questions about legal spatiality in American law as well as the peculiar status of Guantanamo. One such question is the validity of the lease itself.

2. Validity

The Guantanamo lease is not a reciprocal agreement between sovereigns. It is a direct legacy of a colonial relationship. Guantanamo Bay fell into U.S. hands as a spoil of war. Then, as a condition of Cuban independence, the United States leased the base in perpetuity. Previous cases regarding Guantanamo have relied


208. See Koh, Refugee Camps, supra note 182; Koh, Reflections, supra note 182.


210. Risen & Shanker, supra note 152 (describing network of prisons run by the Pentagon and the Central Intelligence Agency in Afghanistan, Thailand, and other undisclosed locations); Rose, supra note 6, at 133.

211. Rose, supra note 6, at 136.

212. Lazar, supra note 189, at 739.

213. There are, of course, other such leases—most prominently, the now-historical lease between China and Great Britain extending control to the United Kingdom over the Hong Kong territory. That lease expired in 1997 and was not renewed. The Hong Kong lease is terse and simply states that “Great Britain shall have sole jurisdiction” in the new area and makes no express mention of sovereignty. Convention Between China and Great Britain Respecting an Extension of Hong Kong Territory, June 9, 1898, P.R.C.-Gr. Brit., 186 Consol. T.S. 310. The U.K. Foreign Office nonetheless treated the lease as granting the United Kingdom sovereignty for ninety-nine years. This fact is derived from an e-mail correspondence between the author and Anthony Aust, former Deputy Legal Advisor in the United Kingdom’s Foreign Office.
heavily on the literal text of the lease and its language concerning sovereignty. But given its history and structure, the lease’s continuing validity is not above question. International legal doctrine presents at least two arguments that the lease may no longer be valid. While both are tenable, neither is especially strong.

The first argument turns on the origins of the lease. Does the lease’s genesis in a colonial relationship somehow vitiate its legality? The Vienna Convention on the Law of Treaties, which codifies the customary international law of treaties, holds that if a new peremptory norm of international law emerges, any existing treaty in conflict with that norm is void.214 Peremptory or jus cogens norms are legal norms that are so significant that they cannot be altered or contradicted by international agreement. If the lease violates such a norm, it is no longer valid under international law. The problem with this argument is that the content of the category of peremptory norms is highly disputed. Aside from a few very well-established norms, such as genocide, there is little agreement among states or jurists on what falls within the bounds of jus cogens. Consequently, it is hard to see precisely what norm the Guantanamo lease violates that reasonably has the status of jus cogens.215 The lease is undoubtedly in deep tension with certain structural principles of the international order—sovereign equality, disfavor for colonialism, and nonintervention in the domestic affairs of sovereign states, among others. Yet these are not generally thought to be jus cogens norms, and so this argument is unpersuasive.

A second possible doctrinal argument rests on the concept of rebus sic stantibus. Under the customary international law of treaties, as well as the Vienna Convention on the Law of Treaties, an agreement may be terminated if a fundamental change of circumstances occurs which (1) was an essential basis of the consent of the parties to the treaty and (2) radically transforms the extent of the obligations to be performed.216 A change in government is not sufficient in and of itself to terminate a treaty under this doctrine. But the shift in Cuba after Castro took power is not mere change of government; rather, Cuba became a state with an ideology and political system completely oppositional to that of the United States. This hostility is manifested in the landmines that ring the base. With such outward hostility, the continued existence of a foreign military base is unusual indeed. Like the jus cogens argument, however, this argument ultimately lacks

215. Restatement, supra note 47, § 102 n.6 (“Although the concept of jus cogens is now accepted, its content is not agreed.”); see also Ian Brownlie, Principles of Public International Law 514-17 (5th ed. 1998).
force. Whether the dramatic shift in Cuban-American relations after the revolution is sufficient to meet the test of the Vienna Convention for treaty termination is unclear. Previous cases have set quite a high bar for invoking the doctrine of *rebus sic stantibus*. In a recent International Court of Justice case involving a treaty between two former Warsaw Pact states (relating to the construction of a dam), the momentous fall of communism in Eastern Europe was held insufficient to justify the invocation of *rebus sic stantibus*. While the change at stake in the Guantanamo case is clearly quite significant, it by no means is plainly sufficient to meet the doctrinal standard. Even if it were, moreover, the political significance of such a ruling is highly uncertain.

3. Interpretation

A more compelling argument does not involve any challenge to the lease’s validity per se but rather the interpretation of it. The critical language of the lease states that Cuba retains “ultimate sovereignty,” whereas the United States exercises “complete jurisdiction and control.” Most federal courts have interpreted this language to mean that Cuba is the sole sovereign in Guantanamo and have held that sovereignty was the touchstone under prior precedents such as *Eisentrager*. The Bush Administration argued that jurisdiction is distinct from sovereignty—an accurate statement—but that sovereignty is the key to habeas jurisdiction. It was this latter claim that the Supreme Court rejected as a statutory matter in *Rasul*. Since the Guantanamo lease specifies that Cuba retains “ultimate sovereignty,” the U.S. position was and remains that this fact disposes of any constitutional claims of the detainees.

Yet traditional canons of construction suggest a different reading of the lease, one more faithful to the history of the base and to the realities of the American presence in Guantanamo. This reading turns on the meaning of the phrase “ultimate sovereignty.” Under the Bush Administration’s interpretation, the word “ultimate” in the lease

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218. See Lease of Lands for Coaling and Naval Stations, *supra* note 1, art. III, 6 Bevans at 1113, 1114.
221. *See also Gherebi*, 352 F.3d at 1286 (“In other words, in the government’s view, whatever the Lease and continuing Treaty say about the United States’ complete territorial jurisdiction, Guantanamo falls outside U.S. sovereign territory—a distinction it asserts is controlling under *Johnson*.”).
is surplusage. The lease could simply read “Cuba remains sovereign” with no change in the legal outcome. “Ultimate sovereignty” can alternatively, and more reasonably, be interpreted to refer to reversion. Cuba retains a reversionary right over Guantanamo if and when the lease is terminated by mutual assent of the parties.\(^2\) In this reading, Cuba is the reversionary sovereign and the United States the temporary sovereign. The United States cannot cede Guantanamo to any state other than Cuba, and if the United States exits Guantanamo, the base reverts completely to Cuba.

In this alternative reading, the word “ultimate” actually performs interpretive work. It refers to residual sovereignty, a concept well known in international law.\(^2\)\(^3\) This reversionary reading is consistent with both the plain meaning of the text and with the realities of the subsequent behavior of the parties—two central considerations when interpreting the texts of international agreements.\(^2\)\(^4\) This interpretation is strengthened further by consideration of the language of “complete control and jurisdiction,” rather than merely “control and jurisdiction.” Why did the drafters add the term “complete”? The use of the modifier “complete” suggests that the United States is exercising a special sort of control and jurisdiction, a view consistent with the preceding interpretation that the United States is a temporary sovereign for the duration of the lease. This theory suggests that Guantanamo is broadly analogous to U.S. insular possessions such as Guam. An even closer parallel is the former Canal Zone in Panama. The Canal Zone was carved out of Panamanian territory via a treaty with the United States, also dating

\(^{222}\) In \textit{Gherebi}, the Ninth Circuit argued similarly, concluding that the 1903 lease’s use of “ultimate sovereignty” means that during the unlimited and potentially permanent period of U.S. possession and control over Guantanamo, the United States possesses and exercises all of the attributes of sovereignty, while Cuba retains only a residual or reversionary sovereignty interest, contingent on a possible future United States’ decision to surrender its complete jurisdiction and control. \textit{Gherebi}, 352 F.3d at 1291.

\(^{223}\) See, e.g., Brownlie, \textit{supra} note 215, at 110-11.

\(^{224}\) The Vienna Convention on the Law of Treaties codifies the customary law of treaty interpretation. The Convention declares that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” Vienna Convention on the Law of Treaties, \textit{supra} note 214, art. 31, 1155 U.N.T.S. at 340. Context is to be derived from further agreements between the parties and “subsequent practice” of the parties. \textit{Id}. The object and purpose, particularly when read in light of the contemporaneous Platt Amendment to the Cuban Constitution, is relatively clear: to ensure that the United States maintained control over Guantanamo as a coaling station and to keep U.S. forces within Cuba as a means of asserting hegemony. The subsequent practice of the United States includes extensive use of Guantanamo for a host of commercial activities and the creation of a self-sustaining city there. Cuba has renounced the agreement and cut off the water and other supplies in retaliation for what, in Cuban eyes, is the manifest unfairness of the lease. See Neuman, \textit{Anomalous Zones}, \textit{supra} note 13 (discussing these facts).
from 1903. That treaty grants to the United States "all the rights, power and authority ... which the United States would possess and exercise if it were the sovereign."

This reading is bolstered by consideration of the factual circumstances of the base. Since negotiating the extraordinary lease terms with the newly independent but thoroughly subservient Cuban government, the United States has never relinquished its occupation of Guantanamo. Guantanamo was in U.S. hands after the Spanish-American War, and the base remains in American hands today. This unusual history accords well with a revised interpretation of the phrase "ultimate sovereignty." And it accords well with the realities of U.S. power in Guantanamo, which is, in practical terms, total. Cuba, whatever the lease may say as a formal matter, is a wholly ineffective "lessor" and poses no threat to the U.S. base whatsoever. Cuban law is uncontestedly unavailable to the detainees, and Cuban courts play no part in this—or any previous—litigation. U.S. jurisdiction over both American civilians and foreign nationals present in Guantanamo is total. In sum, for all intents and purposes, the reality is that Guantanamo is as American a territory as Puerto Rico.

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226. Id. at 2235. A later treaty reduced these rights and powers. See Green, supra note 26, at 789-93.
227. Indeed, it would not be surprising if the United States negotiated favorable military base lease terms with the newly independent but quite subservient Iraqi government. Even then, however, a lease in perpetuity is highly unlikely—a sign both of how views about intervention have changed and how extraordinary the Guantanamo lease is.
228. This view is not wholly novel. For example, Joseph Lazar has stated the following:

The international legal record thus speaks for itself as to the occupation rights of the United States over the territory of the Guantanamo Naval Station. This record also clarifies the meaning of “ultimate sovereignty.” ... Thus, when [the lease] provided that “the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the described areas of land and water,” it presumably was understood that the cession in lease over the territory either recognized the sovereignty over the territory to be in the United States for the duration of the period of occupation, or simply recognized the suspension of sovereignty pending the vesting of ultimate sovereignty on conclusion of the period of occupation.

4. The Atom of Sovereignty

Whether one agrees or disagrees with this reading of the lease is perhaps not dispositive of the question of whether the Constitution somehow applies to aliens in Guantanamo. The question of who—the United States or Cuba—has sovereignty over Guantanamo presupposes that sovereignty is indivisible and cannot be concurrently held. If it is Cuba that is sovereign, the Bush Administration asserts, then the United States ipso facto is not sovereign. Yet this is not at all clear as a conceptual matter. Indeed, "the American experience belies the notion that the atom of sovereignty cannot be split."  

The crux of the lower court decisions in Al Odah and Khalid was the contention that the naval base is "outside the sovereignty of the United States." Implicit in this is the idea that sovereignty is absolute, bounded, and exclusive. These notions are all derived from the Westphalian ideal of sovereignty, which, as discussed above, became entrenched in American jurisprudence and law in the nineteenth century. In practice, as I have shown, that ideal only loosely accords with contemporary reality. Sovereignty has never been fully aligned with the Westphalian territorial ideal. More pertinently, the thrust of the doctrinal evolution described in Part II illustrates that legal spatiality has, in a number of key areas of the law, been increasingly decoupled from sovereignty. The result is that today, U.S. law, both statutory and constitutional, is routinely held to apply beyond the sovereign borders of the United States.

More significantly, sovereignty need not, and has frequently not been, conceptualized as mutually exclusive—as the history of the United States and other federal states make clear. Federalism is a system of shared sovereignty in which territory is divided for some purposes but not for others. American federalism is one of dual, or triple sovereignties: Federal, state, and tribal sovereignty all coexist in a complex system, though the last is more vestigial than vital. As the Supreme Court declared in Alden v. Maine, the Constitution "preserves the sovereign status of the States" and "reserves to them a substantial portion of the Nation's primary sovereignty, together with...


233. See supra Part II.

234. Krasner, supra note 31, at 24-25; Philpott, supra note 32; see also Michael Ross Fowler & Julie Marie Bunck, Law, Power, and the Sovereign State 49 (1995) (stating that sovereignty "is a matter of degree, not of bright lines").

235. See supra Part II.

the dignity and essential attributes inhering in that status."\textsuperscript{237} The states thus retain, in the words of James Madison, "a residuary and inviolable sovereignty," a sovereignty that coexists with that possessed by the federal government.\textsuperscript{238} Thus our own federal structure is one of "dueling sovereignties,"\textsuperscript{239} in which the states and the federal government (and occasionally the tribes) battle over power and control. As the Ninth Circuit recognized in \textit{United States v. Corey}, two sovereignties may, as in our federal system, exercise concurrent jurisdiction, and this "principle applies no less in the international domain."\textsuperscript{240}

Sovereignty is hence not an all-or-nothing proposition. Consequently, there is no necessary conceptual, constitutional, or practical reason to believe that whatever sovereignty Cuba enjoys in Guantanamo necessarily strips the United States of sovereignty.\textsuperscript{241} In other words, one need not accept the lease-based idea that Cuba retains only a reversionary sovereignty in Guantanamo to conclude that the United States is partially sovereign in Guantanamo. Both states may be sovereign concurrently, with the particular sovereignty of each dependent on the precise issue at hand. This view tracks our own theories of sovereignty as embodied in federalism, while also yielding a result—constitutional application to Guantanamo—that fits with the best tradition of American constitutionalism.

\textsuperscript{237} \textit{Alden}, 527 U.S. at 714.
\textsuperscript{238} The Federalist No. 39, at 198 (James Madison) (George W. Carey & James McClellan eds., 2001).
\textsuperscript{240} United States v. Corey, 232 F.3d 1166, 1180 (9th Cir. 2000). The decision in \textit{Corey} goes on to note that this is true for lease agreements with foreign sovereigns as well, with the terms of the lease governing the concurrent authority.
\textsuperscript{241} The Bush Administration argued in its brief opposing certiorari in \textit{Al Odah} that the determination of sovereignty is in essence a political question. Brief for the Respondents at 23, \textit{Rasul v. Bush}, 124 S. Ct. 2686 (2004) (Nos. 03-334, 03-343) (citing \textit{Vermilya-Brown Co. v. Connell}, 335 U.S. 377, 380 (1948)). \textit{Vermilya-Brown} addressed a U.S. base in Bermuda and also involved the interpretation of that lease's language. As a matter of simple precedent, the Administration's position is arguably on firm footing. But Guantanamo's anomalies render that simplicity problematic. Is it really the case that the courts must turn a blind eye to the realities of permanent American control? The Ninth Circuit, in \textit{Gherebi}, rejected that view. As the Ninth Circuit argued:

If "sovereignty" is "the supreme, absolute, and uncontrollable power by which any independent state is governed," "the power to do everything in a state without accountability," or "freedom from external control: autonomy, independence," it would appear that there is no stronger example of the United States' exercise of "supreme power," or the adverse nature of its occupying power, than this country's purposeful actions contrary to the terms of the lease and over the vigorous objections of a powerless "lessor." Any honest assessment of the nature of the United States' authority and control in Guantanamo today allows only one conclusion: the U.S. exercises all of "the basic attribute[s] of full territorial sovereignty." \textit{Gherebi v. Bush}, 352 F.3d 1278, 1296 (9th Cir. 2003) (citations omitted).
Finally, even if concurrent or reversionary notions of sovereignty are rejected, sovereignty and jurisdiction are distinct concepts and one need not entail the other—as Rasul made plain, and as a host of extraterritoriality cases over the last sixty years demonstrate. As the historical practice of habeas corpus shows, courts may have jurisdiction to hear habeas petitions even if the petitioners are held outside the sovereign territory of the government. Clearly, American citizens can bring habeas petitions if detained in Guantanamo. Sovereign control of the territory upon which they sit is not necessary for the federal courts to have jurisdiction. Why then should sovereign control be necessary—as the Bush Administration argues—for jurisdiction over noncitizens? In Rasul, and in the current post-Rasul litigation, the United States rested its claim of the necessity of sovereign power upon Eisentrager. Yet Eisentrager did not expressly hold that all noncitizen detainees held outside the territory of the United States cannot bring petitions of habeas corpus. Rather, it more narrowly held that enemy aliens, tried and convicted abroad by military tribunal, cannot review their convictions in U.S. civil courts.

In sum, I have critiqued the prevailing interpretation of the Guantanamo lease agreement for failing to read meaning into all the key terms in the text, and have argued that a better reading is that Cuba is the reversionary sovereign in Guantanamo, whereas the United States is de jure sovereign—as it unequivocally is sovereign in a de facto sense. Moreover, I have argued, our own federal structure demonstrates that there is no necessary barrier to American sovereignty in Guantanamo coexisting with Cuban sovereignty, with each sovereign authoritatively controlling a delimited sets of powers and issues. Even if, in other words, one rejects the concept of reversionary Cuban sovereignty, it does not follow that the U.S. wields no sovereign powers at the base. Thus between the two diametrically-opposed positions taken in the D.C. district court decisions of January 2005—by Judge Green and by Judge Leon—my argument unequivocably supports Judge Green’s statement that “Guantanamo Bay must be considered the equivalent of a U.S. territory in which fundamental constitutional rights apply.”

Guantanamo, and the terms of the lease granting the United States control over it, are vestigial remnants of the age of empire. Throwbacks to an earlier and quite different time, they are difficult to

243. Rasul, 124 S. Ct. at 2700 (Kennedy, J., concurring).
defend on any principled basis.245 The only reason the forty-five square miles of Guantanamo remain in U.S. hands is America's "full spectrum dominance" over Cuba.246 Distinguishing Guantanamo from other American military bases is not difficult. A more profound critique of the legal treatment of Guantanamo focuses on the concept of legal spatiality itself, however. Why does moving individuals from one geographic location to another fundamentally alter the scope of their constitutional and statutory rights vis-à-vis the U.S. government? What is the legal magic of American soil?

In this regard, it is instructive to compare the decision in Al Odah to that of the Supreme Court in In re Ross247 more than a century ago. Ross involved an enclave of overseas American power—the consular court system in Japan—that, like Guantanamo, grew out of the fundamental inequalities of the time. Like the Guantanamo base, it too was sanctioned by treaty. Ross held that the Constitution could not apply to U.S. government actions within the territory of another sovereign because sovereignty was exclusive; hence the defendant possessed no constitutional rights that could be violated by the U.S. government.248 The logic of Al Odah is strikingly similar. Because Cuba is sovereign, the United States is not sovereign and therefore the detainees lack any constitutional rights against the U.S. government. Just as the consular courts of the imperial era were untrammeled by either U.S. constitutional or local municipal law, so is Guantanamo unaffected and indeed unreachable—as far as foreigners are concerned—by our fundamental law and by Cuban law. A more pure—and anachronistic—statement of legal spatiality can hardly be imagined.

IV. RETHINKING LEGAL SPATIALITY

Does territoriality—the idea that geographic location determines legal rules—make sense in an increasingly globalized world? Can the United States, a nation committed to constitutional government—a "government of laws, and not of men"—in fact govern unfettered by its basic law as long as it acts outside certain spaces?249 These questions, one consequentialist, the other deontological, were for decades arcane. But they are now once again at the forefront of American law and politics.250 Suspected al-Qaeda and Taliban

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245. This is not to deny that all these practices seem to be enjoying a resurgence.
248. Id. at 464.
250. These questions also were hotly debated during the era of the Insular Cases. "It is difficult to realize how fervent a controversy raged . . . over the question of
detainees were deliberately housed at Guantanamo for reasons of security, but also to ensure that judicial processes did not interfere with the detention and interrogation of the prisoners. One of Britain’s top Law Lords called Guantanamo “a legal black hole.”

Can the Constitution accommodate such black holes?

Perhaps an easier way to begin the analysis is to try to defend, from a principled stance, the reverse proposition. What reason is there to believe that U.S. law is spatially bound? The strongest argument in favor of a territorial conception of legal spatiality starts from Westphalian principles. The modern state is built on a territorial framework of political rule. This framework ensures order in an anarchic world system. Under traditional Westphalian principles, the extension of any law into another sovereign’s physical domain inherently subverts territorial sovereignty. This strict spatial conception of sovereignty was, as this Article has demonstrated, deeply favored in the nineteenth century. It continues to be a central part of international law, prominently reflected, for example, in the United Nations Charter of 1945.

But it is decreasingly relevant today. The erosion of legal spatiality in a host of doctrinal areas, and the embrace of extraterritorial claims by many other states, represents a marked, if uneven and incomplete, break with the past. The Supreme Court has rejected pure spatiality in a wide variety of cases—Bowman, Hartford Fire, Reid, Asahi, and Rasul, to name just some—and has done so in often emphatic terms. While the sources of this evolution in conceptions of legal spatiality are murky, it appears that underlying changes in economics, politics, and society have nudged Congress, the Executive, and the courts toward a more functional and pragmatic approach to jurisdiction. Hence, it is now uncontested that were American citizens held in Guantanamo, the federal courts would have habeas jurisdiction over them. And, under long-standing precedent, so too would American detainees held there possess fundamental constitutional rights.

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whether the Constitution follows the flag... The election of 1900 largely turned upon the so-called issue of imperialism.” Coudert, supra note 138, at 823.
251. Steyn, supra note 5.
252. Herz, supra note 33, at 481.
254. See supra Part II.
255. Raustiala, supra note 62.
Though it perhaps had the virtue of conceptual coherence, there is little reason to expect or to prefer a return to nineteenth-century strict territoriality.\textsuperscript{257} The evolution of American law has been a process in which formalistic categories based on spatial location and geographic borders were rejected in favor of more supple, contextual concepts such as “effects” and “minimum contacts.”\textsuperscript{258} Just as fundamental changes in the American economy led to the demise of the approach of \textit{Pennoyer v. Neff},\textsuperscript{259} the evolution and increasing interdependence of the international system—in both economic and security terms—has encouraged courts, legislatures, and executives around the world to break the link between law and land. Yet aspects of strict territoriality remain, persisting even as the underlying conceptual approach that birthed them has long fallen into desuetude. This discontinuity places tension on the remaining spatial doctrines, underscoring inconsistencies that cannot be logically reconciled.

The result has been a tendency to invoke earlier cases, such as \textit{Eisentrager}, in an incantatory and conclusory manner, with little justification offered for the underlying premises of spatiality. In part, this is because a coherent and consistent approach to legal spatiality no longer exists. In 1909, Justice Holmes could straightforwardly lay out a theory of legal spatiality to support his conclusion that the Sherman Act was territorially limited and could not reach actions that occurred abroad.\textsuperscript{260} Today, courts no longer provide such a theory because they cannot. Rather, courts assess effects and consider context, often en route to declaring that the U.S. law in question has global—or at least extraterritorial—reach.\textsuperscript{261} If courts instead seek to

\textsuperscript{257} In the realm of personal jurisdiction, the problems of strict territoriality were legion, and Beale’s vested rights approach did little to solve them. See generally Kramer, supra note 58; Rutherglen, supra note 78.

\textsuperscript{258} See supra Part III.

\textsuperscript{259} 95 U.S. 714 (1877). The nationalization of the American economy was central to this process. See, e.g., Virginia Postrel, Economic Scene: A Case Study in Free Trade: American Incomes Converge, But Not at the Bottom, N.Y. Times, Feb. 26, 2004, at C2 (showing data on the convergence of incomes across regions in the United States over the past century, with an acceleration in the 1930-1950 period); see also Berman, supra note 60 (developing the connection between globalization and jurisdiction).

\textsuperscript{260} Berman, supra note 60. As Kramer argues, “[t]o understand the decision in American Banana, it is important also to understand the legal environment in which Holmes was writing. Territoriality was the cornerstone of a framework developed to regulate sovereign relations in a number of areas, of which choice of law was merely one.” Kramer, supra note 58, at 187.

\textsuperscript{261} My discussion here complements that of Neuman. See Neuman, Anomalous Zones, supra note 13. Neuman provides a set of functional concerns that might lead a government official or judicial actor to differentiate legal rules based on location. For example, zoning rules that permitted sex clubs to operate in some parts of a municipality but barred them from school zones exhibit what he terms spatial variation. Among the considerations Neuman proffers are objective local conditions, subjective local preferences, desire for experimentation, and mere political power. Id. at 1201-06.
restrain extraterritorial assertions, they often woodenly invoke the "presumption against extraterritoriality" or, if the situation addresses individual rights against the government, trot out a handful of increasingly antiquated cases—the Insular Cases, Eisentrager, Duncan v. Kahanamoku—and declare the question closed.

The progressive abandonment over the course of the last century of strict territoriality starkly raises the question of what role ought spatiality play in American law. This question is not easily answered. But my claim here is that simple spatial assumptions are unconvincing, out-of-date, and out of step with our constitutional principles. The clear trend in American law and in international law—and the more compelling reading of the Constitution—suggests that a despatialized approach ought to be the default position, subject to exceptions based on functional and practical concerns.

The implications of this proposition are not academic. American regulators have plainly extended their jurisdiction beyond our borders. And over the last decades, American criminal justice officials have increasingly worked overseas. During the 1970s and 1980s, for example, as global drug markets grew and trafficking proliferated, the Drug Enforcement Agency ("DEA") pursued traffickers not only in Miami and San Diego but also across the border.

262. In some areas, the presumption is rebutted much more easily than in others. On occasion the courts treat it seriously. See, e.g., EEOC v. Arabian Am. Oil Co., 499 U.S. 244 (1991). According to Jonathan Turley, in the interpretation of ambiguous antitrust and securities laws, the presumption against extraterritoriality has proven little impediment to extraterritorial application. This is not, however, true in other areas. Unlike extraterritorial antitrust and securities cases, extraterritorial employment discrimination and environmental claims have been roundly rejected, making the presumption an almost complete barrier to victims of extraterritorial employment or environmental misconduct. Jonathan Turley, "When in Rome": Multinational Misconduct and the Presumption Against Extraterritoriality, 84 Nw. U. L. Rev. 598, 599-600 (1990); see also Bradley & Goldsmith, supra note 18, at 526 ("In the 1970s and 1980s, lower courts applied the effects test aggressively to regulate extraterritorial conduct, spawning controversy with some of the United States' closest trading partners.").

263. 327 U.S. 304 (1946).

264. As Neuman argues:

To find that aliens have extraterritorial constitutional rights would be an extension of prior law. Reid v. Covert does not require such an extension as a matter of precedent, because Reid v. Covert involved citizens. But that does not suffice to explain why the recognition of extraterritorial constitutional rights in Reid v. Covert does not destroy the persuasive power of the earlier precedents.

Strangers to the Constitution, supra note 13, at 106.

265. Even the United Nations is increasingly questioning Westphalian sovereignty. Secretary General Kofi Annan has forcefully argued that sovereign borders no longer ought to protect states against wrongdoing directed at their own citizens—that international human rights norms constrain the actions governments may take. Kofi Annan, Two Concepts of Sovereignty, The Economist, Sept. 18, 1999, at 49, 49-50.
in Tijuana and Cali.\textsuperscript{266} The number of DEA agents stationed abroad rose dramatically during this period, from about twelve in 1967 to over 300 by 1991.\textsuperscript{267} Just as the globalization of economic production in the postwar era led the Department of Justice to increasingly pursue cartels abroad—and to cooperate with foreign antitrust regulators in the process—so too has the globalization of crime led the FBI, the Customs Service, the DEA, and other federal agencies to work aggressively abroad, in an effort to stanch the flow of cross-border narcotics, people, weapons, and money. These extraterritorial projections of American law enforcement power inevitably raise questions of the extraterritorial scope of American legal protections.

A. A Global Constitution

The most sweeping approach to rethinking legal spatiality is to embrace the notion that—as a presumptive matter—our legal system operates globally: that when the government exercises power, that exercise is presumed to operate without regard to territorial location and is always subject to constitutional restrictions.\textsuperscript{268} This approach can be moderated through a practicality standard, in which extraterritorial location is taken into account, but not treated as dispositive, in considering the range of legal rules that apply to a given situation. A different phrasing of this position is that there is no inherent spatial dimension to the law, though spatial restrictions may, in particular cases and under particular circumstances, be adduced that would trump this default position. This is the claim I will lay out and defend here. The alternative stance is to cling to the notion that American law is somehow tethered to territory—that simply by moving an individual around in space, the duties that apply—and most significantly, the rights that individual enjoys—wax and wane.

The claim that the Constitution is not presumptively spatially delimited may seem radical but is not fanciful. The framers of the Constitution plainly envisioned a territory; the Westphalian territorial state was the template they worked with in creating a new state. Yet

\textsuperscript{266} Globalization has enhanced the movement of illicit goods just as it has the movement of licit goods. The Illicit Global Economy and State Power (H. Richard Friman & Peter Andreas eds., 1999); Kal Raustiala, \textit{Law, Liberalization \& International Narcotics Trafficking}, 32 N.Y.U. J. Int'l L. \& Pol. 89 (1999).

\textsuperscript{267} Nadelmann, \textit{supra} note 74, at 3. This is not to imply that there is no precedent for the extraterritorial extension of American criminal law; as \textit{Bowman} itself shows, the issue hit the Supreme Court as early as 1920, and of course long before then American agents had been concerned with fugitive slaves and smuggling schemes. The onset of Prohibition dramatically increased the amount of cross-smuggling and concomitantly increased the extent of extraterritorial American police action. See \textit{generally id.}

\textsuperscript{268} See, e.g., United States v. Cadena, 585 F.2d 1252, 1262 (5th Cir. 1978) ("[O]nce we subject foreign vessels or aliens to criminal prosecution, they are entitled to the equal protection of all our laws, including the Fourth Amendment.").
the language, and the underlying concepts, of the constitutional order they forged are not inherently spatially delimited. The Constitution creates a government of limited powers and places further restrictions on the use of those powers. These federal powers are not thought to be spatially delimited.

For example, there is no spatial limitation to the Commander-in-Chief power. The President is Commander-in-Chief not just when the President or American troops are present within the borders of the United States, but wherever he or the troops may go. Nor does the Vice President cease wielding the powers of the vice presidency, or a senator lose legislative powers, when he or she leaves the borders of the United States. U.S. courts have long held that Congress can legislate beyond our sovereign borders. As the Supreme Court declared in 1922 in *United States v. Bowman*, some criminal statutes, and some regulatory statutes, cannot function if held to apply only within the spatial confines of American territorial jurisdiction—and consequently we apply them globally. American citizens and foreigners alike are subject to some American laws wherever they may go on the planet. In short, our understanding of the spatial scope of federal powers is read functionally: The Commander-in-Chief power would be severely hobbled if it only applied within American borders, and it makes little sense to believe that the Vice President’s—or any other government official’s—powers wane as he or she crosses the border.

This functional approach to constitutional powers seems natural. Yet there is no a priori reason to believe that the spatial restrictions the framers placed on the powers of the federal government cannot or should not be read functionally as well.

What would a despatialized understanding of legal rules and protections look like? It would not demand that all rules apply identically in all places. When a constitutional or statutory rule is clearly and textually subject to a territorial limitation, or reasonably may be thought to contain such a limitation, a spatial reading of its scope is likely to be justified. Likewise, if a legal rule would be nullified in its effect if it did not contain a territorial limitation, or would violate principles of international law and comity if it lacked such a limitation, a spatially limited reading of its scope may also be justified. But under this approach to the law-geography nexus, such a justification must be offered and defended before any spatial delimitation can be said to exist.

Such a presumptively-despatialized approach to American law can be glimpsed already in aspects of American legal doctrine. For

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269. 260 U.S. 94 (1922).
270. See Neuman, *Anomalous Zones*, supra note 13 (offering several such justifications).
example, it broadly accords with the contemporary approach to personal jurisdiction, where the federal courts have held that the Fourteenth Amendment forbids jurisdiction, even over aliens abroad, unless there is some act "by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." The inquiry is guided by the functional and principled concerns that undergird the purposes of personal jurisdiction, not by simple or mechanical locational analysis.

My proposed approach, therefore, often will yield spatial distinctions in both substantive legal rules and in legal protections and rights. But this differentiation must be justified and reasonable under the circumstances, rather than simply reflexive. This approach lies somewhere between what Gerald Neuman has called "global due process" and "mutuality of obligation." Mutualy of obligation, for Neuman, "affords the express protections of fundamental law, to the extent that their terms permit, as a condition for subjecting a person to the nation's law." Global due process aims in the same direction, but more cautiously. It is chary of holding that constitutional rights are presumptively applicable to all persons and seeks to narrow the range of rights that might apply to noncitizens abroad. As Justice John Marshall Harlan stated in Reid with regard to constitutional protections:

The proposition is, of course, not that the Constitution "does not apply" overseas, but that there are provisions in the Constitution which do not necessarily apply in all circumstances in every foreign place.

... [T]he question of which specific safeguards of the Constitution are appropriately to be applied in a particular context overseas can be reduced to the issue of what process is "due" a defendant in the particular circumstances of a particular case.

**B. The Current Approach**

Despite occasional nods from the judiciary, my proposed approach to legal spatiality does not reflect current legal doctrine. To be sure, no comprehensive theory of legal spatiality has been articulated by the Supreme Court since the late nineteenth century. The federal

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273. *Id.* at 108.
274. *Id.* at 109.
courts tend to avoid considering the question in toto, preferring to analyze more narrow dimensions (for example, does a given statute have extraterritorial effect?) or to simply reiterate without analysis older territorial statements (derived, often, from the Insular Cases).

The result is that questions of statutory application have received a variegated, even schizophrenic treatment. The Supreme Court has on occasion tried to justify a territorial approach to constitutional protections that, as a facial matter, lack express geographic limitations.\textsuperscript{276} Verdugo is perhaps the most prominent example of such an implied territorial limitation. In Verdugo, the Supreme Court faced two facts that could have suggested a despatialized reading of the Fourth Amendment’s protections. The first was the text of the Fourth Amendment itself, which refers to “the people” rather than to American citizens and makes no mention of American territory.\textsuperscript{277} The invocation of the “people” is ambiguous, however, since people could be read as a term addressing a group tied to a particular territory—rooted in a particular place. (Indeed, this is how Chief Justice Rehnquist interpreted the phrase). The second was that Verdugo was in fact physically within the United States at the time of the search. Though in detention in San Diego—having been arrested—he was nonetheless well within our territorial borders and was, in a sense, a kind of guest.\textsuperscript{278} Had Verdugo’s residence also been in San Diego, there is little doubt a warrantless search would have run afoul of the Fourth Amendment. Why then did the Court hold that the Constitution offered no protection against the warrantless search of his home?

The majority was not unaware of the complex geography of the case. Indeed, it noted Verdugo’s forced presence within the United States, but used this as evidence that he had not developed the sort of consensual ties that it argued justified protection by the Fourth Amendment. Earlier cases had suggested that mere geographic presence might not be sufficient to trigger constitutional protections. This logic suggested that as ties to the United States deepen, constitutional protections deepen as well.\textsuperscript{279} The Verdugo majority deployed this concept of deepening ties, plus an historical exegesis into the original intent behind the word “people,” to keep the defendant, even though he was personally within U.S. territory, outside the circle of rights-holders. Thus, the right to be free of

\begin{footnotes}
\footnotetext{276}{See United States v. Verdugo-Urquidez, 494 U.S. 259 (1990).}
\footnotetext{277}{U.S. Const. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated ...”).}
\footnotetext{278}{Justice Stevens’s concurrence in Verdugo argued that the search was governed by the requirements of the Fourth Amendment because the respondent was “lawfully present in the United States... even though he was brought and held here against his will.” Verdugo-Urquidez, 494 U.S. at 279 (Stevens, J., concurring).}
\footnotetext{279}{See Johnson v. Eisentrager, 339 U.S. 763 (1950).}
\end{footnotes}
unreasonable search and seizure, in the majority's view, has not only a territorial component but a community-based component as well.

Yet as a doctrinal matter, the connection between deepening ties on the part of aliens and the level of constitutional protection has little support. The deepening ties principle predicts that a first-time visitor, in the United States only briefly, would enjoy the barest minimum of protection against unreasonable search and seizure. (By definition, the first-time visitor has no community ties to speak of.) Yet that is not the result: A Japanese tourist stopping over in Seattle for a couple of days en route to Canada would in fact enjoy the full protections of the Fourth Amendment. The rationale for this protection is simply spatial. Location within the United States is deemed fully sufficient to invoke the Amendment's protections. A pure spatiality principle—rather than a substantial connection principle—is also reflected in *Eisentrager* and *Quirin*. Both suggest that even enemy aliens captured abroad but brought back to the United States would enjoy access to U.S. courts on territorial principles alone. Likewise, aliens captured abroad and brought back to the United States for trial in federal court are fully protected by the Constitution's right to a trial by jury, among others. Even the most generous reading of the deepening ties notion, in short, suggests that it has been applied inconsistently at best.

The current approach also inexplicably, if implicitly, accords some measure of constitutional rights to aliens in the arena of personal jurisdiction. As cases like *Asahi* show, foreign corporations or individuals cannot, consistent with due process, be haled into American courts unless they possess the requisite ties to the forum state. Given their extraterritorial presence, how foreign citizens and firms come to possess these constitutional rights is unclear under the existing regime of legal spatiality. Even the rights of American citizens are currently subject to a bizarre doctrinal regime in which constitutional rights against the U.S. government are more secure when the government acts in Japan than when it acts in Puerto Rico. In sum, the current approach to legal spatiality is both anachronistic

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280. Unless she was at the border or its functional equivalent, where a general "border exception" to aspects of the Fourth Amendment is well-established. *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973). The border exception applies to citizens and aliens alike.

281. As Alex Aleinikoff points out, we treat the question of initial entry to the United States much more seriously than naturalization. This suggests that citizenship as membership is not in fact the guiding principle underlying our immigration law and practice. Aleinikoff, *supra* note 13, at 172-73.

282. See, e.g., *United States v. Davis*, 905 F.2d 245 (9th Cir. 1990). "In order to apply extraterritorially a federal criminal statute to a defendant consistently with due process, there must be a sufficient nexus between the defendant and the United States, so that such application would not be arbitrary or fundamentally unfair." *Id.* at 248-49 (citation omitted).

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and incoherent. The product of a slow and uneven historical evolution, it lacks any compelling underlying rationale.

C. Rethinking Spatiality

The confusion of the current doctrine casts the virtues of a despatialized approach in sharper relief. The approach advanced here dispenses with notions of deepening ties and spatial location and instead focuses simply on the exercise of government power and the reasonable accommodations to location that might be justified by practicality. This approach is not without precedential support. The Supreme Court in *Reid* declared that the U.S. government is “a creature of the Constitution” whose power knows “no other source” and “can only act in accordance with all the limitations imposed by the Constitution.”

284 The Constitution itself contains no textually demonstrable spatial limitation. If *Reid* is to be taken seriously, then where that government acts ought to be largely irrelevant to an inquiry of what rights might restrain that power. At a minimum, location vel non should not be dispositive of legal outcomes.

This position also has the virtue of being rooted in elemental aspects of American constitutionalism. The United States claims commitment to the rule of law, limited government, inherent natural rights, and the proposition that a government derives its just powers from the consent of the governed. Commitment to these principles does not entail habeas petitions for every prisoner of war, nor does it demand the abolition of the legal distinctions that follow from wartime. But it does counsel that courts ought to treat any person that comes within the power of the United States as at least presumptively in possession of the full gamut of protections reasonably applicable under the circumstances. Spatial location can help determine what is reasonable, but it should not be used to formally dichotomize the availability of rights. That simple claim is all that is advanced here. It ought to be uncontroversial, but as the foregoing has illustrated, it plainly is not.

An example of how a despatialized default assumption would work in practice can be gleaned from a 2001 case in the Southern District of New York, *United States v. Bin Laden* (a case involving pre-September 11, 2001 incidents). Bin Laden addressed the interrogation by FBI agents in Kenya of several suspected al-Qaeda members. These individuals were believed to be perpetrators of the 1998 attacks on the American embassies in Kenya and Tanzania. The question presented to the court was whether the self-incrimination

284. Reid v. Covert, 354 U.S. 1, 6 (1957).
provision of the Fifth Amendment applied to the overseas interrogations. The FBI had in fact offered the suspects a reasonably-modified version of the *Miranda* warning before commencing the interrogation. Relying on *Verdugo* and *Eisentrager*, the government stated in court, however, that the *Miranda* warnings that were given were entirely discretionary due to the foreign location of the interrogation. Spatial location, they claimed, determined the outcome.

The court took a different approach. It asserted first that the alleged extraterritoriality of the Self-Incrimination Clause of the Fifth Amendment was “beside the point.” Violations of the privilege against self-incrimination, it said, occur not at the moment law enforcement officials coerce statements, but when a defendant’s involuntary statements are actually used against him in a criminal proceeding. This claim uncritically assumes that there is a spatial limitation to constitutional rights but further assumes that such a criminal proceeding would occur on American territory, vitiating any extraterritorial aspect. This was indeed the factual situation in *Bin Laden*. But it need not be the case: It is easy to imagine American civil courts set up abroad, as was commonly the case in the nineteenth-century consular jurisdiction era—and which may be true of future U.S. courts, military or civil.

The court then noted the capacious language of the Fifth Amendment’s text, which refers, like several other provisions in the Constitution, simply to persons rather than to citizens. Given the inclination of the Supreme Court to construe this right expansively, the district court found no compelling reason to imply an atextual spatial limitation. It consequently held that “a defendant’s statements, if extracted by U.S. agents acting abroad, should be admitted as evidence at trial only if the Government demonstrates

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286. U.S. Const. amend. V ("[N]or shall [any person] be compelled in any criminal case to be a witness against himself . . . .").
289. *Id.* at 181.
290. See also Mark A. Godsey, *Miranda’s Final Frontier— The International Arena: A Critical Analysis of United States v. Bin Laden, and a Proposal for a New Miranda Exception Abroad*, 51 Duke L.J. 1703 (2002). Godsey explores and supports the application of the Fifth Amendment privilege against self-incrimination to interrogations abroad. But he, like the *Bin Laden* court, uncritically accepts the premises of legal spatiality found in cases such as *Al Odah*, and finds that the privilege does not involve extraterritorial assertions of rights since any violation of the Fifth Amendment occurs at trial rather than during interrogation: “Because of the unique nature of the privilege against self-incrimination, the *Miranda* doctrine is one of the few—if not the only—constitutional doctrines that can apply in some circumstances to non-Americans outside the borders of the United States.” *Id.* at 1780. Godsey assumes as well that the trial itself will take place within American territory.
292. *Id.*
that the defendant was first advised of his rights and that he validly waived those rights.\textsuperscript{293} The U.S. government called this result “perverse” since, it argued, non-Fourth-Amendment-compliant statements extracted by foreign police acting abroad remained admissible in American courts.\textsuperscript{294} But the court reasonably replied that it saw “nothing at all anomalous in requiring our own Government to abide by the strictures of our own Constitution whenever it seeks to convict an accused, in our own courts, on the basis of admissions culled via an inherently coercive interrogation conducted by our own law enforcement.”\textsuperscript{295}

While the Bin Laden opinion fundamentally rested on the premise that the Self-Incrimination Clause operated at trial (and hence within American territory in the case at bar), it provides a useful window on what in practice a despatialized view of American law would entail. The simplest aspect in the Bin Laden decision involves the “right to silence” aspect of Miranda warnings. As the court argued, such warnings are not overly burdensome on law enforcement and serve the same functional purpose wherever the interrogation by criminal justice officials may take place.\textsuperscript{296} But an additional issue in giving a Miranda warning is its provision to supply a lawyer. Here, the Bin Laden court’s announced requirements fail a reasonableness test, in that the district court held that the American agents were required to make serious efforts in conjunction with local personnel to secure a lawyer and to investigate local law on the matter.\textsuperscript{297} The availability of a lawyer and the requirements or restraints of local law are clearly not within the purview of the U.S. agents operating abroad. It seems a reasonable accommodation of the extraterritorial location of the interrogation to waive this requirement when U.S. agents act abroad, especially when they act within the territory of another state. Thus, under my proposal, the Miranda warning would remain constitutionally-required, yet would not operate identically outside the confines of U.S. territory as it would inside our borders. But the substantial purpose of the Miranda requirement—to inform suspects of their rights, and to ensure that interrogations are minimally coercive—can and would be secured outside our borders as well as within them.

Likewise, when U.S. law enforcement agents work with foreign law enforcement agents abroad—as they increasingly do—the approach advanced here counsels that, subject to consideration of the degree of

\textsuperscript{293} Id. at 187.
\textsuperscript{294} Id. at 187 n.13.
\textsuperscript{295} Id.
\textsuperscript{296} I want to underscore that this particular claim is limited to criminal justice-related interrogations; clearly the Miranda warning does not apply to interrogations undertaken by American military officials acting in an armed conflict situation.
\textsuperscript{297} Bin Laden, 132 F. Supp. 2d at 189.
connection between the foreign and American agents, constitutional protections ought to apply when the fruits of the investigation are used in U.S. courts. This view accords with our current doctrine, at least with regard to searches of citizens' property located abroad. For example, federal courts generally apply a "joint venture" test in the context of the Fourth Amendment. The joint venture test compares the U.S. agent's acts to the "totality of acts done in the search and seizure." In Powell v. Zuckert, for instance, Air Force investigators joined by Japanese police officials in tandem searched an off-base dwelling of a civilian Air Force employee. The search warrant was requested by the U.S. Air Force; Japanese officials only participated pursuant to their agreement to do so under the Status of Forces Agreement for U.S. military forces stationed in Japan. The D.C. Circuit held that the Fourth Amendment applied to the search despite the participation of the Japanese officials; the United States could not, in essence, wash away the restrictions of the Fourth Amendment simply by having Japanese police participate in a ride-along. As one commentator explains:

[I]t is not inconsistent with Powell to suggest that the practicalities of international law enforcement cooperation are such that a rigid all-or-nothing approach is not feasible.

... This means, for one thing, that the degree of American participation is relevant... In Powell, where no Japanese interest was being served except compliance with the treaty obligation to assist American military investigators, the American officials could more likely have influenced Japanese authorities to conform to unfamiliar external requirements than in a case where the foreign authorities were vigorously pursuing the investigation for their own purposes.

Whether one agrees or disagrees with my proposed line-drawing (or with that of the Southern District of New York or the D.C. Circuit) is not the critical point. Rather, it is the mode of analysis that is important. Simple locational analysis ought not be the basis of our jurisprudence on constitutional rights. In a globalized world, where violators of regulatory prohibitions or perpetrators of crime or acts of terror will often be apprehended abroad, American officials frequently engage in criminal justice and regulatory activities beyond

298. Stonehill v. United States, 405 F.2d 738, 744 (9th Cir. 1968). Even without a joint venture, evidence may be suppressed if it would "shock the conscience." Rosado v. Civiletti, 621 F.2d 1179 (2d Cir. 1980). See generally 1 Wayne R. LaFave, Search and Seizure § 1.8(h) (3d ed. 1996).
300. 1 LaFave, supra note 298, § 1.8(h).
our borders.\textsuperscript{301} Often they will collaborate with foreign regulators and law enforcement officials in this process. When American officials interrogate an individual suspected of a crime under American law, the limitations the Constitution places on the actions of government officials ought to apply, as a presumptive matter, wherever that interrogation occurs. To do otherwise uncritically resurrects antiquated territorial distinctions, while simultaneously creating perverse incentives for U.S. law enforcement to pursue investigations, interrogations, and detentions offshore. When borders are so easily crossed and the panoply of governmental power so easily projected abroad, such incentives are not trivial—as the creation of a detention center at Guantanamo so aptly illustrates.

Twenty-first-century courts need to think functionally, not formalistically, about the spatial scope of the restraints on government power, just as they have long thought functionally and not formalistically when addressing the spatial scope of the exercise of sovereign power itself. That simple proposition will go a long way toward decoupling geography from justice.

CONCLUSION

What is the connection between law and land? The supposition that the scope of the law is determined by territorial location—what I have termed legal spatiality—suffuses our intuitions about the law. Yet the last century has witnessed a transformation of legal spatiality across a range of legal doctrines. With rare exception, it is only with regard to noncitizens, and even then not in all circumstances, that the federal courts continue to cling to the notion that American law is tethered to territory—that individual rights ebb and flow based on where that individual is physically located.

In this Article, I have described the origins of legal spatiality and illustrated its uneven evolution. While it is difficult to discern a coherent trend in the various lines of cases related to spatiality, the general thrust has been toward contextual, functional considerations of jurisdiction. The U.S. government’s current stance with regard to Guantanamo reflects a countervailing thread in the doctrinal skein, in which a dangerous world necessitates sharp distinctions between

citizen and alien. But this countervailing thread is, I have argued, largely founded upon nineteenth-century assumptions of legal spatiality. Particularly in the case of Guantanamo, it is also at odds with the plain fact that the United States controls Guantanamo thoroughly and, should it desire, in perpetuity. As Justice Anthony Kennedy argued in Rasul, this fact is clear and ought to inform our understanding of the relevant applicable law.

Rethinking our approach to territoriality—the basis of the Westphalian state, the model of the last 400 years—is no easy task. This Article does not provide a comprehensive new model of legal spatiality. It does, however, clarify the questions and assumptions at stake and proposes that we at least abandon the formalistic, static, and anachronistic approach to spatiality that appears far too frequently in both the Federal Reports and government briefs. In an increasingly interconnected world, simple spatial distinctions cannot provide us with helpful, or just, guidance in understanding the scope of our legal order.