# CONSTITUTIONAL RIGHTS FOR NONRESIDENT ALIENS: A DOCTRINAL AND NORMATIVE ARGUMENT

*Alec Walen, J.D., Ph.D.**

ABSTRACT

*The decision in* Boumediene v. Bush*, 553 U.S. 723 (2008), held that nonresident aliens (NRAs) detained for years in Guantanamo have a constitutional right to bring a habeas petition to challenge their detention. But the larger issue of constitutional rights for NRAs remains unresolved. Do NRAs outside of Guantanamo have constitutional rights? If so, do they enjoy substantial protections, such as those under the Fourth and Fifth Amendments? I argue here that the doctrine remains unclear, that the text is likewise unclear, that originalist arguments should carry little force, but that the normative argument is clear. As a condition of the legitimacy of U.S. law, NRAs must enjoy a range of constitutional rights that protect them from unjust harm at the hands of the United States.*

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* Professor of Law and Philosophy, Rutgers University. I am indebted to the following people for their help in discussing this Article in its developmental stages: Mitch Berman, David Cole, Jennifer Daskal, Dan Edelstein, Jonathan Hafetz, Erin Islo, Russell Miller, Cymie Payne, Ralf Poscher, and the participants at the Privacy and Power (Symposium) at the University of Freiburg, July 2014.

## INTRODUCTION

Agents of the United States have shot civilians outside its borders, and the U.S. government claims that these civilians cannot sue for violation of their due process rights because they have none.[1] Section 702 of the Federal Intelligence Surveillance Act[2] allows the National Security Agency not only to collect the "metadata" of nonresident aliens (NRAs)—the collection of which from U.S. citizens is now of dubious constitutionality[3]—but also to collect the *content* of

1. *See* Hernandez v. United States, 785 F.3d 117, 120 (5th Cir. 2015) (en banc) (noting the split of the panel members on this position, but ultimately granting the defendant the benefit of qualified immunity).

2. FISA Amendments Act of 2008, Pub. L. No. 110–261, 122 Stat. 2436.

3. *See* Klayman v. Obama, 957 F. Supp. 2d 1, 43 (D.D.C. 2013), *vacated and remanded*, Obama v. Klayman, Nos. 14–5004, 14–5005, 14–5016, 14–5017, 2015 WL 5058403 (D.C. Cir. Aug. 28, 2015); *see also* ACLU v. Clapper, 785 F.3d 787, 826 (2d Cir. 2015) (holding that the collection of such data was illegal on statutory grounds).

their electronic communications.[4] The United States detains people in other countries without according them any constitutional protections, not even the right to habeas corpus.[5]

The Supreme Court, in *Boumediene v. Bush*, held that NRAs detained for years in Guantanamo have a constitutional right to bring a habeas petition to challenge their detention.[6] But the larger issue of constitutional rights for NRAs remains unresolved. Do NRAs outside of Guantanamo have constitutional rights? If so, do they enjoy more substantial protections, such as those under the Fourth and Fifth Amendments?

I argue here that the doctrine remains unclear, that the text of the Constitution is likewise unclear, and that an originalist reading of the text, while inconsistent with extending constitutional rights to NRAs, is not decisive. I also argue that the normative case for extending constitutional rights to NRAs *is* clear and decisive. As a condition of the legitimacy of U.S. law, NRAs must enjoy a range of constitutional rights that protect them from unjust harm at the hands of the United States.

This argument is the general part of a pair of articles; the other part argues specifically that NRAs enjoy Fourth Amendment rights not to be subject to unreasonable searches and seizures.[7] Here, I do not focus on the Fourth Amendment argument. I use it only in the Introduction to illustrate the importance of the general argument.

The general argument is important for two interrelated reasons: courts cannot otherwise act to protect legal rights such as the right to privacy, and courts have an essential role to play in protecting these rights. Illustrating with Fourth Amendment rights, the first reason it is important to establish that NRAs enjoy them is that without them, courts cannot protect legal privacy rights. The relevant federal law, FISA § 702, does not provide any legal protection to the privacy rights of NRAs; it is the problem, not the solution. Further, the relevant international law, the International Covenant on Civil and Political Rights (the "ICCPR"), cannot itself give courts a role in protecting the privacy rights of NRAs. There are two rea-

4. FISA Amendments Act § 702 (providing that "the Attorney General and the Director of National Intelligence may authorize jointly . . . the targeting of persons reasonably believed to be located outside the United States to acquire foreign intelligence information").

5. Al Maqaleh v. Gates, 605 F.3d 84, 99 (D.C. Cir. 2010).

6. 553 U.S. 723, 800–01 (2008).

7. *See* Alec Walen, *Fourth Amendment Rights for Nonresident Aliens*, 16 GERMAN L.J. 1131 (2015).

sons for that. First, the United States has taken the position that human rights treaties like the ICCPR apply only domestically, and thus do not protect NRAs.[8] Second, even if the United States were to reject that cramped reading of the range of application of human rights treaties, the United States, in its instrument of ratification, declared that the ICCPR is not a self-executing treaty,[9] and Congress has done nothing to give plaintiffs a private right of action under the ICCPR. Thus, no NRA could invoke the ICCPR as a basis for enforcing his or her privacy rights in a U.S. court. If the courts are to have a role in protecting the privacy rights of NRAs, they can do so—as things currently stand with regard to statutory and treaty law—only by invoking the constitutional rights of NRAs.[10]

8. *See* Peter Margulies, *The NSA in Global Perspective: Surveillance, Human Rights, and International Counterterrorism*, 82 FORDHAM L. REV. 2137, 2138 (2014) (citing U.S. Dep't of State, Second and Third Periodic Reports of the United States of America to the UN Committee on Human Rights Concerning the International Covenant on Civil and Political Rights, at Annex I (2005), *available at* http://www.state.gov/j/drl/rls/55504.htm#annex1). It is noteworthy that the Obama administration seems to be breaking with the Bush administration on this point. Harold Koh, Legal Adviser to the State Department, authored a memorandum rejecting that reading, and suggesting instead that the United States is obligated to respect the terms of the ICCPR wherever it has "*effective control* over the person or context at issue." Memorandum Opinion on the Geographic Scope of the Int'l Covenant on Civil and Political Rights 4 (Oct. 19, 2010), *available at* https://www.justsecurity.org/wp-content/uploads/2014/03/state-department-iccpr-memo.pdf. More recently, in November 2014, with regard to the Torture Convention, the Obama administration stated to the United Nations treaty-monitoring committee in Geneva, Switzerland, that it "covers all areas under U.S. jurisdiction and territory that the United States 'controls as a governmental authority,' including the prison at Guantanamo Bay, Cuba and 'with respect to U.S.-registered ships and aircraft.'" Karen DeYoung, *Obama Administration Endorses Treaty Banning Torture*, WASH. POST (Nov. 12, 2014), https://www.washingtonpost.com/world/national-security/obama-administration-endorses-treaty-banning-torture/2014/11/12/b6131e68-6a8c-11e4-9fb4-a622dae742a2_story.html (quoting Acting State Department legal adviser Mary E. McLeod). The Obama administration itself still has not, however, taken the position that the ICCPR applies wherever the United States exercises effective control over persons. In that regard, it still sees itself as less restricted than the norm adopted by the UN treaty bodies, which "have interpreted jurisdiction in terms of a state's exercise of control over either *persons* or places." Sarah Cleveland, *Embedded International Law and the Constitution Abroad*, 110 COLUM. L. REV. 225, 251 (2010) (emphasis added); *see also* Hassan v. United Kingdom, Eur. Ct. H.R. App. No. 29750/09, Sept. 16, 2014, *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-146501 (holding that the United Kingdom had jurisdiction over a prisoner, despite not having effective control over the area in which the prison sat, because petitioner was "was within the physical power and control of the United Kingdom soldiers").

9. *See* David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 YALE J. INT'L L. 129, 131 (1999).

10. *See, e.g.*, *Boumediene v. Bush*, 553 U.S. 723, 800-01 (Souter, J., concurring) (declaring the Military Commissions Act of 2006, § 950p of Pub. L. No. 109-366, 120 Stat. 2600 (2006), unconstitutional insofar as it stripped the NRAs detained in the military base in Guantanamo Bay, Cuba of their statutory habeas rights).

With regard to the second point—that courts have an essential role to play in protecting such rights—it is often only courts that can protect the rights of those who lack a political voice. As the Supreme Court noted in *Graham v. Richardson*, "[a]liens as a class are a prime example of a 'discrete and insular' minority for whom . . . heightened judicial solicitude [strict scrutiny] is appropriate."[11] The need for this solicitude is further explained by the fact that:

> [D]emocracies are not particularly likely to protect human rights when the majority feels threatened by outsiders or by a minority group. In those settings, as in the "war on terror," the political branches, responsive as they are to majoritarian desires, are likely to sacrifice the rights of those without a powerful voice in the political process in the name of preserving the security of the majority. This is not a flaw unique to the United States, but is an inevitable feature of a majoritarian process. Precisely for that reason, courts have an essential role to play in protecting individual rights on behalf of those without a voice in the political process.[12]

There is one way in which NRAs may be more protected than domestic discrete and insular minorities: their countries may use diplomatic pressure to ensure that U.S. policies respect their rights.[13]

11. Graham v. Richardson, 403 U.S. 365, 371–72 (1971) (citing United States v. Carolene Prods. Co., 304 U.S. 144, 152–53 n.4 (1938)). The Court afterwards carved out a "public function" exception to the use of strict scrutiny for laws that treat aliens unequally. Michael Scaperlanda, *Partial Membership: Aliens and the Constitutional Community*, 81 IOWA L. REV. 707, 736–38 (1996). The public function exception concerns the right "to participate in the processes of democratic decisionmaking." *Id.* at 737. Obviously, this does not cover the Fourth Amendment right to be secure against unreasonable searches and seizures.

12. David Cole, *Rights Over Borders: Transnational Constitutionalism and Guantanamo Bay,* 2008 CATO SUP. CT. REV. 47, 60 (2008) [hereinafter Cole, *Rights Over Borders*] (citing DAVID COLE, ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM (2005); and JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980)). More specifically, in the privacy rights context, Cole has also pointed out that "Congress is far less motivated to do anything about the NSA's abuse of the rights of foreign nationals [than the rights of U.S. citizens]. They are 'them,' not 'us.' They don't vote." David Cole, *We Kill People Based on Metadata,* N.Y. REV. OF BOOKS (May 10, 2014, 10:12 AM), http://www.nybooks.com/blogs/nyrblog/2014/may/10/we-kill-people-based-metadata/.

13. *See* J. Andrew Kent, *A Textual and Historical Case Against a Global Constitution,* 95 GEO. L.J. 463, 540 (2007) (noting that the traditional answer to the worry that NRAs may be abused by the United States is that "aliens abroad [have been] understood to be protected by international law, diplomacy, and policy set by Congress and the President."); *see also* United States v. Verdugo-Urquidez, 494 U.S. 259, 275 (1990) (plurality opinion) ("If there are to be restrictions on searches and seizures which occur incident to . . . American action [abroad], they

But this presupposes that other countries (1) care about the rights of their own citizens, and (2) have leverage over the United States that could be used in negotiations to protect the rights of their citizens. In many instances, one or both of these presuppositions will not hold.[14]

In truth, if the United States were to acknowledge the moral and legal imperative to respect the rights of NRAs, it would recognize that there is good reason to submit those of its actions that affect the basic rights of NRAs to the review of a neutral judicial body, rather than U.S. courts. For even if U.S. judges try to take the constitutional rights of NRAs seriously, they would almost inevitably bring a U.S. bias to their reasoning. As Mattias Kumm wrote, "any claim by one state to be able to resolve these issues [that could unjustly impact outsiders] authoritatively and unilaterally amounts to a form of domination."[15]

Given the current political climate in the U.S., however, such a suggestion is a complete non-starter. The U.S. is too skeptical of the judgment and intentions of others—and is too strong—to submit its actions to any such body. For the foreseeable future, it will engage in at least this much "domination."[16] But then, at least as a second best, its judiciary should seek to ensure that its actions respect its own core principles.[17] It should hold that NRAs enjoy a range of constitutional protections against unjustifiable harm inflicted by the U.S. government.

This Article proceeds as follows. In Part I, I argue that the case law on constitutional rights for NRAs was never clearly against extending such rights, and now, in the wake of *Boumediene v. Bush*,[18]

must be imposed by the political branches through diplomatic understanding, treaty, or legislation.").

14. Interestingly, in the area of signals intelligence, diplomatic pressure from the German government seems to have led to a Presidential Policy Directive, PPD-28, Jan. 17, 2014, that addresses the worst failures of FISA § 702. The problem with relying on this PPD is that it can be reversed at any time. This issue is discussed at some length in Walen, *supra* note 7, at 1136–37, 1161.

15. Mattias Kumm, *The Cosmopolitan Turn in Constitutionalism: An Integrated Conception of Public Law,* 20 IND. J. GLOBAL LEGAL STUD. 605, 613 (2013).

16. *Id.*

17. This analysis can be compared with Eyal Benvenisti, *Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders*, 107 AM. J. INT'L L. 295 (2013). Benvenisti would have all branches of federal government—"national legislatures, regulators, and courts—take strangers' interests into account." *Id.* at 300.

18. 553 U.S. 723 (2008).

has moved in favor of extending them.[19] In Part II, I argue that no substantial guidance on whether and how to extend the holding of *Boumediene* can be found in the Constitution itself; its text is unclear, and while the original understanding of the text would not support extending constitutional rights to NRAs, that understanding should not govern.[20] In Part III, I argue that there are strong normative reasons in favor of reading *Boumediene* quite broadly.[21] That is, there are strong normative reasons concerning the legitimacy of U.S. law for extending to NRAs the constitutional rights to not be unjustly harmed. These normative reasons should govern the decisions of the Court going forward.

## I. CASE LAW ON CONSTITUTIONAL RIGHTS FOR NRAS

Prior to *Boumediene*, the dominant view was that an earlier case, *Johnson v. Eisentrager*,[22] had determined that NRAs had no rights under the U.S. Constitution. In the words of Justice Rehnquist: "our rejection [in *Eisentrager*] of extraterritorial application of the Fifth Amendment was emphatic."[23] Lest this be thought to be a point only about the Fifth Amendment, it is worth pointing out that the Fifth Amendment includes the most basic of all protections: the protection against deprivation of "life, liberty, or property without due process of law."[24] Moreover, dissenting in *Boumediene v. Bush* some eighteen years later, Justice Scalia summarized what he took to be the straightforward reading of *Eisentrager* and all other relevant case law: "There is simply no support for the Court's assertion that constitutional rights extend to aliens held outside U.S. sovereign territory."[25]

The truth is, however, that Justices Rehnquist, Scalia, and the other dissenters in *Boumediene* oversimplified the prior case law.[26] The

19. *See infra* pp. 59–69.

20. *See infra* pp. 69–80.

21. *See infra* pp. 80–111.

22. 339 U.S. 763 (1950).

23. United States v. Verdugo-Urquidez, 494 U.S. 259, 269 (1990).

24. U.S. CONST. amend. V.

25. Boumediene v. Bush, 553 U.S. 723, 841 (2008) (Scalia, J., dissenting) (citing *Verdugo-Urquidez*, 494 U.S. at 271).

26. *See* Judge José Cabranes, *Our Imperial Criminal Procedure: Problems in the Extraterritorial Application of U.S. Constitutional Law*, 118 YALE L.J. 1660, 1711 (2009) ("In the Court's decisions on particular applications for the extraterritorial application of the Constitution, we discern [not a categorical approach, but] instead a pragmatic, context-specific approach to determin-

most defensible reading of the case law, I will argue, is that it was unclear whether NRAs had constitutional rights before *Boumediene*, and that the best reading of *Boumediene* is one in which they have at least *some* constitutional rights.[27]

### *A. Ambiguity in* Eisentrager

*Johnson v. Eisentrager* involved German nationals who were captured in China after Germany's surrender in World War II, convicted by a U.S. military tribunal for the war crime of continuing to engage in hostilities against the U.S. after their country had surrendered, and then held on an American Army base in Germany.[28] They petitioned for a writ of habeas corpus, complaining that their conviction and imprisonment violated the U.S. Constitution.[29] The Court held that the U.S. courts had no jurisdiction to grant habeas to these petitioners.[30]

There are a number of passages in *Eisentrager* that support the reading that NRAs simply have no constitutional rights on which habeas could have been granted. But there are other passages, of equal importance, and there are things that the Court did *not* say, that support the opposite reading. In the final analysis, the fairest reading of the case is that it did not resolve the question of whether NRAs benefit from some constitutional rights in certain circumstances.

The following were among the most important passages in *Eisentrager* in support of the view that NRAs do not benefit from constitutional rights:

> • We are cited to no instance where a court, in this or any other country where the writ [of habeas corpus] is known, has issued it on behalf of an alien enemy who, at no relevant time and in no stage of his captivity, has

ing whether the protection or limitation in question applies beyond the borders of the United States."); *see also* Judge Karen Nelson Moore, *Aliens and the Constitution*, 88 N.Y.U. L. REV. 801, 845 (2013) ("[T]he application of due process standards to aliens by courts has been variable and nuanced in federal jurisprudence.").

27. I argued that NRAs should be taken to have constitutional rights in Alec Walen & Ingo Venzke, *Detention in the "War on Terror": Constitutional Interpretation Informed by the Law of War*, 14 ILSA J. INT'L. & COMP. L. 45 (2008). I continue to support that position, but my reasons have evolved substantially since that piece.

28. Johnson v. Eisentrager, 339 U.S. 763, 765–66 (1950).

29. *Id.* at 764–68.

30. *Id.* at 785.

been within its territorial jurisdiction.[31]

- [I]n 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.[32]
- The foregoing [a discussion of the limited rights of resident enemy aliens in wartime, and reasons not to extend these rights to nonresident enemy aliens in wartime] demonstrates how much further we must go if we are to invest these enemy aliens, resident, captured and imprisoned abroad, with standing to demand access to our courts.[33]

On the other hand, there are at least two reasons not to read *Eisentrager* as having made the sweeping claim that Justice Scalia and others take it to have made. First, the Court could have said, simply and directly at some point in its opinion, that NRAs benefit from no constitutional protections. It never did. Instead, it makes more qualified statements, such as these:

- We hold that the Constitution does not confer a right of personal security or an immunity from military trial and punishment upon an *alien enemy engaged in the hostile service of a government at war with the United States*.[34]
- [T]he nonresident *enemy* alien, especially one who has remained in the service of the enemy, does not have even this qualified access to our courts [the one had by resident enemy aliens], for he neither has comparable claims upon our institutions nor could his use of them fail to be helpful to the enemy.[35]
- It is war that exposes the relative vulnerability of the alien's status.[36]
- [D]isabilities this country lays upon the alien who becomes also an enemy are imposed temporarily as an

31. *Id.* at 768; *see also* Boumediene v. Bush, 553 U.S. 723, 834–35 (2008) (Scalia, J., dissenting).

32. *Eisentrager*, 339 U.S. at 771; *see also Boumediene*, 553 U.S. at 835 (Scalia, J., dissenting).

33. *Eisentrager*, 339 U.S. at 777; *see also Boumediene*, 553 U.S. at 837 (Scalia, J., dissenting).

34. *Eisentrager*, 339 U.S. at 785 (emphasis added).

35. *Id.* at 776 (emphasis added).

36. *Id.* at 771.

incident of war and not as an incident of alienage.[37]

These passages support the reading later offered by Justices Brennan and Marshall: "The Court rejected the German nationals' efforts to obtain writs of habeas corpus not because they were foreign nationals, but because they were *enemy* soldiers."[38]

The second reason not to read *Eisentrager* as having made the sweeping claim that Justice Scalia and others take it to have made is that, as the majority in *Boumediene* notes: "The discussion of practical considerations in [*Eisentrager*] was integral to a part of the Court's opinion that came before it announced its holding."[39] There would have been no reason to go into these practical considerations, ranging from the mechanics of habeas petitioning to the necessities of war fighting, if the constitutional answer were simply that NRAs do not benefit from constitutional rights.

In the end, one must conclude that the *Eisentrager* case was ambiguous and left the question of constitutional rights for NRAs open for further argument.

### *B. Ambiguity in* Verdugo-Urquidez

The dominant view draws support not only from *Eisentrager*, but from a subsequent case, *United States v. Verdugo-Urquidez*.[40] Admittedly, Justice Rehnquist's opinion, onto which a five-justice majority signed, described the *Eisentrager* Court's "rejection of extraterritorial application of the Fifth Amendment" as "emphatic."[41] It held that the rejection of Fourth Amendment rights was, per force, even easier to establish.[42] Normally, the fact that a majority of the Justices sign an opinion on a constitutional matter would make it binding law unless and until a subsequent majority opinion overrules it. But this was an unusual majority opinion. Justice Kennedy, who signed the

37. *Id*. at 772.

38. United States v. Verdugo-Urquidez, 494 U.S. 259, 291 (1990) (Brennan, J., dissenting) (emphasis added). It is worth adding here that enemy alien status, while sufficient to justify some state actions, such as detention in certain situations, should not be held to be a basis for denying a person, even a nonresident person, all constitutional rights. The European Court of Human Rights is ahead of the Americans' in recognizing this. *See* Al-Skeini v. United Kingdom, 53 Eur. Ct. H.R. 589, 647–50 (2011) (holding that the European Convention applied to the beating and murder of an enemy alien in a British detention facility in Iraq).

39. Boumediene v. Bush, 553 U.S. 723, 723 (2008); *see also Al-Skeini*, 53 Eur. Ct. H.R. at 763.

40. *See* 494 U.S. 259 (1990).

41. *Id*. at 269.

42. *Id*.

majority opinion, also wrote a concurring opinion in which he distanced himself from certain elements of the majority opinion.[43]

Kennedy cited at length Justice Harlan's concurring opinion in *Reid v. Covert*, in which Harlan rejected the proposition "that the Constitution 'does not apply' overseas," and endorsed instead the proposition "that there are provisions in the Constitution which do not *necessarily* apply in all circumstances in every foreign place."[44] Kennedy also adopted Harlan's test for finding that Constitutional provisions do not apply extraterritorially: when so applying them would be "impracticable [or] anomalous."[45] Applying that test to the case at hand, he held that "[t]he conditions and considerations of this case would make adherence to the Fourth Amendment's warrant requirement impracticable [or] anomalous."[46] This was a fairly narrow holding. As a result, the better reading of the lead opinion is that in important ways it was only a plurality opinion. In truth, a majority of the Court held only that the Warrant Clause of the Fourth Amendment[47] did not apply to the search of property outside the United States, owned by an NRA who lacked substantial, voluntary connections to the United States.[48]

It is true that Justice Kennedy wrote that he did not believe that his views "depart[ed] in fundamental respects from the opinion of the Court . . . ."[49] Despite this insistence, he framed a very different vision—a pragmatic vision, seeking to extend constitutional protections when doing so would not be "impracticable [or] anomalous"—of whether NRAs benefitted from constitutional protections.[50] In addition, Kennedy got another bite at that apple, writing the majori-

43. *Id.* at 275–76 (Kennedy, J., concurring).

44. 354 U.S. 1, 74 (1957) (Harlan, J., concurring) (emphasis added) (holding that the wives of American servicemen living in England, charged with capital murder, were entitled to the criminal trial protections of the Fifth Amendment).

45. *Id.* Harlan's original phrasing is "impracticable *and* anomalous" (emphasis added), but it makes more sense for either prong to suffice for holding that people do not enjoy a constitutional right in a particular context.

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

47. U.S. CONST. amend. IV ("[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

48. *Verdugo-Urquidez*, 494 U.S. at 271.

49. *Id.* at 275 (Kennedy, J., concurring).

50. *Id.* at 278 (Kennedy, J., concurring) (quoting Reid v. Covert, 354 U.S. 1, 74 (1957)); *see also* GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION 105 (1996) ("Kennedy's concurring opinion diverged so greatly from Rehnquist's analysis and conclusions that Rehnquist seemed really to be speaking for a plurality of four.").

ty opinion in *Boumediene*. In that case, he and the majority clearly rejected Rehnquist's categorical repudiation of constitutional rights for NRAs.[51] That fact supports the thought that Rehnquist was speaking only for a plurality of the Court when he expressed his view that NRAs enjoy no constitutional protections.

### *C.* Boumediene *and the Extension of Constitutional Rights to NRAs*

Seeking to frame his decision as an extension of the practical reasoning in *Eisentrager*, and adopting a "functionalist"[52] approach to the extension of constitutional rights extraterritorially, Justice Kennedy in *Boumediene* offered a three-part balancing test to determine whether NRAs enjoy constitutional habeas rights. He wrote:

> [W]e conclude that at least three factors are relevant in determining the reach of the Suspension Clause: (1) the citizenship and status [i.e., enemy combatant or not] of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ.[53]

This test clearly implies that the constitutional right to habeas can, in certain circumstances, extend to NRAs. Moreover, the fact that it was held to support a constitutional right to habeas for NRAs with no voluntary connection to the United States clearly repudiates Rehnquist's assertion that constitutional rights for NRAs always depend on their having a "significant voluntary connection" with the United States.[54] But it still leaves a number of important issues up in

51. *See* Boumediene v. Bush, 553 U.S. 723, 764 (2008).

52. Justice Kennedy describes a line of cases, from the "Insular Cases" to *Eisentrager* and *Reid* as all using a "functional approach to questions of extraterritoriality." *Id.* at 764. Neuman identifies the functional approach with what he earlier called the "global due process" approach. *See* Gerald L. Neuman, *The Extraterritorial Constitution After* Boumediene v. Bush, 82 S. CAL. L. REV. 259, 289 n.151 (2009) (citing his discussion in STRANGERS TO THE CONSTITUTION, [NEUMAN, *supra* note 50, at 113–16).

53. 553 U.S. at 766.

54. *Verdugo-Urquidez*, 494 U.S. at 271. Nonetheless, a number of appellate courts have not taken the point. *See* Hernandez v. United States, 757 F.3d 249, 265 (5th Cir. 2014) (acknowledging that "the *Boumediene* Court appears to repudiate the formalistic reasoning of *Verdugo–Urquidez*'s sufficient connections test," but following other courts that "have continued to rely on the sufficient connections test and its related interpretation of the Fourth Amendment

the air, and the guidance it offers depends upon whether one reads the case broadly or narrowly.

One way in which to read the case narrowly is to argue that it expanded constitutional rights only to those territories where the United States is the de facto, if not the de jure, sovereign. This reading is encouraged by the Court's extensive discussion of the de facto sovereignty that the United States actually exercises in Guantanamo.[55] That discussion does not negate, however, the fact that the Court endorsed the relevance of many other factors as well in its three-factor test. Moreover, the Court explicitly says: "A constricted reading of *Eisentrager* overlooks what we see as a common thread uniting the Insular Cases,[56] *Eisentrager,* and *Reid*: the idea that questions of extraterritoriality turn on objective factors and practical concerns, not formalism."[57] Expanding the formal concern with de jure sovereignty by including only one extra inquiry, an inquiry into de facto sovereignty, does not do justice to the range of "objective factors and practical concerns."[58]

A second way to read the case narrowly is as applying only to the constitutional right to habeas. This reading has been adopted by a few lower courts.[59] As a doctrinal matter, it is supported by the idea

text"), *overturned on other grounds*, 785 F.3d 117 (5th Cir. 2015) (en banc); Ibrahim v. Dep't of Homeland Sec., 669 F.3d 983, 997 (9th Cir. 2012) (holding that petitioner did not sever her "significant voluntary connection" in a Fifth Amendment context); United States v. Emmanuel, 565 F.3d 1324, 1331 (11th Cir. 2009) (holding that petitioner did not enjoy Fourth Amendment rights because he lacked a "significant voluntary attachment to the United States").

55. *See Boumediene*, 553 U.S. at 753–55, 764–66.

56. *See id*. at 756. The Insular Cases include De Lima v. Bidwell, 182 U.S. 1 (1901); Dooley v. United States, 182 U.S. 222 (1901); Armstrong v. United States, 182 U.S. 243 (1901); Downes v. Bidwell, 182 U.S. 244 (1901); Hawaii v. Mankichi, 190 U.S. 197 (1903); and Dorr v. United States, 195 U.S. 138 (1904). *See also* Balzac v. Porto Rico, 258 U.S. 298 (1922).

57. *Boumediene*, 553 U.S. at 764.

58. *Id*.; *see also* Al-Maqaleh v. Gates, 605 F.3d 84, 95 (D.C. Cir. 2010) ("[H]ad the *Boumediene* Court intended to limit its understanding of the reach of the Suspension Clause to territories over which the United States exercised *de facto* sovereignty, it would have had no need to outline the factors to be considered either generally or in the detail which it in fact adopted. We therefore reject the proposition that *Boumediene* adopted a bright-line test with the effect of substituting *de facto* for *de jure* in the otherwise rejected interpretation of *Eisentrager*.").

59. *See* Rasul v. Myers, 563 F.3d 527, 529 (D.C. Cir. 2009) (claiming that "the Court in *Boumediene* disclaimed any intention to disturb existing law governing the extraterritorial reach of any constitutional provisions, other than the Suspension Clause"); *see also* Kiyemba v. Obama, 555 F.3d 1022, 1026 (D.C. Cir. 2009) (holding that Guantanamo detainees cannot invoke the Due Process Clause), *vacated*, 559 U.S. 131 (per curiam), *reinstated as modified*, 605 F.3d 1046 (D.C. Cir. 2010) (per curiam). *But see* Hernandez v. U.S., 785 F.3d 117, 138 (5th Cir. 2015) (Prado, J., concurring) (holding that Fifth Amendment Due Process rights can be invoked by an NRA).

that the Suspension Clause—according to which "[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"[60]—is a "structural clause," rather than a clause protecting any rights. Structural clauses limit the power of a branch of government without necessarily appealing to a right as the basis for that limit. Another example from the same section of the Constitution is the ban on the U.S. government granting titles of nobility. Both can be understood simply as restrictions on the power of Congress.

If that is how the Suspension Clause should be understood, then, as Stephen Vladeck explains, "its scope," or geographic range of application, "must be understood wholly apart from individual rights such as due process."[61] And as he further explains, "although we may (inartfully) refer to the 'right' of habeas corpus, habeas is not a right; it is a remedy, and one the availability of which in no way turns on whether or to what extent *other* constitutional protections apply."[62] It could apply merely to protect other statutory or treaty based rights the petitioners have.[63] Therefore, according to Vladeck, one cannot infer from the Court's statement that NRAs enjoy habeas "rights" to conclude that they enjoy true individual rights under the Constitution.

There are, however, two problems with this reading of *Boumediene*. One is that Kennedy's *Boumediene* opinion drew on his *Verdugo-Urquidez* concurrence,[64] and framed much of the discussion around cases like *Eisentrager* and *Reid*,[65] which together concerned Fourth and Fifth Amendment rights—rights that cannot be read as "structural." The other problem is that the underlying issue in *Boumediene* was the loss of liberty without due process—a constitutional problem under the Fifth Amendment.[66] The Court did not *cite*

60. U.S. CONST. art. 1, § 9, cl. 2.

61. Stephen I. Vladeck, *Insular Thinking About Habeas*, 97 IOWA L. REV. BULL. 16, 19 (2012).

62. *Id.*

63. In support of this point, Vladeck cites the federal habeas statute, 28 U.S.C. § 2241(c)(3) (2006) (conditioning habeas jurisdiction on a claim that the prisoner is "in custody in violation of the Constitution *or* laws *or* treaties of the United States" (emphases added)). *Id.* at 19 n.23.

64. *See generally* Boumediene v. Bush, 553 U.S. 723 (2008). Kennedy made the general point quite clearly in his *Verdugo-Urquidez* concurrence. "The question before us . . . [is] what constitutional standards apply when the Government acts, in reference to an alien, within its sphere of foreign operations." United States v. Verdugo-Urquidez, 494 U.S. 259, 277 (1990) (Kennedy, J., concurring).

65. *See Boumediene*, 553 U.S. at 757–64.

66. *Id.* at 760 (addressing the loss of Fifth Amendment rights in *Reid* and *Ross*).

the Fifth Amendment, but it made it clear that the problem was excessively long detention without sufficient procedural protections to ensure that the detainees were really enemy combatants who could legally be detained.[67] In sum, the better reading of the case is that NRAs benefit not only from the constitutional "remedy" of habeas, but also from some underlying constitutional rights that might call for habeas protection.

This broad reading of *Boumediene* still leaves almost everything to be decided. It in no way indicates which rights should be accorded to NRAs. For guidance on that question, one has to turn to a normative assessment of the idea of constitutional rights for NRAs—the focus of Part III of this paper. But before turning to that task, the discussion of the law itself needs to be concluded. And with regard to case law in particular, two more points should be made.

First, the three-factor test obviously cannot extend in any straightforward way to other rights; with its focus on detention, it is specifically framed to fit habeas rights.[68] If that test is abandoned outside of the habeas context, then the only other standard the Court has offered is that a right should not be extended if doing so is "impracticable [or] anomalous."[69] In other words, if the costs of extending a right are too high to be practically borne, or if extending a right would not make sense given the type of right it is, then the right should not be extended. This suggests both that there should be a presumption in favor of extending constitutional rights and that the presumption can be easily (too easily) overridden.[70] An appropriate normative theory is needed to refine this vague and underprotective idea, and perhaps to push the Court to replace it with something more fitting.

Second, Justice Kennedy has expressed resistance to the idea of global constitutional rights for all: "[T]he Constitution does not create, nor do general principles of law create, any juridical relation be-

67. *Id.* at 794 ("In some of these cases six years have elapsed without the judicial oversight that habeas corpus or an adequate substitute demands.").

68. *See id.* at 766. The incoherence of trying to apply the three-factor habeas test to other rights has not stopped courts from trying to do so. *See, e.g.*, Hernandez v. United States, 757 F.3d 249, 268–70 (5th Cir. 2014).

69. *Boumediene*, 553 U.S. at 759.

70. *See* NEUMAN, *supra* note 50, at 114 (describing the "permissiveness" of the global due process, or functionalist, positions on constitutional rights for NRAs). *See also* Christina Duffy Burnett, *A Convenient Constitution? Extraterritoriality After* Boumediene, 109 COLUM. L. REV. 973, 1031 (2009) (describing the functional approach as one that has "been reserved for marginal people in marginal places").

tween our country and some undefined, limitless class of noncitizens who are beyond our territory."[71] Something like this has to be accepted as a constraint that the Court in the future would almost certainly impose on any normative account of constitutional rights for NRAs. But it is important to be clear about what the right constraint would be.[72] It cannot be true that certain persons can be afforded no constitutional rights against the United States, regardless of what the United States did to them. For example, there are no persons who could be picked up and held indefinitely in Guantanamo without trial who would not benefit from the constitutional right to habeas corpus.

To be conceptually clear about it, it would be better to say two things: first, there *is* a juridical relationship between the United States and all persons, citizens and aliens, residents and nonresidents, such that *if* the United States takes certain actions with respect to them, it has violated their constitutional rights; but, second, the actual, substantive relationship between the United States and most NRAs is so thin that they have no basis for bringing any constitutionally grounded claim against the United States.

This reformulation of Kennedy's point captures the insight that U.S. citizens and resident aliens live in a context in which their constitutional rights are likely to make a significant difference to how they lead their lives. These rights control the sorts of laws under which residents, both citizen and alien, live. Even nonresident citizens, if they have ongoing relations with the United States, will have quite general concerns with the structure of U.S. law. Most NRAs, those without property or other substantial connections to the U.S., have, I will argue, constitutional rights only in the passive sense that they can invoke them to limit certain directly harmful unjust acts the U.S. might perform. Putting it another way, residents and, to some extent, nonresident citizens live under laws that touch on, even if they do not violate, their constitutional rights. But for the most part, the laws of the United States do not even touch on the constitutional rights of NRAs. In that sense, most NRAs have no *active* judicial relationship with the United States.

In sum, *Boumediene* clearly held that NRAs, even those without significant voluntary connections to the United States, have consti-

71. United States v. Verdugo-Urquidez, 494 U.S. 259, 275 (1990).

72. Gerald L. Neuman, *Whose Constitution*, 100 YALE L.J. 909, 974 n.390 (1991) ("It is hard to give this proposition a sensible meaning that is not false.").

tutional rights under the U.S. Constitution.[73] I will argue in Part III, as a normative matter, that if an NRA is directly and unjustly harmed by U.S. law or actions, then and only then can he or she raise constitutional complaints. This leaves the vast majority of the world with little to no constitutional basis for a complaint—a feature of this account that makes as much sense as can be made of Kennedy's claims that the U.S. Constitution must not be interpreted as if there is some "juridical relation between our country and some undefined, limitless class of noncitizens who are beyond our territory."[74] Finding that they have rights not to be unjustly harmed by the U.S. under the U.S. Constitution does not imply that they live *under* the U.S. Constitution, or that it somehow is *their* Constitution. It means only that they can seek redress in U.S. courts if the U.S. unjustly harms or seeks to harm them.

## II. ARGUMENTS BASED ON TEXT AND ORIGINAL UNDERSTANDING

Case law may have taken a turn in favor of extending constitutional protections to NRAs in *Boumediene*, but case law is not the only source of constitutional law. One may seek other sources to support or challenge the turn in *Boumediene*. The most obvious other sources are the text of the Constitution itself and the original understanding of that text. In this Part, I take these sources in turn, arguing that they are inconclusive, and that the only proper way to understand whether and how to extend the decision in *Boumediene* is to look to the underlying norms necessary to establish the justice and legitimacy of the U.S. Constitution—a topic to which I turn in Part III.[75]

### *A. The Limits of Textualist Arguments*

Textualist arguments have been made both for and against constitutional rights for NRAs. In favor of extending constitutional rights to NRAs, one can find arguments like this: "The choice in the Bill of Rights of the word 'person' rather than 'citizen' was not fortuitous; nor was the absence of a geographical limitation. Both reflect a

73. *See generally Boumediene*, 553 U.S. at 798.

74. *Verdugo-Urquidez*, 494 U.S. at 275.

75. *See infra* Part II.

commitment to respect the individual rights of all human beings."[76] Admittedly, the Bill of Rights uses many words other than "person." Amendments 1, 2, 4, 9, and 10 speak of rights of "the people," while the Sixth Amendment concerns the rights of "the accused."[77] In addition, the Bill of Rights contains some explicit geographic limitations. The Sixth Amendment, for example, provides for jury trials in "the State and district wherein the crime shall have been committed."[78] But the core Fifth Amendment protections of life, liberty, and property are written to apply to persons, without a limit on nationality or geography.[79]

Two arguments can be made against this reading of the text of the Fifth Amendment. First, one can argue that not much should be read into the choice of the word "person." As J. Andrew Kent points out, "in practical usage, words like 'man,' 'people,' 'subject,' 'individual,' or 'person' are almost always indistinct in scope."[80] He adds, "[i]f the differences in language signified immensely important differences in coverage, one might have expected to see detailed public debate about word choice during the framing of the U.S. Bill of Rights and consideration of the possible scope of different choices."[81] He then points out that there is no such evidence.[82] Instead, as Kent illustrates, the various Bills of Rights adopted by states seemed to use different words essentially for stylistic reasons:

> New York's ratification convention suggested a First Amendment-style assembly clause protecting "the People," while its petition clause, found in the very same section, protected instead "every person." A similar variability in wording is found in the Declaration of Rights of the 1780 Massachusetts Constitution. Many rights are described as being held by "the people," while others are held by "subject[s]." A few rights protect "inhabitants," "individual[s] of the society," "person[s]," and "citizen[s]." In all of these

76. Louis Henkin, *The Constitution as Compact and as Conscience: Individual Rights Abroad and at our Gates*, 27 WM. & MARY L. REV. 11, 32 (1985). *See also* Gerald Neuman, *Closing the Guantanamo Loophole*, 50 LOY. L. REV. 1, 49 (2004).

77. U.S. CONST. amends. I, II, IV, VI, IX, X.

78. U.S. CONST. amend. VI.

79. *Id.* at amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .").

80. Kent, *supra* note 13, at 515.

81. *Id.*

82. *Id.*

> precursors to the U.S. Bill of Rights, it is hard to discern a comprehensive political theory that explains the great variability in wording. For example, in the Massachusetts Constitution, the seemingly foundational and universal right to be tried only by independent and impartial judges is reserved for "citizen[s]," while the right to jury trial is given to "any person," and the right to "obtain justice freely, and without being obliged to purchase it" belongs to "[e]very subject of the commonwealth."[83]

In sum, there is no reason to interpret the use of "person" in the Fifth Amendment as a serious substantive commitment rather than a stylistic choice.

Second, Kent argues that the "globalist" reading of the text's use of "person" commits the "dis-integration fallacy."[84] In particular, he argues that "[v]iewed as a whole, the Constitution is not a globalist document."[85] He supports that position by appealing to the following: that the Preamble is clearly concerned with domestic, not foreign, affairs;[86] that the Privileges and Immunities Clause protects only the "Citizens of each State . . . in the several States";[87] and that Congress has greater power to use force externally than internally, including the power to "declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water."[88]

The problem with both arguments is that they are inconclusive. The word "persons" can be read to refer only to either persons living domestically or persons without qualification. And the domestic focus of much of the Constitution does not imply that other parts of the document, protecting certain rights, would not have global reach. Thus we must look beyond the text for other sources of authority on how best to interpret the words.

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83. *Id.* at 515–16 (alterations in original). In another interesting example, "[t]he Constitution refers to a 'person' accused of treason, but plainly this term cannot comprehend aliens abroad with no prior connection to the United States." *Id.* at 514.

84. *Id.* at 485.

85. *Id.*

86. U.S. CONST. pmbl. (stating that the Constitution is established "to insure domestic Tranquility . . . and [to] secure the Blessings of Liberty to ourselves and our Posterity . . .").

87. U.S. CONST. art. IV, § 2.

88. *Id.* at art. I, § 8, cl. 11. On all of these points and more related points, see Kent, *supra* note 13, at 509–13.

### *B. The Limits of Originalist Arguments*

The next obvious move is to appeal to the original understanding of the text.[89] No one doubts that this originalist perspective is a relevant consideration when interpreting the Constitution.[90] The question, assuming that a clear original understanding can be found, is: How much weight should be given to the original understanding of the text? To answer this question, one must consider the concrete expectations of the text's meaning, the changes that have taken place with regard to relevant facts (e.g., the relations between states) and relevant law (e.g., the extraterritorial extension of constitutional rights to U.S. citizens), and any conflicts between the original understanding and present day notions of democratic legitimacy. I will argue that the answer to the question is: not much, and certainly less weight than should be given to the underlying norms of democratic legitimacy.

It seems to be generally accepted that the Founding Fathers would not have accorded NRAs any constitutional protections. There was no discussion of such rights until the twentieth century. At the time of the founding, the debate was whether friendly (i.e., not enemy) *resident* aliens deserved constitutional protections.[91] The accepted view seems to have been that NRAs were protected only by "international law, diplomacy, and policy set by Congress and the President."[92] This historical fact would be enough for some justices on the Court to hold that NRAs still enjoy no constitutional

89. Appealing to original understanding has now mostly supplanted an appeal to original intent for most self-described originalists. *See* Mitchell Berman, *Originalism is Bunk*, 84 N.Y.U. L. REV. 1, 9 (2009). But nothing that I say here hangs on that distinction; the reader can take "original understanding" as shorthand for "framers' intentions or original public understanding."

90. *See id.* at 24–25 ("Not a single self-identifying non-originalist of whom I'm aware argues that original meaning has no bearing on proper judicial constitutional interpretation. To the contrary, even those scholars most closely identified with non-originalism—Paul Brest, David Strauss, Laurence Tribe, for example—explicitly assign original meaning or intentions a significant role in the interpretive enterprise.").

91. *See* Kent, *supra* note 13, at 531 ("[G]iven the poles of debate in the 1790s—Federalists denying that any aliens had constitutional rights; Republicans arguing that friendly aliens resident in the United States had constitutional rights—it is difficult to imagine that any thought that *nonresident* aliens located abroad had constitutional rights, especially during military conflicts."); *see also* NEUMAN, *supra* note 50, at 54–63.

92. Kent, *supra* note 13, at 540.

protections.[93] But there are reasons—reasons that would be recognized as relevant by most justices on the Court—to think that it would be inappropriate to rest the argument there. Some of these reasons can be stated as internal to originalism, and some cannot. I deal with the former set in the subsequent subsection, and the latter set in the second subsection.

### *1. Limits internal to originalism*

Internal to originalism, one must ask whether to respect the concrete expectations people had about how a law should be understood when it was originally adopted, or whether to respect the original purposes people took the law to have, even if the common or best understanding about how to achieve those purposes has evolved.[94] For an originalist, determining which "level of generality" is appropriate is not a matter subject to judicial discretion, but a matter that should be resolved by the original understanding at the time the law was passed.[95] At least in some cases, it seems clear that the right approach looks to fulfill original purposes. For example, the Eighth Amendment states that "cruel and unusual punishments [shall not be] inflicted." This has long been interpreted purposefully, so that the actual substance of what is prohibited does not reflect what would have been considered cruel and unusual in 1791, but rather "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[96] As Ronald Dworkin wrote, this interpretation of obviously moral language is supported by the idea that, "Enlightenment statesmen were very unlikely to think that their own views [or concrete expectations] represented the last word in moral progress."[97]

93. Justice Thomas is arguably the justice whose opinions conform most to originalist precepts. *See* Randy E. Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 75 U. CIN. L. REV. 7, 7 (2006). But Justice Scalia may be its most "vociferous" defender. *Id*. at 13.

94. *See* RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 13 (1996); RONALD DWORKIN, A MATTER OF PRINCIPLE 57 (1985).

95. *See, e.g.*, KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 187 (1999) ("The level of generality at which terms were defined is . . . a contextualized historical one.").

96. Trop v. Dulles, 356 U.S. 86, 101 (1958). That quote was from a plurality opinion, but it is endorsed by a majority in many cases. *See, e.g.*, Hall v. Florida, 134 S. Ct. 1986, 1992 (2014).

97. Ronald Dworkin, *Comment, in* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 124 (Amy Gutmann ed., 1997).

For the originalist to argue that it is clear that the Constitution should now be interpreted to extend its protections to NRAs no more than when it was adopted to hold, she would have to argue that the original understanding of the relevant level of generality for the scope of constitutional protections was at the level of concrete expectations, not underlying purposes. In truth, however, it is hard to imagine that either the drafters of the Constitution or those who ratified it gave that issue much thought. This would not matter if the underlying purpose of extending constitutional protections to some people (and not to others) is still best served by restricting constitutional rights as they were originally restricted. But, as will be argued shortly, that seems not to be the case. And if there is a conflict between concrete expectations and underlying purposes, and there is no originalist reason to choose one over the other, then originalism seems not to have the resources to direct courts one way or another.

This is a real problem for originalism because there is indeed reason to think that at least some purposes served by extending constitutional protections only to domestic populations are now best served by opening the protection up more broadly. This is because the world has changed in relevant ways.[98] These changes may also be relevant to an external critique of originalism, but I want first to assess them internally.

One way the world has changed is reflected in the evolution of the doctrine regarding the extraterritorial extension of constitutional protections for citizens. The predominant nineteenth-century conception was that people generally enjoyed constitutional rights un-

98. *See* Weems v. United States, 217 U.S. 349, 373 (1910):

> Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore, a principal, to be vital, must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, 'designed to approach immortality as nearly as human institutions can approach it.' . . . In the application of a constitution, therefore, our contemplation cannot be only of what has been, but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value, and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality.

This was quoted in Justice Brandeis's dissenting opinion in *Olmstead v. United States*, 277 U.S. 438, 472–73 (1928).

der the U.S. Constitution only when living within U.S. territory.[99] There were exceptions to that rule.[100] Nonetheless, it was not firmly established that U.S. citizens living outside the United States benefitted from constitutional rights until *Reid v. Covert* in 1957.[101] This change might be thought to reflect simply a drift—an illegitimate drift from an originalist point of view—in constitutional doctrine. But it can be brought within a purposive account by paying attention to the underlying reasons for extending constitutional rights to U.S. citizens abroad. At least some of those reasons suggest changes in the world that should be relevant to the reason for extending constitutional protections to anyone. As Gerald Neuman put it: "[T]he overthrow of strict territoriality represents an appropriate evolutionary response to changes in the technology of transportation and communication, background international practices, and American self-assertion."[102] In other words, as the world became more interconnected, and the United States exercised more force abroad, it became necessary to protect U.S. citizens from the abusive use of that force abroad. Obviously, the need to check the abuse of the U.S. government and its agents operating abroad applies to aliens as well as citizens.

Another relevant legal change is that rights protection itself has evolved dramatically since the U.S. Constitution was first adopted. Originally, the Bill of Rights was held not to restrict what individual states could do to their citizens.[103] The Fourteenth Amendment was adopted to change that, to ensure that states had to respect core rights as framed in the national Constitution. It took a while for that change to take effect. It was not until the 1890s—at the beginning of

99. *See* Ross v. McIntyre, 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 offences committed elsewhere, and not to residents or temporary sojourners abroad. The constitution can have no operation in another country.

(internal citation omitted); *see also* NEUMAN, *supra* note 50, at 7, 73; Kent, *supra* note 13, at 493.

100. *See* Kent, *supra* note 13, at 494–97.

101. 354 U.S. 1, 78 (1957) (holding that the wives of American servicemen living in England, charged with capital murder, were entitled to the criminal trial protections of the Fifth and Sixth Amendments).

102. Neuman, *supra* note 72, at 980.

103. *See* Barron v. Baltimore, 32 U.S. 243, 251 (1833) (holding that the Fifth Amendment restriction on the taking of property did not restrict the states from doing so).

what is known as the "*Lochner*[104] era"—that the Court started to act regularly to protect individual rights. The protection of rights picked up speed in the period from the 1950s to the 1970s, as most of the Bill of Rights came to be enforced against the states. That same era marked the beginning of a period of global growth of judicial activity, both under the guise of judicial review of legislative acts and of judicial enforcement of human rights law.[105] These changes suggest a growing awareness—in the polity that enacted the Fourteenth Amendment, in domestic courts, and in global politics and jurisprudence—that courts should be somewhat reluctant to trust the political branches of government to respect the rights of people. That is, it reflected a growing belief that courts have an important role to play in protecting the rights of the people from those in power. Thus, even if it was originally thought that NRAs could be adequately protected by "international law, diplomacy, and policy set by Congress and the President,"[106] that specific expectation might no longer seem adequate to the purpose of protecting them. Court involvement, enforcing justiciable rights—which might turn out to be only constitutional rights[107]—might be a better fit with that purpose.

In sum, a purposive interpretation of the extension of constitutional rights seems to conflict with the original expectation of their extension. If there was no expectation regarding the proper level of generality, as seems likely to be the case, then originalism cannot choose between these two answers, and we must again search for guidance elsewhere.

### *2. Limits external to originalism*

Originalists might not accept the purposive argument just made, or might accept it but argue that there is sufficient reason to go with the original expectations. Even granting that the originalists were right to do so, the strength of their argument would still depend on the strength of originalism. Assessing the program of originalism as

104. Lochner v. New York, 198 U.S. 45 (1905). The first case in the *Lochner* era was Allgeyer v. Louisiana, 165 U.S. 578, 591 (1897) (striking down a Louisiana statute for interfering with the right of "liberty to contract").

105. *See* Cole, *Rights Over Borders*, *supra* note 12, at 51 (discussing "an important transnational trend of recent years, in which courts of last resort have played an increasingly aggressive role in reviewing (and invalidating) security measures that trench on individual rights").

106. Kent, *supra* note 13, at 540.

107. *See supra* notes 8–10 and accompanying text.

a whole is beyond the scope of this paper, but, drawing on work of Mitchell Berman and Kevin Toh,[108] I will summarize the argument that originalism oversimplifies the legal landscape. I will also argue that when the argument's dictates are contradicted by other legal considerations, in particular the significance of establishing justice and legitimacy, and especially when the law already does not conform to original expectations, one should look to other legal norms rather than hew to the originalist prescription.

The defining characteristic of contemporary, or "new," originalism is the view, as Steven Smith puts it, "that what counts as law—as valid, enforceable law—is what human beings enact, and that the meaning of that law is what those human beings understood it to be."[109] This can be interpreted as a simple, descriptive claim, or as a normative claim about how best to understand the law. As a descriptive claim, it is simply false. Much of U.S. constitutional law is not originalist in the strong sense that is relevant here, the sense that excludes from a determination of what the law is references to things inconsistent with the original meaning of the text.[110] Thus if originalism is to be plausible, it has to be argued for in some philosophical or normative way. One way to make such an argument is as a metaphysical point about the nature "of interpretation, of constitutions, of written documents, of law, of authority, or of democracy."[111] But that too seems not to get off the ground, as is shown by the fact that all of these activities or things *can and do* go on or exist when practiced, interpreted, or used by people who use non-originalist methodology. That leaves normative argument on behalf of originalism.

108. Mitchell N. Berman & Kevin Toh, *Pluralistic Nonoriginalism and the Combinability Problem*, 91 TEX. L. REV. 1739 (2013) [hereinafter Berman & Toh, *Pluralistic Nonoriginalism*]; Mitchell Berman & Kevin Toh, *On What Distinguishes New Originalism from Old: A Jurisprudential Take*, 82 FORDHAM L. REV. 545 (2013) [hereinafter Berman & Toh, *On What Distinguishes New Originalism from Old*].

109. Steven D. Smith, *Reply to Koppelman: Originalism and the (Merely) Human Constitution*, 27 CONST. COMMENT. 189, 193 (2010). The contrast is with "old originalism," the focus of which was on restraining the judiciary, not on what the law *is*. *Id.* at 192–93.

110. Berman and Toh plausibly claim that many originalists—"Whittington, Barnett, and Solum among others"—accept that "[c]ourts act properly in supplementing, in suitably cabined ways, the legal norms that result from [originalist] legal interpretations with implementing rules or devices that they generate through constitutional constructions." Berman & Toh, *On What Distinguishes New Originalism from Old*, *supra* note 108, at 562–63. These constructions may supplement the law discoverable by originalist inquiry but may not contradict it.

111. *Id.* at 571.

There are a number of normative bases that originalists can appeal to when arguing that strong originalism is better than an admixture of originalism and other inputs into constitutional interpretation. These include that originalism will better "promote or realize . . . democratic values, rule of law values (like stability and predictability), aggregate human welfare, or the like . . . ."[112] Berman and Toh convincingly argue that originalists have given no reason to think that it would promote these values better in general. But I turn now to examine what I think is the strongest of the originalist arguments, one that appeals to the norm of democratic legitimacy and the notion of the Constitution as a constraint.

Randy Barnett asserted that the "Constitution is the law that governs those who govern us [including the courts, and it] cannot serve this purpose if those who are supposed to be governed by it can, on their own . . . change the rules that apply to them."[113] According to Barnett's objection, those called upon to interpret and apply the Constitution should not rewrite it. The Constitution provides a rule for its revision—Article V—and may be legitimately revised only via that rule.[114]

This objection begs the question in two important ways, however. First, it assumes a certain willfulness is present in non-originalist judging, as though non-originalist judges act "on their own" without legal constraint. But that is not what non-originalists advocate. They argue simply that there are more inputs into what constitutional law *is* than the original meaning, perhaps supplemented with legal constructions that are consistent with the law as determined by original meaning.[115] These inputs are not "the will of the judges." Rather, they consist of standard considerations in legal reasoning, such as asking whether a ruling is consistent with long-accepted le-

112. *Id.*

113. Randy E. Barnett, *We the People: Each and Every One*, 123 YALE L.J. 2576, 2588 (2014) (alteration in original).

114. *See id.* at 2605 ("Ackerman's informal amendment procedures simply cannot claim greater legitimacy than the Article V procedures he seeks to supplement."). In further support of the importance of legitimacy as the reigning norm for originalists, see ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 143 (1990); SCALIA, *supra* note 97, *passim*.

115. *See* Berman & Toh, *On What Distinguishes New Originalism from Old, supra* note 108 (discussing constructions).

gal practices, case precedent, and the respect for the freedom and equality of persons.[116]

Second, the objection presupposes that the Constitution's Article V is the only legitimate mechanism by which the Constitution can be amended. If, however, this one limited tool is too limited, if being restricted to using it and only it sufficiently undermined the legitimacy of the document as a whole, then there is reason for the Court to supplement Article V and rectify the other substantive flaws that undermine the Constitution's legitimacy. This approach to constitutional law seems to be what animated the Court, for example, when it considered school segregation in the District of Columbia. The holding in *Brown v. Board of Education*,[117] the case in which the Court struck down racial segregation in state run public schools, rested on the equal protection clause of the Fourteenth Amendment. The Fourteenth Amendment, by its terms, applies only to the states. This raised the question of whether federal territories, such as the District of Columbia, which are governed by the Fifth Amendment but not the Fourteenth Amendment, could continue to run racially segregated schools, given that the Fifth Amendment lacks an equal protection clause. The absence of this clause might have been interpreted as barring the Court from declaring racially segregated schools in the District of Columbia unconstitutional. However, the Court held that "it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government."[118]

One could demand that all such flaws be fixed by the Article V amendment process. But that process is a fundamentally political one, and the politics of the day may not be attuned to the flaws in the Constitution that undermine its legitimacy. Thus, it is often vastly more efficient for the Court simply to fix a problem itself.[119] Moreover, there is no good reason, from the viewpoint of legitimacy of the law, that the law cannot be patched by judicial fiat. The result of such patching can be and normally is viewed as legitimate consti-

116. For a plausible list of non-originalist basic constitutional norms, see Berman & Toh, *Pluralistic Nonoriginalism*, *supra* note 108, at 1754–55.

117. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

118. Bolling v. Sharpe, 347 U.S. 497, 500 (1954).

119. If the flaw were sufficiently profound, and politically contested, no judicial patch would stick. For example, it seems plain that the Court could not, on its own, have banned slavery as the Thirteenth Amendment did. That kind of constitutional change could only have resulted from the kind of fight that was eventually resolved by the North's victory in the Civil War.

tutional law by all (or almost all) officials who have sworn a duty to uphold the Constitution.[120] Nor is this sort of fixing radically inconsistent with Article V. Rather, this "patching" simply switches the presumption about who has to act, allowing the amending process to be used to undo what the justices have done.

In sum, the norm of legitimacy may call for non-originalist reasoning, rather than analysis aligned as closely as possible to the original understanding of the constitutional text. When legitimacy does call for non-originalist reasoning, and especially when the case law has already departed from that original understanding, the pull of originalism is outweighed by the pull of legitimacy. We are left, then, with the need to move on to a careful discussion of the legitimacy of *not* extending constitutional rights to NRAs. If not extending those rights is legitimate, then perhaps the original understanding should at least be a drag on any further extensions of such rights. But if democratic legitimacy requires that constitutional rights be extended at least somewhat broadly to NRAs, then legitimacy should carry more weight in a proper reading of the Constitution than a simple, flatfooted appeal to original understanding.

## III. NORMATIVE FOUNDATION FOR CONSTITUTIONAL RIGHTS FOR NRAS

Constitutional law is pervasively concerned with legitimacy. Of course, the Court is guided by concerns with its own legitimacy.[121] But more importantly, the Court is guided by concerns with ensuring the legitimacy of the government as a whole.[122] This emerges in

120. This is clearly demonstrated by the fact that *Bolling* is not the only case in which the Court "fixed" the Constitution—for another example, see Duncan v. Louisiana, 391 U.S. 145, 159–60 (1968) (holding that the right to trial by jury applied to crimes punishable by six months of prison or more, despite the fact that the Sixth Amendment states that the right applies to "all criminal prosecutions"—and there is no case in U.S. history in response to which a significant number of government officials have ever rebelled against the Court's authority.).

121. *See* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 865 (1992) ("The Court's power lies, rather, in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands.").

122. Interestingly, though the norm of democratic legitimacy is implicitly invoked in many ways, as demonstrated immediately below, this norm is invoked explicitly only by the more liberal members of the current or recent Court, and then only in dissent. The norm, or a close cousin of it, is invoked explicitly in *McCutcheon v. FEC*, 134 S. Ct. 1434, 1465 (2014) (Justices Breyer, Ginsburg, Sotomayor, and Kagan, dissenting from the Court's decision to strike down aggregate limits on campaign donations); *Citizens United v. FEC*, 558 U.S. 310, 446 (2010) (Justices Stevens, Ginsburg, Breyer, and Sotomayor, concurring in part and dissenting in part

varied judicial commitments: protecting "discrete and insular minorities"[123] while simultaneously seeking to allow the democratic process to work unfettered;[124] preserving the sort of speech necessary for democratic engagement;[125] ensuring that congressional districts come as close as possible to reflecting the idea of one vote per person;[126] pursuing the federalism agenda of the Rehnquist Court;[127] limiting the role of the courts when second-guessing agency interpretations of statutory language;[128] and seeking to limit the use of legislative history and to rely instead on textualism and original intent.[129]

The thesis of this part of the paper is that concerns with legitimacy can and should be brought to bear in deciding how to read the scope of constitutional protections. I will assess, in particular, two theories

from a decision striking down limits on corporate campaign donations, citing the importance of electoral integrity for "democratic integrity"); *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 504 (2007) (Souter, J., dissenting) (citing problems with "democratic integrity" that justified certain restrictions on "the electoral leverage of concentrations of money in corporate and union treasuries"); *Arlington Cent. School Dist. Bd. Of Educ. v. Murphy*, 548 U.S. 291, 324 (2006) (Breyer, J., dissenting) (citing "the legitimacy of our constitutional system" as a reason to use legislative history when interpreting statutory language). Prior to these cases, there was only one example of a Justice, the liberal Justice Stevens, invoking the concept of democratic legitimacy explicitly. Even he did so only in a footnote quoting a law review article. *See* Fullilove v. Klutznick, 448 U.S. 448, 550 n.26 (1980) (Stevens, J., dissenting).

123. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

124. *See generally* ELY, *supra* note 12 (developing the idea that the Court should be reluctant to strike down legislation except as necessary to police the democratic process).

125. *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) ("[W]e consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.").

126. *See* Reynolds v. Sims, 377 U.S. 533, 567 (1964) ("[T]he basic principle of representative government remains, and must remain, unchanged—the weight of a citizen's vote cannot be made to depend on where he lives.").

127. *See, e.g.*, Ann Althouse, *Variations on a Theory of Normative Federalism: A Supreme Court Dialogue*, 42 DUKE L.J. 979, 988 (1993) ("[A] theory of normative federalism [is explicated by] Justice O'Connor . . . in [some of] her more recent opinions. . . . Federalism diffuses power . . . to enhance democratic self-governance. The persons who benefit from this normative federalism are not the individual rights-claimants . . . but the citizens of the states, who form preferences that they express through the democratic process.").

128. *See, e.g.*, Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 613 (1995) (arguing that the *Chevron* doctrine is based on an "approach to democratic legitimacy [that] is premised on the normative primacy of majoritarianism").

129. *See id.* at 643 ("Scalia's defiant refusal to credit legislative history, in the face of a long interpretive tradition to the contrary, is part of his ongoing campaign to modify congressional behavior to serve his vision of better democratic practice.").

about the normative foundations of the law, both of which aim to provide a framework for understanding what could make it legitimate: social contract theory and democratic theory. Social contract theory has been invoked to justify extending constitutional rights to NRAs, but I will argue that this is an unsound application of social contract theory. Insofar as social contract theory has appeal in this context, that appeal trades on an independent commitment to respecting certain universal moral rights. Democratic theory, which can properly be brought to bear on the question of the scope of constitutional rights, must also be framed in a way that respects certain universal moral rights. The most defensible position, in the end, is that democratic legitimacy requires an interpretation of the Constitution according to which NRAs enjoy certain basic constitutional rights, which protect certain universal moral rights. I will then conclude this Part with an examination of and response to various objections to the thesis that the Constitution should be so interpreted.

### *A. Social Contract Arguments Regarding Constitutional Rights for NRAs*

Contractualism has a natural appeal in the context of constitutional law theorizing as constitutions are, in a straightforward way, documents constituting a social contract. Nonetheless, at least with regard to the question of whether NRAs enjoy constitutional rights, I will argue that contractualism is normatively useless. In one guise, Hobbesian membership theory, it is normatively vacuous. In another guise, mutuality of obligation—the idea that the state owes duties to those who owe it duties, and who may therefore be prosecuted if they breach those duties—it may have normative force for citizens and resident aliens, but not for NRAs.[130] An explanation for the fact that states may prosecute NRAs must turn on recognition of universal moral rights. NRAs can lay claim to constitutional rights protections against the states that would claim the right to prosecute them, but not as a matter of social contract. Their constitutional rights are rather a manifestation of the same underlying universal moral rights that form the moral basis for their being subject to criminal prosecution.

130. Neuman discuses both theories—membership and mutuality of obligation. NEUMAN, *supra* note 50, at 111–14.

### *1. Hobbesian membership theory*

According to the membership approach, the social contract exists only between citizens of a state. As a House select committee put it in 1799, in support of the Alien and Sedition Acts:

> [T]he Constitution was made for citizens, not for aliens, who of consequence have no rights under it, but remain in the country and enjoy the benefit of the laws, not as [a] matter of right, but merely as [a] matter of favor and permission, which favor and permission may be withdrawn whenever the Government charged with the general welfare shall judge their further continuance dangerous.[131]

One can make sense of this conception of the social contract in Hobbesian terms: certain people, the citizens, come together to form a government to establish law and order, and thereby peace, between themselves. Those who are not part of the contract remain in a state of war, or at best a *modus vivendi*, with them. The rights the sovereign provides for those taken under the umbrella of the social contract do not apply to those who are outside of the contract; except as a matter of side agreements with them or their government, or as "favors" that can be revoked whenever it seems more prudent to revoke them than to honor them.[132]

The problems with relying on this model of the social contract arise at two levels: lack of fit with the U.S. constitutional tradition and normative vacuity. The lack of fit seems most obvious at a doctrinal level, though it truly comes to light only when stepping back to appreciate the normative context in which the Constitution was drafted and adopted.

Doctrinally, a problem with fit arises from the fact that resident aliens have long been held to benefit from constitutional rights.[133] One could try to make sense of that within a Hobbesian framework as Justice Rehnquist did in *Verdugo-Urquidez*, by saying that it is only

131. 9 ANNALS OF CONG. 2987 (1799), *cited in* NEUMAN, *supra* note 50, at 55.

132. *See* THOMAS HOBBES, LEVIATHAN 189 (Ian Shapiro ed., Yale Univ. Press 2010) (1651) ("[T]he Infliction of evil whatsoever, on an Innocent man, that is not a Subject, if it be for the benefit of the Common-wealth, and without violation of any former Covenant, is no breach of the Law of Nature. For all men that are not Subjects, are either Enemies, or else they have ceased from being so, by some precedent covenants.").

133. *See generally* Yick Wo v. Hopkins, 118 U.S. 356 (1886) (holding that the Fourteenth Amendment protects resident aliens); Wong Wing v. United States, 163 U.S. 228 (1896) (holding that resident aliens are entitled to Fifth and Sixth Amendment rights).

those aliens who have made a "significant voluntary connection with the United States" who enjoy constitutional rights.[134] By making this connection, they become at least partial members of the social contract.[135] That, however, is an inadequate move to achieve full fit with U.S. constitutional law. As Justice Kennedy pointed out in his concurring opinion in *Verdugo-Urquidez*, "[a]ll would agree . . . that the dictates of the Due Process Clause of the Fifth Amendment protect" even an alien arrested in a foreign country and taken involuntarily to be tried in the United States.[136]

Justice Rehnquist has another move available to him. He could suggest that we accord defendants like Verdugo-Urquidez constitutional *trial* rights—even while denying that he should enjoy Fourth Amendment privacy rights with regard to his property in Mexico—because it would be socially awkward, or worse, undermining of the legal order, to have a second-class of legal procedures, operating domestically, for aliens who are tried in the United States.[137] In other words, he could argue that involuntary resident aliens—resident only because they were brought to the United States against their will—benefit from constitutional rights for our comfort and security, not because of their status as rights holders. The problem with this answer—which seems to be the best answer someone like Rehnquist can produce[138]—is that it brings us face to face with the normative vacuity of the Hobbesian approach to this issue. The truth about a Hobbesian theory of the state is that it contains no rights against the sovereign.[139] The only underlying norm is that the sovereign must make life secure enough that resisting would only create more insecurity for the individuals who resist it, thus making resistance irrational. If one happens to be granted legal rights by the sovereign, it

134. United States v. Verdugo-Urguidez, 494 U.S. 259, 271 (1990).

135. This fits with Hobbes's view about the non-subject forming a covenant with another country. *See* HOBBES, *supra* note 132, at 82–83.

136. 494 U.S. at 278.

137. It is unclear how awkward this would be, and why the United States should fetishize territory, given that it is willing to try NRAs accused of terrorist activities in a parallel court system of military commissions located in Guantanamo Bay. *See* the Military Commissions Act of 2009, 10 U.S.C. § 948b (2012). I question the legitimacy of this parallel court system in a later section of this Article. *See infra* Part III.C.6.

138. NEUMAN, *supra* note 50, at 113, considers and rejects a weaker answer: that they acquire rights as they acquire obligations of compliance once brought here. This is weak for a reason that Neuman does not see: it is not clear why they acquire "obligations" of compliance that they would not otherwise have.

139. *See* HOBBES, *supra* note 132, at 105–12.

is always a matter of pure discretion on the sovereign's part. The sovereign does no wrong if it decides that only a certain subset of people (e.g., white, propertied, Protestant males) benefit from constitutional rights. As a result, the Hobbesian approach to the question of the normative foundation of the state can provide no guidance for the question: Who is protected by constitutional rights?

If one is convinced that such foundational legal questions can only be answered by appeal to positive law in an Austinian sense—the commands of the sovereign[140]—then of course the normative project of this Part of the Article will seem foolish. If one accepts such a theory, then all one can do to advise a judge facing the question of who benefits from constitutional rights—whether NRAs, or resident aliens, or even citizens—is appeal to some norms outside of the law, be they moral or the sort of Hobbesian (or Machiavellian) prudential norms that would lead an advisor to say to the sovereign: do as you will, as long as you do not squander your power and undermine your ability to govern. In any case, one can offer no *legal* advice. But if one takes seriously the normative project of working out how best to interpret the law—as any true lawyer or judge must[141]—then one needs to look to a different kind of theory to discern who benefits from constitutional rights and who does not.

This normative vacuity point also allows one see the deeper sense in which a Hobbesian theory fundamentally does not fit the legal tradition of the United States. The United States was founded by people who were primarily guided by John Locke,[142] whose political orientation was grounded substantially on the premise that Hobbes was wrong, because the government must respect the rights of the people. As Thomas Jefferson wrote, in the *Declaration of Independence*:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty[,]

140. *See* Brian Bix, *John Austin*, *in* THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2014), *available at* http://plato.stanford.edu/archives/spr2014/entries/Austin-john/.

141. *See* H.L.A. HART, THE CONCEPT OF LAW 20 (3d ed. 2012) (criticizing Austin for being unable to distinguish a gunman's orders from a government of laws); RONALD DWORKIN, LAW'S EMPIRE 176–275 (1986) (discussing the norm of legal integrity as a guide to its interpretation).

142. *See* JOHN LOCKE, SECOND TREATISE OF GOVERNMENT (Richard Cox ed., Wiley 2014) (1690).

> and the pursuit of Happiness.—That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed . . . .[143]

This embrace of a Lockean, rather than a Hobbesian, moral view by the founders does not, by itself, imply a globalist position on constitutional rights.[144] Indeed, Locke clearly thought that government exists to serve the needs of the people who consent to be governed by it.[145] But the way he justified the limited powers of the government is relevant—in ways that will be explored in more detail the next section—for the rights of NRAs: "A man, . . . having in the state of nature no arbitrary power over the life, liberty, or possession of another, but only so much as the law of nature gave him for the preservation of himself, and the rest of mankind; this is all he doth, or can give up to the commonwealth."[146] This assertion implies that a state, which has only those powers that citizens can give up to it, has "no arbitrary power over the life, liberty, or possession[s]" of aliens. This idea is the sort of natural law/natural rights framework that informed the founders' conception of the social contract. A Hobbesian membership approach to the social contract cannot accommodate this fact.

### 2. *Mutuality of obligation*

The prime alternative social contract account of the extension of constitutional rights appeals to the idea of mutuality of obligation. As James Madison put it in 1800 (quoted by Justice Kennedy nearly 200 years later):

> [I]t does not follow, because aliens are not parties to the Constitution, as citizens are parties to it, that, whilst they actually conform to it, they have no right to its protection. Aliens are not more parties to the laws than they are parties to the Constitution; yet it will not be disputed that, as they

143. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

144. A global position is not implied because there are other ways of binding a government to respect the natural rights of aliens. My argument for constitutional rights for NRAs is a second-best position that should be adopted because the better alternative is not available. *See supra* notes 15–17 and accompanying text.

145. *See* LOCKE, *supra* note 142, § 131 (on government existing to serve the common good and correct the defects of the state of nature); *id.* § 95 (on consent as the foundation for civil society and government).

146. *See id*. § 135.

> owe, on one hand, a temporary obedience, they are entitled, in return, to their protection and advantage.[147]

This was not just Madison's argument. The idea of mutuality of obligation seems to have been generally accepted in the legal traditions and sources drawn upon by the founders of the U.S. Constitution—from the Hebrew Bible, to the writings of early modern legal scholars such as Vattel and Blackstone.[148]

Given that we live in a world in which countries now hold NRAs accountable for a range of crimes, the idea of mutuality of obligation has implications not just for resident aliens, but also for NRAs. As Gerald Neuman wrote:

> The United States has increasingly asserted the right to subject such persons to American law when their actions outside the country have effects within the country or on American citizens. . . . [T]he mutuality of obligation approach affords the express protections of fundamental law, to the extent their terms permit, as a condition for subjecting a person to the nation's law. Government's interference with the freedom or property of any human being must be justified, and when the justification relies on the individual's obligation to obey U.S. law, the criteria for justification include government's respect for constitutional rights.[149]

This argument can be restated as follows: The United States has reason to punish NRAs who threaten or harm it or its citizens. Punishment presupposes an obligation, the breach of which justifies the punishment. Thus, the United States must find that NRAs have obligations to obey U.S. law. But then the United States owes NRAs the protections of its Constitution in turn.

Unfortunately, this argument cannot work if framed as a fundamentally contractarian argument. This is because there is no way to make sense of NRAs' obligation to obey U.S. law within the framework of a social contract. The social contract tradition may make

147. United States v. Verdugo-Urquidez, 494 U.S. 259, 284 (1990) (Kennedy, J., concurring) (quoting JAMES MADISON, MADISON'S REPORT ON THE VIRGINIA RESOLUTIONS (1800), *reprinted in* 4 ELLIOT'S DEBATES 556 (2d ed. 1836) (defending the Virginia and Kentucky Resolutions, and protesting the Alien and Sedition Act)).

148. *See* Kent, *supra* note 13, at 503–05. As Blackstone wrote: "as the prince affords his protection to an alien, only during his residence in this realm, the allegiance of an alien is confined, in point of time, to the duration of such his residence, and, in point of locality, to the dominions of the British empire." 1 WILLIAM BLACKSTONE, COMMENTARIES *358.

149. NEUMAN, *supra* note 50, at 108–09.

sense of the duties that resident aliens owe, insofar as resident aliens are presumed to have consented to obey U.S. law by choosing, voluntarily, to sojourn there.[150] But generally no such consent can be found for NRAs. It might be plausible to say that some NRAs consent to U.S. law, insofar as they engage in commerce with the United States. That could explain why NRAs can be prosecuted, for example, for violations of U.S. antitrust law.[151] It is implausible, however, to say that NRAs have consented to be governed by a range of other laws that the U.S. might nonetheless prosecute them for violating, laws such as the Military Commissions Act, including its ban on "terrorism" and "providing material support for terrorism."[152]

One might object that consent is almost always a fiction, and that even U.S. citizens do not really consent to U.S. law. As Neuman notes, "authors since Hume have emphasized the strained character of claims of actual or tacit consent, as opposed to hypothetical consent, even of later generations of citizens."[153] But with citizens one invoking the social contract framework can appeal to their having a right to participate in government, by voting, speaking, and running for office, as at least one ground for their obligation to obey the results of democratically legitimate laws, at least insofar as those laws do not violate their basic rights. With NRAs, we have neither consent nor participation as a ground for obligation in a contractual model. Their obligation to obey, if it is to be justifiable at all, must have a different basis.

One might respond to this point by asserting that NRAs must not owe any duty to obey U.S. criminal law. Within a mutuality of obligation framework, that position would imply both that the United States acts unjustifiably if it punishes NRAs and that NRAs have no constitutional rights against the United States—an instance of mutual *lack* of obligation. This suggestion does not fit current U.S. practice or international law allowing such prosecutions,[154] but one

150. This sort of voluntary acceptance of responsibilities aligns with Justice Rehnquist's emphasis on rights protecting only those aliens who have established a "significant voluntary connection with the United States." *Verdugo-Urquidez*, 494 U.S. at 271.

151. *See* United States v. Nippon Paper Industries Co., 109 F.3d 1 (1st Cir. 1997).

152. Military Commissions Act of 2009, 10 U.S.C. § 950t(24), (25) (2012).

153. NEUMAN, *supra* note 50, at 112.

154. *See* S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 67 (Sept. 7); Cabranes, *supra* note 26, at 1672 (quoting Edwin D. Dickinson, *Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. 435, 467 (1935)) (describing the "Lotus" principle, according to which "[t]he jurisdiction to prosecute and punish for [extraterritorial] crime is . . . something with which international law invests States."); *see also* Michael P. Scharf, *Application of Treaty-Based Universal Jurisdiction to*

might say: so much the worse for U.S. practice and international law.

The problem with this response is its basic Hobbesian vacuity. If NRAs have no constitutional rights against the United States, then they may have no justiciable right to be free from pseudo-prosecution by the United States. Such prosecutions would not be "real" prosecutions; they would not presuppose a duty to have obeyed the law. These prosecutions would be more like show trials—demonstrations of U.S. power to harm NRAs to promote governmental interests. Even if the United States used all the normal forms of a criminal trial when "prosecuting" an NRA, the lack of duty owed by the NRA-defendant would make such a trial a kind of farce. Such "trials" would really just be forums for waging war against threatening outsiders. In other words, this position simply licenses the state to use its power as it sees fit—the exact Hobbesian position rejected above.[155]

A better response to the dilemma outlined above starts with rejecting the idea that the criminal law creates duties to obey the law in the first place. A better theory of criminalization asserts that criminal law's "definitions of [certain] wrongs as crimes constitute not prohibitions but declarations: not to the effect that these are wrongs, since that is what it presupposes, but to the effect that these are public wrongs . . . ." (i.e., wrongs to which the state can respond with prosecution and punishment).[156] This theory clearly makes sense for *mala in se* crimes. And even for *mala prohibita* crimes, one can argue that the state pursues a certain good by regulating behavior, and criminal law then delineates how the state will respond to the breach of those regulations.[157]

Assuming this model of criminalization is correct, extraterritorial law enforcement is a matter of states taking responsibility for public wrongs outside of their territory. Of course, it is a tricky business for a state to take responsibility for crimes outside of its territory, especially when the wrongdoer is not a citizen.[158] A state should general-

*Nationals of Non-Party States*, 35 NEW ENG. L. REV. 363, 368 (2001) (noting that the United States has invoked the Lotus principle before the International Court of Justice).

155. *See supra* Part II.A.1.

156. R.A. Duff, *Relational Reasons and the Criminal Law*, *in* 2 OXFORD STUDIES IN PHILOSOPHY OF LAW 175, 182 (Leslie Green & Brian Leiter eds., 2013).

157. *See id*. at 191–92.

158. Duff is particularly concerned about this, and holds that "as citizens, wearing our civic uniforms, our interest is normally limited to what belongs to or impinges on the civic enter-

ly defer to the prosecutorial interests of the countries in which a crime is committed, and should generally avoid imposing criminal penalties on activity that another state not only permits but requires.[159] These concerns, however, leave significant bases for the prosecution of NRAs in extraterritorial jurisdictions. The top three bases are: (1) "objective territoriality" or the "effects principle" (extending jurisdiction over acts "intended to produce and producing detrimental effects within" the prosecuting state[160]); (2) the "protective principle" (extending jurisdiction over acts that harm the state[161]); and (3) the "passive personality principle" (extending jurisdiction over acts that harm the state's citizens).[162] In addition, international law recognizes "[u]niversal jurisdiction over the specified offenses [when there is] universal condemnation of those activities and general interest in cooperating to suppress them, as reflected in widely-accepted international agreements and resolutions of international organizations."[163] These crimes include: piracy; slave trading; war crimes; crimes against humanity; aircraft hijacking and sabotage; hostage-taking; crimes against internationally protected persons; apartheid; torture; and acts of terrorism.[164] States that assert extraterritorial jurisdiction to prosecute these crimes effectively declare that such crimes are public wrongs that those states have an interest in preventing and punishing—regardless of the identities of

prise of our polity." *Id.* at 203. But he also emphasizes the qualification "normally," explaining: "I am not suggesting that polities have no responsibilities beyond their own borders . . . . But such responsibilities, on the view sketched here, must mark extensions, evoked by urgent need or emergency, to the polity's normal concerns . . . ." *Id.* at 203 n.45.

159. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 403(2)(a)–(h) (1987) (listing these two factors, along with six other factors, that are relevant in determining whether extraterritorial jurisdiction is "reasonable").

160. ELLEN S. PODGOR & ROGER S. CLARK, UNDERSTANDING INTERNATIONAL CRIMINAL LAW 27 (3d ed. 2013) (quoting from Strassheim v. Daily, 221 U.S. 280, 285 (1911)).

161. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 402 cmt. f (1987) ("[T]he right of a state to punish a limited class of offenses committed outside its territory by persons who are not its nationals—offenses directed against the security of the state or other offenses threatening the integrity of governmental functions that are generally recognized as crimes by developed legal systems.").

162. *Id.* cmt. g ("[A] state may apply law—particularly criminal law—to an act committed outside its territory by a person not its national where the victim of the act was its national. The principle has not been generally accepted for ordinary torts or crimes, but it is increasingly accepted as applied to terrorist and other organized attacks on a state's nationals by reason of their nationality, or to assassination of a state's diplomatic representatives or other officials.").

163. PODGOR & CLARK, *supra* note 160, at 31.

164. *See* Cabranes, *supra* note 26, at 1673–75. For a slightly different list, see PODGOR & CLARK, *supra* note 160, at 31–32.

the offenders or the victims.[165] A state acting under any of these principles does not claim that a duty—the breach of which they claim the right to punish—is necessarily owed to it (though such a duty may be owed to it insofar as the state invokes jurisdiction under the protective principle). Rather, it is saying that the duty, no matter to whom it is owed, is important enough to the state that it is going to try to ensure that violations of it do not go unpunished.[166] It may be particularly important for a state to prosecute those who harm it or its citizens, but a state need not limit itself to prosecuting those who harm it or its citizens. All that is required for a state to prosecute NRAs is that it judge the criminal act in question to be a sufficiently grave violation of the rights of others—grave enough to warrant the use of criminal law even by a state in whose territory the crime did not take place.

At bottom, then, the prosecution of NRAs is based, at least in part, on the idea of universal moral rights.[167] The significance of such rights, however, cannot plausibly be limited to empowering states to prosecute NRAs. If they are significant enough to justify a country taking extraterritorial jurisdiction over aliens, they must also be significant enough to command respect for the rights of these same aliens. This shows that mutuality of obligation should not be understood as a matter of quid pro quo or social contract; it is not as if the United States accepts obligations to NRAs as the price of imposing

165. "The extent to which [the extensive] use of universal jurisdiction is acceptable is hotly debated." PODGOR & CLARK, *supra* note 160, at 32. While some in the United States strongly oppose universal jurisdiction "on sovereignty grounds," others continue to assert it in legislative proposals to pursue crimes such as human trafficking and the use of child soldiers. *Id*. And it is arguable that jurisdiction for crimes under the Military Commissions Act relies on universal jurisdiction. *Id.* at 42.

166. This does not give Congress carte blanche authority to define offenses against the law of nations as it pleases. It gives Congress the authority to define those offenses against the law of nations that it takes an interest in and to define how it will hold people responsible for violating them. *See* United States v. Palmer, 16 U.S. (3 Wheat.) 610, 641–42 (1818) ("[C]ongress cannot make that piracy which is not piracy by the law of nations, in order to give jurisdiction to its own courts over such offences."). *But see* U.S. CONST. art. 1, § 8, cl. 10 (listing among the powers of Congress: "To define and punish piracies and felonies committed on the high seas, and offenses against the law of nations.").

167. It might seem more lawyerly to say that they depend on universal *human* rights. But universal human rights are best thought of as a body of positive law, created by official declarations and treaties. They may be imperfectly connected to the relevant moral rights. Moreover, they apply only to government action, not individual action. *See* CHARLES R. BEITZ, THE IDEA OF HUMAN RIGHTS 109 (2009). Strictly speaking, an NRA against whom a country might seek to extend its criminal jurisdiction has not violated anyone's "human rights." The real issue is that he may have violated someone's basic *moral* rights, rights in which states should take an interest.

obligations upon them. Rather, it arises from recognition of a common, underlying moral truth: the same sorts of rights that give a state the moral basis for prosecution also limit a state's actions. A state that recognizes one aspect of those rights cannot coherently refuse to recognize the other.

Importantly, when one sees that mutuality arises only in this weaker sense—from a common ground, not from a contract—one also sees a fix for one of the peculiar problems of mutuality of obligation in the stronger sense. The problem is that it seems to ground rights for NRAs only insofar as they face obligations as agents—people who have duties to act or refrain from acting. Insofar as they are held to lack duties to a state, it does nothing to protect them from abuse at the hands of that state. This is a substantial moral gap in the mutuality of obligation approach to constitutional rights for NRAs. The gap is removed once one sees that the constitutional rights of NRAs must be grounded in basic moral rights, not some form of contractually grounded mutuality of obligation.

To be sure, the discussion so far does not tell us which constitutional rights must be recognized—I will examine that in the next section. It asserts only that there will be some rights against the state that are just as morally and legally pressing as the victims' rights that a state can claim the authority to vindicate through the extraterritorial prosecution of crimes by NRAs.

### *B. Universalism and Justice-Based Limits on Democracy*

The preceding discussion of contractualism led to the conclusion that the mutuality of obligation between states and NRAs whom they might seek to prosecute is not fundamentally an implication of contractualism, but a manifestation of underlying universal moral rights. Here I will argue that there is a second path to recognizing the significance of universal moral rights as the basis for finding constitutional rights for NRAs, namely via the limits such rights impose on legitimate democratic authority. It is on this path that one can get substantive guidance regarding which constitutional rights NRAs should be held to have.

### *1. Legitimacy and justice-sensitive externalities*

The idea that democratic legitimacy depends in part on respect for the rights of outsiders has recently been spelled out by Mattias Kumm, in terms of what he calls "justice-sensitive externalities."[168] As Kumm explains, we can start by agreeing that constitutionalism is tied "to a normatively ambitious project of establishing legitimate authority."[169] But, as Kumm goes on to say, "the idea of sovereignty as ultimate authority—a conception . . . of legitimacy and democracy reductively tied to the self-governing practices of 'We the People'—is deeply misguided."[170] This is because "national constitutional legitimacy is not self-standing."[171] That in turn is "because the practice of constitutional self-government within the framework of the sovereign state raises the problem of justice-[sensitive] negative externalities."[172]

Kumm's point can be understood by returning to Locke on the limited authority a person or a state has "over the life, liberty, or possession of another."[173] One does not have to take seriously the Lockean idea of a state of nature to accept the point that the mere combination of people into a group, or groups into a larger group, to pursue some set of goals does not give the new group authority to ride roughshod over others. It may provide the new group with more raw power, but raw power by itself does not grant legitimacy. To be a legitimate power, a new group must do two things. First, internally, it has to claim the allegiance of those who constitute it. It does this by pursuing their common welfare in a fundamentally just way—in a liberal conception of legitimacy, the state must respect citizens as free and equal members of society[174]—and by giving them a fair opportunity to influence how their government operates. Second, externally, a new group has to claim the respect, or at least the acquiescence or toleration, of outsiders. That is, the group must

168. *See* Kumm, *supra* note 15, at 614; *see also* Benvenisti, *supra* note 17, at 298.

169. Kumm, *supra* note 15, at 611.

170. *Id*.

171. *Id*. at 612.

172. *Id*.

173. LOCKE, *supra* note 142, § 135.

174. *See* JOHN RAWLS, A THEORY OF JUSTICE 3, 13 (1971) ("Justice is the first virtue of social institutions. . . . [W]henever social institutions satisfy these principles [of justice] those engaged in them can say to one another that they are cooperating on terms to which they would agree if they were free and equal persons whose relations with respect to one another were fair.").

behave reasonably toward outsiders so that they cannot rightfully object that the way the group behaves in pursuit of the ends of its members wrongs outsiders and gives them a legitimate grievance. Apart from upholding its agreements with outsiders, the primary way for a group to avoid giving outsiders a legitimate grievance is by respecting their claim not to suffer justice-sensitive negative externalities that result from the group's activities.[175]

It might seem that the external aspect of legitimacy should not present a deep worry to a state; the state must maintain its legitimacy with its citizens to survive, but it can rely on raw power to survive against outsiders. However, this thought confuses a purely sociological conception of legitimacy with moral legitimacy. It reverts to an ultimately Hobbesian concern with power. The relevant question for judges who care about justice and legitimacy—and for moral actors generally—does not concern a state's raw power. Rather, the question is whether the state and its law have the moral status to command respect. In other words, the concern is whether the state acts in ways that others can legitimately object to and can therefore legitimately resist as wrongful. The internal and the external dimensions of legitimacy are equally relevant to *moral* legitimacy.

The roots of this idea go back not only to Locke, but also to Kant, the first writer to clearly articulate the connection between justice and universal rights. As Kant put it:

> [T]hose in power should understand [that justice imposes] an obligation not to deny or diminish anyone's rights through either dislike or sympathy. Above all, this requires

175. A fuller theory of the reasonable bases for objections from outsiders that could arguably limit the legitimacy of a state's actions would have to appeal to a conception of global justice. Perhaps the richest description of global justice yet developed can be found in MATHIAS RISSE, ON GLOBAL JUSTICE (2012). He describes five grounds of justice: "shared membership in states, common humanity, humanity's collective ownership of the earth, membership in the global order, and subjection to the global trading system." *Id.* at 281. The first of these gives rise to a purely domestic conception of distributive justice, but the other four give rise to global conceptions of justice, with extensive potential implications for the demands of justice that outsiders can make on a state. But I think we can and should approach the question of how to identify the kinds of claims outsiders might make that would be justiciable in U.S. Courts with the simpler idea of justice-sensitive negative externalities. Among the reasons to stick with this simpler formulation is that it captures the idea of negative protection against state-caused harm that the Court has emphasized is the limit of the protection offered by the Due Process Clauses in the Fifth and Fourteenth Amendments. *See* DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189 (1989). Another reason, discussed in *infra* Part III.C.1, is that many features of global justice are the responsibility of states collectively, not the responsibility any one state should police by itself.

> that the nation have an internal constitution founded on principles of right and that it also unite itself (analogously to a universal nation) with other neighboring and distant nations so they can settle their differences legally.[176]

As noted in the Introduction, there is currently no prospect of the United States uniting itself in a "universal nation" that can settle international disputes in a fair and binding manner. Nonetheless, the duty of justice, that requires a country to establish a domestic constitution that frames not only how it will promote the people's welfare but also how it will protect their rights, calls just as strongly for a legal order that respects the rights of all people. As a second best, those rights should be understood to be constitutional rights. Regardless of the support a state's laws and policies have domestically, if they violate constitutional rights, whether of citizens or of aliens, they cannot be regarded as legitimate.[177]

### *2. Justice-sensitive externalities and the content of rights*

Having framed the foundation for constitutional rights for NRAs in terms of justice-sensitive externalities, we can look to that idea for guidance on *which* constitutional rights NRAs should be held to enjoy. This guidance will not come in the form of a formula that can be mechanically applied. But the idea of justice-sensitive externalities provides basic categories to guide the discussion of which constitutional rights should be extended to NRAs and which not.

At a basic level, NRAs should enjoy the rights any system of law would accord one group to protect them from the activities of others. This means, first and foremost, that NRAs' lives, liberty, and property[178] (or, more generally, their welfare) may not be subject to

176. IMMANUEL KANT, PERPETUAL PEACE 133 (Academy page 379) (Ted Humphrey trans., 1983) (1796).

177. *See* Cabranes, *supra* note 26, at 1698. Cabranes explains that an "organic" theory of the Constitution:

> reminds us that a nation built on the rule of law must hold itself to the rule of law if its actions are to be perceived as legitimate both at home and abroad. A government formed by a Constitution cannot act in ways that are repugnant to that foundational document simply because those affected are aliens in a foreign land.

*Id.*

178. *Contra, e.g.*, Atamirzayeva v. United States, 524 F.3d 1320 (Fed. Cir. 2008) (holding that an Uzbek citizen in Uzbekistan lacked sufficient connection to the United States to recover damages for a taking of her property, razed by Uzbek authorities acting on behest of U.S. embassy officials in Tashkent).

arbitrary taking (or destruction).[179] Rather, life, liberty, and property can be taken or destroyed only when there is an objectively sufficient basis for taking or destroying them. Consequently, NRAs must enjoy the most basic due process rights (understood both substantively and procedurally).[180]

What are the conditions in which people's welfare can justifiably be diminished? First, it can be diminished as the aim and result of criminal punishment. However, punishment may be meted out only for acts that are legitimately criminalized, only after providing for due process, and only when jurisdiction can be soundly established.[181] Second, welfare may be diminished when an actor has made herself liable to harm, insofar as harming her is necessary to protect or make whole the innocent. This applies paradigmatically to tortfeasors and contract breakers, but also to combatants in an unjust war of aggression.[182] Third, welfare may be diminished when it is objectively necessary to harm some to avoid a greater evil, and when the harm is not brought about by using people, without their consent, as a means to the greater good.[183] This allows for collateral damage to innocents when proportional and necessary to prevent even more harm.[184] Finally, welfare can be permissibly diminished

179. This corresponds to the view articulated by Justice White's concurrence in *Downes v. Bidwell*, 182 U.S. 244, 291 (1901): "[E]ven in cases where there is no direct command of the Constitution which applies, there may nevertheless be restrictions of so fundamental a nature that they cannot be transgressed, although not expressed in so many words in the Constitution." *Downes* was one of the first of the so-called "Insular cases," see *supra* note 56, and this view is generally taken to have been adopted as the majority view in later cases. *See* NEUMAN, *supra* note 50, at 5.

180. The notion of "substantive due process" rights may sound like "a contradiction in terms." ELY, *supra* note 12, at 18 ("[W]e apparently need periodic reminding that 'substantive due process' is a contradiction in terms—sort of like 'green, pastel redness.'"). And a widely shared view of it—promoted originally by its critics—is that it was primarily developed during the *Lochner*-era as a "judicial innovation unsupported by the text or pre-ratification history of the Due Process Clauses [both in the Fifth and Fourteenth Amendments] themselves." Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 412 (2010). However, there is evidence that "by 1868 'due process of law' had developed additional, well-established substantive connotations as both a prohibition of legislative interference with vested rights and as a guarantee of general and impartial laws." *Id.* at 416.

181. *See supra* notes 160–66 and accompanying text.

182. *See generally* JEFF MCMAHAN, KILLING IN WAR (2009).

183. *See* MODEL PENAL CODE § 3.02 (on choice of evil); *see generally* Alec Walen, *Transcending the Means Principle*, 33 LAW AND PHIL. 427 (2014) (providing an account of why it is particularly difficult to justify using others, without their consent, as a means to some end when substantial harm results).

184. Note that even if it is permissible to inflict a lesser harm on some to prevent a greater harm from befalling others, compensation may be owed to those who are harmed.

in competitive situations when some pursue their own ends, using fair means, and thereby achieve a competitive advantage over others.[185] No one can assert a right against suffering this sort of harm, as doing so would infringe too greatly on the freedom of others to pursue their own ends.[186] Any other diminishment of the welfare of others violates their rights.

States are merely groups of people organized to pursue their common welfare under a shared legal order. While states gain authority over insiders—insofar as insiders give up their "natural" liberty to be part of a particular civil society, governed by its laws, paying taxes to support its institutions, and benefiting from its policies—states gain no special authority over outsiders. While states may exclude others from their group (as long as the collective rules of inclusion and exclusion are fair),[187] and while they may focus their energies on promoting the welfare of their citizens and their posterity, states may not inflict harms on outsiders except when doing so would be justifiable in morally neutral terms. As Yuval Shany argues, "states should not be held accountable for the remote consequences of their acts or omissions—exercises of state power entailing indirect, unforeseen, or insignificant consequences."[188] Nevertheless, states may not directly harm others—kill them; punish, torture, or maim them; take their property; remove their liberty; pollute their environment; or even invade their privacy—unless doing so can be justified in the morally neutral terms laid out immediately above.[189]

185. *See* Kumm, *supra* note 15, at 622 ("States are not under a general duty to ensure that outsiders benefit as much from state policies as nationals.").

186. This point need not have libertarian implications. The context in which people pursue their own ends should be fair, so that no one reaps excessive advantages—advantages that cannot be defended within a proper conception of distributive justice, or advantages that distort the balance of power going forward, and thereby undermine the prospects for the stable existence of a just legal order.

187. *See* Kumm, *supra* note 15, at 618–19; RISSE, *supra* note 175, at 288–90; Michael Blake, *Immigration, Jurisdiction, and Exclusion*, 41 PHIL. & PUB. AFF. 103, 110–11 (2013).

188. Yuval Shany, *Taking Universality Seriously: A Functional Approach to Extraterritoriality in International Human Rights Law*, 7 LAW & ETHICS HUM. RTS. 47, 50 (2013).

189. Something like this point was recognized over 100 years ago, in *Downes v. Bidwell*, when the Court considered what rights to extend to unincorporated territories:

> We suggest, without intending to decide, that there may be a distinction between certain natural rights enforced in the Constitution by prohibitions against interference with them, and what may be termed artificial or remedial rights which are peculiar to our own system of jurisprudence. Of the former class are the rights to one's own religious opinions . . . ; the right to personal liberty and individual property; to freedom of speech and of the press; to free access to courts of justice, to due process

### *C. Objections and Replies*

In this section, I address seven objections to the view that judges should interpret the Constitution so that it provides NRAs with basic constitutional rights against being unjustly harmed by the United States.

#### *1. The Constitution is not a universalist document*

The first objection is that the universalism endorsed in the last two sections is simply divorced from the particularity and limited reach of real constitutions, including the U.S. Constitution. As Neuman put the point:

> The universalist's interpretation would transcend the concerns of a single social contract and bind the government to the rules of a just world order, regulating the international use of armed force and injustices arising from the global distribution of wealth. A constitution could serve that function, but nothing in the text or history of the United States Constitution suggests that it offers itself as a solution to this broader problem.[190]

He continues: "This does not mean that such uses of force or wealth are immune from demands for justification; it simply means that the standards of justification are not to be sought in the United States Constitution."[191]

In reply it should first be said that Neuman is mistakenly presupposing that universalism must take the form of social contract. That is a mistake because universal moral rights exist prior to any contract and in fact put constraints on any legitimate contract. This is consistent with saying that a constitution is a form of contract, and that a domestic constitution cannot be identified with a global one. The point is that universal moral rights, understood in a pre-contractual way, still have a significant role to play in every just domestic constitution.

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of law, and to an equal protection of the laws; to immunities from unreasonable searches and seizures, as well as cruel and unusual punishments; and to such other immunities as are indispensable to a free government.

182 U.S. 244, 282–83 (1901).

190. NEUMAN, *supra* note 50, at 110.

191. *Id.* at 111.

Nonetheless, Neuman articulates some specific worries about universalism that should be addressed. One is that universalism would "bind the government to the rules of a just world order," including, in particular, concerns with "the global distribution of wealth."[192] This objection can be easily dismissed. The position taken above was not that the United States had to bind itself to the promotion of a just world order, it was the more limited claim that it could not inflict unjustifiable harms on others as it pursues the welfare of its citizens.[193] This is not to deny the importance of a just world order, it is only to say that the achievement of a just world order is truly beyond the scope of any domestic constitution. A just world order would have to be the result of international agreements. At most, a domestic constitution could be thought to bind a state to support the development and enforcement of such agreements. Prior to such agreements actually being made, however, there are no "rules of a just world order" to which a constitution could bind a government.

A more powerful objection in Neuman's text is that a universalist basis for constitutional rights would put the courts in a position to "regulat[e] the international use of armed force,"[194] and that is not what the U.S. Constitution purports to do. "The Constitution confers war-making powers but contains no specification of the permissible occasions for their use."[195] This is a more powerful objection because the idea that NRAs have constitutional rights not to be unjustly harmed suggests that they have constitutional rights not to be subject to unjust military aggression.

The answer to this worry comes in two parts. On the one hand, courts must show an appropriate "margin of appreciation" when national security interests are at stake. The phrase "margin of appreciation" is not used in U.S. Supreme Court case law, but the idea is not alien to its jurisprudence. Consider, for example, *Hamdi v. Rumsfeld*, the case in which the Court held that a U.S. citizen detained as an enemy combatant in Afghanistan had due process rights with regard to his status as an enemy combatant.[196] Though the Court balanced his right to liberty against the government's in-

192. *Id.* at 110.

193. As Louis Henkin noted, "[i]f, in a world of states, the United States is not in a position to secure the rights of all individuals everywhere, it is always in a position to respect them." Henkin, *supra* note 76, at 32.

194. NEUMAN, *supra* note 50, at 110.

195. *Id.*

196. Hamdi v. Rumsfeld, 542 U.S. 507, 537 (2004).

terest in ensuring that enemy combatants "do not return to battle against the United States,"[197] it did so at least claiming to "accord the greatest respect and consideration to the judgments of military authorities in matters relating to the actual prosecution of a war."[198] Or consider the fact that in *Boumediene v. Bush* one of the reasons the Court felt free to hold that petitioners had a constitutional and judicially enforceable right to habeas was that security threats were not apparent in Guantanamo Bay.[199] The Court has traditionally been reluctant to second-guess the political branches on the question of whether war-like threats to security exist,[200] but it felt free to act in that case because it noted that in this case the "Government [did not] argue that they" do.[201] In other words, courts are inclined to respect the judgments of the other branches regarding the existence and significance of security threats.

The answer, on the other hand, is that it is not anomalous for the Court to consider constitutional rights in the context of war.[202] This is not inconsistent with the prior point because the Court can protect those rights without telling the President when, where, or how he can use military force abroad. The *Hamdi* Court held that only the most basic constitutional right, the right to due process—a right that would be enforced only once someone is off the battlefield—has to be respected.[203] There is no reason to fear that according constitutional rights to NRAs would do any more to regulate the international use of armed force.

A third way to press Neuman's objection to universalism is to note that "the Constitution includes too full a list [of rights] to read as if they all" are universal obligations.[204] An obvious example is the

197. *Id*. at 531 (framing the balance along the lines set out in *Mathews v. Eldridge*, 424 U.S. 319 (1976)).

198. *Id*. at 535.

199. Boumediene v. Bush, 553 U.S. 723, 770 (2008).

200. *See* Ludecke v. Watkins, 335 U.S. 160, 169 (1948) ("Whether and when it would be open to this Court to find that a war though merely formally kept alive had in fact ended, is a question too fraught with gravity even to be adequately formulated when not compelled.").

201. *Boumediene*, 553 U.S. at 770.

202. *See, e.g.*, *Ex parte* Milligan, 71 U.S. 2, 34 (1866) (holding that the constitutional right to a jury trial was "made for a state of war as well as a state of peace"); *Ex parte* Quirin, 317 U.S. 1, 28 (1942) (holding that Congress acted "within constitutional limitations" in setting up military tribunals).

203. As the Court put it: "it does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims like those presented here." Hamdi v. Rumsfeld, 542 U.S. 507, 535 (2004).

204. NEUMAN, *supra* note 50, at 110.

right to a jury trial. But the equally obvious answer to this argument is to distinguish those constitutional rights that are fundamental and apply to all people who confront the power of the United States, from those that assure U.S. citizens that they can benefit from particular procedures that they may value. A person can benefit from one right without benefitting from them all.[205] Admittedly, the idea that a more limited set of rights applies to some but not all has a danger: "Arguments for limiting . . . rights in their new application have a way of filtering back to undermine the original core."[206] But this danger is something that we live with even when dealing with the rights of U.S. citizens abroad.[207] For example, in *Reid v. Covert*, the Court held that civilian U.S. citizens abroad had a right to trial by jury, but only when facing the death penalty.[208] That ruling has not undermined the broader right to a jury trial domestically. Likewise, some circuit court decisions hold that U.S. citizens overseas are not protected by the Warrant Clause of the Fourth Amendment.[209] This does not seem to have undermined, nor does it threaten to undermine, the applicability of the Warrant Clause domestically. It is unclear, therefore, why the worry about dilution should be particularly strong if some constitutional rights are also held by NRAs.

### *2. Judges are not competent to pick the relevant rights*

Another objection to holding that the Constitution protects the fundamental moral rights of NRAs is that they are not enumerated in the Bill of Rights, and therefore judges will likely feel lost at sea when called to name them. As Neuman put it: "it is not clear how . . . a positivist Supreme Court can make the trade-offs necessary for

205. As Sarah Cleveland points out, "[t]he Supreme Court also has long followed a retail approach to the application of the Constitution abroad." Cleveland, *supra* note 8, at 282.

206. NEUMAN, *supra* note 50, at 111.

207. It is also something we live with domestically, as the incorporation of the Bill of Rights against the states is still incomplete. For example, the Fifth Amendment requirement that all prosecutions for "infamous crime[s]" be based "on a presentment or indictment of a Grand Jury" does not apply to the states. *See* Burnett, *supra* note 70, at 977. Yet the federal application of the full Bill of Rights seems not to have been undermined.

208. 354 U.S. 1, 64 (1957).

209. *See, e.g.*, United States v. Stokes, 726 F.3d 880, 893 (7th Cir. 2013); *In re* Terrorist Bombings of U.S. Embassies in E. Afr., 552 F.3d 157, 176–77 (2d Cir. 2008).

designing a separate extraterritorial constitution for aliens . . . ."[210] He went on to argue:

> Frankfurter's confidence that he could carry out a due process project for the rights of citizens against the federal government in the international context obviously mirrored his similar attitude toward the rights of persons against the states under the due process clause of the Fourteenth Amendment. In the latter context, history did not vindicate Frankfurter's confidence—ultimately, he was unable to communicate any objective basis for his choices, and his rival Hugo Black had increasing success in incorporating provisions of the Bill of Rights into the Fourteenth Amendment.[211]

Neuman then concludes that "[t]he relatively greater degree of objectivity, as well as the greater degree of textual support, argues in favor of applying the Constitution as written . . . ."[212] In other words, Neuman draws the lesson that the *whole* Constitution should apply to NRAs and citizens alike, except where the constitutional text clearly calls for different treatment.

Neuman's position seems to be an excessive and implausible response to the problem of deciding which rights to apply. As just noted, courts have felt the need to pick which clauses apply abroad even when dealing with U.S. citizens living abroad.[213] Complete incorporation of the Bill of Rights is not a viable option for extraterritorial constitutional rights. In fact, the Bill of Rights is still not completely applicable to the states domestically.[214] Given that not all constitutional rights can plausibly be held to apply everywhere, the Court is left with two options: finding that the Constitution has no extraterritorial reach, or allowing judges to decide which provisions apply. There is no reason to worry that judicial choice will be so

210. NEUMAN, *supra* note 50, at 115.

211. *Id*. at 116.

212. *Id*.

213. *See supra* notes 204–09 and accompanying text.

214. As noted above in *supra* note 207, the Fifth Amendment right to indictment by a grand jury has not been incorporated against the states. Likewise, neither the Seventh Amendment right to a jury trial in civil cases, nor the Eighth Amendment protection against excessive fines has been incorporated against the states.

problematic that the Court should choose no rights over some rights.[215]

This is not to say that judges should try to assume the role of moral philosophers, discerning which rights are morally fundamental from first principles. They don't show any special talent for that role. But they are not without legal guideposts to decide which rights NRAs should enjoy. They can start with the Bill of Rights and seek to distinguish whether particular rights are especially important for U.S. citizens operating in a domestic context or whether they protect persons in general from unjustifiable harm from the state. Moreover, they can look to developments in international law for guidance on other negative rights that are not explicitly covered by the Bill of Rights, such as those against torture.[216] It is true that "the United States Constitution does not bind the national legislature to comply with its obligations under international law."[217] However, the suggestion is not that international legal obligations should be directly incorporated into U.S. constitutional law. It is rather that the courts could look to international law for guidance, as a persuasive authority, when interpreting the basic constitutional due process right not to be harmed in unjustifiable ways.[218]

### *3. Universalism would put the U.S. at an unacceptable disadvantage*

A third objection to interpreting the U.S. Constitution in light of universal rights is that the U.S. would put itself at an unfair disad-

215. One reason Justice Frankfurter was less successful than Justice Black may be that there is an inherent political discomfort in saying that a given constitutional right is important enough to be in the federal Constitution but not important enough to govern the states. This discomfort can be avoided when the question is not which level of government is restricted, but where (in what context) a right is to apply. A foreign context raises distinct pragmatic, moral, and political issues.

216. *See* United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

217. NEUMAN, *supra* note 50, at 116. It is worth noting that Neuman himself points out that the Court has been especially clear in denying the constitutional status of "economic and social human rights." *Id.* But that fits the thesis of this paper just fine, as such rights are not negative rights against harm.

218. Though it has sometimes caused a firestorm of controversy, this too is not alien to the U.S. constitutional tradition. *See* Lawrence v. Texas, 539 U.S. 558, 573 (2003) (drawing support from the European Court of Human Rights for the decision to end the criminalization of consensual, adult homosexual conduct); *see also* Walen & Venzke, *supra* note 27, at 46 (arguing that the Court should look to international humanitarian law for guidance in determining the constitutional rights of NRA detainees in the "war on terror").

vantage if it did so. As James Madison put it: "If a federal Constitution could chain the ambition or set bounds to the exertions of all other nations, then indeed might it prudently chain the discretion of its own government, and set bounds to the exertions for its own safety."[219] The implication is that since other nations will not restrain themselves to respect the rights of U.S. citizens, the U.S. is under no duty to restrain itself with respect to foreign citizens.

In considering this challenge, it is important to distinguish two sorts of cases: (1) when foreign countries engage in belligerent actions, trade policies, or other actions that aim to undermine the welfare of the United States and its citizens generally; and (2) when foreign countries act against individual U.S. citizens to violate their rights, such as trying them without due process. There is nothing in the thesis of this Article—that NRAs should benefit from constitutional rights that protect their basic moral right not to be harmed without moral justification—that would prevent the United States from responding in kind to the first kind of actions (using belligerent force to counter belligerent force, tariffs to counter tariffs, etc.). It is appropriate for the United States, as a sovereign, to defend itself from the antagonistic acts of foreign states. However, this is quite distinct from the morally obtuse and reprehensible position that the United States should be able to abuse the citizens of other countries just because other countries do the same to U.S. citizens.[220] Being constitutionally barred from the latter sort of abuse should be unobjectionable.

### *4. Hegemony*

A fourth objection to universal rights is that allowing NRAs to benefit from constitutional rights would be a form of legal hegemony, imposing U.S. constitutional law on other countries. This objection, however, reflects a fundamental confusion. It confuses the idea that U.S. courts could restrict U.S. government activity overseas with the idea that U.S. courts could restrict what foreign govern-

219. THE FEDERALIST NO. 41 (James Madison) (defending Congress' authority to raise armies in time of peace) (quoted in NEUMAN, *supra* note 50, at 110).

220. Not that such proposals have not been made. At the end of the eighteenth century, the U.S. House of Representatives debated "a proposal to allow the United States to kill captured Frenchmen in certain circumstances in retaliation for French outrages against American prisoners." Kent, *supra* note 13, at 530 (citing Act of Mar. 3, 1799, ch. 45, 1 Stat. 743, *repealed by* Act of Mar. 3, 1813, ch. 61). It is an interesting sign of progress that no such proposal would, I trust, be floated today.

ments do in their countries. Just as there can be no worry about hegemony if U.S. courts find that U.S. citizens have rights against the federal government under the Constitution, even when abroad, there can be no worry about hegemony if the U.S. courts find that NRAs have the same kind of rights.

This objection is not completely confused if stated as an objection to extending U.S. constitutional rights to residents of U.S. unincorporated territories. As Neuman has written, "[t]here is no justification for sentimentality about the Insular Cases,"[221] which did grant that fundamental constitutional rights could be invoked by citizens in what were essentially colonial territories. However, in the Insular Cases, the problem was not that the Court extended constitutional protections to the aliens (or citizens) who were resident in those territories; the problem was that the United States was holding such territories as colonial possessions in the first place.

One might make the hegemony point in a different way by claiming that it is simply not the business of one nation to protect the citizens of another, even from itself. As Justice Rehnquist wrote: "For better or for worse, we live in a world of nation-states in which our Government must be able to function effectively in the company of sovereign nations."[222] The implication of this thought is that each sovereign nation should protect its own citizens. If citizens from one country feel that they have been treated unjustly by another country, they should address their concerns to their own government, which can then address the problem as such problems are normally addressed: through negotiation; treaty-making; and legislation.[223]

The problems with this objection, as noted above, are twofold: (1) that the United States is not licensed to treat foreign citizens poorly, regardless of how their own countries treat them; and (2) that other countries may have limited power to negotiate with the United States, given the disparity in power that is likely to exist.[224] Given this reality, it is not only unproblematic but positively important for

221. NEUMAN, *supra* note 50, at 88.

222. United States v. Verdugo-Urquidez, 494 U.S. 259, 275 (1990) (internal quotation marks omitted).

223. *Id.* As Rehnquist wrote in the Fourth Amendment context: "If there are to be restrictions on searches and seizures which occur incident to such American action, they must be imposed by the political branches through diplomatic understanding, treaty, or legislation." *Id.*

224. *See supra* note 14 and accompanying text.

U.S. courts to function as an extra check on the United States abusing its powers abroad.

### *5. Blocking proper partiality*

A fifth objection to universal rights can be stated in terms of a certain kind of political incredulity. Can it really be maintained that the United States should refrain from acting against the interests of NRAs if such actions would benefit the United States? Can NRAs really be held to have rights on par with citizens—even if only in the area of negative rights—if those rights would, for example, interfere with the United States' ability to obtain information that would help avert an act of terrorism?

The answer is yes. To see why that is plausible, it helps to distinguish two kinds of harmful actions: (1) those that would not be justified even if the accompanying benefit would be substantially greater than the harm inflicted; versus (2) those that would be justified if the accompanying benefit is substantially greater than the harm inflicted. As an illustration of the first kind of action, consider torture. The United States is a signatory of the Torture Convention, which bans torture in all circumstances.[225] It should not be problematic to accept that the United States may not torture NRAs just as it may not torture its own citizens, even if it thinks it will benefit from doing so.[226] As an illustration of the second kind of action, consider a police officer who questions a woman about some activity that seems likely to be criminal, and who searches her for weapons.[227] A police officer engaged in such behavior does not have to get a warrant; the exigent circumstances justify his infringement of the woman's normal Fourth Amendment rights. Again, it seems that in such cases citizens and aliens—whether resident or not—should be treated the

225. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, S. TREATY DOC. No. 100-20, 1465 U.N.T.S. 85 (entered into force June 26, 1987). The United States ratified the treaty on Oct. 21, 1994. A full list of signatories to the Convention is available online. *See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx (last visited Jan. 2, 2016).

226. Some may bring up the ticking time bomb scenario at this point, to argue that the act of torture might be justified if the accompanying—in this case, resulting—benefit is much greater than the harm inflicted. But even if this scenario provides a moral exception to the complete ban on torture, it is hard to see why the exception would apply differently to citizens and aliens, whether resident or not.

227. This scenario is a model "Terry stop." *See* Terry v. Ohio, 392 U.S. 1 (1968).

same: their privacy should be respected unless exigent circumstances arise that call for some intrusion.

One might object that I have here used only the two poles, and that the important action occurs in intermediate cases where the right is not so easily outweighed as privacy rights under the Fourth Amendment,[228] but not so hard to outweigh as the right not to be tortured. One might suggest that the right not to be subject to detention is a perfect example of a middle-ground right with respect to which citizens and NRAs may be treated differently. But even here, I think first impressions may deceive. Yes, aliens may be detained in certain circumstances where citizens may not—circumstances having to do with their being excludable from the country where they are not citizens, and their simultaneously not having another country to which they can go and be safely supervised.[229] But excludability is a special disability that aliens have relative to citizens. In general, when it comes to things like detention as a matter of criminal punishment, or preventive detention in a quarantine, or pre-trial, or for mental illness, there is no reason to treat citizens and aliens differently.[230] Even when it comes to holding prisoners of war, there is no reason to treat citizens and aliens as having different constitutional rights.[231] Citizens can be detained as enemy combatants,[232] and

228. I argue for the equal application of the Fourth Amendment to nonresident citizens and NRAs in Walen, *supra* note 7.

229. *See* Alec Walen, *A Unified Theory of Detention, with Application to Preventive Detention for Suspected Terrorists*, 70 MD. L. REV. 871, 922–27 (2011).

230. *See generally id.* (surveying the moral basis for all of these types of preventive detention).

231. The implication of this thesis is that the Military Commissions Act of 2009 unjustifiably applies only to aliens, providing them with second-class justice. *See* Military Commissions Act, 10 U.S.C. §§ 948a–950t (2009) (establishing that the purpose of the military commissions is "to try alien unprivileged enemy belligerents for violations of the law of war and other offenses triable by military commission"). Military commissions were not always so. *See Ex parte* Quirin, 317 U.S. 1 (1942) (upholding military tribunals that applied to aliens and U.S. citizens alike). Moreover, the constitutionality of subjecting aliens to military commissions to which U.S. citizens are not subject is currently being challenged on equal protection grounds in the D.C. Circuit, in *Al Bahlul v. United States*. *See generally* 792 F.3d 1 (D.C. Cir. 2015) (en banc); *see also* Jonathan Hafetz, *Due Process and Detention at Guantanamo: Closing the Constitutional Loopholes*, JUST SECURITY BLOG (Nov. 4, 2014), http://justsecurity.org/17076/due-process-detention-guantanamo-closing-constitutional-loopholes/ (discussing the *Al Bahlul* case). It should also be noted that it would not be unusual for courts to reject this sort of unjustified distinction between citizens and aliens. *See, e.g.*, A (FC) and others (FC) v. Secretary of State for the Home Department, [2004] UKHL 56 (holding that section 21 of the Anti-terrorism, Crime and Security Act 2001, which allowed the detention of people suspected of being international terrorists, unless they left the United Kingdom, but which applied only resident aliens, not British citizens, was inconsistent with Art. 14 of the European Convention

aliens deserve due process, just as citizens do, to determine if they are enemy combatants.[233]

### *6. Failure to fit "Functionalism"*

The idea that NRAs benefit from the full range of constitutional rights necessary to protect their negative rights not to be harmed without sound moral justification may seem too strong to fit with current case law. The Court in *Boumediene* adopted a functionalist position, allowing constitutional rights to be recognized only if the overall balance of considerations favored doing so. Some view this balancing as problematic because it too easily allows rights to be bargained away.[234] As Neuman says, the "permissiveness" of the "impracticable [or] anomalous" test is well "illustrated by Frankfurter and Harlan's conclusion [in *Reid v. Covert*] that military trials are permissible for noncapital cases involving civilians abroad and by their view that it justifies the departures from [domestic] constitutional practice approved in the Insular Cases."[235]

There is no denying that a functional test could be used to deny NRAs constitutional rights whenever it would be inconvenient for the United States to recognize them. But the problem is not in balancing per se. There is nothing inherently wrong with refusing to extend constitutional rights when doing so would be impracticable or anomalous. Many constitutional rights involve a balancing test, which limits their application when treating them as more absolute would be impracticable.[236] In addition, it goes nearly without saying that where applying a constitutional right would be anomalous, it

of Human Rights, prohibiting discrimination including on the basis of "national or social origin").

232. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 509 (2004) (holding that a U.S. citizen can be detained as an enemy combatant in certain circumstances).

233. *See* Boumediene v. Bush, 553 U.S. 723, 745–46 (2008) (holding that NRAs have a constitutional right to habeas to ensure they have received due process before being held long term as enemy combatants).

234. *See, e.g.*, Burnett, *supra* note 70, at 1014 (arguing that the "impracticable [or] anomalous" test—the foundation of the Court's functionalism in *Boumediene*—is applied so that the protection of "constitutional guarantees could depend entirely on policy considerations to be determined on a case-by-case basis").

235. NEUMAN, *supra* note 50, at 114.

236. Consider, for example, the fact that free speech rights yield to reasonable time, place, and manner restrictions. *See* Clark v. Cmty. for Creative Nonviolence, 468 U.S. 288, 293 (1984) ("Expression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, or manner restrictions.").

should not be applied. This was the reason that Justice Kennedy, concurring in *Verdugo-Urquidez*, held that the Warrant Clause of the Fourth Amendment could not apply extraterritorially:

> The absence of local judges or magistrates available to issue warrants, the differing and perhaps unascertainable conceptions of reasonableness and privacy that prevail abroad, and the need to cooperate with foreign officials all indicate that the Fourth Amendment's warrant requirement should not apply in Mexico as it does in this country.[237]

Insofar as this reasoning is sound, it should be unproblematic.

At this early stage in the development of constitutional jurisprudence for NRAs, it is too soon to say that the Court has embraced a functionalism that is deeply inconsistent with respecting the universal negative rights that I am arguing should be respected. It must be admitted that the extensive discussion in *Boumediene* of the relevance of U.S. control over the base in Guantanamo is in tension with the claim that the Court's functionalism does not put excessive weight on a territorial connection between the United States and a prospective holder of constitutional rights against the United States.[238] How that tension gets resolved remains to be seen. The day may come when the tension is resolved clearly against the position stated here, and then that position will have to be reframed as one inconsistent with the doctrine but normatively preferable to it. For the moment, however, the thesis of this Article is not only normatively sound, but broadly consistent with the extant Supreme Court jurisprudence.[239]

237. United States v. Verdugo-Urquidez, 494 U.S. 259, 278 (1990) (Kennedy, J., concurring). *See also* Johnson v. Eisentrager, 339 U.S. 763, 784 (1950) (offering the example, among others, of granting Second Amendment rights to NRAs to carry guns in territory that is under military occupation as an illustration of a ridiculous thing to do).

238. The relevance of U.S. control over territory is reflected in the second prong of the three-factor test "for determining the reach of the Suspension Clause": "the nature of the sites where apprehension and then detention took place." *Boumediene*, 553 U.S. at 766.

239. It is not, however, broadly consistent with lower court jurisprudence, which has generally taken a very restrictive view of the constitutional rights of NRAs. *See, e.g.*, Hernandez v. United States, 785 F.3d 117 (5th Cir. 2015) (en banc); Rasul v. Myers, 563 F.3d 527 (D.C. Cir. 2009); Kiyemba v. Obama, 555 F.3d 1022 (D.C. Cir. 2009), *vacated*, 559 U.S. 131 (per curiam), *reinstated as modified*, 605 F.3d 1046 (D.C. Cir. 2010) (per curiam); Atamirzayeva v. United States, 524 F.3d 1320 (Fed. Cir. 2008).

Additionally, the functionalism the Court has now adopted seems to apply equally to nonresident citizens as to NRAs.[240] That may be an anchor that prevents the Court from dismissing the constitutional rights of NRAs too cavalierly.

### *7. Too many lawsuits would swamp the courts*

Finally, one might argue that there is no principled basis upon which to grant some NRAs constitutional rights without creating far too many constitutional rights, and thereby swamping the courts with lawsuits by NRAs.[241] There are, however, at least two ways to keep that problem under control. First, the courts can set pleading requirements so that certain categories of harms, in certain categories of contexts, will not suffice as a basis to bring a suit. Consider the domestic analogy of regulatory takings. The Court has held that economic regulations that diminish the value of private property are not a taking unless the owner has been deprived of *all* productive value of the property.[242] Though this does not completely shut the door to suits for regulatory takings, it provides a principled basis for allowing most regulatory activity to proceed without worrying about whether it constitutes the sort of taking of property that would require compensation under the Fifth Amendment.[243] One can extend that idea to the international context. As I once put the point:

> In a military context only clearly and egregiously illegal actions should give potential plaintiffs a right to sue. That means that if the U.S. has committed a war crime, say by dropping bombs on a village containing no legitimate military targets, and if the plaintiffs can make a case that this

240. The impracticable or anomalous test was first enunciated by Justice Harlan in a case involving nonresident citizens. *See* Reid v. Covert, 354 U.S. 1, 74–75 (1957). See also the recent Fourth Amendment cases from the circuit courts, holding that nonresident citizens benefit only from the Reasonableness Clause, and not the Warrant Clause of the Fourth Amendment: *In re Terrorist Bombings of U.S. Embassies in E. Afr.*, 552 F.3d 157 (2d Cir. 2008); *United States v. Stokes*, 726 F.3d 880 (7th Cir. 2013).

241. *See* BENJAMIN WITTES, LAW AND THE LONG WAR 116 (2008) (discussing how judicial review would prove too much if applied to those persons retained by American forces).

242. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 127 (1978).

243. Another analogy is qualified immunity, which allows lawsuits against many kinds of government agents for money damages, but only if "a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was clearly established at the time of the challenged conduct." Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2080 (2011) (internal quotation marks omitted).

> was not simply an accident in the effort to hit a legitimate military target, then there is no reason the U.S. should not allow suit for damages. But if the U.S. is pursuing proportionately large legitimate military targets, the courts should not be open to hearing lawsuits from those harmed in that effort.[244]

In other words, the courts can take a mostly hands-off approach to the supervision of military activity, while also acknowledging that in certain extreme cases the military may deprive people of their lives without due process of law, and may be sued as a result.[245]

Second, allowing NRAs to sue need not be especially hard on the United States. For example, *Bivens* actions against individual U.S. agents for the violation of constitutional rights could be barred if there are "special factors counseling hesitation."[246] And only those forms of court action most fitting to a case—for example, an injunction, or supplemental procedures such as habeas—need be used.

## CONCLUSION

This Article has argued that NRAs enjoy constitutional rights not to be subjected to unjust harms. The argument proceeded in three parts.

First, I argued that Supreme Court precedent implies that NRAs generally benefit from constitutional rights. This argument involved two steps: (1) there is no case law barring extension of constitutional rights to NRAs; (2) the recent *Boumediene* case implies that NRAs have at least some fundamental constitutional rights—those that it would be neither impracticable nor anomalous for them to have.

Second, I argued that this position is at least consistent with whatever authority should be accorded to textualist and originalist arguments. Textualist arguments are themselves indecisive. Originalist arguments focused on original expectations call for rejecting consti-

244. Alec Walen, *Constitutional Rights for Nonresident Aliens*, 29 PHIL. & PUB. POL'Y Q., Summer/Fall 2009, at 6.

245. This idea is not anomalous in the larger, global legal context. A similar point was made by the Israeli Supreme Court. *See* HCJ 769/02 The Public Comm. against Torture in Isr. v. Gov't of Isr. para. 61 [2005] (Isr.) ("There is always law which the state must comply with. There are no 'black holes.'").

246. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 396 (1971).

tutional rights for NRAs. But originalist arguments appealing to the purpose of extending constitutional rights, given changes in the facts and the law, arguably support extending them to NRAs. There are two good reasons not to resolve this dispute in favor of original expectations originalism. First, the extension of constitutional rights to nonresident citizens undermines the extent to which the law can be understood within an originalist framework focused on original expectations. Second, there are good reasons to reject the original expectations form of originalism if the reading of the law it recommends runs into problems of legitimacy, which the third Part of the Article argues is the case for the position that NRAs enjoy no constitutional rights. Therefore, the originalist argument that NRAs enjoy no constitutional rights should carry little weight.

Third, I considered two normative arguments regarding the conditions for legitimate law. First, a social contract argument based on mutuality of obligation is sometimes cited as a normative reason to grant NRAs the protection of constitutional rights. But insofar as there is a mutuality of obligation between the United States and NRAs, it is not because of a social contract between them. It is because of the significance of universal moral rights. Those moral rights ground the United States' legal right to prosecute NRAs, but they equally ground the NRAs legal (constitutional) rights against the United States. Second, turning to the limits of democratic legitimacy, I argued that having come together "to form a more perfect union"[247] does not give the United States any new rights, not possessed by individuals or smaller groups, to inflict justice-sensitive externalities on others. Ideally, a neutral agency would adjudicate between countries and NRAs. Since the United States is not about to submit itself to any such neutral agency, the Court should adopt the second best option—to read respect for the basic rights of NRAs into the U.S. Constitution.

247. U.S. CONST. pmbl.