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## Citizenship and Protection

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# CITIZENSHIP AND PROTECTION

Andrew Kent\*

*This Article discusses the role of U.S. citizenship in determining who would be protected by the Constitution, other domestic laws, and the courts. Traditionally, within the United States, both noncitizens and citizens have had more or less equal civil liberties protections. But outside the sovereign territory of the United States, noncitizens have historically lacked such protections. This Article sketches the traditional rules that demarcated the boundaries of protection, then addresses the functional and normative justifications for the very different treatment of noncitizens depending on whether or not they were present within the United States.*

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## INTRODUCTION

Chief Justice Earl Warren famously described citizenship as “man’s basic right” because “it is nothing less than the right to have rights.”<sup>1</sup> As Justice Robert Jackson put it for the full Court, “Citizenship as a head of jurisdiction and a ground of protection was old when Paul invoked it in his appeal to Caesar. The years have not destroyed nor diminished the importance of citizenship nor have they sapped the vitality of a citizen’s

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1. *Perez v. Brownell*, 356 U.S. 44, 64 (1958) (Warren, C.J., dissenting).

claims upon his government for protection.”<sup>2</sup> U.S. citizenship—the topic of this Symposium—is thus theorized to be the foundation upon which all other rights rest and the ultimate basis upon which to claim protection against the U.S. government.

But the actual connection over the course of American history between citizenship, the Constitution, and protection from government overreach has been much more muddled and complex than this. In ordinary peacetime contexts, citizenship has historically played a relatively minor role in demarcating the Constitution’s domain—that is, in determining who is under the umbrella of its civil liberties protections. Most political rights have always been reserved for citizens.<sup>3</sup> And in the immigration context, of course, citizenship can be crucial. But with regard to civil liberties, the practice of U.S. constitutionalism has been to make relatively few distinctions based on citizenship within the United States and during peacetime.<sup>4</sup>

Instead of citizenship, the primary axes along which the domain of the Constitution’s protections has been demarcated are territorial location, domicile, and enemy status during wartime. For much of American history, constitutional protections stopped at the boundaries of the United States and did not extend to military enemies or persons in war zones, no matter their citizenship. The right to access the courts to claim legal protections, which often is as important as having substantive constitutional rights themselves, was also dependent on enemy status and territorial location more than on citizenship.

In Part I, this Article summarizes the historical evidence about the role of enemy status, territorial location, domicile, and, to a lesser extent, citizenship in determining who was protected by the Constitution and could access U.S. courts. I also set out the most prominent typologies and theories that legal academics have used to describe the rules setting the

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2. *Johnson v. Eisentrager*, 339 U.S. 763, 769 (1950); *see also Reid v. Covert*, 354 U.S. 1, 7 (1957) (plurality opinion) (“When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land. This is not a novel concept. To the contrary, it is as old as government. It was recognized long before Paul successfully invoked his right as a Roman citizen to be tried in strict accordance with Roman law. And many centuries later an English historian wrote: ‘In a Settled Colony the inhabitants have all the rights of Englishmen. They take with them, in the first place, that which no Englishman can by expatriation put off, namely, allegiance to the Crown, the duty of obedience to the lawful commands of the Sovereign, and obedience to the Laws which Parliament may think proper to make with reference to such a Colony. But, on the other hand, they take with them all the rights and liberties of British Subjects; all the rights and liberties as against the Prerogative of the Crown, which they would enjoy in this country.’” (quoting 2 CHARLES M. CLODE, *THE MILITARY FORCES OF THE CROWN* 175 (London, John Murray 1869)).

3. *See* Peter J. Spiro, *The (Dwindling) Rights and Obligations of Citizenship*, 21 WM. & MARY BILL RTS. J. 899 (2013).

4. *See infra* Part I. *See generally* Alexander M. Bickel, *Citizenship in the American Constitution*, 15 ARIZ. L. REV. 369, 369 (1973) (“[T]he concept of citizenship plays only the most minimal role in the American constitutional scheme.”).

boundaries of constitutional protection and contrast them with the actual historical concepts and practices used in earlier eras.

Part II explores the justifications for these traditional limits on the domain of the Constitution's protections by addressing two questions: First, why have both citizens and noncitizens generally been protected by the Constitution and courts while in the United States? Second, why have protections ceased—entirely for noncitizens and to a lesser extent for citizens—when they are outside the sovereign territory of the United States or when they are military enemies? Having explored the reasons why noncitizens have historically received robust protections while within the United States, this Article suggests that some additional protections for noncitizens present in the United States might be warranted. In particular, I suggest that there should be a rebuttable presumption that noncitizens in the United States during peacetime have equivalent constitutional protections to citizens. The lack of extraterritorial constitutional rights for noncitizens and for military enemies has been subjected to sustained criticism in recent decades. This Article acknowledges those criticisms, but suggests that there are some reasonable justifications for limiting constitutional protection to the traditional domains.

Before proceeding, I want to note the limits of this discussion, which is focused on the national security and foreign affairs context. Over the course of American history, women, slaves, African Americans including freed slaves, suspects and defendants in state and local criminal cases, incarcerated convicts, the institutionalized mentally ill, and other groups have moved from largely or entirely outside the domain of the Constitution's and the courts' protections to their current position inside.<sup>5</sup> Indeed, in many ways, the enlargement of the domain of protection has been the most important part of the story of U.S. constitutional development. Here I am talking instead about contexts involving national security and foreign affairs. Thus, when I say that enemy status, territorial location, domicile, and, to a lesser extent, citizenship determined the domain of the constitutional protections, I do not mean to slight the importance of race, gender, and other categories. Those topics are critically important, but are not mine in this Article.

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5. Compare U.S. CONST. amend. XIV, § 1 (“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . .”), with *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 407 (1857) (stating that “at the time of the Declaration of Independence, and when the Constitution of the United States was framed and adopted” persons of African descent “had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect”).

I. THE HISTORICAL DOMAIN OF THE CONSTITUTION AND  
THE RIGHT TO ACCESS THE COURTS

This Part summarizes the traditional categorical rules about the domain of protection. I am generalizing a great deal here because the supporting research is presented in detail in other places and, in any event, this Article is focused on big themes that span U.S. history rather than doctrinal nuance at a given point in time.

Territorial location and domicile, more than citizenship, has historically been a crucial determinant of protection by the Constitution and the courts. Generally speaking, both citizens and noncitizens within the United States were protected by the Constitution and could access the courts to claim protection. Even if it had been deemed desirable, it would have been difficult to assign rights to persons within U.S. territory on the basis of citizenship, for there was no formal definition of U.S. citizenship in federal positive law until the Civil Rights Act of 1866.<sup>6</sup> It was widely assumed that birth within the United States—at least for white people—conferred citizenship, but neither the Constitution nor congressional statute spelled out the particulars about what national citizenship was, what relation it had to state citizenship, or, with the exception of naturalization (which was provided by statute), how national citizenship was gained.<sup>7</sup> There was some debate about whether resident noncitizens had civil rights under the Constitution in the first decade under the new Constitution, but the issue was fairly quickly settled in favor of rights for all within the United States.<sup>8</sup> Congress did impose tougher naturalization requirements during this time,<sup>9</sup> but in terms of civil rights, there emerged a clear consensus that resident noncitizens possessed them.

A significant amount of subsequent U.S. Supreme Court doctrine establishes the constitutional rights of noncitizens present in the United States.<sup>10</sup> Immigration case law also shows the importance of territorial

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6. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27 (“[A]ll persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States . . . .”); *see also* U.S. CONST. amend. XIV, § 1.

7. JAMES H. KETTNER, *THE DEVELOPMENT OF AMERICAN CITIZENSHIP 1608–1870*, at 231–36, 287–88 (1978).

8. *See* J. Andrew Kent, *A Textual and Historical Case Against a Global Constitution*, 95 GEO. L.J. 463, 527–31 (2007) (discussing debates about the Alien Friends and Alien Enemies Acts); *see also* GERALD L. NEUMAN, *STRANGERS TO THE CONSTITUTION* 103 (1996) (“The legacy of the Alien Act debates includes the fundamental rejection of the claim that citizenship is the key to rights-bearing capacity under the Constitution.”).

9. KETTNER, *supra* note 7, at 239–44.

10. *See, e.g.*, *Plyler v. Doe*, 457 U.S. 202, 211–12 (1982) (illegal aliens under the Equal Protection Clause); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 (1953) (resident aliens under the Fifth Amendment); *Bridges v. Wixon*, 326 U.S. 135, 148 (1945) (resident aliens under the First Amendment); *Russian Volunteer Fleet v. United States*, 282 U.S. 481, 489 (1931) (foreign corporation with property in the United States under the Takings Clause); *Truax v. Raich*, 239 U.S. 33, 39 (1915) (resident aliens under the Equal Protection Clause); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (resident aliens under the Fifth and Sixth Amendments); *Yick Wo v. Hopkins*, 118 U.S. 356, 368–69 (1886) (resident aliens under the Equal Protection and Due Process Clauses of the Fourteenth Amendment).

location. As the Court said recently, “The distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law.”<sup>11</sup> Noncitizens who have entered the United States had significantly greater constitutional rights in immigration contexts than those stopped at the border.

Before the twenty-first century, noncitizens outside the sovereign territory of the United States were held to lack any constitutional rights.<sup>12</sup> Although these mistaken claims are heard less frequently than they once were,<sup>13</sup> some scholars still continue to assert that, during earlier eras of American history, noncitizens outside the United States were understood to possess constitutional rights,<sup>14</sup> including protections under the Suspension Clause.<sup>15</sup> This is incorrect. Certainly no Supreme Court case prior to the

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11. *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (citing *Kaplan v. Tod*, 267 U.S. 228, 230 (1925)); see also *Demore v. Kim*, 538 U.S. 510, 521 (2003) (stating that in the immigration area, “Congress regularly makes rules that would be unacceptable if applied to citizens” (quoting *Mathews v. Diaz*, 426 U.S. 67, 80 (1976))).

12. See Kent, *supra* note 8, *passim*; Andrew Kent, Boumediene, Munaf, and the Supreme Court’s Misreading of the Insular Cases, 97 IOWA L. REV. 101, 123–32 (2011) [hereinafter Kent, *Insular Cases*]; Andrew Kent, Do Boumediene Rights Expire?, 161 U. PA. L. REV. PENNUMBRA 20, 23–24 (2012); Andrew Kent, Habeas Corpus, Protection, and Extraterritorial Constitutional Rights: A Reply to Stephen Vladeck’s “Insular Thinking About Habeas,” 97 IOWA L. REV. BULL. 34, 34, 36–40 (2012); Andrew Kent, *The Constitution and the Laws of War During the Civil War*, 85 NOTRE DAME L. REV. 1839, 1853–60 (2010) [hereinafter Kent, *Civil War*].

13. See, e.g., LOUIS HENKIN, CONSTITUTIONALISM, DEMOCRACY AND FOREIGN AFFAIRS 99–100 (1990) (suggesting that the Framers intended the Bill of Rights to embody a “universal human rights ideology” that would protect noncitizens abroad).

14. See, e.g., Jordan J. Paust, Boumediene and Fundamental Principles of Constitutional Power, 21 REGENT U. L. REV. 351, 354–55 (2009) (implying that the Founders believed that noncitizens outside the United States had constitutional rights). Recently, Professor Jules Lobel suggested that prize decisions arising from the Quasi-War with France “implicitly recognize[d] and accept[ed] the extraterritorial application of the Constitution’s separation-of-powers provisions.” Jules Lobel, *Separation of Powers, Individual Rights, and the Constitution Abroad*, 98 IOWA L. REV. 1629, 1635 (2013) (citing *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804); *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 28–29 (1801)). But, by implicit direction from the Constitution and Congress that longstanding customary practices of admiralty courts would continue under the new constitutional system, federal courts sitting in prize applied the law of nations to decide the legality of U.S. prize seizures, absent contrary direction by statute. Imprimatur of a prize court was required to legalize the seizure and clear away all competing claims to title so the vessel and cargo could be sold by the captors or payment for salvage recovered, as the case may be. *Barreme* and *Seeman* do not show that the Constitution operated extraterritorially to grant enforceable constitutional rights to noncitizens, but rather that federal courts followed their instructions to refuse to approve seizures by U.S. officials or agents if the seizures violated the law of nations or statute.

15. See, e.g., Stephen I. Vladeck, *The Suspension Clause As a Structural Right*, 62 U. MIAMI L. REV. 275, 293 (2008) (discussing *In re Yamashita*, 327 U.S. 1 (1946), as an example of the “extraterritorial” or “overseas” availability of habeas for noncitizens over the executive’s objections). *Yamashita*, however, arose in the Philippines and was decided when the Philippines was actually still American territory (independence came in July 1946, after the Supreme Court’s decision). In addition, the Supreme Court’s power to review Mr. Yamashita’s habeas petition by certiorari came from a statute expressly granting such power, 28 U.S.C. § 349 (1940), and the Philippine courts had power given by positive law to issue writs of habeas corpus. Because both habeas corpus in the local courts and appellate review in an Article III court were provided by statute, the Suspension Clause was not implicated.

twenty-first century ever held or suggested that noncitizens outside the sovereign territory of the United States had constitutional rights.<sup>16</sup> I have exhaustively researched this issue, digging into reported and unreported case law, executive and congressional documents, legal treatises, newspapers, and popular writings during several periods of American history including the Founding, the Civil War era, and the era of imperialism around the turn of the twentieth century. I have found no evidence that noncitizens outside the United States were understood to have constitutional protections, and a very large number of sources that reject that idea.<sup>17</sup>

Whether U.S. citizens possess extraterritorial constitutional rights is a complicated question. Since the mid-twentieth century, it has been generally thought that they do.<sup>18</sup> But there is much confusion about the law prior to that time. There are several Supreme Court decisions holding or

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16. See *Boumediene v. Bush*, 553 U.S. 723, 770 (2008) (“[B]efore today the Court has never held that noncitizens detained by our Government in territory over which another country maintains de jure sovereignty have any rights under our Constitution.”); cf. *Zadvydas*, 533 U.S. at 693 (“It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders.”).

17. See, e.g., *Johnson v. Eisentrager*, 339 U.S. 763, 771 (1950) (“[A]t least since 1886, we have extended to the person and property of resident aliens important constitutional guaranties—such as due process of law of the Fourteenth Amendment. But, in extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien’s presence within its territorial jurisdiction that gave the Judiciary power to act.” (citation omitted)); *id.* at 784 (rejecting a plea for “extraterritorial application” of the Bill of Rights to protect enemy aliens outside the United States and stating that “[n]o decision of this Court supports such a view. None of the learned commentators on our Constitution has ever hinted at it” (citation omitted)); *United States v. Belmont*, 301 U.S. 324, 332 (1937) (“[O]ur Constitution, laws, and policies have no extraterritorial operation, unless in respect to our own citizens.”); *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 318 (1936) (“Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our citizens . . . .”); *Fong Yue Ting v. United States*, 149 U.S. 698, 724 (1893) (“Chinese laborers, therefore, like all other aliens residing in the United States for a shorter or longer time, are entitled, so long as they are permitted by the government of the United States to remain in the country, to the safeguards of the constitution, and to the protection of the laws, in regard to their rights of person and of property, and to their civil and criminal responsibility.”); *In re Ross*, 140 U.S. 453, 464 (1891) (“By the constitution a government is ordained and established ‘for the United States of America,’ and not for countries outside of their limits. The guaranties it affords . . . apply only to citizens and others within the United States, or who are brought there for trial for alleged offenses committed elsewhere, and not to residents or temporary sojourners abroad. The constitution can have no operation in another country.” (citation omitted)); *Norris v. Doniphan*, 61 Ky. (4 Met.) 385, 399 (1863) (“The restrictions in the constitution upon the powers of the government were designed to protect the people of the United States, and not aliens resident abroad.”); 33 ANNALS OF CONG. 1042 (1819) (statement of Rep. Henry Baldwin, later a justice of the Supreme Court) (referring to British subjects executed by General Andrew Jackson during a U.S. military raid into Spanish-owned Florida and rejecting the claim that “the Constitution and laws of the country” had been violated because “neither have any bearing on the case of these men. They were found and executed outside of the territorial limits of the United States, where our laws or Constitution have no operation, except as between us and our own citizens, and where none other could claim their benefit and protection.”).

18. See generally *Reid v. Covert*, 354 U.S. 1 (1957) (plurality opinion).

suggesting that U.S. citizens or U.S. nationals lacked extraterritorial constitutional rights,<sup>19</sup> but there are indications that U.S. citizenship or lawful permanent residence might have provided some extraterritorial rights protection.<sup>20</sup> Most of the controversial and coercive national security activities of the U.S. government occurring outside the United States impacted only noncitizens, and, hence, prior to the mid-twentieth century, no definitive doctrine about the extraterritorial rights of citizens was needed or developed.

Professor Linda Bosniak has called this geographic or territorial approach to allocating rights the “hard-on-the-outside, soft-on-the-inside” method.<sup>21</sup> In earlier centuries, this general approach to determining the domain of rights was described as a reciprocal relationship between allegiance and protection.<sup>22</sup> Those who owed and gave allegiance—all citizens and any noncitizens who were peacefully resident or traveling within the United States—were generally within the protection of the domestic laws, courts, and government of the United States. Persons who owed no allegiance, such as noncitizens abroad, also received no protection.

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19. See *In re Ross*, 140 U.S. 453, 464, 480 (1891) (sailor of U.S.-flagged vessel tried in a U.S. consular court in Japan); *Neely v. Henkel*, 180 U.S. 109 (1901) (U.S. citizen extradited to Cuba governed by U.S. military law for a criminal trial). For a discussion of *Neely* and its significance, see Kent, *Insular Cases*, *supra* note 12, at 145–49.

20. See Kent, *supra* note 8, at 494–97 (providing a number of examples). Professor Gerald Neuman disagrees that extraterritorial constitutional rights for U.S. citizens were thinkable before the mid-twentieth century, and, in particular, disagrees with my characterization of *Mitchell v. Harmony*, 54 U.S. (13 How.) 115 (1851), involving a tort suit by a U.S. citizen against a U.S. army officer for events occurring in Mexico. See Gerald Neuman, *Understanding Global Due Process*, 23 GEO. IMMIGR. L.J. 365, 367 n.7 (2009) (alleging that I misunderstood and “selectively” quoted *Harmony*). As I noted previously, *Harmony* is, in form, a common law trespass suit. See Kent, *supra* note 8, at 495. But the plaintiff’s counsel quite clearly and, in a more indirect fashion, the Supreme Court, also referenced federal constitutional rights among other rules of law to help describe the nature of the citizen’s right that was violated in Mexico. See *Harmony*, 54 U.S. (13 How.) at 126–27, 134, 136. The nineteenth century witnessed a very gradual shift from the common law and law of nations to constitutional law as the primary law governing civil rights suits against federal officers. See Andrew Kent, *Are Damages Different: Bivens and National Security*, 87 S. CAL. L. REV. (forthcoming 2014) (manuscript at 42–44), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2330476](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2330476). *Harmony* was an early transitional decision along this road. The Supreme Court soon described *Harmony* as a constitutional decision, see *Cammeyer v. Newton*, 94 U.S. 225, 234 (1876), as did the Court and D.C. Circuit in the twentieth century. See *Reid*, 354 U.S. at 8 (Black, J.) (plurality opinion); *Zweibon v. Mitchell*, 516 F.2d 594, 626–27 (D.C. Cir. 1975). *Harmony* was not, at bottom, a constitutional decision, as it would be if it arose today, but neither was it a pure common law tort suit with no constitutional dimensions, as Neuman incorrectly suggests. *Harmony* supports my modest claim that, *contra* Neuman and some other scholars, extraterritorial constitutional rights for U.S. citizens were “thinkable” prior to the mid-twentieth century. See Kent, *supra* note 8, at 497.

21. Linda Bosniak, *Being Here: Ethical Territoriality and the Rights of Immigrants*, 8 THEORETICAL INQUIRIES L. 389, 396 (2007).

22. This paragraph is based on Andrew Kent, *Judicial Review for Enemy Fighters: The Court’s Fateful Turn in Ex parte Quirin, the Nazi Saboteur Case*, 66 VAND. L. REV. 153, 176–211 (2013). See also Philip Hamburger, *Beyond Protection*, 109 COLUM. L. REV. 1823 *passim* (2009).



Wartime was also a fault line for protection by the Constitution and courts. Both U.S. citizens and aliens on the home front remained protected by constitutional and other domestic law rights during war, but all persons resident in an enemy nation, enrolled in an enemy's armed forces (enemy fighters), or present at the site of actual combat were out of the protection of the Constitution, no matter their citizenship.<sup>23</sup> The Civil War was responsible for solidifying these rules in U.S. law. The residents of the Confederate States of America (CSA) were U.S. citizens or resident noncitizens who, under some earlier understandings, retained common law and constitutional rights even during wartime that would have prevented the U.S. government from using military measures against them.<sup>24</sup> During the war, the Supreme Court accepted the Union's legal view that residents of the CSA had forfeited constitutional rights by their rebellion and attempted secession, and could be treated for most purposes as *de facto* nonresident enemy aliens, a class that lacked protection by the Constitution.<sup>25</sup>

Prior to the twentieth century, the common law and international law were invoked as frequently, or even more so, than the U.S. Constitution to provide protections against the U.S. government. Therefore, questions of the domain of protection and how it has changed over time cannot only examine entitlement to *constitutional* protection. Because common law and international law often functioned as effective substitutes for constitutional protection, it should not be surprising that the availability of those protections also depended on war, territorial location, domicile, and citizenship. Access to protection under common law or international law was controlled both procedurally and substantively—by both procedural or standing doctrines about who could access the courts to seek legal protection and substantive doctrines about the scope of rights. Civilian enemy aliens (nationals of a country at war with the United States) domiciled abroad did not have the right to access U.S. courts during wartime.<sup>26</sup> Residents of the CSA—most of whom were U.S. citizens—were barred from the Union's courts during the Civil War as *de facto* enemy aliens.<sup>27</sup> Enemy fighters, no matter their nationality, domicile, or actual location, could not access U.S. courts during wartime.<sup>28</sup> Even U.S. citizens domiciled in an enemy nation during wartime lacked the right to access U.S. courts. Moreover, it was generally held that “[l]east of all, will the common law undertake to rejudge acts done *flagrante bello* in the face

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23. See Kent, *Civil War*, *supra* note 12, *passim*; Kent, *supra* note 22, *passim*. On the legal effect of residence in an enemy nation during wartime, see KETTNER, *supra* note 7, at 277–78.

24. See Kent, *Civil War*, *supra* note 12, at 1860–71.

25. *Id.* at 1872–1902.

26. This and the following two sentences are based on Kent, *supra* note 22, at 176–211.

27. See Kent, *Civil War*, *supra* note 12, at 1905–07.

28. Kent, *supra* note 22, at 188–215.

of the enemy.”<sup>29</sup> So the site of actual battle was not generally a zone where the common law provided protections.

In sum, under traditional domain rules, noncitizens located outside the United States, military enemies wherever located (no matter their citizenship), and all persons at a site of active combat were outside the protection of the Constitution. The right to access U.S. courts to claim protection by the Constitution or other laws was denied to military enemies and to nonresident enemy aliens. The domain of protection was therefore based on formal, categorical distinctions between domestic and foreign territory, war and peace, resident and nonresident, enemy fighter and not, and zone of battle and elsewhere. Citizen-noncitizen distinctions mattered, but less than is commonly supposed.

Starting with the pathbreaking work of Professor Gerald Neuman, legal academics have created various typologies to describe the theories of the domain of the Constitution. Their terminology varies—different approaches are variously called membership, compact, social contract, territoriality, country, mutuality of obligation, municipal law, organic, global due process, functional, limited government, universalism, and conscience.<sup>30</sup> I have not adopted any of these typologies, which often mix the descriptive and normative—the *lex lata* and *lex ferenda*, as international lawyers would say, law as it is (or was) and law as one would prefer it to be. I have instead, for my descriptive purposes, decided to stick close to the language and concepts used during earlier eras of our constitutional history by courts, executive officials, litigants, theorists, and other actors. That approach allows us to see more clearly how enemy status, domicile, territorial location, and citizenship interacted to demarcate the domain of the Constitution and the right to access the courts. In particular, I prefer the language of “protection” and “allegiance” because it was widely used well into the twentieth century.<sup>31</sup>

## II. JUSTIFICATIONS FOR THE TRADITIONAL DOMAIN RULES

What might justify the “hard-on-the-outside, soft-on-the-inside” approach, under which both citizens and noncitizens in the United States during peacetime are granted broad and broadly similar protections under

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29. *Tyler v. Pomeroy*, 90 Mass. (8 Allen) 480, 484–85 (1864). And complying with the laws of war was a complete defense to a common law tort suit. *See, e.g., Terrill v. Rankin*, 65 Ky. (2 Bush) 453, 458 (1867).

30. For a helpful and succinct overview, see Chimène I. Keitner, *Rights Beyond Borders*, 36 *YALE J. INT’L L.* 55, 60–61 (2011).

31. *See Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950) (“[T]he Government’s obligation of protection is correlative with the duty of loyal support inherent in the citizen’s allegiance . . . .”); *id.* at 769 (“[O]ur law does not abolish inherent distinctions recognized throughout the civilized world between citizens and aliens, nor between aliens of friendly and of enemy allegiance, nor between resident enemy aliens who have submitted themselves to our laws and nonresident enemy aliens who at all times have remained with, and adhered to, enemy governments.” (footnote omitted)); *Ex parte Kawato*, 317 U.S. 69, 74 (1942) (“A lawful residence implies protection, and a capacity to sue and be sued.” (quoting *Clarke v. Morey*, 10 Johns. 69, 72 (N.Y. 1813))).

the Constitution, laws, and institutions of the United States, while noncitizens outside the country and military enemies wherever located are excluded from protection? Many legal academics and human rights activists consider some of the traditional domain rules that limited protections for noncitizens and military enemies to be undesirable and even disreputable. They are not wrong that some outdated or even troubling reasons have been advanced to justify using territorial location, enemy status, or citizenship to determine whether a person has constitutional protections. And they are not wrong that the U.S. government is more likely to act excessively harshly when it acts on those outside the domain of protection. But there are some good reasons as well for the traditional rules about domain.

First, this Part addresses the less controversial issue: the reasons why we might want to give both citizens and noncitizens inside the United States very similar kinds of civil liberties protections. Second, I examine the possible justifications for treating noncitizens outside the United States and military enemies as outside the protection of the Constitution. For any specific constitutional right or structural protection for individual liberty, there could be a unique and complex calculus about whether it makes sense to reserve liberties for some people, places, and contexts, but not others. But this Part makes general observations rather than focusing on specific instances.

#### A. *U.S. Territory As a Zone of Liberty Irrespective of Citizenship*

The traditional domain rule that gave robust protection to aliens living or traveling within the United States had a number of conceptual foundations and justifications. This view that alien residents or visitors are under the protection of the sovereign's municipal laws, so long as they are within the country, had ancient roots in the Hebrew Bible,<sup>32</sup> and can be seen in foundational documents like the Magna Carta.<sup>33</sup> As it developed in England, the idea was fundamentally feudal, as seen in the older terminology used to describe it, which stressed a reciprocal relationship between protection and allegiance. One was said to owe personal allegiance to one's lord or monarch, and in exchange for that allegiance and service, received protection.<sup>34</sup> Thus, allegiance and, hence, protection were intimately tied to the land, that is, to geography.

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

33. See 4 WILLIAM BLACKSTONE, COMMENTARIES \*69.

34. See KETTNER, *supra* note 7, at 13–61.

Over time, as the lord-subject relationship was depersonalized and became one between and among subjects and their government, an element of contract was understood to inform the protection-allegiance framework.<sup>35</sup> In this social contract, an individual and the government were understood to have reciprocal rights and duties. The individual had a duty of allegiance, which included obeying the law and maintaining fidelity to one's home state, and, at some times and for some people, rendering actual services such as military duty. The government had the reciprocal obligation of protection for the people owing allegiance. This included not only providing domestic law and institutions (paradigmatically courts) to protect rights, but also things such as intervening diplomatically, or perhaps even militarily, to protect citizens when mistreated abroad.

Although aliens were not thought to be part of any organic social contract, the protection-allegiance framework nevertheless provided robust protections for them when they were living or peacefully traveling within the country. They owed a "temporary allegiance," and, hence, were within protection during their time there.<sup>36</sup> Emerging out of feudal times, treating aliens within the country equitably and generously was a refrain of many natural lawyers and other theorists,<sup>37</sup> and was an emerging norm of the law of nations in the eighteenth century.<sup>38</sup> It found expression in early bilateral treaties of the United States<sup>39</sup> and official U.S. government policy.<sup>40</sup>

Supreme Court opinions tend to give noninstrumental reasons explaining the constitutional protections for noncitizens in the United States. One set of reasons is formal, based on a constitutional text which only infrequently limits rights by citizenship or location.<sup>41</sup> The Court also suggested that "general international law" required the United States to give legal protections to noncitizens residing within the sovereign territory—unless

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35. *Id.* at 246–47.

36. *See* Kent, *supra* note 22, at 176–91.

37. *See, e.g.*, 3 EMMERICH DE Vattel, *THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW* 145–48 (Charles G. Fenwick trans., 1916) (1758).

38. *See* 3 G.F. VON MARTENS, *A COMPENDIUM OF THE LAW OF NATIONS, FOUNDED ON THE TREATIES AND CUSTOMS OF THE MODERN NATIONS OF EUROPE* 83 (William Cobbett trans., London, Cobbett & Morgan 1802) (1795); 8 *id.* at 273.

39. *See* Treaty of Amity, Commerce, and Navigation, U.S.-United Mexican States, arts. XIV–XV, Apr. 5, 1832, 8 Stat. 410; Treaty of Friendship, Limits and Navigation, U.S.-Spain, art. XX, Oct. 27, 1795, 8 Stat. 138; Treaty of Amity and Commerce, U.S.-Prussia, art. II, July 9–Sept. 10, 1785, 8 Stat. 84; Treaty of Amity and Commerce, U.S.-Swed., art. XVII, Apr. 3, 1783, 8 Stat. 60; Treaty of Amity and Commerce, U.S.-Neth., art. VIII, Oct. 8, 1782, 8 Stat. 32.

40. *See* Judicial Privileges of Foreigners, 1 Op. Att'y Gen. 192, 193 (1816); Reprisals, 1 Op. Att'y Gen. 30, 32 (1793).

41. *See, e.g.*, *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (holding that the Fifth and Sixth Amendments protected all within U.S. territory, including resident aliens, by applying the reasoning of *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886), which found that the "provisions [of section one of the Fourteenth Amendment] are universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or nationality").

some positive law directed otherwise.<sup>42</sup> Another kind of noninstrumental justification offered by the Court several times is that “[t]he alien [is] accorded a generous and ascending scale of rights as he increases his identity with our society,”<sup>43</sup> by residing here and developing what the Court called “significant voluntary connection[s].”<sup>44</sup> This approach views constitutional protection as a claim against the government that comes from membership in a community—a kind of social contract idea tied to a particular community and the government it created.<sup>45</sup>

There are also many instrumental reasons to treat both stranger and citizen equally and fairly within the home country. It promotes peace by reducing international friction. Mistreating foreign nationals or denying them justice was a frequent source of strife and even a justifiable cause of war prior to the twentieth century.<sup>46</sup> This fact was cited during the Constitution’s ratification debates as a reason to empower a new federal government to protect foreigners.<sup>47</sup> Equitable treatment of foreigners in the United States was thought to promote commerce and other forms of trade and exchange, as well as immigration, which was a source of power for the state.<sup>48</sup>

Constitutional rights and equitable treatment for foreigners in the United States probably helped maintain law and order and encourage productive behavior by immigrants. Persons who felt secure within the protections of the law would be more likely to obey the law and invest positively in the future.

It also helped protect liberty for U.S. citizens. The goal was to build a government that was not tyrannical, but that respected rights and acted through ordinary legal processes. If our legal regime had empowered state institutions to act harshly and without constitutional restraint against internal aliens, that objective would be undermined. Keeping U.S. territory as a zone of civil liberty for both citizens and noncitizens has been an explicit goal of the designers of our national security institutions, laws, and practices. I think it rests in part on the idea that, to protect the liberty of citizens here, we must protect the liberty of everyone here in the United States by structuring and restraining the government from grossly

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42. *Lau Ow Bew v. United States*, 144 U.S. 47, 61–62 (1892) (“By general international law, foreigners who have become domiciled in a country other than their own acquire rights and must discharge duties in many respects the same as possessed by and imposed upon the citizens of that country; and no restriction on the footing upon which such person stand by reason of their domicile of choice, or commercial domicile, is to be presumed.”).

43. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990) (quoting *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950)).

44. *Id.* at 271.

45. NEUMAN, *supra* note 8, at 54–55.

46. 3 DE VATTEL, *supra* note 37, at 230–31.

47. *See* THE FEDERALIST NO. 80 (Alexander Hamilton).

48. *See* Kent, *supra* note 8, at 504 (“The strong desire of many eighteenth-century Americans to stimulate economic development and to populate their new country by encouraging immigration, would likely have contributed to the understanding that aliens within the country should be under the protection of the laws, as would the American social values of egalitarianism, opportunity, and hospitality to strangers.” (footnotes omitted)).

mistreating anyone.<sup>49</sup> It is often very difficult or impossible, *ex ante*, for government actors engaged in coercion to determine whether someone is a citizen or noncitizen. A government officer stopping someone on the street for purposes of interrogation or arrest likely won't know in advance the target's citizenship. So it is preferable that U.S. law require the government to treat everyone with equal dignity and rights. Serious government coercion, especially military or covert action, often spills over and affects much more than just the intended target. Thus, it is preferable to strictly limit all domestic uses of coercion of those kinds. And as David Cole has argued, if U.S. law empowers the government to act harshly against noncitizens, that precedent can later be used to justify application of those same measures to citizens.<sup>50</sup>

It has not been universally agreed upon that all persons within sovereign U.S. territory during peacetime were within the protection of the laws and courts. During the Founding era, some hard-line Federalists adopted arguments that Professor Neuman correctly describes as “nativist” and “exclusionary,” arguing that aliens were not “parties” to the “compact” of the Constitution and so were not protected by it.<sup>51</sup> In part, the justification was that republican government required specific habits of mind and character that aliens might not possess; there were also fears that noncitizens might corrupt or radicalize the U.S. citizenry if they were made fully part of the people of the United States.<sup>52</sup> The Federalists lost this argument, however.

In our history, the major exception to the practice of granting equal or nearly equal protection for civil liberties to all within U.S. sovereign territory during peacetime occurred when the United States became a colonial power in 1898.<sup>53</sup> As part of the peace treaty with Spain, Puerto Rico and the Philippines became U.S. territories.<sup>54</sup> In a series of decisions known as the *Insular Cases*, the Supreme Court repeatedly held that certain constitutional guarantees did not extend to these islands, notwithstanding that they were *de jure* U.S. territory and the war had ended.<sup>55</sup> The Court generally did not distinguish between U.S. citizens and noncitizens in these

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49. See generally NEUMAN, *supra* note 8, at 57–59.

50. See, e.g., David Cole, *Against Citizenship As a Predicate for Basic Rights*, 75 *FORDHAM L. REV.* 2541, 2544 (2007).

51. NEUMAN, *supra* note 8, at 54–56.

52. *Id.* at 56.

53. As noted in the Introduction, I am speaking about issues that can be said to involve foreign relations or national security, and am therefore not speaking about slavery, women's rights, or other domestic issues.

54. Treaty of Peace Between the United States of America and the Kingdom of Spain (Treaty of Paris), U.S.-Spain, arts. II–III, Dec. 10, 1898, 30 Stat. 1754, 1755–56.

55. See, e.g., *Balzac v. Porto Rico*, 258 U.S. 298 (1922) (criminal jury trial and Seventh Amendment civil jury guarantee); *Trono v. United States*, 199 U.S. 521 (1905) (Double Jeopardy Clause); *Dorr v. United States*, 195 U.S. 138 (1904) (jury trial guarantees of Article III and Sixth Amendment); *Downes v. Bidwell*, 182 U.S. 244 (1901) (Uniform Duties Clause of Article I).

cases.<sup>56</sup> The Court came to say that only “fundamental” constitutional guarantees were applicable.<sup>57</sup> The justifications for this departure from traditional constitutional practice ranged from the frankly racist to the practical.<sup>58</sup> The various justifications for according lesser constitutional protections to U.S. citizens and others resident in island territories like Puerto Rico are certainly not convincing today, if they ever were. To my mind, they provide no basis to question the correctness of our traditional constitutional practice of providing robust constitutional protections to all persons in U.S. territory during peacetime, irrespective of citizenship.

Our constitutional tradition of only rarely making distinctions between citizens and noncitizens with regard to civil liberties within the United States is so longstanding and supported by such strong policy justifications that it would be appropriate, in my view, to say that by the accumulation of judicial and political precedent we have implicitly adopted a rebuttable presumption that noncitizens peacefully in the United States can claim the same constitutional protections for civil liberties as citizens. Of course that presumption would be rebutted in some immigration contexts because the United States must retain the ability to decide which noncitizens are entitled to remain here. But in most contexts, I think it would and should be difficult to find persuasive reasons to justify differential treatment.<sup>59</sup>

#### B. War and Extraterritorial Location As Limits on Protection

There are probably few today who would disagree that citizens and noncitizens should have very similar levels of constitutional protections when they are in the United States peacefully. The controversial questions concern extraterritorial activities and wartime. As discussed above, the protection of noncitizens under the Constitution was historically thought to stop at the border, and military enemies wherever located were understood to lack protection by the Constitution, laws, and courts. The case of

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56. See, e.g., *Balzac*, 258 U.S. at 309 (“The citizen of the United States living in Porto Rico cannot there enjoy a right of trial by jury under the federal Constitution, any more than the Porto Rican. It is locality that is determinative of the application of the Constitution, in such matters as judicial procedure, and not the status of the people who live in it.”). For a discussion and analysis of the *Insular Cases*, see generally Kent, *Insular Cases*, *supra* note 12.

57. See, e.g., *Balzac*, 258 U.S. at 305, 309.

58. See, e.g., *id.* at 310 (suggesting that jury trials were inappropriate in Puerto Rico in part because the Spanish civil law system had been so long entrenched there).

In reality, residents of the island territories had greater civil liberties protections than these Court decisions suggest, because by executive order and later by statute, the U.S. government imposed on itself almost all of the constitutional limitations in favor of individual rights that applied against federal government in the United States. See, e.g., *Kepner v. United States*, 195 U.S. 100, 111–23 (1904) (describing executive and congressional actions to bring U.S. constitutional principles to the Philippines).

59. David Cole has succinctly rebutted some common but very unconvincing arguments against extending equal rights to noncitizens within the United States, such as their potential disloyalty, their status as guests rather than persons entitled to be here, the notions that what they seek are privileges rather than rights as such, and the claim that granting equal rights will reduce incentives to naturalize. See David Cole, *Are Foreign Nationals Entitled to the Same Constitutional Rights As Citizens?*, 25 T. JEFFERSON L. REV. 367, 384–88 (2003).

extraterritorial rights for U.S. citizens is complex and muddled,<sup>60</sup> and I will largely table it because most extraterritorial U.S. government activities impact noncitizens. What might justify limiting the constitutional and other protections for noncitizens to peacetime and the borders of U.S. sovereign territory?

In recent decades, most academic commentary about the domain of the Constitution has been strongly opposed to linking rights to either citizenship or the territory of the United States. It has supported judicial enforcement of constitutional norms for all people in all or most places and contexts, including at U.S. borders, outside the United States, and perhaps even during armed conflicts. Professor Neuman's work has been the most influential attempt to categorize different approaches to determining the personal, territorial, and contextual domain of the Constitution. As he recognizes, much modern academic commentary strongly supports a "universalist" view of the Constitution's domain, an approach that "require[s] that constitutional provisions that create rights with no express limitations as to the persons or places covered should be interpreted as applicable to every person and at every place."<sup>61</sup> Given the normative preference of many academics for universalism—or if not, universalism, then at least a domain of protection *much* more expansive than provided under traditional rules—it is not surprising that the old doctrines and practices that limited the Constitution's reach because of war, territorial location, domicile, or citizenship have come under harsh academic criticism.

In influential accounts, some scholars emphasize that geographic limits on the Constitution's protections reflect abandoned notions of strict territorial jurisdiction in eighteenth- and nineteenth-century international law and conflicts of laws.<sup>62</sup> Other accounts assert that limits on the Constitution's domain in the foreign affairs area arose from unsavory and even racist case law justifying the exertion of plenary governmental control over American Indians, immigrants, and nonwhite inhabitants of America's colonial empire.<sup>63</sup> Still others trace the limited domain of the Constitution in the war, foreign affairs, and imperialism contexts in part to an unhealthy desire by the U.S. government for maximum flexibility to assert its power.<sup>64</sup> David Cole critiques constitutional rules and counterterrorism policies that draw distinctions between citizens and noncitizens as a new

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60. See *supra* notes 18–20 and accompanying text.

61. NEUMAN, *supra* note 8, at 5; see also *id.* at 6 (“[T]he universalist approach has significant support among modern commentators . . .”).

62. *Id.* at 7, 83, 89, 91; see also Sarah H. Cleveland, *Embedded International Law and the Constitution Abroad*, 110 COLUM. L. REV. 225, 229 (2010) (“Traditional doctrines regarding the geographic scope of U.S. constitutional protections derive from nineteenth-century international law principles of jurisdiction, which largely limited the lawful jurisdiction of a sovereign state to its geographic territory.”).

63. See Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1 (2002).

64. See, e.g., KAL RAUSTIALA, DOES THE CONSTITUTION FOLLOW THE FLAG? 86 (2009).



kind of “political repression” that bears some similarities to McCarthyite paranoia about subversive foreign influence.<sup>65</sup> And he worries that excessive fear has often driven the United States to act more harshly toward noncitizens, who are convenient targets due to their inability to defend themselves politically because of a lack of representation.<sup>66</sup> Since September 11, 2001, a vast array of commentators and activists have called for U.S. military policies such as overseas detention, interrogation, surveillance, and drone strikes aimed at noncitizens to be newly subject to judicial review and constitutional limitation, rather than left in the discretionary control of the political branches.

These commentators believe that the traditional underpinnings and justifications of domain limits along the axes of geography, citizenship, and war are no longer tenable and that the domain of the Constitution and legal protection more generally should be significantly expanded.<sup>67</sup> Although these critical accounts make some important points, they are incomplete for not fully examining either the historical roots of the limitations on domain, including the crucial allegiance-protection framework, or whether there are any persuasive reasons why the domain of protection should be limited by geography, war, and citizenship.

In my view, there are some plausible reasons to think that traditional limits on domain are justifiable. Internally, government has the capacity and duty to create an ordered society of liberty. It has pervasive contact with the populace. It can legislate to structure the government, economy, and society. It has many levers of power and control—criminal law, tax law, civil regulation, a monopoly on the use of force, and, in particular, use of military force. Thus, at home, the government is all powerful and has duties to allow human flourishing. In these circumstances, the U.S. constitutional tradition has thought it critical to provide protection against government overreaching to both citizens and aliens. This ensures that the great power of the government is exercised responsibly and with due regard to the interests of affected individuals.

Externally, the U.S. government has much less power, much less contact with the people, and much less practical ability to monitor, control, and coerce. As a result, it is much harder to predict, preempt, or deter externally based, as opposed to domestic, threats. As Madison asked in *The Federalist No. 41*, in discussing whether the Constitution should prohibit a standing army:

With what colour of propriety could the force necessary for defence [of the United States] be limited by those who cannot limit the force of offence? If a Federal Constitution could chain the ambition or set bounds to the exertions of all other nations: then indeed it might prudently chain the discretion of its own Government, and set bounds to the exertions for

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65. David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1 (2003).

66. Cole, *supra* note 50, at 2542–44.

67. See, e.g., Kal Raustiala, *The Geography of Justice*, 73 FORDHAM L. REV. 2501, 2523 (2005).

its own safety. How could a readiness for war in time of peace be safely prohibited, unless we could prohibit, in like manner, the preparations and establishments of every hostile nation?<sup>68</sup>

Madison's point also applies to the question of whether the external, defensive powers of the federal government should be limited by robust individual-rights guarantees.

When the U.S. government does exercise power externally, it can generally act only episodically, usually either with consent and to some extent under the direction of the foreign state, or hostilely. Both of these situations—consent from the host state or hostile action, which will almost always be opposed by the territorial state—impose real limits on what the U.S. government can do.

The purposes of government action are different too. Externally, the U.S. government is generally not creating civic order, but engaging in very different functions like intelligence gathering, war, and diplomacy and very targeted law enforcement against particular high-importance offenders.

As Justice Joseph Story said, “in a republic” such as the United States, governmental “institutions are essentially founded on the basis of peace.”<sup>69</sup> The individual rights in the U.S. Constitution were designed for the paradigm case of a government ordering everyday, peacetime affairs within its sovereign territory. Recall that, at the Founding, the Constitution was not understood to protect either noncitizens outside the United States or military enemies wherever located. A number of the individual rights in the Constitution make absolutely no sense to think of as applicable to extraterritorial activity or to war or other contested assertions of power—for instance, the Second and Third Amendments. Given its purposes, it is similarly hard to understand how the First Amendment could possibly be thought applicable to nonsovereign activity of the U.S. government abroad, such as military action or intelligence work. Many other provisions of the Bill of Rights, such as most of the Fifth and all of the Fourth, Sixth, and Seventh Amendments, as well as the Suspension Clause, presuppose the paradigm case of domestic governance operating through the civil court system. Applying these very stringent rules designed for domestic peacetime situations of political, civil, and economic liberty to extraterritorial activities—be it war, intelligence gathering, covert action, postconflict reconstruction and nation building—could be exceedingly awkward and would limit too greatly the legitimate national security powers of the state.

One might respond that the courts could just balance and limit any constitutional right that seemed to be a poor fit for an extraterritorial or national security context and that this would be better than having a categorical rule stopping the Constitution at the water's edge. Maybe. Freedom for the judiciary to tailor rights would introduce a massive amount

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68. THE FEDERALIST NO. 41 (James Madison).

69. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1166 (Boston, Hilliard, Gray & Co. 1833).

of judicial subjectivity, requiring the courts to make complex factual assessments and predictions about which rights would be workable to observe in which extraterritorial national security settings, untethered from any textual guidance. Nothing about the composition, structure, or information-gathering ability of the federal judiciary gives me a great deal of confidence that it is suited for such a difficult task. Constitutionalizing our extraterritorial national security policy also strikes me as potentially problematic because it would rigidly fix rules rather than allow the U.S. government to act quickly, flexibly, and nimbly. And it would, as Madison warned, unilaterally hamstring the United States while leaving our adversaries free to act as they wish.

Limiting external national security activities with international law, U.S. statutes, executive orders, and discretionary policy decisions based on concerns about reciprocity, legitimacy, and the like provides a good deal of protection to noncitizens, while also giving desirable flexibility to the U.S. government. It is not just policy flexibility that the U.S. government gets from the traditional domain rules. Clear, categorical rules also reduce decision costs and allow decisionmakers to plan with some certainty about the legal rules by which their conduct will be governed.<sup>70</sup> And finally, if rights protections for noncitizens or military enemies can be granted or withheld by the political branches—via treaties, statutes, or policy decisions—U.S. policymakers have some bargaining power to secure greater protections for the rights of Americans.<sup>71</sup>

Since the Constitution has been interpreted to apply extraterritorially for the benefit of U.S. citizens, it is sometimes said to be arbitrary and unjustifiable to fail to extend that protection to noncitizens.<sup>72</sup> This seems overly simplistic. Questions of scale and the specifics of each location are quite significant. There is no reliable count of the number of U.S. citizens residing abroad, but a recent estimate puts it around 6 million.<sup>73</sup> While the U.S. government and legal system may be able to extend the extraordinary protections of the U.S. Constitution and courts to citizens abroad in the relatively few instances where that might arise, it would be an entirely different matter to hold those protections available to the over 6.5 billion non-U.S. citizens living outside the United States.

There are other unconvincing arguments for extending constitutional protections and judicial review to noncitizens abroad is. One asserts that,

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70. See Eric A. Posner, *Boumediene and the Uncertain March of Judicial Cosmopolitanism*, 2008 CATO SUP. CT. REV. 23, 28.

71. See *id.* at 43 (“Unilateral action by courts to grant unreciprocated benefits to noncitizens simply weakens the bargaining power of their own government.”).

72. See, e.g., Raustiala, *supra* note 67, at 2523.

73. See *6.32 Million Americans (Excluding Military) Live in 160-Plus Countries*, ASS’N AMERICANS RESIDENT OVERSEAS, <http://www.aaro.org/about-aaro/6m-americans-abroad> (last visited Mar. 25, 2014). Most of those reside in Europe and North and South America. See *id.* (estimating about 4.2 million U.S. citizen residents of those areas). East Asia, South Asia, the Middle East, and Africa, where the United States has been more likely to act on its own—without host government assistance or sometimes even consent—to protect national security, have far fewer resident U.S. citizens.

because all humans have equal dignity, as supposedly recognized by international human rights law, our Constitution should be interpreted to recognize this too.<sup>74</sup> It is true that human rights law proceeds from fairly universalist premises, but there is no easy analogy between constitutional rights and international human rights. Many provisions of important human rights instruments are limited to the jurisdiction of the signatory,<sup>75</sup> rather than imposing worldwide obligations. More importantly, many states agreeing to international human rights instruments knew that they would have discretion, as a matter of their domestic law, about how and to what extent they would be enforced.<sup>76</sup> So states may agree to greater rights on paper because they know that those rights would mean less in practice.<sup>77</sup> In countries like the United States, the legislature has authority to override or limit treaty provisions if it thinks the national interest requires that, but of course the U.S. Constitution cannot be changed except by the Court or formal amendment. Constitutionalization of extraterritorial actions by the U.S. government would therefore introduce a great deal of rigidity and constraint. Moreover, the U.S. Constitution, as interpreted by the Supreme Court, frequently imposes much more exacting restrictions on the government than human rights treaties do, such as in the area of criminal procedure. In sum, arguments that the existence of universal-sounding international human rights somehow suggest that U.S. constitutional rights should be extended to noncitizens abroad have little real traction.

There are of course other arguments that have been or could be made in favor of extending constitutional protections and judicial review to noncitizens abroad. For example, there may be reputational and diplomatic benefits associated with holding the U.S. government's extraterritorial treatment of noncitizens to the same very high standards we reserve for persons within the United States.<sup>78</sup> I do not aim to present a complete ledger of the costs and benefits of increasing protection for noncitizens abroad and military enemies. My aim is rather to help fill a gap in the academic debate, which is largely one-sided in favor of a greatly expanded

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74. See, e.g., Diane Marie Amann, *Guantanamo*, 42 COLUM. J. TRANSNAT'L L. 263, 299, 300, 312, 314 (2004); Louis Henkin, *The Constitution As Compact and As Conscience: Individual Rights Abroad and at Our Gates*, 27 WM. & MARY L. REV. 11, 29 (1985); Jordan J. Paust, *An Introduction to and Commentary on Terrorism and the Law*, 19 CONN. L. REV. 697, 723 (1987).

75. International Convention on the Elimination of All Forms of Racial Discrimination arts. III, VI, XIV, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969); International Covenant on Civil and Political Rights art. II, *adopted and opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171, 1057 U.N.T.S. 407; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment arts. II, V, X, XII–XIII, XVI, Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85, 114; Convention on the Rights of the Child art. II, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990).

76. For instance, the U.S. Senate has given its advice and consent to ratification of human rights treaties on the condition that they be non-self-executing.

77. See generally Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935 (2002).

78. See, e.g., Galia Rivlin, *Constitutions Beyond Borders: The Overlooked Practical Aspects of the Extraterritorial Question*, 30 B.U. INT'L L.J. 135, 135 (2012).

domain of protection that sweeps away the traditional, categorical limitations.

#### CONCLUSION

In conclusion, I offer some thoughts about the future regarding the two major issues discussed: the traditions of providing robust legal protection for all within U.S. territory regardless of citizenship but of withholding constitutional protections from military enemies and from noncitizens abroad.

If one is persuaded, as I am, that protecting the liberties of the people of the United States from government overreaching requires giving noncitizens present in the United States the same or very similar constitutional protections, then there are a number of policies in the present or recent past that deserve careful scrutiny. For example, laws like the Arizona “show your papers” provision targeting illegal immigrants<sup>79</sup> are objectionable on these grounds if they increase the likelihood of racial or ethnic profiling and harassment of U.S. citizens or lawfully present aliens.<sup>80</sup> Although the Constitution as currently interpreted allows Congress and the executive to make distinctions between people from different countries for purposes of immigration law, the instrumental reasons for treating U.S. territory as a zone of liberty irrespective of citizenship might suggest some limits. For example, the widespread post-9/11 immigration round-ups which targeted people by national origin—being nationals of Arab and/or Muslim nations—probably made some U.S. citizens or lawful permanent residents who shared the same origins feel less secure in their rights. David Cole has frequently argued that burdens on the speech of immigrant noncitizens poses risks to the First Amendment rights of citizens. These concerns should inform the policy balance struck by the political branches, and are also arguably relevant to constitutional interpretation by the courts of the rights of noncitizens present in the United States.<sup>81</sup> As I argue above, our constitutional tradition might well support a rebuttable presumption that civil liberties protections available for U.S. citizens in the United States extend to noncitizens.

Turning now to the traditionally categorical barriers to constitutional protection for military enemies and noncitizens abroad, I see a great convergence occurring. Even though, as I suggested in Part II.B, there are some sound reasons supporting these categorical limits on domain, they are

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79. ARIZ. REV. STAT. ANN. § 11-1051(B) (2012) (requiring state officers to make a “reasonable attempt . . . to determine the immigration status” of any person they stop, detain, or arrest on some other legitimate basis if “reasonable suspicion exists that the person is an alien and is unlawfully present in the United States”).

80. *See Arizona v. United States*, 132 S. Ct. 2492, 2510 (2012) (finding that the Arizona provision was not preempted by congressional enactments, but suggesting that new legal challenges could be brought in the future after the law’s implementation is examined).

81. *See generally* Adam B. Cox, *Citizenship, Standing, and Immigration Law*, 92 CALIF. L. REV. 373 (2004) (arguing that U.S. citizens have important interests in the content of much immigration law nominally directed at noncitizens and thus should have standing to challenge it).

increasingly being swept away. The importance of citizenship to protection by the Constitution and courts is further decreasing, formal barriers to legal protection and judicial review based on extraterritorial location and enemy status are dissolving, and the dissolution of these categorical boundaries is changing the design and operation of the U.S. national security state. Legal rules and practices regarding protection of civil liberties are becoming more uniform across the entire domain of U.S. government national security activity. I plan to explore this convergence in future work.